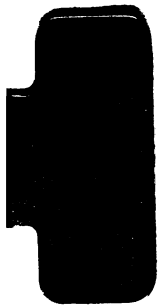

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

TERRITORY OF MINNESOTA.

FROM THE ORGANIZATION OF THE TERRITORY UNTIL ITS ADMISSION INTO THE UNION, IN 1858.

VOL. I.

CONTAINING THE REPORTS OF WILLIAM HOLLINSHEAD, ISAAC ATWATER, JOHN B. BRISBIN, MICHAEL E. AMES, and HARVEY OFFICER.

BY

HARVEY OFFICER,

ATTORNEY AT LAW.

CHICAGO:

E. B. MYERS & CHANDLER,

LAW BOOKSELLERS & PUBLISHERS,

1858.

ADVERTISEMENT.

This volume of Reports of the Supreme Court of Minnesota Territory is submitted to the criticism of the Bar with some reluctance by the Reporter, and he deems a few words of explanation necessary before presenting it. Upon entering upon the duties of the office, in December last, he determined to complete the publication of the volume which had been commenced by Mr. AMES as soon as practicable, and for that purpose obtained from the Clerk's office the record and file of every case which had not been reported. These files were carefully examined, and many of them found to be imperfect and incomplete—some for want of an Opinion, others lacking "points and authorities," and in some cases the whole judgment-roll could not be found. Diligent enquiry was made for the missing files throughout the different offices in the city, and a notice published in the public papers requesting that these files should be handed to the Clerk of the Court.

In July 1857, our State Capitol narrowly escaped destruction by fire, and in the confusion of the hour the papers in the Clerk's Office were necessarily scattered. Some few papers belonging to the Supreme Court files have been since found in the Office of the Secretary of the Territory. I am informed by Judge SHERBURNE that he filed written Opinions in all cases which were assigned to him by the Court, with a single exception; doubtless the other members of the Court were equally industrious, but their Opinions have been lost.

These facts, it is hoped, will satisfactorily explain the meagre state of some of the later reports. They have been reported as fully as the record in each case would allow. But it is confidently believed that the volume, with all its imperfections, contains reports of much interest and value to the Bar of the State. Wherever the record justifies it, the report of each case contains a short history of the cause, the points made and authorities cited by the respective counsel, the Opinion of the Court, and a syllabus or digest of the same. Much labor was bestowed upon the Index. No apology is needed for merging "HOLLINSHEAD'S" and "ATWATER'S Reports" in this, the first of Minnesota Reports. It is hoped that those having charge of the publication of the future Reports of the Supreme Court of the State will retain this title.

The Appendix contains the Rules of the Supreme and District Courts of the Territory, adopted at the July Term 1852. A few copies of these Rules were published, but they will be now read for the first time by many members of the Bar.

In some few cases where Opinions were filed in the District Court and the judgment below affirmed, the same have been published *as* District Court Opinions. It was designed to add an appendix containing a number of the Opinions of the Judges of the several districts in cases of importance, but they could not be obtained.

HARVEY OFFICER.

ST. PAUL, July 14, 1858.

THE SUPREME COURT

OF THE

TERRITORY OF MINNESOTA.

By the Act of Congress organizing the Territory of Minnesota, approved March 3, 1849, the judicial power of said Territory was vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace. The Territory was divided into three Judicial Districts, a District Court to be held in each by one of the Justices of the Supreme Court, at such times and places as should be prescribed by law.

The jurisdiction of the several Courts, both appellate and original, was declared to be as limited by law, with the proviso that Justices of the Peace should not have jurisdiction of any matter in controversy when the title or boundaries of land should be put in issue, or where the debt or sum claimed should exceed one hundred dollars; and the said Supreme Court and District Courts respectively were invested with Chancery as well as Common Law jurisdiction.

Writs of Error, Bills of Exception and Appeals were allowed in all cases from the final decisions of said District Courts to the Supreme Court, under such regulations as might be prescribed by law, but Trial by Jury was allowed in no case removed to the Supreme Court.

Writs of Error and Appeals from the final decisions of said Supreme Court were allowed to be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy should exceed one thousand dollars. [See Sec. 9 Organic Act.]

The powers and jurisdiction of the Supreme Court of the Territory were limited by law, pursuant to the Organic Act, on Chapter 69, page 287 Revised Statutes of Minnesota, ap-

proved March 31, 1851. [See Chapter 81 of Revised Statutes (the words "all *penal* judgments" in Section 2 of this chapter should read "all *final* judgments:" see *Moody & Perkins vs. Charles L. Stephenson*, 1 *Minnesota Reports*, 401.) See also Amendments to Revised Statues 1852, pages 5, 13,15 and 18. Also, Act of March 5, 1853, entitled "An Act to authorize the exercise of all equity jurisdiction in the form of civil actions," &c.]

The Supreme Court was duly organized by virtue of the proclamation of Governor RAMSEY dated the 1st of June, 1849, AARON GOODRICH having been appointed Chief Justice and DAVID COOPER and BRADLEY B. MEEKER Associate Justices.

The first term of the Supreme Court of the Territory was held at the American House in the Town of St. Paul, on the second Monday in January 1850. By the Act of the Territorial Legislature approved March 31, 1851, the Supreme Court were to hold semi-annual sessions—the first to commence on the second Monday of January, the second on the second Monday of July, of each year.

The second term of the Court was held at the Methodist Episcopal Church in the Town of St. Paul, on the first Monday of July 1851.

The third term of the Court was held at the same place, on the first Monday in July 1852—JEROME FULLER, Chief Justice; D. COOPER and B. B. MEEKER, Associates.

By an Act approved March 5, 1853, the time for holding the Terms of the Court was changed to the last Monday of February and the first Monday of September in each year, with power to order such special terms as the Judges might deem necessary.

The fourth term of the Court was held at the Court House in the Town of St. Paul, on the first Monday of September 1853, and adjourned over until the fourth Monday of January 1854.

The fifth term was held pursuant to adjournment—WILLIAM H. WELCH Chief Justice, ANDREW J. CHATFIELD and MOSES SHERBURNE Associates, who had been appointed under the administration of FRANKLIN PIERCE.

By an act approved February 7, 1854, the time for holding terms of the Supreme Court was again changed to the second

Monday of January in each year, with power to order special terms if necessary.

Adjourned terms of the Court were held at the Capitol in the City of St. Paul, on the fourth Monday of February 1854, and on the 14th day of August of the same year.

A special term of the Court was held at the Capitol in St. Paul, on the 6th day of December 1854.

A regular term was held at the same place on the second Monday of January 1855, and also on the second Monday of January 1856, which last term was adjourned until the 15th day of July, 1856.

A regular term of the Court was also held on the second Monday of January 1857; and the last term was held on the second Monday in January 1858—WILLIAM H. WELCH Chief Justice, R. R. NELSON and CHARLES E. FLANDRAU Associates.

This volume contains the reports of all cases decided by the Supreme Court of Minnesota, from the organization of the Territory until its admission into the Union in 1858.

At the July Term 1851, WILLIAM HOLLINSHEAD, Esq. was appointed Reporter of the decisions of the Supreme Court. The Court then had the power to appoint the Reporter (Revised Statutes, chap. 69, art. 1, sec. 7), but by Act approved February 27, 1852, the Governor of the Territory was required to appoint a Reporter every two years.

ISAAC ATWATER, Esq. (now Associate Justice of the Supreme Court of the State) was appointed Reporter by Governor RAMSEY, in March 1852.

In 1853, the cases argued and determined in the Supreme Court at the July Term 1851, were reported by Mr. HOLLINSHEAD, and those decided at the July Term 1852 were reported by Mr. ATWATER. These Reports were published as an Appendix to the Session Laws of 1853, by virtue of an order of Court made at the July Term 1852, under the respective titles of "HOLLINSHEAD'S Reports" and "ATWATER'S Reports."

JOHN B. BRISBIN, Esq. was appointed Reporter on the 28th day of February, 1854, who reported all the cases decided at the January Term 1854. The Reports of Messrs. HOLLINSHEAD, ATWATER and BRISBIN were carefully and ably prepared, and no change has been made in the text in the re-publication of those reports in this volume.

Mr. BRISBIN's commission having expired by limitation, MICHAEL E. AMES, Esq. was appointed Reporter by Governor GORMAN, on the 20th of March, 1856.

Mr. AMES commenced the publication of the present volume of Reports, by virtue of the Act approved February 28, 1856, and for the purpose of uniformity re-published HOLLINSHEAD's and ATWATER's Reports, Mr. BRISBIN at the same time superintending the publication of cases reported by him. Mr. AMES also reported a portion of the cases decided at the January Term, 1856; and resigned the office in October 1857.

On the 27th day of November of the same year HARVEY OFFICER was appointed Reporter, by Governor MEDARY. Since that time he has reported and prepared for publication the cases decided at the January Term 1856, commencing on page 230, as well as the cases decided at the January Terms of 1857 and 1858, and has completed the publication of the volume according to the original plan of Mr. AMES.

JUDGES

OF THE

SUPREME COURT OF THE TERRITORY OF MINNESOTA,

DURING THE PERIOD OF THESE REPORTS.

JULY TERM, 1851.

Hon. AARON GOODRICH, Chief Justice;
" B. B. MEEKER, } Associates.
" D. COOPER, }

JULY TERM, 1852.

Hon. JEROME FULLER, Chief Justice;
" B. B. MEEKER, } Associates,
" D. COOPER, }

JANUARY TERM, 1854.

Hon. WM. H. WELCH, Chief Justice;
" MOSES SHERBURNE, } Associates,
" ANDREW J. CHATFIELD, }

JANUARY TERM, 1856.

Hon. WM. H. WELCH, Chief Justice;
" MOSES SHERBURNE, } Associates.
" ANDREW J. CHATFIELD, }

JULY SPECIAL TERM, 1856.

Hon. WM. H. WELCH, Chief Justice;
" MOSES SHERBURNE, } Associates.
" ANDREW J. CHATFIELD, }

JANUARY TERM, 1857.

Hon. WM. H. WELCH, Chief Justice;
" MOSES SHERBURNE, } Associates.
" ANDREW J. CHATFIELD, }

JANUARY TERM, 1858.

Hon. WM. H. WELCH, Chief Justice;
" R. R. NELSON, } Associates,
" CHAS. E. FLANDRAU, }

INDEX.

REPORTS

OF THE

SUPREME COURT.

CASES

ARGUED AND DETERMINED,

IN THE

SUPREME COURT OF MINNESOTA.

IN JULY TERM, 1851.

STEPHEN DESNOYER, Plaintiff in Error, *v.* TIMOTHY L. HEREUX, Defendant in Error.

Where the Court undertakes to instruct the Jury as to the law arising from a view of all the facts before them—all those facts, as detailed by each witness, should be incorporated in the Bill of Exceptions, whenever the ruling of the Court is excepted to.

The term "pleadings," has a technical and well-defined meaning. They are the written allegations of what is affirmed on the one side, or denied on the other, disclosing to the Court or Jury having to try the cause, the real matter in dispute between the parties.

Such pleadings must be filed under the 7th Sec. of the 4th Art. of the Act of this Territory, "concerning Justices," when required by the plaintiff, or defendant, or the Justice.

It is error in a Judge, to instruct a Jury that they may disregard the declaration, if the evidence were such as to warrant a recovery; and that the right of the plaintiff could not be affected by the declaration on file.

RICE, HOLLINSHEAD & BECKER, for Plaintiff in Error.

JACOB J. NOAH, for Defendant in Error.

By the Court—MEEKER, J. This cause originated in a Justice's Court, where the plaintiff, (who is defendant in error,) on the return of process against the defendant, (the plaintiff in error,) appeared and filed his declaration in covenant. The

Justice tried the cause, and gave a judgment against the defendant for $50.

From this judgment the defendant appealed to the District Court of Ramsey County, into which the Justice returned a transcript of all the proceedings had before him; and at the September term of 1850, the cause was tried before the Hon. Aaron Goodrich, Judge, and a jury, after having been charged by the Court, returned with their verdict in favor of the plaintiff; upon which judgment was rendered for $40; and now the judgment is brought by Desnoyer before this Court by writ of error, for review and reversal.

The Bill of Exceptions, which must be our chief guide in forming our conclusions as to the correctness or errors in the proceedings in the Court below, is singularly barren as to the record of the evidence adduced at the trial, and upon which the Judge must have based his instructions.

Indeed, if it contains any portion of the testimony that went to the jury, besides mere declarations and inferences, it is altogether irrelevant and immaterial. Without undertaking to lay down any rule that would apply under all circumstances, it is thought proper here, to state, that in cases where, as in the one now under consideration, the Court undertakes to instruct the jury as to the law arising from a view of all the facts before them—*all those* facts, as detailed by each witness, should be incorporated in the bill, whenever the ruling of the Court is excepted to. For *otherwise*, if the instructions themselves are abstractly correct, a Court of Review will presume they were properly given; and that there was sufficient evidence to base them upon, although, by neglect or carelessness, it is not to be found on the record before them. Following this view of the case, it is obvious, that the judgment of the District Court must be affirmed, unless there are errors that might have misled the jury apparent on the face of the instructions in the Bill of Exceptions.

We shall pass by those asked for by the counsel for the defendant, because, if they were not properly refused, the law arising theron is less important, (involving no principle not already familiar,) and proceed at once to the consideration of some of those given by the Court, and which must have had a controlling influence on the minds of the jury in the formation

of their verdict; as, from the view we have taken of *these*, the cause will have to be reversed and remanded. They are the following:—

"If the evidence offered by the plaintiff would warrant a recovery, they would find for the plaintiff, without reference to the declaration."

"That his right could not be affected by the declaration on file in this case."

These two instructions will be treated as forming but one proposition, and will involve, to some extent, the construction of the 7th Sec. of the 4th Art. of the Act of this Territory, "Concerning Justices."

That act requires that "pleadings" shall be put in before such magistrates, when required by them, or the opposite party.

The term "*pleadings*," has a technical and well-defined meaning; and when it occurs in our laws, the profession are at no loss to comprehend its purport.

They are the written allegations of what is affirmed on the one side, or denied on the other; disclosing to the Court or Jury, who have to try the cause, the real matters in dispute between the parties.

Now, although the practice before Justices should be liberal, and proceedings had before them viewed with indulgence by superior courts; yet, when they require the parties to plead on the return of process, or when this is required by the plaintiff or defendant, as allowed by the statute, it would be strange indeed, if the issue thus made up in writing, could be departed from or abandoned, at pleasure. *Such* a liberal practice before Justices, would admit evidence of trespass *vi et armis;* or, assault and battery, under an issue *in writing*, showing a claim of debt or covenant.

In the 13th Art. and 5th Sec. of the same Act, in its provisions to regulate appeals from Justices' Courts, it provides, that the "Issue before the Justice shall be tried before the Court above, (District Court,) without other or further new declaration or pleadings, except in such cases as shall be otherwise directed by the Court."

The mode of proceeding with appeals from Justices' Courts, in the District Courts, is thus made very plain. They *shall* be tried without other or further new declaration or pleading, except in such cases as shall be otherwise directed by the Court; or, in other words, they *shall* be tried there on the same declaration or pleadings on which the cause was tried before the Justice, unless the Court directs new or additional ones. The statute appears to be imperative in requiring the District Courts to try the cause upon the same pleadings, where they have not been altered or supplied by others. When the Court, however, with a view to perfect or change the pleadings, directs, or permits, the declaration filed before the Justice to be amended, or a new one to be substituted, or pleas to be filed, as was done in the District Court of Ramsey in this case, the Court, Jury and parties are just as much restrained by the declaration, and other pleadings, thus re-modeled and created, as they would be in any suit originally commenced in the District Court. The parties must comply with the written issue in their proof, as in other cases. *See* 3 *Monroe*, *p.* 382. *Davis vs. Young.*

The instructions therefore of the Judge, that the Jury might disregard the declaration in this cause, if the evidence were such as to warrant a recovery, and that his right could not be affected by the declaration on file in this cause, were erroneous.

It is therefore considered by the Court, that the judgment be *reversed*, and the cause remanded to the District Court of Ramsey, with directions to award a *venire facias de novo*, which is ordered to be certified accordingly.

Goodrich, Chief Justice, dissenting.

This case was brought to the District Court for the County of Ramsey from the judgment of a Justice of the Peace. The Jury in the District Court, after hearing the evidence and the charge of the Court, found for the plaintiff below a verdict of $40; for the reversal of which, this cause is brought to this Court on Error.

The Court charged the Jury,—"That plaintiff must prove performance of the contract on his part; or that he was ready and willing to do so. Or that he was prevented

by the defendant from such performance. That if plaintiff had failed in his declaration to aver an excuse for the non-performance of the contract on his part, he might set up such excuse in evidence before the Jury. That if plaintiff had failed to assign as a breach of the covenant on the part of the defendant, the bad quality of the lumber furnished by defendant, he might introduce evidence to show the bad quality of such lumber. That this was an appeal from a Justice of the Peace—that declarations need not be filed in Justices' Courts.

"That if the evidence offered by plaintiff, would warrant a recovery, they would find for the plaintiff, without reference to the declaration.

"That if plaintiff had failed to *prove* material facts touching his right to recover, he *must fail*. That his right could not be affected by the declaration now on file in this cause."

The Judge, who presided in the Court below on the trial of this cause, felt a deep solicitude that a *liberal* practice should obtain on the trial of all causes before Justices of the Peace; and that whenever such causes came to the District Court, the attainment of justice should be regarded as *paramount* to a strict adherence to the rigid technicalities of Courts of Record. The finding of the Jury was *fully sustained by the evidence offered on the trial below.*

Is there error in the charge of the Court?

I think not.

The Supreme Court of the State of New York has uniformly held, that "The same nicety and precision is not required in pleadings joined in a Justice's Court, which are required in Courts of Record; and evidence will be received under pleadings joined in the former, which would not be received under pleadings joined in the latter. *Mosier vs. Trumpbour*, 5 *Wendell*, 274.

Technical nicety, or legal precision, is not required in pleadings in Justices' Courts.

Whenever the Supreme Court can possibly infer that the merits have been fairly tried, they will not examine or test, by technical rules, the formality of the pleadings; and if it clear-

ly appear that the plaintiff had no right to recover, the Court will reverse a judgment, though a jury find a verdict for the plaintiff. *Stuart vs. Close*, 1 *Wendell*, 434.

Special pleading in a Justice's Court is to be discountenanced. *Cline vs. Husted*, 3 *Cai. Reports*, 275.

Many cases similar to those above cited, may be found in the Reports of the State of New York. These decisions were made under statutes less liberal than those governing similar proceedings in our own Territory. The Legislature of New York declared that the pleadings in the Common Pleas shall be the same which were had before the Justice—that they shall be liberally construed, without regard to established forms or technical rules of pleadings, and with a view to substantial justice between the parties.

The 6th Sec. of the 13th Art., Chap. 6, of the Laws of Minnesota, declares that the issue before the Justice shall be tried by the Court above, without other or further new declaration or pleadings, except in such cases as shall be otherwise directed by the Court.

And in the 4th, 7th and 8th Sections of Chap. 50, of the Laws of Minnesota, I find the following liberal enactments, which *are in full force and effect*, and to which I invoke the attention of this Court.

"After judgment rendered in any cause, any defect or imperfection in matter of form, contained in the record, pleadings, proofs, entries, returns, or other proceedings in such cause, may be rectified and amended by the Court in affirmance of the judgment, so that such judgment shall not be reversed or annulled; and any variance in the record from any process, pleadings, or proceedings had in such cause, shall be reformed and amended according to such original process, pleading, or proceeding."

"For the want of any allegation or averment, on account of which omission a special demurrer could have been maintained."

"For omitting any allegation on account of any matter, without proving which, the Jury ought not to have given such verdict. For the want of right venue, if the cause was tried

by a jury of the proper county. The omissions, imperfections, defects and variances, in the preceding section enumerated, and all others of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties on the trial, shall be supplied and amended by the Court into which such judgment shall be removed by Writ of Error."

In view of the *liberal* stand taken by the last Legislative Assembly of this Territory, and of the *important* reforms in our system of pleading and practice, which will be in force in a few weeks from this time; and of the manifest *hardships* which must result from a rigid and harsh construction of our statutes, I feel constrained to dissent from the opinion of the Court in this case.

This, I exceedingly regret. Yet when I reflect that Minnesota is now in its infancy; that its jurisprudence may be seriously affected by the strict construction and rigid adherence to ancient forms and technicalities recognized by this Court, and in view of the *great legal reforms* going on in Europe and America, I am admonished by evidence not to be mistaken, that the time has arrived in which laws are to be made and administered for the furtherance of substantial justice.

It is now too late for the defendant below, to object to the declaration. He has pleaded to the merits, thereby waving such defects as might have been reached by demurrer. As the finding of the Jury is fully sustained by the evidence, it is the duty of this Court to affirm the judgment of the Court below.

PIERRE CHOUTEAU, JR., and others, Appellants, *vs.* HENRY M. RICE and others, Appellees.

An interlocutory decree is one which is made pending the cause, and before a final hearing on the merits.

A final decree is one which disposes of the cause, either sending it out of Court before a hearing is had upon the merits, or, after hearing is had upon the merits, decreeing, either in favor of, or against the prayer in the bill.

A decree, dissolving an injunction, is an interlocutory decree, and not properly the subject of appeal.

Under the Organic Law and the Statutes of Minnesota, appeals will only lie from final decrees.

This was an appeal from a decree of the District Court of Washington County, allowing the plea filed by the appellees, and dissolving the injunction.

The appellees moved to dismiss the appeal:—

1. Because the decrees appealed from are interlocutory, and not final.

2. Because the dissolution of an injunction is a matter resting entirely in the discretion of the Judge making the order, and therefore, not properly the subject of appeal.

A. WILKIN and HOLLINSHEAD, for the Motion.

The fair construction of the statute is, that only such orders and decrees as are a determination of the cause below, are appealable. In other words, that *final*, and not *interlocutory* decrees, are intended to be the subject of review.

To construe the statute in any other way would be to make *any* order or decree, of whatever character, appealable, and thus work infinite mischief, and delay justice. *Marcy, J.* 2 *Wendell*, 230. 3 *Dan., Ch. Pr.* 1606. *Owen vs. Griffith*, 1 *Ves.*, 350.

The dissolution of an injunction rests in the sound discretion of the Court. 3 *Dan. Ch. Pr.*, and note. *Robertson vs. Bingley*, 1 *McCord, Ch.* 351. An order which does not put a final end to the cause, is interlocutory. 3 *Dan. Ch. Pr.* 1606. An appeal will not lie from a decree dissolving an injunction. *McCullum vs. Eager*, 2 *Howard*, 61. *Barnard & Hawley vs. Gibson*, 7 *Howard*, 650. *Forgay vs. Conrad*, 6 *Howard*, 120.

R. R. NELSON and WILKINSON, for Appellants.

The Organic Act, Sec. 9, provides that the jurisdiction of the Supreme Court shall be as limited by law. The Statutes of Minnesota define the powers and jurisdiction of the Supreme Court, and give it a jurisdiction which shall extend to all matters of appeal from the decisions, judgment and decrees of any Distrct Court, in all matters, whether at law or in equity.

The act relating to the Court of Chancery provides, that any party may appeal from any order or decree of the Court of Chancery to the Supreme Court. *Stat. Min. p.* 64. The language of the Statutes is unmistakable. Not only is an appeal given by the Organic Law, but the Statutes say that *any* order or decree can be appealed from.

In New York, before the Revised Statutes of 1830, the right was given to all persons *aggrieved* by any sentence, judgment, decree, or order of the Court of Chancery. Under this statute, appeals have been taken and sustained from orders granting, dissolving, and refusing to dissolve injunctions. 1 *New York R. L. p.* 134, *Sec.* 8. 1 *Moulton, Ch. Pr. p.* 55. 14 *Johns, R.* 63. 3 *Cowen*, 714. *Mc Vickan vs. Walcott*, 4 *Johns, R.* 510, 528. *Beach vs. Fulton Bank*, 2 *Wend. p.* 229, 230, 235. An appeal lies from an order for costs only. 12 *Johns*, 510, *Spencer J.* An appeal lies from interlocutory orders. 4 *Paige*, 273, 457, 473. 5 *Paige*, 296, 309. 6 *Paige* 273, 379. 3 *Johns, R. p.* 566. Courts of appellate jurisdiction will interfere and relieve, when a discretionary power has been used unjustly. *Taylor & Delancey*, 2 *Caines*, 142. See also 2 *Wend.* 235.

An appeal lies from an interlocutory order, overruling a motion to dissolve an injunction. *Lindsay & Jackson*, 2 *Paige*, 581, *ibid.* 164.

An appeal lies from an order dissolving an injunction. 3 *Paige*, 381. 26 *Wend.* 115. 4 *Equity Dig.* (No. 11, 12, 13,) *p.* 479. 6 *Paige*, 379. 6 *Wend.* 11.

By the Court—COOPER, J. This cause came to this Court on appeal from the U. S. District Court of the Second Judicial District.

The appellees interpose a motion to dismiss this appeal for the reasons:—

1. That the decree sought to be corrected is interlocutory and not a final decree, and therefore not the subject of an appeal.

2. That the dissolution of an injunction is a matter resting entirely in the discretion of the Judge making the order, and therefore not appealable.

In order to understand, and have a just and full appreciation of the questions arising out of this motion, it will be necessary to give a succinct history of this cause.

The cause was commenced by filing a bill of complaint, alleging the existence of a partnership between the complainants and defendants, stating that a sum of money was due from the defendants—charging, that the defendants had in their possession a large amount of partnership effects, and that they were wrongfully appropriating them to their own use, and fraudulently refusing to account for them. The bill prayed that a decree might be made dissolving the partnership—another prayer for appointing a receiver—another for granting an injunction to restrain defendants from disposing, either of their individual property, or that of the company—and another ordering that a subpœna issue, together with such other and further relief as might be necessary in the cause. A receiver was appointed. He accepted, and gave bonds. The injunction was granted, the subpœna issued, and service was had upon the parties defendant.

Subsequently, the defendants came into Court, and plead in bar an agreement executed by the parties to this suit, which purports to settle all matters of variance between them.

The plea is *allowed*. This is the first error complained of. Upon the *allowance* of the plea, an order is made dissolving the injunction. This constitutes the second error; and from these two decrees this appeal is taken.

Are these interlocutory, or are they final decrees? What is an interlocutory, and what a final decree? An interlocutory order or decree, is one which is made pending the cause, and before a final hearing on the merits. A final decree, is one which disposes of the cause, either sending it out of Court be-

fore a hearing is had upon the merits, or, after a hearing upon the merits, decreeing either in favor of, or against the prayer in the bill. Either of which puts an end to the cause.

A final order may sometimes be made upon an interlocutory proceeding; but not the converse. There is much difficulty in defining, so clearly as we could wish, the exact line which is to distinguish interlocutory from final decrees; but I think that the rule first laid down is the proper one, and that no order or decree which does not preclude further proceedings in the case in the Court below, should be considered final.

In the case before us, no obstacle has been presented to prevent a further and final hearing; and we therefore think, that these orders are entirely and purely of an interlocutory character, and not the subject of appeal.

There is no doubt of the propriety of a rigid adherence to this rule, where the statute does not alter or extend it.

Does the statute alter or extend it?

We think not. The Legislature of this Territory did nothing more than to prescribe the manner in which appeals should be taken, and evidently intended to carry out, by its provisions, the salutary rule indicated in the 9th Section of the Act organizing the Territorial Government.

That act provides, that "Writs of Error, Bills of Exceptions and Appeals in Chancery causes, shall be allowed in all cases, from the final decisions of said District Courts, to the Supreme Court, under such regulations as may be prescribed by law."

This provision needs no judicial construction. Its intention is manifest, and its language plain. But it is held that the Statutes of Minnesota, regulating appeals from the Courts of Chancery, confer the right of appeal from *any* order or decree of such Court.

Sec. 54 provides that "Any party may appeal from any order or decree, to the Supreme Court."

This is a plain provision, and if unqualified by the succeeding sections of that Act, would undoubtedly give the right of appeal from interlocutory, as well as final decrees. But in the construction of statutes, we must look at the whole act relating to the particular subject under consideration, and not merely to detached sentences, taken from any particular section of

such act. One of the subsequent sections provides, that upon the taking of an appeal, the appellant shall give such security as one of the judges shall direct, conditioned to abide the final decision or order of the Supreme Court, and to pay the costs of appeal, in case the *final decree* of the Court below is affirmed. What meaning can be attached to this provision, other than that the appeal must be from a final order or decree? If appeals had been allowed from *interlocutory* orders or decrees, would the Legislature have enacted that on such appeal, the party appellant should give security to pay all costs on an appeal from a *final decree?* Such a construction would be monstrous. Would they anticipate an order, and make one party liable for the acts of another? Never!

But the Act does not stop even here; it goes further, and provides, "That if the final decree of the Court below be affirmed, the Supreme Court shall have power to award damages, not exceeding fifteen per cent. on the amount awarded by the decree below." Can this "amount awarded by the decree below" mean any thing but a final decree? It cannot. Money or property is only awarded by final decrees, unless it is under the provision of statute.

Here we have no such statutes, and if this act means anything by naming these orders or decrees, it means such orders and decrees as are allowed under the general rules regulating the practice in Courts of Chancery. A decree awarding money or property, in dispute, in the bill of complaint, and under the general pleadings, must be a final decree.

And why? For the reason that it goes to the vitality of the issue—it touches the merits of the cause.

From a thorough investigation of this question, we are entirely convinced, that the construction of the statutes given, is the proper and only one, and that appeals will only lie from final decrees. To adopt a different rule, where there is no statutory prohibition, would be almost equivalent to closing the doors of justice. This rule has been sanctioned by experience, and is one which commends itself to every rational mind. Manifest wrong—manifest delay—and manifest injustice, would most indubitably be the result of allowing appeals from every decree of a Court of Chancery. We must establish some rule,

and if not the one herein announced, where are we to stop? It is extremely dubious, if a contrary rule were adopted, whether there be a man amongst us, who would live to see the end of this, or any other cause, now pending in the Courts of Chancery of this Territory.

Nor can hardship or irreparable injury accrue to any party from the adoption of this rule. The Courts of Chancery are always open, and relief will be granted whenever, and wherever, the proper application is made, and a proper cause shown upon the merit of the application.

The appeal is dismissed with costs.

GOODRICH, Chief Justice, dissenting.

It appears, from the record in this cause, that complainants, P. Chouteau, Jr. and others, in the month of October, 1849, filed their original bill in the District Court, at Stillwater, against Henry M. Rice and others, charging that said Rice and others, had entered into partnership with complainants for the purpose of trading with certain Indian tribes in Minnesota. That complainants furnished a large amount of goods, money, &c. for such trade, a portion of which was still in the possession of Rice. That Chouteau resided in the city of St. Louis, Mo. That Rice assumed the management of the business at St. Paul, and was charged with its conduct in accordance with certain articles of partnership, which are made a part of complainant's bill. That Rice, departing from, and disregarding said articles of partnership, fraudulently diverted the capital so furnished by complainants, from its legitimate object—embarked in wild and visionary speculations in lands, town lots, buildings, &c. &c.—that by this conduct on the part of Rice, complainants had sustained a loss of $30,000.

They pray that Rice and others, with whom they allege he has combined and confederated for the purpose of defrauding them, be made parties defendants to this bill—that Rice be enjoined from the further management of the affairs of the firm—that he and his confederates be restrained from conveying or disposing of such property of the firm as he may have in his possession, or that held in his own right—that an account be taken and the partnership dissolved—upon which an

injunction issued. The bill was subsequently taken *pro confesso;* after which, and at the October term, 1850, Rice and others pleaded a settlement and release of all matters in controversy of a date subsequent to the filing of complainants' bill—and, by counsel, moved the Court that the injunction be dissolved and the bill dismissed. The cause was continued for advisement, and on the 1st of July, 1851, the opinion of the Court was filed.

The *pro confesso* was set aside on the 12th of February, 1851. On the 3rd of March, 1851, respondents pleaded said settlement and release more *formally.*

At the May term of said Court, 1851, and *previous* to any further steps having been taken in the cause, complainants exhibited to the Court their supplemental bill against respondents; charging that said settlement and release, set up by respondents in said plea, had been obtained by and through the false and fraudulent conduct and misrepresentations of Rice; and by petition and affidavit, moved the Court that the same be filed and made part of the original bill.

This motion was heard by the Court. *Subsequent to* which, and on the 26th day of May, 1851, the following order was made in the cause:—

"This cause came on to be heard on an *ex parte* application, on the part of the complainants to file a supplemental bill—a plea having been pleaded and a motion filed on the part of defendants, to dissolve the injunction had in said case enjoining said defendants; and the application having been argued by counsel, it is hereby ordered that the plea pleaded be allowed. And it is further ordered that the injunction in this case be dissolved. And it is further ordered that the supplemental bill be filed of record in this case, and that the prayer of said complainants for a subpœna be granted."

"And it is further ordered that said subpœna be issued accordingly, and made returnable on the 25th of June, 1851."

"And it is further ordered that the said defendants plead or answer to the said supplemental bill, filed as the same may require, or demur thereto, within twenty days after the return of the subpœna ordered and allowed—and that, in default of so doing, the said bill and supplement be taken as confessed."

By which complainants' rights seem to have been placed in jeopardy, and from which order they appealed to this Court.

And respondents move this Court to dismiss said appeal :—

1st. Because the decree appealed from is interlocutory and not final.

2d. Because the dissolution of an injunction rests entirely in the discretion of the Judges, and cannot properly be made the subject of appeal.

And this motion is *sustained* by a majority of this Court, and from which opinion I feel constrained to dissent.

In the disposition of this question we are bound by no *precedent* of our own.

The injunction in this case was the first ever granted in this Territory; therefore, the investigation and disposition of this question must turn upon its own peculiar merits, governed by the established usages of Courts of Chancery.

Congress has clothed the members of this Court with all the equity powers of the English Court of Chancery. The equity jurisdiction of the Courts of the United States, is independent of the local law of any State, and is the same in nature and extent, as the equity jurisdiction of England, from which it is derived. *See* 2 *Sumner, C. C. R.* 401.

The 9th section of the Organic Act, provides, that "the appellate jurisdiction of the Supreme Court, shall be as limited by law." By what law? By such laws as govern the English Court of Chancery, and as may be *rightfully* enacted by the local legislature.

By said Act it is provided that Writs of Error, Bills of Exception and Appeals shall be allowed in all cases from the final decisions of said District Courts to the Supreme Court, under such regulations as may be prescribed by law.

In the above cases of *final* decrees, &c., appeals, &c., *shall be allowed.* In what other cases may not appeals be allowed? *In all cases where justice shall require them.* Would an appeal lie from an order, similar to the one made in this cause, in the English Court of Chancery? I am clearly of opinion that it would.

By the Laws of Minnesota, page 64, Sec. 54, it is enacted, that "any party may appeal from *any decree or order of the*

Court of Chancery, to the Supreme Court. *Provided*, that within thirty days after the rendition of such order or decree, he shall serve notice of such intended appeal upon the opposite party or his solicitor—one on the clerk of the court where such decree or order was made and entered."

It appears from the record that complainants have done all that can be required of them under the statute to entitle them to the benefits of an appeal.

Our Territorial Legislature was not restrained by the Organic Act, from permitting appeals from orders and decrees *not final*. Courts of Chancery have always held this power, and will continue to exercise it on all proper occasions. And it is the duty of such courts to *allow* and *sustain* appeals from any and all interlocutory orders and decrees *prejudicial* to the *rights* of either party *independent* of any legislative aid upon the subject. Courts of Chancery have been established for the purpose of preventing fraud, and of affording relief against it, not for the infliction of injuries. I find this question clearly settled in the case of *Beach vs. Fulton Bank*. 2 *Wend.* 226. Here the Chancellor denied an application, made by appellants, to open the proofs taken in a cause in which the respondents were complainants, and the appellants were defendants, for the purpose of re-examining a witness produced on the part of the respondents. The motion was denied with costs. It appeared, that since the examination of the witness in Chancery, he had been called to testify in a cause tried in the Superior Court of the city of New York, and on that occasion, disclosed facts which the appellants alleged were material and pertinent to their defence in the cause depending in Chancery, and which the witness had not disclosed on his examination in Chancery. From this order, the defendants appealed, and a motion was made, as in the present case, to dismiss the appeal.

After a thorough examination of the subject, the Court *unanimously* denied the motion.

If it shall be contended that the Legislature has not the power to authorize the granting of appeals from orders *not final*, most certainly this Court has, and will exercise that right.

Suppose an order to be entered in the District Court, in a

cause which must be decisive of the rights of the parties, and which may work serious injury to one of them. Shall he not be allowed an appeal to this Court, where such order may be examined?

Most certainly he shall.

It is contended, that the order made in this case dissolving the injunction, was made in the exercise of discretionary power, and that therefore an appeal does not lie. The same ground was taken in support of the motion to dismiss the appeal in the case of *Beach vs. Fulton Bank*, above referred to, and to which case I shall make frequent reference, and from the opinion of the Court therein delivered, many extracts.

If, by discretion, is meant *arbitrary power*, I contend that it does not belong to this Court. It would involve the essence of tyranny.

That discretion which pertains to a Court of Chancery, is a *sound legal discretion*, regulated by the principles of enlightened equity, and it is legitimate for this Court, sitting as a Court of Appeal, to review *any order* made in the exercise of such discretion. Why should the exercise of discretion not be examined as well as the making of a *final* decree?

The Chancellor has no other guide in the making these orders, than an enlightened conscience, regulated by the settled principles of equity.

A discretion, exercised contrary to such principles, will not be recognized by this Court. Had the Court below refused to set aside the *pro confesso* heretofore taken *in this cause*, upon the application of respondents, founded upon an affidavit setting up a meritorious defence, Rice would, like complainants, have been forced to an *appeal* or the abandonment of his suit.

Submission on his part, to such an order, or refusal, would have been conclusive of his rights. But suppose he *did appeal*, and this Court should have held, as in the present case, that the order was interlocutory and not final, or that such refusal or order was made in the exercise of *discretionary power*, and could not, consequently, be made the *subject of appeal*. In this event, respondents would have been where complainants appear to be—at the *mercy* of their adversaries, in so far

as the subject matter of this suit is concerned, and without relief; a result utterly at war with the pure and enlightened principles which have continued to govern the action of Chancellors in England and America for centuries past.

The real case of complainants, and the supposed case of respondents appear to me to be in direct opposition to the well established usages of Courts of Chancery, and if carried out, must amount to a *denial* of justice to the parties.

If this appeal be dismissed on the ground that the retention of it might establish a practice burdensome to the Court, I must be permitted to remark that we are not likely to be greatly oppressed by appeals from questionable orders. A thorough examination of the history of Courts of Chancery, on both sides of the Atlantic, will warrant the assertion that this Court will never be burdened by appeals from doubtful orders or decrees.

In the case referred to, in 2 *Wend.* 225, Mr. Justice Spencer said he was against dismissing the appeal; and he disposed of the question as to the order being one from which an appeal would not lie, by the general declaration, that the right was given by statute, and when the appeal was interposed, the order from which it was brought was an existing one. *In 4th Johnson's Reports*, 510, the Supreme Court of New York decided, that an appeal lies from an order of the Court of Chancery *refusing* to dissolve an injunction, and decreeing costs against the defendants.

Mr. Chancellor Kent, in his opinion in the case of *Beach vs. Fulton Bank*, says:—

"The same question, as to the distinction between orders from which appeals would or would not lie, that had arisen in the preceding cases, and which the Court had declined to decide any further than became strictly necessary for the disposition of the cause before them, met them again in this case, and found them as unprepared, and as much embarrassed with the difficulties attending it, as they had been on any former occasion."

The learned Judge, when he delivered the opinion of the Court, expressly declined drawing the line of distinction. He merely decides that the refusal to dissolve an injunction, di-

recting it to be retained and awarding costs to be paid by the party making the application, is an order within the terms of the statute. That in the case of *Buel vs. Street*, *Spencer J.*, declared, that an appeal would lie where the order affected the rights of the parties or imposed a grievance, and not on a mere *practical* order.

In the case of *Train vs. Waters*, where this question came again under consideration, *Platt, J.*, observed, that he was not prepared to say that an appeal would not lie in any case for *costs only*. *Spencer, J.*, intimates an opinion, that an appeal would lie in such a case under our statute.

I will here remark, that the Statute of New York, allowing appeals from orders, &c., in Chancery, is not so broad as the Statute regulating such appeals in Minnesota. *See* 2 *Wend.* 234.

Kent, C. J., continues to remark as follows :—

"I believe I have allowed to most, if not all, of the cases wherein the Court have had occasion to consider the distinction between orders, with regard to the question, whether appeals may or may not be brought on them, and I have attempted to draw from them a general rule to mark the two classes; but I must confess, that I have closed the examination of them with the same conviction which others have expressed—that it is exceedingly difficult, if not impracticable, to arrive at any satisfactory result.

"Each case, it seems to me, has been decided in a great degree with reference to its own characteristics, and without regard to the application of any principle classifying these orders. If this Court shall now attempt to extract from the various positions laid down in these cases, a general rule for the government of their proceedings, it is a matter of duty that they should not forget that they are fixing limits to a highly prized and valuable right; and that an unnecessary restriction upon its exercise may, and most probably would, interfere in an essential manner with the administration of justice.

"On the argument of the rule laid down by the Chancellor in the case of *Closen vs. Shotwell*, relative to Writs of Error, and much urged upon our consideration, there is an evident distinction between Writs of Error and Appeals. If it had not been long established by unquestionable authority, the

Court would at once see the necessity of recognizing it. The discretionary powers confided to the Courts of Common Law, are few and unimportant, compared with the immense mass of them which surrounds, and perhaps I might say, constitutes the very being of a Court of Equity.

"The power of issuing injunctions and attachments is, so to speak, the right arm of the Court of Chancery, and the exercise of it in almost every instance, is conceded to be a matter existing in discretion.

"To put every act of this power, be its consequences to parties ever so serious, entirely beyond a review by the court of the last resort, would, in many instances, be a denial of justice, and the surrender of a long used and necessary portion of the jurisdiction of this Court.

"In the case of *Taylor vs. Delancy*, presenting as nearly as any one could, the abstract question of the exercise of discretionary power, it was strongly intimated, that this Court would interfere and relieve where the discretion had been exercised in an unjust manner.

"In the case of a temporary injunction to stay the party from proceeding to trial at law, one of the ablest Judges that ever had a seat in this court, was in favor of sustaining the appeal from the order granting it. The question, whether an appeal would or would not lie on an order dissolving or refusing to dissolve an injunction—a matter certainly resting as much in discretion as any that can come before the Chancellor—has been twice raised here. In the one case, the Court declined the question, and in the other, it decided that an appeal would lie on an order refusing to dissolve an injunction, and allowing costs for resisting the application. It is a familiar principle, that questions of costs are confined to the discretion of the Chancellor; yet it has been decisively intimated, that an appeal would be sustained here on an order relating solely to costs. Enough has been shown, it appears to me, without going more at large into this matter, to satisfy us that if we should adopt the broad rule, that no appeal can be entertained here, from an order made by the Court of Chancery, in the exercise of its discretionary powers, we should come in conflict with several of the former decisions of this Court, and depart from the

settled construction of the statute securing the right of appeal.

"Being unable to dispose of the motion before us by applying to it any general rule, it becomes necessary to consider the general character of the order on which the appeal is brought; and the object of the application denied by the Court below, so far, at least, as to determine whether this Court ought to sustain the appeal. We ought not to send the appellants out of Court unheard on the merits of their appeal, without being fully satisfied that they could have no relief here. In case they should show their situation to be such as they represent it, we are then, for the purpose of deciding this motion, to assume that the witness, in order to whose re-examination the defendants applied to the Chancellor to have the proofs opened, had been cross-examined in a proper manner to draw out the facts which they now wish to prove by him; that since publication passed in the cause below, he has disclosed under oath, in a suit at law, facts which he did not disclose on his examination in Chancery, material and pertinent to the defence of the appellants; and that a seasonable application was made for his further examination. This is the case that the appellants declare they shall present to us on the appeal, and until we investigate its merits, we cannot say that it is not what they represent it to be.

"I cannot doubt, that an order refusing such an application would be a decision affecting the merits of the cause in which it should be made, and a matter of serious grievance to the party against whom it might be entered. If such a case exists, why shall not the aggrieved party find relief in this Court?

"Not merely because the granting or refusing of the application to the Court below was confided to its discretion; because we have seen that this Court, in repeated instances, has refused to restrict itself by this consideration, and in several cases has sustained appeals on orders emanating from the discretionary powers of the Courts in which they were made.

"Was the application below to the favor of the Court? This is denied by the appellant, and on the assumption which this motion requires us to make, may well be denied.

"I regard it as a matter of right, that a party shall have the full benefit of any defence he may have in a Court of Equity,

which he has not waived by his acts or forfeited by his negligence; and if, from the peculiar circumstances of the case, the rules of proceeding adopted for ordinary cases, stand in the way of making such defence, the party, I think, may claim of the Court, that it should conform its proceedings to the peculiar circumstances of the case. I do not, I am confident, undervalue the importance of having established modes of proceeding in all Courts of Law and Equity, and of enforcing observance of them; but to withhold right by an undue regard to the forms by which it is obtained in common cases, is making the end subservient to the means, and would seem to be, in a Court of Equity, a renunciation of one of the acknowledged objects of its original institution—that of qualifying and tempering the rigor and sharpness of the common law in special cases, and of supplying that which is unintentionally harsh in the application of a general rule to a particular case.

"I am, therefore, for denying this motion, and hearing the appeal on its merits."

"*Sutherland, J.* Where the party is aggrieved or may be aggrieved by an order made in Chancery, he has the right to appeal. To deny the right, where the order is founded upon the exercise of the discretionary powers of the Court, would be to abrogate appeals in most cases of interlocutory orders. He was of opinion that the appeal should be heard, and that the motion of the respondents ought to be denied."

"Whereupon the motion was *unanimously* denied."

I feel confident, that the Court, in the above case, clearly defined the duty of Appellate Courts in *all* cases of appeals from orders and decrees not final; and I much regret that this Court has, at the commencement of its judicial duties, departed so widely from the course laid down by the mighty intellects engaged in the investigation of the case above referred to. In proceedings *in Chancery*, let us adhere to long established usages. "Remove not the ancient land marks which thy forefathers have set."

The Supplemental Bill, like the original, charges *fraud in the most positive terms.* With these charges resting upon re-

spondents, it was clearly erroneous to dissolve the injunction.

I am of opinion that this motion should be denied, and the appeal heard upon its merits.

JOHN SNOW and ALDEN BRYANT, Plaintiffs in Error, *vs.* ROSWELL B. JOHNSON, Defendant in Error.

ERROR TO THE DISTRICT COURT OF WASHINGTON COUNTY.

The facts in controversy, and the point ruled in this case, appears sufficiently from the opinion of the Court.

RICE, HOLLINSHEAD & BECKER, for Plaintiffs in Error.

M. S. WILKINSON and NELSON, for Defendants in Error.

By the Court.—GOODRICH, Chief Justice. This is an action of assumpsit, brought in the Court below by the Defendant in Error, against the Plaintiffs in Error, upon a verbal contract, in and by which it is alleged that the plaintiffs in Error agreed to pay one half of the expense of constructing a certain wharf in the town of Stillwater. To which the defendants below pleaded *non assumpsit.*

The cause was submitted to a Jury under the charge of the Court, who, on the 12th day of February, 1850, found for the plaintiff a verdict for $32,50 and costs; for the reversal of which this Writ of Error is brought. It appears from the evidence, that about the 1st of August, 1848, Johnson contracted with one Perry Edwards for the construction of a wharf, at and for the sum of $200. That Edwards was prosecuting the work which he afterwards abandoned at Johnson's request. It further appears, that while the work was in progress, Snow and Bryant agreed to pay one half of the expense of its construction. That afterwards, and during the month of August, Johnson paid Edwards $65, to recover one half of which this suit was brought. On the trial in the Court below, defendants offered to prove by Socrates Nelson, that the work was

not worth the amount paid Edwards by Johnson. The Court overruled this offer, and rejected the evidence of Nelson; to which ruling of the Court defendants excepted. We think, that in this the Court erred, and that this exception was well taken.

If defendants are to be compelled to bear a part of Johnson's debt to Edwards, it would be oppressive not to permit them to show what amount was justly due, or paid to Edwards. When the contract was abandoned, the *amount* of work done by Edwards, and its *value*, was clearly the subject of proof, and had Johnson refused to pay Edwards, he would have resorted to the law, and recovered upon his proof. Johnson would have had an undoubted right to adduce evidence tending to reduce the amount of Edwards' claim; and if Snow & Bryant are to be brought into contribution, they must be permitted to protect themselves against collusion between Johnson and Edwards.

Give them the control of this matter; close the door against Snow & Bryant, and they are at the mercy of Johnson and Edwards, who may mulct them in any amount they choose. Such a proceeding cannot be sanctioned by this Court. It matters not what amount Johnson paid to Edwards.

The legitimate inquiry is, what amount did Johnson *rightfully* pay Edwards?

This Court will not lay down the rule, that when a party is sued for money, he shall not be allowed, by way of defence, to prove that the amount demanded is unjust and extortionate.

The judgment of the Court below is reversed with costs; and this cause remanded where a new trial may be had.

PASCHAL ST. MARTIN, Plaintiff in Error, *vs.* STEPHEN DESNOYER, Defendant in Error.

Under the Statute of Minnesota, regulating proceedings in *certiorari*, the District Judge only affirms or reverses, in whole or in part, the judgment of the Justice. The act does not confer upon the District Court authority to disregard all formal requirements in the proceedings before the Justice, and settle finally the rights of the parties as the very right of the matter might appear.

The action of replevin before Justices, is a proceeding *in rem*, where the *thing replevied alone* gives the Magistrate authority to try replevins.

The Statute of Minnesota has made no provision for the trial of actions of replevin before Justices, until the property is found and *replevied*.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The facts of this case are fully set forth in the opinion of the Court.

ATWATER, for Plaintiff in Error.

RICE, HOLLINSHEAD & BECKER, for Defendant in Error.

By the Court.—MEEKER, J. On the 11th of December, 1850, Paschal St. Martin sued out a writ of replevin against Stephen Desnoyer, from before Ira Kingsley, Esq., a Justice of the Peace for the County of Ramsey, directed to any Constable of said County, commanding him that he cause a certain "Body-belt" to be *replevied*, and if the said St. Martin should give security as required by law, to deliver said Belt to him—also, to summon the said Desnoyer to appear before him on the 18th of the same month, to answer the complaint of the plaintiff. This writ was returned before the Justice, as he states, on or before the return day mentioned, endorsed "*Property not found; summons served on the defendant.*" On the 18th the parties, by their attorneys, appeared, and the plaintiff filed his declaration in *replevin;* to which the defendant pleaded "*non cepit;*" when the cause was, by consent, adjourned to the 31st; at which time the parties, by their attorneys, again appeared, when the counsel for the defendant moved to quash the suit, on the ground that *the goods had not*

been replevied. The Justice overruled the motion—heard the cause—and gave judgment for the plaintiff.

The defendant then took the case to Ramsey District Court, where the Judge reversed the judgment of the Justice, and *that* judgment of reversal is brought before us by Writ of Error.

At the very threshold, a question of no trifling importance is presented, which, to at least one member of this Court, is of no easy solution. The question arises from a difficulty that is found in settling the proper construction of the 11th Sec. of the 14th Art. of the Act of this Territory, concerning Justices. This article in the act mentioned, regulates proceedings in *certiorari*, and, in the section in question, undertakes to prescribe the duties of the District Judge, on the Justice's return before him.

"He shall proceed and give judgment in the cause, as the right of the matter may appear, without regarding technical omissions, imperfections, or defects, in the proceedings before the Justice, which did not effect the merits; and may affirm, or reverse, in whole, or in part, and may issue executions, as upon other judgments rendered by him."

The language *seems* to be broad and comprehensive, and, to confer upon the District Court, the undoubted authority to disregard all formal requirements in the proceedings before the Justice, and to settle finally the rights of the parties, as the very right of the matter might appear, and to issue execution as upon other judgments rendered by him—all of which expressions are unmeaning, and worse than superfluous, if they do not look to some final and definite action upon the *merits.* But, says the Statute, he shall affirm or reverse the judgment, in whole or in part. This he would certainly do, *in effect*, if he disposed of the cause as the right of the matter appeared. If he should be of opinion with the Justice, he might render final judgment, and issue execution, as in other cases; and this would be a practical affirmation.

If he should be of opinion that a party was not entitled to any thing where the Justice had given him a judgment, he could so decide; and this would be a virtual reversal, though the Judge's decision concluded the controversy.

Again, if the Judge's judgment exceeded, or fell below the one that is brought before him, what would the legal effect be but an affirmance in part, or a reversal in part? And can the Statute mean more or less, especially as the District Judge is required to give judgment in the cause as the right of the matter might appear? Such a construction would seem best calculated to harmonize the apparently contradictory and inconsistent language with which the section under consideration was framed, as it is certainly, most conducive to a speedy administration of justice.

But the highest Courts of New York have interpreted differently, a similar Statute, of which ours is but a transcript; and that interpretation of the law in the States West and Northwest where it has been re-enacted, has been uniformly followed, if not approved. *See Philips vs. Geesland*, 1 *Chandler's Wisconsin Reports, p.* 59.

By these authorities, the District Judge only affirms or reverses, or reverses in part; and from these authorities we do not feel ourselves at liberty to depart. As the reversal of the District Court was no departure from the well established mode of procedure under the section in question, there is in that act no error, unless indeed, the proceedings had before the Justice, as they appear on the return of that officer, were in conformity with the statute by which he is empowered to try actions of replevin.

The object of this action at common law, was the replevin or restoration in specie, of goods wrongfully taken or detained. Originally it was framed to try the legality of a distress; but it was subsequently allowed in any case where goods were illegally taken. The action formerly was said to be of two sorts, namely: in "*the detinet*," or "*detinetis;*" the former, where the goods are still detained by the person who took them, to recover the value thereof and damages; and the latter, as the word imports, where the goods have been *delivered* to the party. But the former is now obsolete; and there does not appear in any of the books, any proceeding in replevin, which was not commenced by writ, requiring the proper officer to cause the goods to be replevied to him, or by plaint in the

Sheriff's Court, the immediate process upon which is a precept to replevy the goods of the party levying the plaint; both of which proceedings are *in rem*, that is, to have the goods again. *See title Replevin, page* 162, *vol.* 1, *Chitty's Pleadings.*

For this purpose, and no other, it seems to us, the Legislature of Minnesota conferred upon Justices of the Peace, the power and jurisdiction to try actions in replevin.

Throughout Art. 10th of the Act concerning Justices, it is treated as a proceeding *in rem*, where the thing replevied alone, gives them authority to try replevins, the summons or citation being merely incidental thereto. The mandate of the writ, the form of which is given by the statute, is, that the officer executing it cause the same goods and chattels to be replevied.

The 6th Sec. of the same Art., lays down the mode of trial after the mandate of this writ has been executed, thus:—"If the plaintiff discontinue, become non-suited, or if he should otherwise fail to prosecute his suit to final judgment, then, and in each of these cases, it shall be lawful, and it is hereby made the duty of the Justice when required by the defendant, to empannel and swear a Jury, to enquire and assess the value of the goods and chattels replevied, together with adequate damages for the caption and detention thereof; or if on the trial of the issue joined, the Jury shall find for the defendant, then the value of such goods and chattels, (goods and chattels replevied,) together with adequate damages, shall be assessed by such Jury; and the Justice shall thereupon render judgment in favor of the defendant, for the value and damages so found in either of the foregoing cases."

It is most obvious, that the value of such goods and chattels as were actually replevied by the officer in the execution of the writ, is all the time intended; and this view is further demonstrated by the last clause of the same section; which provides that adequate damages shall be assessed for the plaintiff, for detention of the goods, if the property is found to be his. Why only give him damages for the detention of his goods, unless they were in fact replevied or delivered to him? Surely, if they remained at the trial, with the defendant, or if he had

destroyed or converted them, the plaintiff would be entitled to the value of the goods, as well as damages for their detention.

The statute has, therefore, made no provision for the trial of actions in replevin before Justices, until the property is found and replevied; and, as at common law, they had no jurisdiction to try actions in replevin, nor indeed any other actions in tort, the District Court properly reversed the judgment of the Justice, who proceeded to try this cause before the property was replevied, or the writ properly executed, and who, for this cause, should have quashed the suit.

Judgment affirmed, with costs.

BENJAMIN GERVAIS, Plaintiff in Error, *vs.* SIMON POWERS and AMHERST WILLOUGHBY, Defendants in Error.

A Justice of the Peace, in his return to a writ of *certiorari*, should not confine himself to the affidavit of the party suing out the writ; he should make a complete return of all the proceedings, and his rulings at the trial, and the District Court, in its affirmance or reversal of the judgment, should be guided by what appears on his return.

In an action of trespass, *quare clausum fregit et. de. bon. a.* for taking away a cow that had been taken up as an estray, evidence of the cost of advertising under the statute, and the value of pasturage, was admitted.

Held to be Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

This was an action of trespass *quare clausum fregit et. de. bon. a.* originally instituted before Justice Wakefield, by the plaintiff, agansit the defendants in error, to recover the sum of $25, the vclue of a cow alleged to have been driven from the close of the plaintiff by the defendants.

From the return of the Justice, it appeared that it was proven on the trial, that some time about the 1st of December, 1849, the defendants came to the premises of the plaintiff, at Little Canada, and drove away a cow. That the cow was worth $15 or $20. That the plaintiff had possession of her during the whole of the summer of 1849, and had fed her for six weeks

before she was driven away. That it was worth $2 per week to feed her, and that the plaintiff had become liable for advertising her as an estray. The Justice gave judgment in favor of the plaintiff for $10. The defendants, who did not appear on the trial, sued out a writ of *certiorari*, and stated as error in their affidavit, that the Justice had no jurisdiction over their persons, they being summoned to appear before him on the 22d of January, 1850, whereas the plaintiff appeared on the 21st, and filed his declaration and had the cause adjourned until the 28th of January, when the judgment was rendered. The judgment of the Justice was reversed by the District Court, whereupon the plaintiff took a writ of error.

M. S. Wilkinson and L. A. Babcock, for Plaintiff in Error.

There was sufficient evidence to justify the judgment of the Justice.

The Court below erred in giving judgment of reversal upon a mere question of fact.

A. Wilkin and William D. Phillips, for Defendants in Error.

The testimony admitted by the Justice was illegal; the plaintiff, not having proceeded under the act relating to estrays, could not properly prove items of charge or expense under that act. The value of the cow was illegally proven.

By the Court.—Meeker, J. This is an action of trespass '*quare clausum fregit*," brought by the plaintiff on the 10th of January, 1850, when process was sued out returnable on the 21st of the same month, at which time the plaintiff, by his counsel, filed a formal declaration in trespass, complaining of the defendants, that they had, with force and arms, broken and entered his close, and then and there took away goods and chattels, &c. On the return day, the defendants not appearing, the cause was adjourned to the 28th, when the Justice rendered judgment for the plaintiff for $10, and $5,50 costs.

The evidence, as appears from the Justice's return was that the defendants drove from the premises of the plaintiff a cow, which he was keeping as an estray, that he had pastured her

some six weeks, which was proven to be worth $2 per week, and that the plaintiff had agreed to pay James M. Goodhue $2, for advertising her, as an estray, in his paper. The plaintiff also introduced evidence, conducing to show by the confession of one of the defendants, that the cow was theirs.

There was no testimony introduced for the defendants, nor were they in attendance. This is substantially all the evidence in the cause. The judgment was taken by *certiorari* to the District Court of Ramsey, where the Judge reversed the judgment, and from that Court to this, by writ of error.

In the defendant's affidavit for a certiorari none of the testimony appears, and but a single error is complained of, which is, that the Justice had no jurisdiction of the persons of the defendants as they were summoned to appear before him on the 22d of January, 1850.

To this the Justice in his first return replied, they were summoned to appear on the 21st, and not on the 22d of January, as averred in the affidavit.

It is alleged that the District Court erred in reversing the judgment because the error complained of in the affidavit did not appear upon the return of the Justice, &c. The consideration of this proposition will necessarily involve the inquiry as to what extent it is made the duty of a Justice to respond to the complaint and errors, set forth in the affidavit of the party aggrieved, and whether his return should contain any matters beyond them. If the Justice were to confine his return only to the averments in the affidavit of a party suing out a certiorari, a merely partial and imperfect view might be had, and it would be impossible for a Judge to determine correctly, either the law or the merits of the case. Such a practice would be a strong temptation to perjury, and to a false and distorted view of what transpired on the trial before the Justice. We think the Justice should make a complete return of all the proceedings and his rulings at the trial, and the District Court, in its affirmance or reversal of the judgment, should be guided by what appears on his return.

We do not deem it necessary in the disposition of this cause, to determine judicially, whether a person keeping an estray can maintain an action like this, either against the owner or

any one else, for taking it away. For, if he cannot, the District Court was certainly correct in reversing the Justice's judgment, and if he can, the District Court was equally correct in reversing a judgment which, from the Justice's return must have been rendered, principally, on evidence altogether irrelevant and inadmissible in an action of trespass *quare clausum fregit*, foreign alike to the cause of action suggested in the summons, or set forth in the declaration.

Surprise and injustice must be the legitimate fruit of such a practice, and this might be illustrated in the very case now under consideration.

The defendants, having been informed by the summons that they were sued in an action of trespass, might have felt that no such action could be maintained against them, and therefore have neglected to appear and defend; whereas, had they been sued in assumpsit on account or any other money demanded for pasturage, and advertising an estray, their conduct might have been quite otherwise.

The judgment of reversal rendered by the District Court is affirmed with costs.

JOHN SNOW and ALDEN BRYANT, Plaintiffs in Error, *vs.* ROSWELL B. JOHNSON, Defendant in Error.

A declaration in covenant must aver a demand for the specific articles named in the covenants, and it is error to receive evidence of a demand for specific articles when only a demand for money is averred.

Where covenants between parties are independent, or where it is evident from the articles of agreement that the act to be done by one, was to precede the act to be done by the other, then, upon a failure of him who was to do the first act, the other would have a right to recover upon a general averment of performance. But where the covenants are mutual and concurrent, the act of the one, dependent upon the act of the other, not only a readiness and willingness to perform must be averred, but an actual tender, both averred and proved.

J. covenanted to sell and convey to S. & B. by good and sufficient deed of conveyance. S. & B. covenanted to pay $400, in groceries, liquors and provisions, one half in the month of April then next, and the remainder when called for. Held, that the covenants were concurrent, and that performance or tender of performance must be averred and proved.

ERROR TO THE DISTRICT COURT OF WASHINGTON COUNTY.

The Plaintiffs in Error were the Defendants below.

This was an action of covenant instituted in the District Court for the Second Judicial District, upon an agreement in writing, under the hands and seals of the parties, plaintiff and defendant, dated September 4, 1848, whereby Johnson agreed to sell and convey, by a good and sufficient deed of conveyance, to Snow and Bryant, certain real estate in the town of Stillwater, for which Snow and Bryant agreed to pay $200 in groceries, liquors, and provisions, when called for, and $200 in groceries, liquors and provisions, during the month of April, then next, the groceries and provisions to be at 25 per cent. above cost, and the liquors at 30 per cent. above cost.

The plaintiff averred in his declaration, that he called upon the defendants for the first instalment, to wit: on the 27th day of October, 1848, which was then due from the said defendants to the said plaintiff, to wit: a large sum of money, to wit: the sum of $200. And in the second count he averred, that on the 1st of May, 1849, the whole of said purchase money, to wit: the sum of $400, became due and owing to plaintiff, and concluded with the averment of general breach by defendants, and general performace by plaintiff.

The defendants pleaded *non est factum* and gave notice that they would prove:

1st. A tender and acceptance of the specific articles to the value of $400, in full satisfaction of the plaintiff's claim.

2d. That the plaintiff did not surrender possession of the premises at the time stipulated.

The case came on for trial before Judge Cooper, on the 15th of May, 1850, and resulted in a verdict for plaintiff of $437 49.

Numerous exceptions were taken to the ruling of the Judge upon the trial.

RICE, HOLLINSHEAD & BECKER, for Plaintiffs in Error.

The covenants mentioned in the pleadings are concurrent. *Parker vs. Parmele*, 20. *Johnson*, 130. *Robb vs. Montgomery*, *ibid* 15. *McCoy vs. Bixlee*, 6 *Ohio Rep.*, 312. 2 *Step.*

N. P. 1070. 4 *Wash. C. C. R.* 714. 2 *Selwyn's N. P.* 443, 510. 11 *Wend.* 72. *Bank Columbia vs. Hager*, 1 *Peters*, 464.

The averments as to demand and performance on part of plaintiff, are insufficient in both counts. *Gould's Pleading*, 176-7-8-15-16. 1 *Selwyn's N. P.* 111, 513, 109. 1 *Stephen's N. P.* 381-2. 2 *Greenleaf's Ev.* 237. 1 *Chitty's Pl.* 322-3-4-9-30. 1 *Saund. Pl. and Ev.* 133-5. *Parker vs. Parmele*, 20, *John.* 130. *Lobbell vs. Hopkins*, 5 *Cowen*, 518. *Rice vs. Churchill*, 2 *Denio*, 145. *Wilmouth vs. Patton*, 2 *Bibb's Kentucky R.* 280.

The averment of a demand in the first count was contradicted by the proof, and the variance was fatal. *Briston vs. Wright*, 2 *Smith's Leading Cases. Part* 1, 2, *Cowen and Hill's Notes to Phillip's Ev.* 524. 1 *Saund. Pl. and Ev.* 128, 131, 148. 4 *Amer. Com. Law and cases there cited*, 73. The verdict was contrary to law and evidence.

M. S. Wilkinson and Nelson, for Defendant in Error.

The covenants are independent. 6 *Durnf. & E.* 570. *Term. Rep.* 1 *Cowen's Treatise, p.* 53. The covenants have been executed in part and are not concurrent. 11 *Wend.* 70.

A general averment of performance was sufficient. 6 *Wend.* 296.

If the words stated under the form of a *videlicet* are repugnant, they are not to be regarded, and may be stricken out as surplussage. *Gould's Pleading, p.* 69. *Jacob's L. D. Title Scilicet.* 1 *Smith's Leading Cases, p.* 447.

By the Court.—Cooper, J. This is an action in covenant brought for the recovery of $400 worth of groceries, &c., the consideration of the sale of a house and lot in Stillwater.

Johnson covenanted to sell and convey (by a good and sufficient deed of conveyance) a house and lot to Snow and Bryant: Provided always, that Snow and Bryant pay, or cause to be paid, to the said Johnson the sum of $400 in groceries, liquors and provisions, at twenty per cent. above purchase price, &c., in manner following, to wit: $200 worth when called for by the plaintiff, the remainder in the month of April,

then next, and further, that Snow and Bryant were to have immediate possession of the premises sold.

There was a judgment in the Court below in favor of Johnson, the plaintiff below, for $437 39; and, to reverse that judgment, this writ of error was sued out.

The first error complained of by the plaintiff in error, is, that the declaration did not aver a demand and refusal of the specific articles due upon demand; but avers merely "that the said plaintiff called upon the said defendants for the first instalment, to wit: on the 27th day of October, 1848, which was then due from the said defendants to the said plaintiff, to wit: a large sum of money, to wit: the sum of $200, became due and owing; yet the said defendants refused and have not paid the same," &c.

This exception is well taken. The declaration should have averred a demand for the specific articles named in the covenant, and we cannot presume the word "instalment" to mean groceries, liquors and provisions, when the scilicet, which is used to explain the amount, says the demand is for a large sum of *money*, to wit: the sum of $200. Under this averment, the court received evidence of a demand for groceries. In this there was evident error. The variance between the declaration and proof is too palpable to overlook. The rule is well settled that the proof must conform to the averment in the declaration. Were a different one to obtain, it would be productive of the greatest injustice. The defendant looks to the declaration in order to prepare his defence. Would it not therefore be misleading him, to permit the plaintiff to prove a demand for wood, under an averment for a demand of a horse. It would be monstrous, and the evils resulting from such a course would be illimitable.

We think the Court below likewise erred in the charge to the Jury, in instructing them, "that though it was necessary to aver a demand and refusal, yet it was not necessary, to entitle the plaintiff to recover, that he should aver and prove a tender of a deed."

Where the covenants between the parties are independent, or where it is evident from the articles of agreement, that the act to be done by one, was to precede the act to be done by

the other, then, upon a failure of him who was to do the first act, the other would have the right to recover upon a general averment of performance. But where the covenants are mutual and concurrent, the act of the one dependent upon the act of the other, not only a readiness and willingness to perform must be averred, but an actual tender, both averred and proved.

Concurrent covenants are those, where mutual conditions are to be performed at the same time; and in covenants of this character, if the one party is ready, and offers to perform his part of the covenant, and the other refuses or neglects to perform his part, the party who was ready has fulfilled his engagement, and may maintain his action for the breach or default of the other; although it is uncertain which is obliged to do the first act. But to entitle him to recover, he must aver and prove such offer to perform.

How was it in this case? Were the covenants independent or were they concurrent?

Johnson covenants to sell and convey to Snow and Bryant, by a good and sufficient deed of conveyance. Snow and Bryant covenant to pay $400. No time is mentioned when Johnson is to convey; nor does Snow and Bryant covenant to pay before Johnson conveys. And do the words, "provided always that Snow and Bryant pay or cause to be paid the sum of $400," alter the character of the covenant?

We think not.

Suppose the amount of groceries, due on demand, had not been demanded until the month of April, when the remainder was to become due, would Snow and Bryant have been obliged to pay before Johnson was ready to convey? Certainly not. Then, if not, could Johnson alter the effect of the agreement by making a demand at an earlier period? Had he, in other words, the power to make the covenants independent or concurrent, according to his will, without any concurrent power on the part of the defendants below, by his construction of the covenant?

Suppose A agrees to sell and convey to B, and B covenants to pay A $1,000, which must do the first act?

Not B, certainly, because he is not obliged to part with his

money before he receives his conveyance. Nor is A obliged to part with his title until he receives his money. Here are mutual covenants, and to enable either to recover, he must tender a performance on his part, and aver such tender and prove it. Would it alter the case if B had covenanted to pay A $1,000 in the manner following: $500 on demand and $500 in six months? Certainly not. Neither has covenanted to do the first act, and in order still to recover on the one part or the other, an offer to perform must be proved. Nor would it alter the case, were it further stipulated that B was to have immediate possession. For A would have the means, at any time, of making his demand, and thus indemnifying himself. But suppose A was entitled to his action without a tender, and it appeared afterwards that he had no title, in what situation would it leave B? It may be answered, he would have his remedy on the covenant. But would not this work manifest hardship on B, to compel him to pay his money before he was aware of the fact of whether A had a title or not, where he had not plainly and distinctly covenated to pay A, and take the risks of the title afterwards? It unquestionably would. Then wherein is the difference between the case supposed and that now under consideration? There is none. The case of *Parker vs. Parmele, in* 20 *John. Rep.* 138, which is very analagous to this one, ruled the same principle, and determined, that in order to enable the plaintiff to recover the purchase money, he must aver and prove a tender of conveyance. A long train of authorities establish this rule beyond all question, and we think they are right.

We are clearly of opinion that the court below erred, in admitting evidence of a demand for groceries, &c., under an averment for money, and also, that it was error to instruct the jury that the plaintiff need not, in order to entitle him to recover the amount due on demand, aver and prove a tender of a good and sufficient deed of conveyance.

The judgment is therefore reversed, with costs, and a *venire de novo* awarded.

WILLIAM H. HUBBARD, Plaintiff in Error, *vs.* AARON WILLIAMS, Defendant in Error.

Negotiable paper is not such "property, money or effects." as the statute contemplates in describing what species of property may be made the subject of garnishment.

Property, money or effects, to be attachable under the statute, must be in the possession, or under the control, or *due* from, the person summoned as garnishee. It must be due to the defendant in the judgment or decree which forms the basis of the writ, at the time when the writ is served upon him.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The facts of this case appear sufficiently from the opinion of the Court.

ATWATER, for Plaintiff in Error.

RICE, HOLLINSHEAD & BECKER, for Defendant in Error.

By the Court.—COOPER, J. This was an action in assumpsit, instituted before a Justice of the Peace, October 29th, 1850, to recover the amount of a promissory note, made by Hubbard, the defendant below, payable to one Reuben Bean or order, at thirty days, for $45, and dated September 23d, 1850. On October 2nd, 1850, Bean passed this note to Edmund Rice, and, October 11th, Rice passed it to Williams, the plaintiff below, and defendant in error in this cause. Upon the trial of the cause before the Justice, the defendant, Hubbard, pleaded a former recovery on the same note, and produced in evidence a judgment obtained by Steele against Bean, the original payee of the note; and also a judgment against himself as garnishee of Bean. The process of garnishment was issued October 2nd, 1850, and served on the same day upon Hubbard. He appeared and answered that he had, September 23d, 1850, made his promissory note for $45, at thirty days, payable to Bean or his order; and, upon this answer, at a subsequent day, a judgment in default of his appearance, was entered against him for $45, the amount of the said note.

The Justice, in the trial of the cause now under consideration, disregarded this judgment against the defendant below as

garnishee of Bean, and gave judgment in favor of Williams for $45 36, and costs. To reverse that judgment, the cause was taken by *certiorari* to the District Court. The District Court affirmed the judgment; and it is now brought into this Court for review. We think, the Judge who ruled the case below was right.

This was a negotiable note, and the maker was garnisheed before the maturity of that note. Negotiable paper is not such "*property*," "*money*" or "*effects*," as the statute contemplates, in describing what species of property or effects may be made the subject of garnishment. And *these* must be in the hand or possession, or under the control, or *due* from the person garnisheed *to* the defendant in the judgment or decree, which forms the basis of the writ at the time the writ is served upon him. Is it possible for the maker of a negotiable note, or any one else, except the holder, to tell to whom he is liable at any given hour during the period of that note's currency? It is not.

For such paper may, and in commercial communities often does, pass through scores of hands in a single day. Can the maker, therefore, be said to be indebted to the original payee before the maturity of such paper? We apprehend not. As well might he be said to be indebted to each one of the various persons through whose hands that note had passed; and as well and plausibly might he be garnisheed to answer under process of garnishment for the debt of each, or any, or all of them. But if negotiable paper, before its maturity, were the subject of garnishment, not only the maker of the note would be often made to suffer, but the innocent holder, as in the case now before us. Here, it is not alleged or pretended that Williams had any notice of such process having been issued at the time he took the note. It is alleged that Rice knew it. How? That he had heard so! Even if he had heard such a rumor, would that have prevented his recovery if he had retained the note? We apprehend not. But the question of notice does not arise in this cause; and even if it did, I think it would not alter the case. Williams had no notice; he had received the note for a valuable consideration, and was unquestionably entitled to recover.

The case before us illustrates the impracticability of making negotiable paper before its maturity, the subject of attachment or garnishment.

Here, either an innocent holder must lose his money, or a maker must be made to pay twice. This is a hardship. Indeed, it establishes the necessity of the rule.

The statute of Wisconsin, regulating the assignment and negotiability of paper, provides, "that such paper shall be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

Thus, instead of restricting the *lex mercatoria*, it extends it; and shall we, in the face of this statute, and the adjudications under it by the Supreme Court of the State of Wisconsin, as well as the thousands of adjudications of other States, lay down and establish a new principle? Shall we alter a principle of law induced by necessity—founded upon reason—sanctioned by the use of ages, and approved by the best and wisest jurists, both of this country and Europe?

We think the judgment of the District Court should be affirmed.

Judgment affirmed, with costs, and execution awarded.

JOHN H. BREWSTER, Plaintiff in Error, *vs.* WILLIAM LEITH, Defendant in Error.

C. & A. were indebted to various persons. Their personal property had been attached for their debts. B., one of the creditors, obtained a transfer of the property to him in trust for the payment of himself and other creditors. He also procured releases from the plaintiffs in the several suits in attachment. *Held*, that B. having taken the property to market and sold it for cash funds, was liable for the indebtedness of C. & A., at the suit of one of the attaching creditors.

Forbearance to use legal means, by one party to secure himself, at the request of another, and consequent loss, is sufficient consideration to support a contract.

Taking a party in the sight of a raft of logs and declaring them to be his property, and marking them at his instance, held to be sufficient delivery.

R. R. NELSON, for Plaintiff in Error.

RICE, HOLLINSHEAD & BECKER, for Defendant in Error.

By the Court.—MEEKER, J. This was an action of assumpsit brought by Leith against Brewster, before Horace K. McKinstry, Esq., a Justice of the Peace in and for the county of Washington. Process was issued on the 26th of November, 1850, and made returnable on the 2nd of December following, when the parties appeared, and the plaintiff, by his attorney, filed his declaration, to which the defendant pleaded the general issue.

It appears in evidence, that an article of agreement, or deed of assignment, was executed by Cummings & Arnold, partners in business, who were in debt to John H. Brewster, William Leith, and others named therein, in certain sums of money. The article stipulates that they owe $80 49 to Leith, and purports to transfer to Brewster, "251,000 feet of pine saw logs, now lying and being in the River St. Croix, a short distance above Lake St. Croix, and being the same logs heretofore attached by Jesse Taylor, Esq., Sheriff, and William C. Penny, Deputy Sheriff, at the suits of the above named parties, estimated and valued at four dollars per thousand feet, log measure," in trust for Brewster, Leith, and the other creditors therein mentioned. Brewster was to sell the logs, and to pay the debt specified. No date is affixed to the agreement, but it is disclosed in evidence, that the transaction took place in the summer previous to the institution of this suit—perhaps in June, the date when the value of the logs was estimated. It further appears that Brewster was present at the time of the agreement, and the draftsman says he delivered it to him. There is also evidence showing that Leith, previous to this, had commenced a suit for his demand on Cummings & Arnold, and the writ placed in the hands of the Sheriff to seize the logs in question, and whilst he was proceeding to execute the same, he was informed by the counsel of the parties, that the matter had been adjusted.

In pursuance of the arrangement above alluded to, it sufficiently appears, that Brewster proceeded to take control of the logs by a formal delivery of the attaching creditors of the firm, or at least some of them, stating in reference to the plaintiff's interest therein, that he had bought it.

It was also proved that Brewster paid or settled, by giving

his note therefor, the costs of the suit of Leith against Cummings & Arnold. The logs were taken to St. Louis and sold for paper which was converted into cash whilst Brewster was there. It does not appear that he took them down, or that he superintended the sale. He had returned when this suit was brought, as appears from the process served upon him, and as shown by the testimony of Ames, was to pay the men after he had sold the logs at St. Louis, and returned with the money.

This, we think, is a correct embodiment and analysis of the evidence, to portions of which various exception were taken, during the progress of the cause before the Justice; but, as there appear to be no material errors in his rulings, we do not deem it necessary to make any further comment upon them.

Upon this evidence, the Justice gave a judgment for the plaintiff for $80 49, and costs of suit, to reverse which a *certiorari* was prosecuted, and the cause taken to the District Court of Washington County, where his judgment was affirmed; which judgment of affirmance it is now sought to reverse.

Passing by the many exceptions and errors complained of, we think there are but two points involved that deserve our consideration. The first is, has the plaintiff established a sufficient and legal assumpsit as against Brewster?

And secondly, if he has, had the right of action accrued when Leith commenced this suit? Ames, the draftsman, and attesting witness to the article above named, stated, in connection with the proof of its execution, that he understood from Brewster, that the latter was to pay the men as soon as he received the money for the sale of the logs and had returned with it. Daniel McLean deposed that the defendant informed him, as he was delivering the logs by marking them, that he, (Brewster,) had bought the logs of plaintiff; Cummings being there at the same time, consenting to the delivery.

Besides this, there is evidence strongly conducing to show that Brewster received the logs against which Leith had previously sued out a writ of attachment, and was to pay the demand the latter had against Cummings & Arnold, upon his releasing to the former the lien which he had, or was about to secure upon them.

If, to use the unprofessional language of a plain witness,

like McLean, in reference to Leith's interest in the logs which he had, or was about to acquire, Brewster had "purchased" it from Leith, or if there was a release to Brewster by Leith of a legal advantage—whether, in short, it was an absolute purchase, or a relinquishment of some right or property in them that Leith was obtaining by virtue of a suit then pending, we think the consideration sufficient, and the promise to pay the debt due to Leith well sustained.

Forbearance to use legal means by one party, to secure himself, at the request of another, and consequent loss, is sufficient consideration to support a contract. *See Lemaster vs. Burkhart*, 2 *Bibb*, 30.

Benefit to one, or trouble or prejudice to another, is a sufficient consideration. *See* 1 *Marshall*, 538. 4 *Munroe*, 532.

If then the promise is backed by a sufficient consideration, and Brewster legally undertook to pay the debt of Leith when it became due by the terms of the assumpsit, had Leith a right to sue by these terms when this action was brought?

There can be no doubt, we think, of the delivery of the logs to Brewster. McLean, one of the attaching creditors, named in the article, (although in no way interested in the event of this suit,) states that he, (McLean,) took possession of the logs by the direction of the Sheriff, and, from his evidence in the cause, we think it should be inferred that he delivered them in pursuance of the general arrangement spoken of, and he adds that Leith requested him to deliver his interest at the same time. He further states that Brewster obtained a boat and man and went upon the raft—that Cummings & Arnold delivered the raft to satisfy the debts of the men—and this, we think, McLean might be well informed of, as he is named in the assignment, and held a claim against the same firm. He states that he took an axe and marked the logs in each string when he so delivered them to Brewster—that Brewster received three strings as his property from Cummings, who was present and consenting at the same time. We cannot well conceive of a more perfect delivery of such heavy and ponderous property. Nor do we see any reason or propriety in exacting more than was here done to effect a transfer of such property. The logs were

taken to St. Louis and sold for paper, which was converted into money.

It does not explicitly appear that they were sold under his direction or by his orders, but it does appear that he was there at the time.

And, in the absence of all proof, as to what had become of the logs after they were delivered to him, we do not consider the most positive proof, on this head, at all necessary.

What excites a strong suspicion that the sale was under his control, is the credit endorsed on the back of the article and proven to be in his hand writing, though signed by Stinson, one of the attaching creditors named in the assignment. It is for the sum of $228 70, the full amount due him as appears in the deed. It is dated St. Louis, September 23d, 1850. Why pay that to Stinson, if Brewster did not receive the money for the logs? And is it reasonable to suppose he paid Stinson without securing his own claim? These are strong circumstances in favor of the recovery in this case, especially as they are not, nor are they attempted to be explained.

We think, from all the facts in the case, that Brewster's liability to pay Leith's demand was fixed, and that the suit was not prematurely brought.

The judgment of the District Court is therefore affirmed with costs.

Ex parte—FRANCIS LEE, Lieutenant Colonel of the Sixth Infantry, and Brevet Colonel in the Army of the United States.

Judges of Probate are not invested with any powers which authorize them to issue writs of Habeas Corpus.

The Act of the Legislative Assembly establishing the Court of Probate, created a new tribunal—a Court of Record with new powers and duties. That Act is not a supplement to the Act of the Legislative Assembly of Wisconsin Territory. It supersedes and repeals the Statute of Wisconsin relative to Judges of Probate.

Prohibition issued to restrain a Judge of Probate from proceeding under Habeas Corpus issued by him.

On the 17th day of July, 1851, Colonel Francis Lee presented the following petition to the Supreme Court.

"*To the Honorable, the Supreme Court of the Territory of Minnesota:*

"The petition of Francis Lee, Lieutenant Colonel of the Sixth Infantry and brevet Colonel in the Army of the United States, respectfully represents unto your Honors, that your petitioner is now in command of the Garrison at Fort Snelling in said Territory.

"That on the 17th day of June, 1851, Henry Shafer, John McCarthy, John G. Weible, John W. Lynch, John O'Connell, William Gallinbeck, Thomas Cronghin, Company D, First Dragoons; Augustus Jenks, John Bigtold, George W. Clarkson, Patrick Powers, Frederick Stoll, Nicholas Seiter, Francis Dwyre, William Peters, Thomas H. Weigley, Bryan Feeley, John Myers, Companies K and C, Sixth Infantry, soldiers enlisted in the Army of the United States, and stationed at Fort Snelling, aforesaid, by William H. Hubbard, an Attorney in their behalf, presented a petition to the Judge of Probate of Ramsey County, in said Territory, which office is, as your petitioner is informed, now held by one Henry A. Lambert; setting forth that they were restrained of their liberty by your petitioner, and praying the said Judge of Probate to grant a writ of Habeas Corpus, directed to your petitioner, requiring him to bring before the said Judge of Probate, the bodies of the men before named; a copy of which Petition is hereunto annexed, marked 'A,' and your petitioner prays that the same may be regarded as a part of this application.

"That on the 18th day of June, 1851, the said Henry A. Lambert, Judge of Probate of Ramsey County, in the Territory of Minnesota, aforesaid, issued a writ of Habeas Corpus, so called, directed to your petitioner, commanding him to have the bodies of the men before named before him, the said Henry A. Lambert, Judge of Probate, immediately after the receipt of the said writ, a copy of which writ of Habeas Corpus is hereunto annexed marked 'B,' and your petitioner prays that the same may be taken as part of this petition.

"That your petitioner, being advised by his counsel, and by

the District Attorney of the United States for the Territory of Minnesota, that the said Judge of Probate had no authority to issue the said writ of Habeas Corpus, and that the service of the same upon land reserved by the Government of the United States for military purposes, and for the purpose of discharging soldiers from the Army of the United States, was entirely illegal, refused to obey the command in said writ contained, and refused to have the bodies of the men before named, before the said Henry A. Lambert, Judge of Probate, as required.

"That on the 23rd day of June, 1851, the said Henry A. Lambert, Judge of Probate of Ramsey County, issued a writ of Attachment, addressed to the Marshal of the Territory of Minnesota, commanding him to attach the body of your petitioner for disobedience of the said writ of Habeas Corpus, a copy of which writ of Attachment is hereunto annexed marked 'C,' and your petitioner asks that the same may be made a part of this, his petition.

"That Henry L. Tilden, Marshal of the Territory of Minnesota, by his deputy, C. P. V. Lull, arrested your petitioner pursuant to the command of the said writ of Attachment.

"That your petitioner was, on the 25th day of June, 1851, discharged from the custody of the said Marshal, by order of the Hon. Aaron Goodrich, Chief Justice of the Supreme Court of the Territory of Minnesota.

"That on the 2nd day of July, 1851, the said Henry A. Lambert, Judge of Probate, issued an *alias* writ of Attachment, directed to the Marshal of the Territory of Minnesota, commanding him again to attach the body of your petitioner; pursuant to which *alias* writ, your petitioner has been again arrested; that a copy of said *alias* writ of Attachment is hereto annexed marked 'D,' and your petitioner prays that the same may be taken as part of this, his petition.

"That since the issuing of the writ of Habeas Corpus aforesaid, and notwithstanding your petitioner's disobedience of the same, the said Henry A. Lambert, Judge of Probate, has, by a process which he calls a '*precept*,' professedly issued under, and in execution of, the said writ of Habeas Corpus, brought before him nine of the men before named, and discharged

them from their contract of enlistment as soldiers in the Army of the United States.

"And your petitioner further represents unto your Honors, that the said Henry A. Lambert, Judge of Probate, has both verbally and in writing, avowed his intention and determination to continue to issue '*precepts*,' and will, of course, discharge the men under the command of your petitioner, as heretofore. That said '*precepts*' are issued avowedly in furtherance of the purposes of said writ of Habeos Corpus, and are intended to be based thereon.

"And your petitioner further represents unto your Honors, that the assumption of authority to issue writs of Habeas Corpus, and to discharge the men stationed at Fort Snelling from their contract of enlistment, by the said Henry A. Lambert, Judge of Probate, has awakened discontent and insubordination in that portion of the Army under the command of your petitioner, and that it has extended to such a degree that the men improve every opportunity to escape to the office of the said Henry A. Lambert, Judge of Probate, for the purpose of obtaining a discharge.

"And your petitioner believes that the continuation of the proceedings under the said writ of Habeas Corpus, and the issue of said '*precepts*,' will work serious injury to the military service, and materially impair the usefulness of the Garrison under the command of your petitioner.

"Wherefore, and for the reason that the said Henry A. Lambert, Judge of Probate, has exceeded his jurisdiction in issuing and executing the said writ of Habeas Corpus, and the said Attachment and *alias* Attachment, and the said '*precepts*,' and is continuing to exceed his jurisdiction, by sending process into territory exclusively subject to the control of the Congress of the United States, for the purpose of discharging men enlisted in the Army of the United States.

"Your petitioner prays your Honors to grant a *Writ of Prohibition*, issuing out of, and under the seal of this Honorable Court, to be directed to the said Henry A. Lambert, Judge of Probate, and the said William H. Hubbard, Attorney for the men before named, and to the said men, commanding them to desist and refrain from any further proceedings in the mat-

ter of the said Habeas Corpus, and the said Attachment and *alias* Attachment, and the said *precepts*, until such time as may be fixed by your Honors, and inserted in said writ, and until the further order of this Honorable Court therein; and then to show cause why they should not be absolutely restrained from any further proceedings in the said matter.

"And your petitioner will ever pray, &c.

"FRANCIS LEE,
"Lt. Col. Sixth Inf., Bt. Col. U. S. A."

RICE, HOLLINSHEAD & BECKER, Attorneys for Petitioner.

Territory of Minnesota, ss.

Personally appeared before me, Francis Lee, the petitioner above named, who being first duly sworn, did depose and say that the facts set forth in the foregoing petition, so far as they are stated upon his own knowledge are true, and so far as they are stated upon information from others, he verily believes them to be true.

FRANCIS LEE,
Lt. Col. Sixth Inf., Bt. Col. U. S. A.

Sworn and subscribed this 14th day of July, 1851.

JAMES K. HUMPHREY,
Clerk Supreme Court.

On the 16th day of July the Court granted the following rule:—

"This day came the said Francis Lee, by his Attorney, and moves the Court that a Writ of Prohibition issue against the said Henry A. Lambert, a Judge of Probate within and for the County of Ramsey, to restrain proceedings upon certain writs of Habeas Corpus issued by the said Henry A. Lambert, and also commanding the said Henry A. Lambert to refrain from issuing other writs of Habeas Corpus, directed to the officers or soldiers of the Garrison at Fort Snelling, for reasons on file.

"Whereupon it is ordered, that the said Henry A. Lambert, Judge of Probate, appear before this Court on Saturday next, the 19th day of July, A D, 1851, at ten o'clock, A M, and

show cause why a writ of Prohibition should not issue restraining him from the proceedings complained of in the petition of the said Col. Francis Lee, on file in this Court.

"And it is further ordered that a copy of this rule be served upon the said Henry A. Lambert, by the Marshall."

On the 19th, Lambert appeared by counsel, and filed the following answer:—

"*To the Honorable, the Judges of the Supreme Court, for the Territory of Minnesota:*

"The answer of Henry A. Lambert, Judge of Probate of the County of Ramsey, and ex-officio Supreme Court Commissioner, to the petition of Col. Francis Lee, praying for a writ of Prohibition against this respondent, in the matter of a Habeas Corpus heretofore issued by this respondent, upon application of William H. Hubbard, in behalf of Augustus Jenks *et. al.* and the proceedings had therein.

"This respondent respectfully represents to your Honors, that he ought not to be prohibited from further proceeding in said matter of Habeas Corpus and Attachment, because he says that he, as an officer of the United States for this Territory, is authorized by the Organic Act and the laws of the Territory of Wisconsin, in force in this Territory, to issue the writ of Habeas Corpus throughout the entire County of Ramsey aforesaid, and the entire County of Dakota aforesaid, (it being attached to the County of Ramsey for judicial purposes, and there being no officer residing in the County of Dakota authorized to issue said writs.)

"He denies that the so-called Military Reserve at Fort Snelling is under any other, or different, jurisdiction than that to which the balance of this Terrritory is subject.

"He admits the issuing of said writs of Habeas Corpus and Attachment as the officer aforesaid has in said petition set forth: and also the discharge of the persons therein, in said petition mentioned, on the return of the precept, upon cause shown, from the custody of said petitioner.

"That the first writ of Attachment in said petition mentioned, was returned by the Deputy Marshal, in the manner following: 'Served the within on the within-named Lee, and he was dis-

charged from Judge of the District Court, June 25th, 1851.' That, considering said return insufficient, he, upon demand of counsel, issued an alias writ of Attachment, as set forth in said petition, to which last mentioned writ there has as yet been no return, and respondent cannot say whether said Lee is in custody under said writ, or not.

"Of all other matters set forth in said petition, not hereinbefore admitted, this respondent is ignorant, and asks proof of the same; and, having shown fully why the said writ of Prohibition should not issue against this respondent, as Judge of Probate aforesaid, as prayed for in said petition, he asks to be discharged with his reasonable costs, &c.

"HENRY A. LAMBERT,

"Judge of Prob. of Ramsey Co. M. T. ex-off. Sup. C'rt. Com'r."

Sworn to and subscribed before me, this 19th day of July, 1851.

CHARLES R. CONWAY,
Notary Public, Ramsey Co. M. T.

HOLLINSHEAD for the rule.

A Writ of Prohibition is a writ issued by a superior Court directed to the Judge and parties of a suit in an inferior Court, commanding them to cease from the prosecution of the same upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court.

The reason of Prohibitions in general, is: that they preserve the rights of the Courts, and of individuals. The wisdom and policy of the law suppose both best preserved when everything runs in its right channel: as, if one might be allowed to encroach, another might, and thus confusion be produced in the administration of justice. 3 *Black. Com.* 112. *Com. D. h. t. Bac. Abr. h. t. Saun. Index h. t. Vin. Abr. h. t.* 2 *Sell. pr.* 308. 2 *Hen. Be.* 533. 2 *Hill*, 368. *Jacobs' Law Dic. title Prohibition. People vs. Works*, 7 *Wend.* 487-8.

The Supreme Court has a discretion to grant or deny this writ. *Burrill's Pr.* 182. The *2d sec. of the 22d chap. Laws of Minnesota, on page* 55, authorizes the Supreme Court to issue writs of Prohibition.

Lambert claims jurisdiction because he says he is acting as Supreme Court Commissioner.

Supreme Court Commissioners only possessed the chamber jurisdiction of a Judge of the Supreme Court of Wisconsin Territory. Under the Constitution of the United States and the decisions of the Supreme Court of the United States, Territorial officers have no authority over districts purchased by the General Government for military purposes. Sheriffs and constables cannot be allowed to obstruct National operations. Petty magistrates should not be encouraged in disbanding the Army, arresting its officers, and exposing the frontier—defenceless—to danger. *See the reasoning of Chief Justice Kent in the case of Jeremiah Ferguson*, 9 *John's* 239; *also of Nicholson*, *C. J.* 2 *Hall's Law J.* 192; *case of Emanuel Roberts; Husted's case*, 1, *J. C.* 136; *Story's Conflict of Laws, p.* 30, 910. The case of Carlton (7 *Cowen*, 471) was controlled by the act of the Legislature of New-York ceding West-Point to the United States, and if it were not it is not in point. West-Point belonged to the State of New-York. The State jurisdiction having once attached, and not having been surrendered, remains. Here the case is wholly different.

A Judge of Probate in Minnesota has no right to issue the writ of Habeas Corpus at all, for whatever purpose, or wherever served. The statute of Wisconsin vesting the powers of Supreme Court Commissioner in a Judge of Probate has been repealed and supplied by the statute of Minnesota establishing Courts of Probate, and the power of issuing writs of Habeas Corpus is not enumerated as among the items of jurisdiction vested in the Court of Probate. No such officer as a Judge of Probate of Wisconsin Territory, exists in Minnesota. Where the powers and duties of a Court are defined by statute, and no reference is made to former enactments—it is manifestly improper to infer a jurisdiction entirely different, and give to the Court a power belonging to another tribunal.

The proceedings of the Judge of Probate are illegal, even if he has power to issue writs of Habeas Corpus, because the Military Reservation on which Fort Snelling is situated, is entirely and exclusively under the jurisdiction of the Federal Government, and Territorial officers have no authority there, whatever.

16*th clause of* 8*th sec. Cons. U. S. Cherokee Nation vs. State of Georgia*, 5 *Peters*, 1. 1 *Kent's Com. p.* 429-30. *Com. vs. Clary*, 8 *Mass. R.* 73. *Com'th. vs. Young.* 1 *Hall's Jour. Juris.* 53. *Opinion of the Judges*, 1 *Metcalf's R.* 580.

Mr. LAFAYETTE EMMETT, contra.

Congress has unlimited and exclusive jurisdiction over every part of the Territory. The Military Reserve is under no other jurisdiction than that to which the rest of the Territory is subject. There is no division of powers between the United States and the Territory; but every official act is done in the name and by the authority of the United States. 3 *Story's Com.* 193, *et. seq.* 1 *Kent*, 183, *et seq. Kendall vs. U. S.* 12 *Peters*, 524, 619.

The Court of Probate being created by the Organic Act, the Probate Judge is not a mere Territorial officer, but an officer of the United States—as much so as are the Judges of the Supreme and District Courts. *Wise vs. Withers*, 1 *Cond.* 552. (3 *Cranch.*)

When the office of Supreme Court Commissioner was abolished all the power and duties of that office were conferred upon the Judge of Probate, (except the allowance of writs of *injunction.*) The Supreme Court Commissioner was especially empowered to issue writs of Habeas Corpus. The Supreme Court Commissioner was authorized by the laws of Wisconsin Territory, in force here, to do any act which a Judge of the Supreme or District Court could do out of Court, and none doubted their authority to serve a writ of Habeas Corpus over the Reserve.

Neither Congress nor the Territorial Legislature, have ever made or recognized any distinction between the Reserve and the rest of the Territory, but they have always been treated as equally under the exclusive jurisdiction of the United States.

The County of Dakota being attached to Ramsey County for judicial purposes, and the whole of the Reserve lying within these Counties, Judge Lambert, as an officer of the United States, has jurisdiction over every part of it.

The law of 1849 is not repugnant to, and does not, without a repealing clause, repeal the act of Wisconsin Territory; but

is cumulative or auxiliary, and merely defines the duties of a Probate Judge in testamentary and administration matters. *Beals vs. Hall*, 4 *Howard*, 37. *Wood vs. the United States*, 16 *Peters*, 342. *Davis vs. Fairtairn*, 3 *Howard*, 636.

By the Court—COOPER, J. The object of this application was to obtain a writ of Prohibition to restrain the Judge of Probate from issuing writs of Habeas Corpus, directed to the Commandant at Fort Snelling, a United States Military Garrison—commanding and requiring him to have before said Judge of Probate, certain soldiers under his command, regularly enlisted in, and belonging to, the United States Army.

The relator raised, for the consideration of the Court, two questions, both going to the jurisdiction of the Probate Judge.

First. That the Judge of Probate has no power or authority to issue writs of Habeas Corpus in any case.

Second. That even does he possess such power, being a mere Territorial officer, he cannot enforce the execution of his precepts on the Military Reservation at Fort Snelling, such territory being under the exclusive jurisdiction of Congress.

We find it necessary to rule the first proposition only, that going to the *gist* of the application. It is the unanimous opinion of the Court, that Judges of Probate are invested with no powers which authorize them to issue writs of Habeas Corpus. The Judge of Probate in the present case, assumes to derive his authority from an act of the Territory of Wisconsin. The Legislative Assembly of that Territory created an officer known as a *Supreme Court Commissioner*, and invested him (how properly, it is unnecessary for us to say) with all the powers which a Territorial Judge might exercise at chambers.

Subsequently, however, that officer was abolished, and the powers he exercised, conferred on the Judges of Probate of the several counties.

To be entirely intelligible, it is proper here to state that the act of Congress organizing this Territory, provides "That the "laws in force in the Territory of Wisconsin, at the date of the "admission of the State of Wisconsin, shall be valid and oper- "ative therein so far as the same be not incompatible with the "provisions of this act: subject, nevertheless, to be altered,

"modified, or repealed, by the Governor and Legislative "Assembly."

Under the provisions of the laws of Wisconsin, as they existed at the date of the organization of this Territory, if not incompatible with any Federal law, the Judges of Probate would have possessed unquestioned authority to issue writs of Habeas Corpus, and to have done all the other chamber business of a United States District Judge; but at the first session of the Legislature of this Territory, an act was passed, which, settling this question, took from the Judges of Probate these powers. That act *created* a new Court—a Court of Record, with new powers and duties—a Court which entirely superseded in its powers and duties all the functions of the Judges of Probate under the laws of Wisconsin. This act created a Court of Probate. It defined its powers: it prescribed its duties. It covered the whole ground of the duties of a Probate Court. It gave it exclusive jurisdiction over the estates of decedents, minors, lunatics and habitual drunkards. It went, however, no further. It gave no power to issue writs of Habeas Corpus.

That act recited *verbatim et literatim* many of the sections and provisions of the act of Wisconsin. Why was this, if this act of the Territory of Minnesota was only intended as a supplement to the act of Wisconsin regulating the duties of Judges of Probate? Why recite section after section—why recapitulate in the same words, duty after duty prescribed by the laws of Wisconsin, if this act was not intended to supersede and repeal the other?

There is no reason. There could be no reason for such a course; and we are satisfied that our own act did repeal and supersede the act of Wisconsin; and that the duties assigned to a Supreme Court Commissioner do not exist in the Judges of Probate here.

But there is another reason for taking this view, and one which is unanswerable.

That is, the distinction made in the *creation* of our Courts of Probate.

The act of Minnesota regulating the duties of Courts of Record, *creates*, by express and appropriate terms, a *Court of Probate*, which shall be a *Court of Record*. The Court of

Probate of Wisconsin, was a *ministerial* office—its Judge a ministerial officer. Can we, therefore, by mere implication, confer upon a distinct and different tribunal powers and duties which belonged to another tribunal, and not legitimately within the purview of its duties, or the object of its creation.

This question can be answered but one way.—No! It is not necessary that an actual repealing clause should be used to discontinue or supersede an existing enactment. The creation of a new Court, as in the present case, with new duties and powers, but at the same time embracing all the powers and duties theretofore exercised by an inferior tribunal, is equivalent to a repeal: it is a substitution of one for another tribunal.

In this case, the office of the Judge of Probate, as it existed under the laws of Wisconsin, was in effect abolished by the creation of a new Court, organized upon entirely different principles: its duties covering the ground of the legitimate object of a Court of Probate. But there is no necessity to extend this reasoning further. Our Court of Probate was created by our own statute. When it came into existence, its predecessor expired. Before that time, neither here nor in Wisconsin, did such a tribunal exist. And being the creature of our own peculiar statute—the offspring of our own Legislative body cannot claim prerogatives or powers drawn from any other paternity, without express legislation conferring such powers and prerogatives.

The writ of Prohibition is allowed.

CASES

ARGUED AND DETERMINED,

IN THE

SUPREME COURT OF MINNESOTA.

JULY TERM, 1852.

CASTNER, ET. AL. *v.* STEAMBOAT DR. FRANKLIN.

Where counsel requests the Court to charge the Jury on a number of propositions collectively, and the Court refuse to charge as requested, if any one of the propositions is not correct, error will not lie for such refusal. Per FULLER, J.

Counsel must state the precise point which he wishes decided, and if the decision is against him, he must except to it specifically.

The Mississippi River is a navigable stream, and the principles apply in regard to its navigation as to streams navigable at common law. Per MEEKER, J.

ERROR TO THIS DISTRICT COURT OF RAMSEY COUNTY.

The plaintiffs proceeded by attachment against the Steamboat Dr. Franklin, for damages done to logs of the plaintiffs, by the said boat, in a slough near the upper landing, in St. Paul. The cause was tried at the September Term of the said Court, 1851, and a verdict rendered in favor of the plaintiffs for $150 and costs.

The defendants sued out a Writ of Error from this Court. The facts sufficiently appear in the opinion of the Court.

RICE, HOLLINSHEAD & BECKER, for the Plaintiffs in Error.

BABCOCK & WILKINSON, for Defendants in Error.

By the Court—MEEKER, J. This is a special proceeding pursuant to the act entitled "an Act to provide for the collection of demands against boats and vessels," found in the Revised Statutes, Laws of Wisconsin Territory, pages 168-9-70. On the 4th of August, 1851, the plaintiffs below obtained a warrant for the seizure of the boat, which was executed on that day, being based upon a complaint verified by Castner, one of said plaintiffs. It set forth that the plaintiffs were partners, doing business under the name of John M. Castner & Co., that they were lawfully possessed of 48 saw logs, of the value of $160, lying in a slough near what is commonly called the Upper Landing in St. Paul; that they were not in the channel of the Mississippi River, but were lawfully boomed and secured. On the 2nd of June, 1851, the said boat, being under the management of the captain, officers and pilot, unlawfully ran into the said slough, and unlawfully ran against the boom by which the said logs were confined, and thereby greatly broke, damaged and injured the said boom, and thereby the said logs of the plaintiffs were lost, floated away and destroyed. Further:—at and before the time aforesaid, the plaintiffs were lawfully possessed of a quantity of hard wood saw logs, of the value of $160, then lawfully lying at or near a saw mill, known as the upper saw-mill, in St. Paul; which logs were lawfully secured by a boom around them, made for that purpose, and were out of the main channel of the Mississippi River. Yet the said boat being under the management of the master, and through his management unlawfully ran into the said slough, and unlawfully broke and damaged the boom, and thereby, said logs, to wit: 48 hard wood saw logs, of the value of $160, floated away, and thereby by reason of the unlawful breaking of the said boom as aforesaid, the plaintiffs suffered great loss and damage, to wit: $260. This is the substance and language of their complaint. To this the defendants, the owners of the boat, answered and pleaded as follows:—That the said steamboat, Doctor Franklin, did not commit the acts and injuries in manner and form as the plaintiffs have above thereof complained, nor any nor either of them. That if said logs in said boom mentioned, were lying and being at the place therein set forth, they were unlawfully obstructions to the free navigation of the

Mississippi River, were in said river, and subject to be removed and abated as public nuisances, and that the course and direction of the said steamboat Doctor Franklin, at the time and place in the said complaint mentioned, were on and in a public highway, free of passage to all boats and vessels of every citizen of the United States; and that the said steamboat, Doctor Franklin, could not in any other manner, or by taking any other course or direction, land her passengers and freight at the upper landing, &c.

The cause was tried at the September term, 1851, and a verdict and judgment for $150 and costs, were rendered for plaintiffs. This judgment is impeached in the assignment of errors, on the ground that the judge who tried the cause misdirected the jury, and refused to give the instructions as asked by the counsel for the defendants.

The first question of any moment that arises on the record before us, and that upon which the defence mainly is made to depend, is whether the Mississippi is, in the legal acceptation of the term a navigable river; for if it be not, then the right, privilege and exemption relied on by the defendants are seriously abridged and modified. If it be such a navigable stream, *then* the rights of the plaintiffs in this cause are favored and fortified by the rights that result to the public. By the common law, that was a navigable stream only in which the tide ebbed and flowed, and to the extent only of such ebb and flow. The soil under the river navigable in this sense of the word, does not belong to the Riparian proprietors, but to the public. The adjustment of controversies between individuals and the public in England and America, has been by ascertaining the extent of the flowing of the tide where such controversies arose on rivers thus defined to be navigable. This contracted view of the subject, afforded by the common law, proceeds from the fact, that that system arose by the almost imperceptible progress of ages, in a country of limited extent, which contains but two rivers, the Thames and Severn, of any use to the public for navigable purposes, up both of which the tide ebbs and flows. As England had but these, it was natural for the law of that country to prescribe the ebb and flow of the tide as one of the essential qualities of a navigable river. In the early settlement of the

United States, the colonists brought along with them the common law, which was the birthright of Englishmen, and adopted as their rule of right, action and propriety, qualified only so far as their new condition and home rendered certain provisions of it inapplicable or unnecessary. In this manner the definition of a navigable stream gained currency among the colonists by tacit consent, at a time when steam propellers were unknown, and our rivers little used by other craft. Thus, before art and the internal trade and commerce of our country had developed the value of our majestic watercourses, an arbitrary rule had excluded many of them from the dignity and character of navigable waters, *eo nomine*—attended with all the legal consequences and inconveniences, not to say absurdities, resulting to the public and to individuals, from such a construction. Under the application of this authority, the public have been incommoded by the successful assertion of the technical rights of Riparian proprietors. The navigation of large streams has been embarrassed and impeded by individual ownerships and improvements. Lands bounded by navigable rivers, have carried as incidents of this circumstance, the exclusive right to the soil to the middle of the stream, and where they were united in the same person on both sides of the river, such person has exercised the exclusive control of the entire channel adjacent. Such is the origin, progress and operation of this principle of the common law.

We do not think that the ordinance of 1787, so far at least as the Mississippi is concerned, has worked any change of the law upon this subject, and are of opinion, that if this river is navigable, in that sense that will secure to the public all the rights, privileges and immunities incident to streams navigable at common law, it must be so from other reasons and different authority than that celebrated law. The language of the ordinance above alluded to is, that "The navigable waters *leading into* the Mississippi and the St. Lawrence, and the carrying places between the same, shall be *common highways*, and forever free as well to the inhabitants of said territory as to the citizens of the United States, and those of any other State that may be admitted into the confederacy, without any tax, impost, or duty therefor." There was obviously no intention

on the part of Congress to constitute these vast rivers, two of the largest in the world, mere highways for travel and commerce, for that would have been to declare them something less than navigable rivers, by leaving the rights of Riparian owners the same with owners of land bordering on public roads and ways, restricting the privileges of navigators and craftsmen to low water mark, and in derogation of some of the most important rights, essential to the public use, which are always implied and enjoyed with impunity, on streams that are navigable in the legal meaning of that term. Besides, at the time of the passage of the ordinance in question, the mouths of the Mississippi and of the St. Lawrence, were within the dominions of foreign powers, and under their exclusive control. Spain commanded the mouth of the Mississippi, and Great Britain, the St. Lawrence; so that the United States had no authority by a new declaratory act to impart to those rivers, any such quality or any higher or lower one. But we think the language of the ordinance is not susceptible of such a construction, and as already stated, does not embrace the Mississippi. Does then the common law apply arbitrarily in reference to this subject, and are we to be bound by it in the decision of this case? Or shall we assume that, owing to the conceded navigability of the Mississippi, and the palpable absurdity of considering it a private stream, that in this respect, the common law is not applicable to our local situation? This has been the course of the Supreme Courts of the States of Pennsylvania and South Carolina, and perhaps some others. *See Carson vs. Blazer*, 2 *Bin. Rep.* 475; *Shunk vs. Schuylkill Navigation Co.*, 14 *S. & Rawle*, *p.* 71; *Cates vs. Waddington*, 1 *McCord Rep.* 580. See also 3 *Devereux*, (*N. C.*) *Rep.* 79. From the view, however, we have taken of the law in this case, we have not deemed it necessary to declare judicially, that the principle of the common law we have been discussing is not applicable to our situation.

We think from the policy of our Government, evinced in the administration of its public land system, and the repeated Legislative recognitions thereof, the National Legislature has clearly enough controlled and limited the common law rule in regard to this subject. In the disposition of the public domain it has from the beginning, reserved the Mississippi and the soil

it flows over from its surveys and grants. The surveyors in its employ, have always bounded their plats by the meanderings of its banks, and its patents have been issued to individuals only to the same extent. It is obvious that what has not been so let to and vested in individuals, still remains in the Government, for the use of the public which that Government represents. The conclusion then we have come to is, that the Mississippi is in *law*, as in fact, a navigable river—and that all navigators and craftsmen of whatever description thereon, enjoy the same rights and are entitled to the same exemptions, that they would have had on rivers navigable at common law, among which is the right to land freight and passengers and to receive the same on its banks, and this privilege extends to high water mark. This is, however, a right subject to some qualifications, or rather, it being a privilege in derogation of private rights, should for that reason, be strictly confined to the purposes and objects for which it was designed. It is a right, too, which like all others however absolute, must be so exercised as not to interfere with the legal rights of individuals—in other words, the privilege must not be abused.

In this case it is contended by the counsel for the defendants that the slough in which the logs were boomed, is a part of the channel of the Mississippi proper, and that therefore navigators and boatmen enjoy the same rights and exemptions on it, to which they may be entitled on navigable rivers. We do not think the proof justifies this conclusion. The most that can be conceded and argued is, that there is an inlet above and an outlet below, in the rear of the warehouses on the main bank of the river, and that a portion of the season the entire bottom from the base of the bluff to, and including the main bank, overflows during high water and freshets sufficiently to admit steamboats, and rendering it convenient to land freight and passengers at Elfelt's warehouse, near the foot of the bluff. Nevertheless, this whole bottom is now comprised within, and constitutes a portion of the town of St. Paul, being laid out in streets and lots more or less valuable as town property. We do not therefore consider it as completely condemned to the purposes of navigation as the channel or the bank near the

two warehouses. Nor do we think the proprietors thereof should be considered guilty of erecting a public nuisance, if they were to use it for booming logs, erecting buildings, or making any other improvements thereon, conforming to and respecting the plat of St. Paul when the streets are opened, though it be used sometimes during the high water, or freshets, for a steamboat landing. And even if it were indeed a part of the Mississippi proper, as counsel would contend, it is by no means certain that the logs in question, which do not appear in the evidence to have been moored there for any permanent purpose, may not, for aught that appears, have been confined there temporarily, or until the owners could find a market for them, or raft them for the lower country. In this latter view of the case, we are of the opinion the owners had the same right to use the *navigable* waters of the Mississippi as the owners of a steamboat, and we will add, the same right to protection from injury, and exemption from invasion.

In regard to the ruling of the Court below, we are inclined to the opinion, that there is no such error in it as should be cause of reversal in this case. The instructions that were asked by the counsel for the defendants, and which the Judge refused to give, we are all of the opinion, after a careful examination, should have been rejected; and the directions to the jury, which were submitted through loose and incoherent propositions, yet as they appear relevant, and, when taken together, seem to cover the law of the case so far as appears in the evidence presented in the bill of exceptions, which, it will be noticed, contains no averment that it was all *the testimony heard at the trial*, upon which the instructions must be presumed to be based, we think, on the whole, the judgment should be affirmed with ten per cent. damages, exclusive of interest and costs, which is ordered accordingly.

Fuller, J. The plaintiff in error, who was defendant below, relies for a reversal of the judgment against him, upon the refusal of the Judge at the trial to charge the jury as requested by his counsel.

The defendant's counsel submitted to the Judge, in a body,

eight propositions numbered consecutively, some of them involving several subordinate propositions, and all together covering more than two sides of a sheet of foolscap, closely written, and containing abstract rules of law, as well as principles applicable to the case in hand; and asked to have the whole administered to the jury as a charge.

If there was anything erroneous in any one of the propositions, the Judge did right to reject the whole. He was not bound to sift and hunt through such a mass to see whether he could find some proposition, or part of a proposition, which it would be proper to give as a rule of law for their guidance, to the jury; and his neglect or refusal to do so is not error, although it might have been if the same proposition or part of a proposition had been submitted to him separately, with a request that he should charge the jury in accordance with it; and his refusal had been specially excepted to. A Judge is not to be trapped by being called upon in the hurry of a trial, to analyze a mass of legal maxims and solve a long series of problems, and find the true result, on pain of having his decisions set aside if he errs. He is bound to look into them so far only as to see whether they contain anything improper for a charge, and if they do, may refuse the whole. The counsel himself must put his finger on the precise point he wishes decided, and take good care that his request is not too large, or his proposition too broad. And if the decision is against him, he must object to it specifically. When a general objection is made to the decision of a Court on the trial of a cause, and, on a review thereof, it appears that the decision, if erroneous at all, is only in part, such objection will not be available, from the want of precision in its statement at the trial. *McAlister vs. Read*, 4 *Wend.* 483. *Read vs. McAllister*, 8 *Wend.* 109. The same rule is applicable to the charge actually given. A general exception to his charge does not bring up any particular remark made by the Judge, or any omission in such charge, unless his attention was directed to the point at the time. *Camden & Amboy R. R. and T. Co. vs Belknap*, 21 *Wend.* 354. Wholesale exceptions are not allowed. The error, if any, must particularly pointed out. The rule is more strict in the Appellate Court, when the case comes up on error, than on a motion

for a new trial in the Court below. *Archer vs. Hubbell*, 4 *Wend.* 514.

In the case under consideration, but one general exception was taken, both to the refusal of the Judge to charge as requested by the counsel for the defendant, and to the charge which he did deliver to the jury. The exception is manifestly too broad, and covers too much. Portions of the eight propositions submitted by the counsel are little more than abstract rules of law, and other portions are otherwise objectionable. His request was not that the Judge should submit any particular portion of them, but that he should give the whole to the jury as a charge. No particular portions of the charge delivered was excepted to, but the whole of it. It was not all wrong, although much of it was harmlessly irrevalant.

The 8th proposition submitted by the defendant's counsel, "That if the steamboat Doctor Franklin was prevented from passing up the public street to the ordinary landing in high water, by the log rail or other obstruction extending from the steam mill, that then the said boat might lawfully pass over the water on the land adjacent, notwithstanding a boom for securing logs might be removed thereby," can hardly be maintained upon any established principle of law. There is no pretence that the street in question was ever opened, worked or used as such by the public. And if it were, streets are not designed for navigation by steamboats. That is not one of the public uses or easements with which the fee of the land is burdened.

The substance of the 7th proposition is, that the Doctor Franklin committed the injury complained of, in abating a nuisance which obstructed the passage of a street, never opened or used as such, and at the time under water. This is a far-fetched and untenable defence. There were other objectionable matters in the defendants' propositions, but these are enough for examples. And the exception covered these, as well as that part of the charge made, in which the Judge in effect charged against the first proposition, and instructed the jury that if they believed the public interests could have been subserved by landing anywhere else, then the boat was bound to land there.

If error was committed by the Judge in his charge, or in his refusal to charge, the defendant does not come to this Court in a situation to take advantage of it. We must presume that the Judge would have complied with a lawful request, and that if any particular part of his charge was wrong, he would have corrected it if that portion had been excepted to.

Concurring for the most part in the reasoning of my learned associate, I have by another way arrived at the same conclusion: that the judgment of the Court below should be affirmed.

Pierse *vs.* Smith.

The proof required to issue a Writ of Attachment must be legal proof, or such species of evidence as would be received in the ordinary course of judicial proceedings.

Hearsay and belief are not the "circumstances" required by law, to authorize the issuing of a Writ of Attachment.

This being an extraordinary remedy, should not be resorted to, except in cases clearly within the provisions of the Statute.

This was an action of assumpsit commenced in the District Court of Ramsey County, for the recovery of the sum of two hundred and sixty-two dollars and a half. A writ of Attachment was issued in the suit, based on the following affidavit:

Territory of Minnesota, } *ss.*
Ramsey County. }

Allan Pierse being duly sworn, says: that Charles K. Smith (now in said County) is indebted to him on account, for work and labor performed for him, the said Smith, at his instance and request, as per bill of particulars annexed, in the sum of two hundred and sixty-two dollars and fifty cents, (subject to a credit of twenty dollars, amount of two bills, for ten dollars each, if he yet has them, which affiant gave said Smith)—that

the demand is one sounding in contract. And further, that he verily believes the said Smith is about to depart from this Territory with intent to abscond. The circumstances upon which the belief is founded, are these:

It is known here to the said Smith, as well as others, that petitions have recently been sent to the President of the United States praying that he be removed from the office of Secretary of this Territory; and there can be no doubt, from the gravity of the charges against him, and the authenticity of the testimonials substantiating them, which have accompanied these petitions, that the President will remove him. There are numerous creditors of the Government in and about St. Paul, having claims which should be paid out of the money appropriated at the session of Congress before the last, to pay the expenses of the Legislative Assembly of the Territory of Minnesota for the session of said Assembly which has recently terminated. Some twenty-four thousand dollars were appropriated, and, from the amount the said Smith is known to have received last fall, and the amount of drafts he is said to have exhibited lately, he must have received the whole appropriation.

After the adjournment of the session he was dilatory in paying the expenses of it, giving various frivolous excuses for not doing so, the principal of which was, that he had no cash, but had Government drafts. After a while, he went down to Galena, to get these drafts cashed, as he avowed. After his return he suspended payments, declaring to some creditors that he wanted ten, to others fifteen days, to ascertain *how his accounts stood at Washington*, before he paid out any more money; and he is at this moment withholding from the creditors their money. These things affiant has been told by Government creditors who have demanded payment of him, and he believes them to be true—and this, too, when he must have, and affiant verily believes he has—ten or twelve thousand dollars of Government money in his possession, appropriated and sent to him for the express purpose of paying these very creditors who he is thus trifling with, and depriving of their just dues. Affiant cannot believe that an individual who feels any responsibility to the community, or who intends to remain in it, would thus act; and he believes that the motion of ten or fifteen days was

a mere pretence to get a respite to make preparations to abscond, as soon as he hears of his removal from office, and carry off the money in his possession and not pay the Government creditors. These ten or fifteen days are now about expiring, and information of his removal is expected soon.

Affiant prays that a writ of Attachment issue, and that the said Smith's property be attached according to law.

A. PIERSE.

Sworn and subscribed before me, this 6th May, 1851.

A. GOODRICH, C. J.

A motion was made, on the part of the defendant, at the Fall Term of the Court, 1851, to quash the writ of Attachment granted on the above, chiefly on the ground of the insufficiency of the affidavit. After argument, the motion was granted, and the writ set aside. From this order, the plaintiff sued out a writ of Error to this Court.

A. PIERSE, in person, for Plaintiff.

RICE, HOLLINSHEAD & BECKER, for Defendant.

FULLER, C. J. The laws of Wisconsin, under which this suit was commenced, after specifying the cases in which a suit may be commenced by Attachment (see *Laws of Minnesota*, 1849, *p.* 155, *Sec.* 3) provided, that "the facts necessary to entitle a party to a writ of Attachment should be proven to the satisfaction of a District Judge, or Supreme Court Commissioner, by the affidavit of the plaintiff or some credible witness, stating therein the circumstances upon which the belief of such facts was founded."

Proof, in the sense in which it is used in this act, means legal evidence, or such species of evidence as would be received in the ordinary course of judicial proceeding. 9 *J. R.* 75. It is not sufficient for the affidavit to detail mere hearsay or belief. These are not "circumstances" within the meaning of the law, which are competent proof of the facts necessary to entitle the party to the writ. The circumstances upon which the belief of the plaintiff, or a "credible witness," are founded, must be

proved otherwise than by swearing to information derived from others. *Tallman vs. Bigelow*, 10 *Wend*, 420. *Smith vs. Luce*, 14 *Wend.* 237.

The application for an Attachment is not addressed to the whim or caprice of a Judge. In granting or refusing it, he acts judiciously, and is bound to exercise a sound discretion. He must have evidence before him upon which to exercise it. He has no right to be satisfied, unless circumstances are sworn to in the affidavit sufficient to prove the requisite facts, so as to satisfy a reasonable man in the exercise of a sound judgment, of their truth. *Loder vs. Phelps*, 13 *Wend.* 46. For the law on this subject, see 5 *Taunt.* 520. 1 *Tynch*, 287. 1 *Cromp. and Jew.* 401. 1 *Marsh*, 267. 6 *Taunt.* 460; 4 *ib.* 156. 1 *Com. R.* 40. 2 *Wils.* 385.

The proceeding by Attachment is an extraordinary remedy, highly beneficial when properly guarded, but not to be resorted to except in cases clearly within the provisions of the law. It is summary in its nature, granted in the first instance *ex parte*, and liable to abuse. Its effect may be disastrous to the defendant. It should not therefore be resorted to without good cause. It is proper that he should be protected against its improper use, and, to that end, the facts necessary to entitle a a party to a writ of Attachment are required to be proved to the satisfaction of the Judge before it issues.

Tested by these principles, the affidavit on which the Attachment was-granted in this case, will be found defective. The writ was applied for on the ground that Smith, the defendant was about to abscond. The circumstances sworn to, to prove this, are; that petitions had been sent to the President for his removal from the office of Secretary of the Territory, which was known to Smith; the inference of the plaintiff from the gravity of the charges against him, and the authenticity of the testimonials, that the removal would be made; that there were at the time numerous creditors of the Government in and about St. Paul, having claims which should be paid out of the moneys appropriated by Congress for legislative expenses; that twenty-four thousand dollars were appropriated, and from the amount Smith was known to have received the fall before, and the amount of drafts he was said to have received lately, he must have

received the whole appropriation; that the plaintiff was told by Government creditors who had demanded money of him, that he was dilatory in paying the expenses of the Legislature, making various frivolous excuses, the principal of which was that he had no cash, but had Government drafts; and that after awhile he went to Galena to get them cashed, as he avowed, and after his return suspended payment, declaring to some creditors that he wanted ten, to others fifteen days, to ascertain how his accounts stood at Washington, before he paid out any more money, when he was withholding from the creditors their money. The rest of the affidavit is made up of the reasonings, inferences and belief of the plaintiff.

What was told him, must be disregarded, and also his inference as to the amount of the appropriation which had been received. Leaving out that, there is nothing left but the circumstance that an effort was being made to remove Smith from office on grave charges, well authenticated, and that there were creditors of the Government who ought to be paid out of the appropriation. To infer from these that the defendant was about to abscond, was to draw a conclusion not warranted by the premises. And if the whole affidavit were admissible as legal proof, such a deduction from it would still be far-fetched, and quite unsatisfactory to any discreet judge. On the argument, the plaintiff laid some stress upon the fact that Smith had since left the Territory. We cannot look beyond the affidavit, and take judicial notice of a fact not proved, nor could the court below.

There is no error in the District Court of Ramsey County, dismissing the suit for the insufficiency of the affidavit on which the Attachment was granted, and it is therefore affirmed with costs.

LAWRENCE *vs.* WILLOUGHBY.

In pleading a Judgment Record, a variance between the declaration and the Record as set forth therein, in the amount declared on, or names of parties, will be fatal.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

This was an action of debt, founded on a Judgment obtained in a court in Illinois. The cause was tried by consent of parties by the Court without a jury. A Judgment was rendered for the plaintiff.

PIERSE & MURRAY, Attorneys for the Plaintiff.

AMES & NELSON, for the Defendant.

COOPER, J. This is an action of debt, founded on a judgment for $400, damages and costs of suit; obtained by W. B. Lawrence, the defendant in error here, in the County Court of Jo Davis County, in the State of Illinois, against Amherst Willoughby the plaintiff in error, and one N. W. Finn.

The errors complained of, and assigned for correction in this Court, are:

First. That there is a variance between the declaration and the transcript of the judgment declared upon, in stating the amount of said judgment and costs.

Second. There is a variance between the declaration and the transcript of the Judgment Record, declared on in stating the parties to said judgment.

The judgment obtained in the Court of Illinois, was for $400 damages and the costs of suit. The declaration was, that it was for $400 damages and costs of suit, which costs amount to $150. The Record shows this averment to be incorrect, and the variance is fatal.

Again, the declaration alleged that the judgment was obtained against Amherst Willoughby and one Finn. This variance is also fatal.

In averring matters of record, great particularity should always be observed. Any misstatement in the description of a record in pleading is, as a general rule, fatal to such pleading. The reason of this is too obvious to admit of a doubt of its propriety. Did a different rule obtain, the evils growing out of it would be incalculable, and the objects of pleading defeated entirely. The defendant is entitled to notice of the cause of action upon which he is sued. To afford him such notice, and properly apprise him of the matters against which he is called upon to defend, is one of the main objects of pleading.

The averments, therefore, in a declaration, and the proof of the matters averred, must be identical. The allegations and proof must correspond. Here it cannot be pretended that such was the case. The judgment declared upon, and the transcript offered in evidence, and received to sustain the allegations in the declaration, were different both in the amount of the judgment and the parties to it. A more palpable case could not be supposed, neither amount nor parties being the same; who could say it was the identical judgment declared upon? It might just as well have named any other party, and the variance would not be greater. The declaration and proof, therefore, not corresponding, it was bad, and being so, the judgment must be reversed with costs.

Lewis *vs.* Steele and Godfrey.

In an action under the statute of Forcible Entry and Detainer, the complaint must *particularly* describe the premises detained.

The statute requiring these actions to be brought before two Justices, an adjournment when only one is present is irregular.

This was an action commenced by the defendants in error, for a wrongful detention of certain real property, before B. W. Lott and O. Simons, Justices of the Peace for Ramsey County.

The facts appear in the opinion of the Court.

RICE, HOLLINSHEAD & BECKER, for Plaintiffs in Error.

AMES & NELSON, for Defendant in Error.

MEEKER, J. On the 5th of July, 1851, complaint was filed for Franklin Steele and Ard Godfrey, known by the style and firm of the St. Anthony Mill Company, setting forth that Eli F. Lewis held over the lands, tenements and other possessions of the complainants, on Hennepin Island, so called, at the Falls of St. Anthony, in the County of Ramsey, after the termination of the time for which they were let him. And also, that the said Lewis held and continued in the possession of the house and premises on Hennepin Island, so called, at the Falls of St. Anthony, in the County aforesaid, let to him by the complainants contrary to the conditions of the lease or arrangement under which he held. And also that the said Lewis had neglected to pay the rent of the house and premises let to him by the complainants on said Island for more than ten days after the same became due; that the agent of the complainants more than ten days previous thereto made demand in writing of the said Lewis that he deliver up possession of the said house and premises held as aforesaid, but the said Lewis, disregarding the said notice and demand, continued to hold and occupy the said house and premises, wrongfully and against the rights of the complainants.

Upon the complaint sworn to by one of the counsel of Steele and Godfrey, Bushrod W. Lott and Orlando Simons, Esqrs. two Justices of the Peace for Ramsey County, issued on the same day a summons citing Lewis to appear before them on the 15th day of the same month to "answer and defend against the complaint aforesaid." On the 15th, in obedience to the summons, Lewis was present, but Simons, one of the Justices, was not; when, on motion for the plaintiffs, *a single Justice adjourned the cause to the* 22*d*, on which day they rendered judgment of restitution and costs, against Lewis who was not in attendance.

Lewis then sued out a writ of *certiorari*, and took the cause to the District Court of Ramsey County, where the judgment of the Justice was affirmed with costs. To reverse this latter

judgment, he has brought it before this Court. This statement of the progress of the steps of the controversy as they chronologically arose, seems all that is necessary to dispose of the errors assigned, which will now be considered in the order in which they are made.

The first error assigned is, the insufficiency of the complaint. There does not appear to be much in the objection that it does not set forth, in terms, that there was a lease, or that the relation of landlord and tenant existed between the complainants and Lewis, as a lease, and that relation is necessarily implied in the language of the complaint. But the last clause of this assignment points to a defect not so easily answered—the vague and imperfect description of the premises sought to be recovered. It is not because this summary remedy is in the nature of a criminal or penal proceeding that some degree of strictness and particularity are required in the complaint; for the matter complained of is not with us indictable, nor is it in any just and appropriate sense a penal offence, since our statute imposes no fine, but simply because the law expressly demands that the complaint should "*particularly* describe the premises so entered and detained." The propriety of this requirement will suggest itself at once. It is necessary as a guide to the Justices whose duty it is made to lay before the jury the *cause* of complaint, and to issue to the proper officer final process of restitution in the event of a verdict for the complainants. Such an officer has no other guide but the precept placed in his hands, and, if that be vague and indefinite, to whom shall he go for information, or how is he to know with any certainty what the premises are which he is to deliver to the party entitled? Surely no one will contend that he should go beyond, or without the execution for his direction. In the case before us, the first description is, lands, tenements, and other possessions of the complainants, on Hennepin Island, so called, at the Falls of St. Anthony. How much of said Island is here meant? And are the lands, tenements, and other possessions referred to, on the lower or upper end of said Island? If either, how much? Or can this description be intended to mean the *entire* Island? The second and third descriptions are equally uncertain and insufficient.

The second error assigned is, that the venire was issued by the Justices at a time different from that when the summons was issued, contrary to the statute. Perhaps this seeming departure from the letter of the statute should not be deemed sufficient cause, by itself, of reversal, and should be considered directory only, and not imperative upon the Justices. But be this as it may, the third error relied on, is conclusive against the complainants. It is in substance, that the adjournment by one Justice, in the absence of the other, to the 22d, when a jury was empanelled, was wholly unauthorized and void. In ordinary matters of trust and confidence, and, as between individuals merely, a power and special authority conferred upon two or more cannot be executed by a less number than the whole. *Coke's Litt.* 113. *Powell on Devices*, 294, 304, and the authorities there cited. But here is a class of cases that no one Justice of the Peace is empowered to try, but the law reposes that trust and confidence in *two*, by constituting them a Court to issue process, to lay the matter of complaint before the jury, to render judgment, and issue execution thereon. How much more important that the rule of law above cited should apply where, as in this case, judicial power affecting the rights and property of many, is delegated to, and vested in the discretion of *two* officers of limited jurisdiction! Lewis having been summoned, therefore, to appear before the Justices on the 15th, and defend at the inquest, and but one Justice being then in attendance, who had no authority to do an act which the law required two to do, the process was on that day *spent*, and the trial on the 22d null and void.

The cause is therefore reversed with costs, but without prejudice to proceedings *de novo*.

Hartshorn *vs.* James Green's Administrators.

Evidence tending to show the ownership of a Promissory Note which is the cause of action in another than the plaintiff, is admissible.

A Court sitting as a Court of Law cannot, at the same time, exercise Chancery jurisdiction.

This was an action brought in the District Court of Ramsey County, for the recovery of an amount claimed to be due the plaintiff from the defendants on a promissory note made by said Green, payable to Hartshorn, or bearer. A verdict was found for the plaintiff, and the defendant sued out a writ of Error from this Court.

Ames, Wilkinson & Babcock, Plaintiff's Attorneys.

Rice, Hollinshead & Becker, Defendants' Attorneys.

Cooper, J. This was an action of assumpsit brought by W. Hartshorn, to recover the amount of a promissory note made to him by James Green, for the sum of $840 98.

The administrators of Green pleaded *non assumpsit*, and gave notice of set off. The defence set up under this plea and and notice was, first: That the plaintiff has no title to the note, having assigned it for a valuable consideration to W. H. Randall in trust for the benefit of his (Hartshorn's) creditors. This assignment took place in August, 1847. A further defence was, that the said plaintiff had been enjoined at the suit of Randall from proceeding to collect any claims due him, which injunction was still in force and remaining upon the record, to which the Court was referred. The District Judge, upon the last allegation being made, stayed, for the time being, the suit at law; entered upon his duties as Chancellor upon the Equity side of the Court, and made an order in the case of Randall against Hartshorn, the plaintiff below in this suit, that this suit be proceeded in to final judgment, and that the amount re-

covered, if anything, be paid to the receiver in the other suit named.

The defendant then offered in evidence the deed of assignment from Hartshorn to Randall, for the purpose of showing the title to the note sued upon to be in the latter; to be followed by proof, that the note had been in Hartshorn's possession, or under his control, from the time of the assignment to the time of trial; that he had refused to deliver it to the assignee; and that the defendants as administrators of Green had had notice from the assignee not to pay the note, unless to him.

The counsel for the plaintiff objected to the admission of the deed of assignment, and the subsequent oral testimony proposed, because this particular note was not specified in said deed of assignment. The Court sustained the objection and overruled the offer.

The language of the deed is this: "The said W. Hartshorn hath granted, bargained, sold, assigned, transferred and conveyed, and by these presents does grant, bargain, &c. all goods, stock in trade, merchandise, skins, furs, debts due from the Indians; all assets, book accounts, claims, and demands of every nature and description whatsoever, due, belonging to, or to become due, owing or belonging to the said Wm. Hartshorn," &c. Thus, no note, book account, or other demand, was specified.

But this made no difference. The fact of title made no difference as to the overruling of this offer. It was legitimate testimony. The Court could not know how far it would go to sustain the fact of title in Randall, until it was received, and he therefore erred in refusing it. But, really, the title was the gist of the defence, and the order of the Court, saying that the cause should proceed to final judgment, in the face of all these circumstances, was also irregular, as it was greatly calculated to mislead the jury in regard to the legal effect of the proof admitted. It was a matter of no consequence in whom the title to the note was, if it was not in the plaintiff below: for under such a state of facts, he could not recover.

Another error complained of, but amounting in principle to the same thing, was, that the Court charged the jury as follows: "That the question of title to the said note, or whether it be-

longed to the plaintiff, or not, was a question not to be considered by them, as the Court had disposed of that matter by the order made on the Chancery case of Randall *vs.* Hartshorn, during the progress of the trial."

In this the Court likewise erred. Even had it possessed the power to create the happy union of the Court of Law and Equity, sitting as the same Court, in the trial of the same suit at law, the Court erred. For, if the order disposed of the question of title to the note at all, it vested it in the receiver, and the proof offered was legitimate to sustain such defence.

As before remarked, the whole gist of the defence was in the title to the note; and anything going to show that the title was not in the plaintiff, was admissible. Under the plea, this defence was perfectly available. Then, in the first place, the deed of assignment was improperly rejected: and, in the second, the charge of the Court to the jury was manifestly wrong.

The judgment is, therefore, reversed with costs, and a *venire facias de novo* awarded.

Cooper *vs.* Brewster.

A cause cannct be transferred from one Justice to another in the same County, on an affidavit of prejudice and partiality.

An action cannot be sustained on a Note given to secure the payment of money to become due on the election of a candidate to a certain office. Such notes are void, as being against public policy.

This was an action commenced before H. K. McKinstry, Esq. Justice of the Peace for Washington County, by the plaintiff in error, against the defendant in error. The plaintiff declares on a promissory note made by defendant, for the sum of $380, claiming a balance due of $98 36. Two other persons were named as defendants in the summons, but Brewster was the only one summoned. Brewster appeared and plead the gen-

eral issue, and gave notice of a set off of the following promissory note:

$100.

For value received, I promise to pay to L. Buford, or bearer, one hundred dollars when H. H. Sibley is elected representative in Congress from Minnesota Territory.

J. O. COOPER.

Stillwater, August 9, 1850.

The defendant alleged a transfer of the said note, on a good consideration, to him, and that he was owner of the same.

At the trial, the plaintiff having proved his complaint, the defendant offered in evidence the note mentioned in his notice of set off, together with proof of the fact, and date of the election referred to in the note. The plaintiff objected, and the Justice refused to receive the note in evidence.

The defendant then applied for a transfer of the cause to some other Justice on an affidavit of prejudice and partiality. The Justice refused to make the transfer. The jury returned a verdict for the plaintiff for $98 36, and costs.

The defendant removed the cause to the District Court of the 2d Judicial District, from whence it was transferred to the 1st District, and by that Court the judgment of the Justice was reversed. The plaintiff removed the cause, by writ of Error, to the Supreme Court.

RICE, HOLLINSHEAD & BECKER, for Plaintiff in Error.

AMES & NELSON, for Defendant in Error.

FULLER, C. J. This action was commenced before a Justice of the Peace, by the plaintiff, against John H. Brewster, and two other defendants, who were not served with process, nor did they appear. The plaintiff declared upon a joint promissory note against the three. Brewster pleaded *non assumpsit*, and gave notice of set off. Upon the trial, the defendant offered in evidence as a set off, a note for one hundred dollars, made by Cooper the plaintiff, and payable to one Buford, or bearer,

"when H. H. Sibley should be elected delegate to Congress," and purporting on its face to have been given for value received. This evidence was objected to by the plaintiff, and excluded by the Justice. The defendant's attorney then offered to make oath that he believed the Justice would not hear and decide the case impartially, on account of prejudice and other causes, and moved that it be transferred to some other Justice of the County having jurisdiction. The Justice refused to entertain the motion. Judgment was rendered in favor of the plaintiff for the balance due upon the note given by the defendants. Brewster removed the cause to the District Court of Ramsey County, which reversed the judgment of the Justice, and thereupon the plaintiff sued out a writ of Error from this Court.

The Justice was clearly right in not entertaining the motion to transfer the cause. There was no warrant for such a proceeding. The laws of 1849, under which the suit was commenced, page 19, authorize such a transfer only where the defendant makes an affidavit before issue joined, that the Justice is a material witness for him, without whose testimony he cannot safely proceed to trial; or where it is "proved that he is near of kin to the plaintiff." For errors committed through partiality or prejudice, the remedy is by appeal or *certiorari*.

The note offered in evidence by the defendant was not negotiable. It was payable only upon the happening of a contingency, and not absolutely. *Story, on Promissory Notes*, 1 *and* 24. Not being negotiable, its mere possession, and production by Brewster on the trial, was not evidence of title to it in him, much less in all of the defendants. *Prescott vs. Hall*, 17 *J. R.* 292. *Perkins vs. Parker*, 17 *Mass. R.* No evidence of a transfer by Buford, the payee, to the defendant, was offered. And unless it belonged to all of them jointly, it could not be set off against the plaintiff's demand. *Laws of* 1849, *page* 18, *Sec.* 1, *Sub.* 6.

And had the note belonged to defendants, it was void, as being against public policy. It was, in effect, a wager upon an election. It was given for value received. If Sibley was defeated, then Cooper retained that value without compensation, and Buford lost it. If Sibley was elected, then Buford was to

receive, and Cooper to part with, one hundred dollars. Each of the parties thus acquired a pecuniary interest in the event of the election, and a motive to cast his own vote, and procure others to cast theirs for his private benefit, without regard to the public good. Such a contract should not be upheld. It is against public morals, and tends directly to destroy the purity of elections. No man should be permitted to convert the elective franchise into a device for gambling. It is a sacred trust confided to him by his country, which he is bound to exercise in such a way only as in his judgment will contribute most to his country's welfare. Accordingly, all wagers on the result of an election are held to be illegal and void. *Lansing vs. Lansing*, 8 *J. R.* 454. *Rush vs. Gott*, 6 *Owen*, 169. *Brush vs. Keeler*, 5 *Wend*, 256, 12 *J. R.* 376. The rule would have have been established to little purpose, however, if contracts like the one under consideration should be adjudged valid. The evasion of the law would then be easy and secure. The Justice was right in excluding the evidence. The District Court erred in reversing the judgment rendered by him.

The judgment of the District Court of Ramsey County is therefore reversed with costs, and the judgment of the Justice affirmed.

(Cooper, Justice, being brother of the plaintiff, took no part in the decision.)

Town of St. Paul *vs.* Steamboat Dr. Franklin.

The District Court cannot review upon *Certiorari* proceedings had before the President of the Town of St. Paul, in cases arising under the Laws and Ordinances of said Town.

This was an action commenced before the President of the Town of St. Paul, to recover of the defendant a sum claimed

to be due the plaintiff for wharfage, under the ordinances of the Town of St. Paul. Judgment was rendered by the President of said Town, in favor of the plaintiff for the sum of ten dollars and costs. On the application of the defendant, a writ of Certiorari issued from the District Court of Ramsey County to the President, to remove the proceedings to that Court. The District Court reversed the judgment of the President, whereupon the plaintiff sued out a writ of Error from the Supreme Court.

L. EMMETT, Attorney for Plaintiff in Error.

RICE, HOLLINSHEAD & BECKER, for Defendant in Error.

COOPER, J. This was a suit instituted before the President of the Town of St. Paul, to recover a tax imposed by an ordinance of said Town, upon steamboats landing at the wharves within the limits of said borough. Judgment was rendered by said President against the Dr. Franklin for ten dollars and costs. *A writ of Certiorari* issued to the President of the Council, from the District Court of Ramsey County, and the judgment and proceedings had in the matter were certified to said Court.

By an act of the Territorial Legislature of 1849, the Town of St. Paul was incorporated; and the power to make rules and regulations for the goverance of said incorporation, conferred upon the President and Council authorized by it. An ordinance was made, taxing steamboats one dollar for every arrival and departure. Under this ordinance, suit was brought against the Franklin, and judgment recovered against her.

The District Court reversed this judgment; and this is the error assigned. The grounds are, that an appeal only—and not a *Certiorari*—will lie under the 13th section of the Act of November 1, 1849, incorporating the Town of St. Paul. The section referred to, is in these words:

"The President of said Town shall be a conservator of the peace within the limits of said corporation, and shall have and exercise all the ordinary powers of Justice of the Peace within the limits of said corporation, in all matters, civil

and criminal, arising under the laws of this Territory; he shall give bond and security as required of Justices of the Peace, except that the said bond shall be taken in the name of the Town of St. Paul; and appeals may be taken from his judgment in all civil cases and in all penal cases arising under the laws and ordinances of said Town, to the District Court of the County of Ramsey, in the same manner and within the same time as appeals are or may be taken and perfected in ordinary cases before Justices of the Peace. Said President shall keep a docket, and true record of his proceedings, judgments and executions, in all cases which may come before him, and shall be allowed the same fees as are allowed to Justices of the Peace for similar services."

There is some difficulty in giving a proper construction to this section; as taken in connection with the 9th section of the Organic Law of the Territory, which provides "that the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace," there is much doubt of its force and effect. The section of the Organic Act referred to, states in whom and in what tribunals judicial power shall be vested, and limits it to these. Yet the Legislature has conferred those restricted powers and functions on the President of the Town of St. Paul.

We think, however, that, as far as it properly regards this question, the right of bringing up a case from the judgment of the President by a writ of *Certiorari*, the act is capable of but one construction. It is true, it tries to confer upon the President the ordinary powers of a Justice of the Peace, but it does not make him a Justice of the Peace. The act is intended only to *limit*, *describe*, and *regulate*, his duties. This is manifest from every line of it. Appeals, for instance, shall be had from his judgments, not as a Justice, but in the *same manner* and within a like period. Thus, it is plain that the act did not regard him as a Justice; and the reference to the powers of a Justice, and the mode of appeal, went to the *manner* alone, and *not* to the matter. It was merely descriptive and directory. And unless the limits were regarded, and the directions followed, the party was sure to err. By the section quoted, appeal is the only means allowed by which

the President's judgment could be reviewed and corrected. This is a special proceeding, wholly statutory, and must be strictly followed. The allowance of the *Certiorari*, and reversal of the President's judgment, is therefore reversed with costs.

BOARD OF COMMISSIONERS OF WASHINGTON COUNTY *vs.* MOSES J. McCOY.

In a Justice's Court, where adjournments, subsequent to the first, are called for, to procure material testimony, the facts showing that due diligence has been used to obtain such testimony must be set forth, by the party making the affidavit, for that purpose.

ERROR TO THE DISTRICT COURT OF WASHINGTON COUNTY.

This cause was commenced before Albert Harris, Esq. a Justice of the Peace for said County. The facts appear in the opinion of the Court.

F. K. BARTLETT, for Plaintiff in Error.

AMES & NELSON, for Defendant in Error.

COOPER, J. This cause originated in a Justice's Court, and was removed thence to the District Court. The facts in the case were these.

The suit was commenced January 8th, 1851, by issuing a summons made returnable on the 15th. On the return day, the parties appeared; the declaration was filed; the plea put in; issue was joined; and the cause adjourned at the instance of the plaintiffs, to the 22d. On the 22d, the parties again appeared. In the meantime, the plaintiffs had taken the deposition of Samuel Burkleo, and offered to read it; but it was

excluded, for insufficiency of notice to the defendant at the time and place of taking it. The plaintiff's counsel thereupon moved for a second adjournment, to enable him to re-take the deposition. The motion was granted, and a further adjournment was had till the 27th. Notice was then given, in open Court, to the defendant, that the deposition of Samuel Burkleo would be taken at 8 o'clock, A. M. of the day to which the cause had been adjourned, at the town of Stillwater. On the 27th, the parties again appeared, but having failed to procure Burkleo's testimony, the plaintiff's counsel moved for a still further adjournment. This motion was based upon an affidavit, which set forth that Samuel Burkleo was a material witness; that he was a member of the Legislative Assembly, and consequently not obliged to obey the process of subpœna; that the Legislature was then in session; that he was in the habit of visiting his home and family at Stillwater every Saturday, and of returning to St. Paul to resume his duties each succeeding Monday; that deponent believed he would visit his home on the Saturday last past (25th), but he had failed to do so; and further: that deponent had used all due diligence to procure his presence or testimony, but was unable to do either.

The Justice refused to adjourn, and no evidence having been adduced, a judgment for costs was rendered against the plaintiffs. The refusal to adjourn, was the error complained of in the Court below. The District Court affirmed the judgment. This affirmance, it is alleged, is error, and it is now brought into this Court, by writ of Error, for correction.

We think the District Court did right in affirming the judgment. The affidavit upon which the adjournment was asked, was manifestly insufficient. It shows no act which gives evidence of the diligence alleged to have been used. On the contrary, the inference is, from the whole tenor of the affidavit, that the plaintiffs relied wholly and exclusively upon the chance of Burkleo visiting his family, as was usually his custom. This he did not happen to do, and the plaintiffs for that reason claimed a further adjournment. No act appears to have been done to secure his attendance. No reason or excuse whatever is assigned, why his deposition might not have been taken any day

at St. Paul. There is no allegation that a subpœna ever issued, or that he refused to obey its mandate, or that even a request had been made, or notice given him of the time and place where his testimony was to have been taken. All these things, did they exist, should be set out in the affidavit. It is not enough, under any circumstances, merely to swear to the judicial conclusion, that due diligence had been used. It is for the Court or Justice to say whether the acts of the party amount to due diligence, and not for the affiant.

In this case there is evidence of a want of diligence; of laches so gross that the Justice would have been unwarrantable in granting an adjournment. After the first adjournment—which was, of course—motions for a further adjournment were addressed to the discretion of the Justice. That discretion must be exercised soundly and with care: ever having a just regard for the rights and interests of both parties. The defendant had already appeared to defend in this action, three several times; and to have adjourned again, unless under the most urgent and peculiar circumstances, and after all the diligence that could be used on the part of the plaintiffs, would have been visiting upon the defendant burdens created by the laches of the other party. This could not be permitted. The Justice did right in refusing it, and the judgment must be affirmed.

Judgment affirmed with costs.

CARLTON AND PATCH *vs.* PIERRE CHOUTEAU, ET. AL.

Under the Statutes existing before the Code took effect, where several defendants were sued as joint Promissors, judgment could not be taken against one of them separately.

This was an action of assumpsit in the usual form, for work and labor; commenced by Carlton and Patch, plaintiffs, against

Pierre Choteau, Jr. John B. Sarpy, John F. A. Sandford, Jos. A. Sires, Henry H. Sibley, Henry M. Rice, and Sylvanus B. Lowry, defendants. By stipulation, a jury trial was waived, and the cause tried by the Court. On the 9th of October, 1851, after hearing the evidence, and argument of counsel, the Court rendered judgment against Henry M. Rice for the sum of four hundred and fifteen dollars, and in favor of the other defendants. The decision was as follows:

"In pursuance to the stipulations entered into by the parties to this suit on the 13th day of September, 1851, and filed in this cause, the matters of law and fact in controversy between said parties were submitted to the determination of the Court, without the intervention of a jury, on the 24th day of September, A. D. 1851. Whereupon, upon hearing the evidence touching the matters and things involved, and upon argument by counsel, the cause is held under advisement until this 9th day of October, A. D. 1851, when it is adjudged by the Court, that the said Pierre Chouteau, Jr. John B. Sarpy, John M. A. Sandford, Joseph A. Sire, Henry H. Sibley, and Sylvanus B. Lowry, did not assume and promise in manner and form as the said John J. Carlton and Edmund Patch have complained against them: but that the said Henry M. Rice did, of his own right, for himself, assume and promise in manner and form as the said Carlton and Patch have complained; and do assess the damage of the said Carlton and Patch, by reason of the premises, at four hundred and fifteen dollars. Therefore, it is considered by the Court, that the said John J. Carlton and Edward Patch recover of the said Henry M. Rice the said sum of four hundred and fifteen dollars, their damages aforesaid, in form aforesaid, assessed, and their costs in this behalf to be taxed."

The plaintiffs, upon this judgment, sued out a writ of Error to this Court.

Rice, Hollinshead & Becker, for Plaintiffs.

Ames, Babcock, & Wilkinson, for Defendants.

Fuller, C. J. This is an action of assumpsit. The delaration is against the defendants, as partners and joint contract-

ors, and contains the common counts only. The defendants, Rice and Lowry, did not plead to it. The other defendants pleaded *non assumpsit.*

The Court below rendered judgment against Henry M. Rice and in favor of his co-defendants: the Judge who tried the cause without a jury, finding by his written decision, spread upon the record, that there was no joint undertaking, but that the defendant, Rice, promised individually.

We are not at all satisfied that under the provisions of the Revised Statutes, pp. 343, 349, Chapter 70, an action can be commenced against joint contractors on a joint promise, and judgment rendered against one of them alone, on his several promise; and we leave that question undetermined. See *Murray vs. Gifford*, 5 *How. Pr. Rep.* 14 *Voorhies' Prac.* 229.

But this action was commenced before the Revised Statutes took effect; and by Section 26 of Chapter 70, page 332, is expressly excepted from the operation of that Chapter.

By the the common law, the plaintiffs must recover against all the defendants or none. *Graham's Pl.* 91, 95, 1 *ch. P. C.* 50 7 *Term Rep.* 352.

The District Court erred, therefore, in rendering judgment against one of the defendants, and in favor of the others, and the judgment must be reversed with costs of reversal, the cause remitted to the Court below, and a *venire de novo* issued. Order accordingly.

It is unnecessary to decide the other questions raised upon the argument. We think, however, that the statement of facts found on the trial contained in the decision of the Court is not a sufficient compliance with the provisions of Section 41, page 356, R. S.

SPENCER *vs.* WOODBURY.

The assignee of an instrument in writing not negotiable, cannot maintain an action thereon in his own name.

This was an action commenced before a Justice of the Peace of Ramsey County, on the 20th day of June, 1851, upon the following instrument, in the name of the assignee thereof:

"I do agree to cut and split two thousand rails on the north-west quarter of Section 20, Township 29 north, and Range 22 west, on or before the first day of May next, to be delivered to Elliott Adams or bearer.

(Signed) "WARREN WOODBURY."

Dated Feb. 18, 1850.

The plaintiff declared, in writing, upon the above instrument, and filed the same as his bill of particulars. The defendant pleaded *non assumpsit*.

The Justice gave judgment for the defendant, and the case was taken to the District Court on *certiorari*, when the judgment of the Justice was reversed. To review the last judgment, the defendant sued out a writ of Error.

L. EMMETT, for Plaintiff in Error.

PIERSE & MURRAY, for Defendant in Error.

MEEKER, J. The following instrument was executed by Warren Woodbury on the 18th of February, 1850, to wit:

"ST. PAUL, Min. Ter., Ramsey County.

"I do agree to cut and split four thousand rails on the north-west quarter of Section 20, Township 29 north, and Range twenty-two [22] west, on or before the first day of May next, to be delivered to Elliott Adams, or bearer.

"WARREN WOODBURY."

Upon this instrument, as the holder thereof, J. B. Woodbury brought suit before Orlando Simons, a Justice of the Peace in and for the County of Ramsey, who gave judgement for the defendant. Spencer then took it to the District Court of Ramsey County, by *certiorari*, when the Justice's judgment was reversed, and that decision of the District Court is brought before us by writ of Error.

The only question that is legitimately raised in the record before us, is whether the writing upon which this suit is based is negotiable or assignable, so as to vest in any holder other than the original obligee a right of action at law. It is at most but a chose in action, and as that class of rights were not assignable at common law, and as the Statutes in force at the time, rendering notes assignable promising the payment ot money, does not affect other obligations, promising payment of anything else, or the performance of labor, the action in this case upon the obligation in question cannot be maintained at law.

The judgment of the District Court is therefore reversed with costs.

CHOUTEAU ET. AL. *vs.* RICE, H. M. ET. AL. IN CHANCERY.

First. Where new matters are to be set up in a suit of equity, it must be done by supplemental bill, and not by special replication.

Second. Pleading new matter by special replication, is no longer allowable.

Third. New matter cannot be set up by amendments to an original bill.

Fourth. Objections to the form and manner of a bill in equity, cannot be made available on *general demurrer*.

Fifth. Inconsistent and repugnant matters are not admitted by a demurrer. They cannot be well pleaded; and only such matters as are well pleaded are admitted by demurrer.

Sixth. The original and supplemental bills compose but one suit, and a general replication applies to both.

HOLLINSHEAD, BECKER & WILKIN, for Applicants.

AMES & NELSON, Contra.

This was an appeal from an order overruling a demurrer to a supplemental bill, in the District Court of the United States for the Second Judicial District, and brought into this Court to reverse that order. The Judge below overruled the demurrer on the grounds that a general demurrer was not good when there were equities apparant upon the face of the bill; that the demurrer went simply to the form and manner of pleading, and that could only be taken advantage of by a special demurrer, setting forth with certainty the objections.

Held by Appellants,

1. That the facts are not set forth wlth the reasonable certainty necessary to enable the defendants to answer, or the Court to decree. 1 *Barb. Ch. Pr.* 38, 39, 40.

2. That the facts set forth in the Supplemental Bill arose prior to the filing of the original bill, as appears upon the face of the Supplemental Bill. 3 *Dan'l Ch. Pr.* 1681; *Lord Red.* 202; 4 *Simms*, 76; 1 *Paige*, 200; *Story's Eq. Pl.* 614; 2 *Barber's Ch. Pr.* 75; *Mitford's Pl.* 60—164; 3 *Atk.* 817; *Coeper's Eq. Pl.* 214; *Mitford's Eq. by Jeremy*, 202, 203, 207; 2 *Madd.* 387.

3. The Supplemental Bill is inconsistent with the original bill, and in the most important particulars in direct conflict therewith.

4. That the statements contained in the Supplemental Bill do not establish any claim of the complainants to equitable relief, but are (apart from sweeping charges and unsupported allegations) entirely consistent with fairness and integrity on the part of the defendants.

5. The facts and circumstances set forth in the Supplemental Bill are all either legitimate evidence in support of the original bill, or are properly the subject of replication to the plea on file, and therefore need not, and ought not, to be stated by way of supplement. *Story's Eq. Pl.* Sec. 337; *Mitford's Pl.* 164; 3 *Atk.* 817; 1 *Paige*, 201; 2 *Barb. Ch. Pr.* 75; 3 *Paige*,

294; 2 *Mad. Rep.* 53, 387; 17 *Ves.* 144; 1 *Barb. Ch. Pr.* 106; 1 *Dan'l Ch. Pr.* 656.

The Appellees held:

1. Where new events or new matters have occurred since the filing of a bill, a Supplemental Bill is in many cases the proper mode of bringing them before the Court, for, generally, such facts cannot be introduced by way of amendment. *Story's Eq. Pl.* p. 381, Sec. 332; p. 385, Sec. 335, 336.

2. After the pleadings on both sides are closed, the Complainants cannot remedy an original deficiency in their bill by amendment, because that would open the whole cause anew and be productive of irregularity and confusion; but if at such a stage of the proceedings any imperfection should be discovered in the Bill, as that which requires further discovery, or to put new matters in issue, the complainants will be at liberty to resort to a Supplemental Bill for such purposes. *Lubes' Eq. Pl.* 137.

3. A Supplementary Bill in the nature of a bill of Discovery may be filed, after the cause is at issue, whete the new facts were not known to the complainants at the time of filing the replication. *Bar. & Har. Dig.* Vol. 3, p. 44; 3d Vol. *Eq. Dig.* 45; 4 *Simons*, 628.

4. Where material facts have occurred subsequent to the commencement of the suit, the Court will give the Complainants leave to file a Supplemental Bill; and where such leave is given, the Court will permit other matters to be introduced into the Supplemental Bill, which might have been incorporated in the original bill by way of amendment. 6 *Monroe* 141; 2 *Maddock*, 544; *Moulton Ch. Pr.* 234, 264, 291; 1 *Pg. Ch. Rep.* 168, 200; 3 *Atkins*, 370; *Hanington's Mich. Rep.* 332; 1 *Hoff. Pr.* 405, 42; 4 *Eq. Dig.* 583; 5 *Mad. Ch. Rep.* 427.

5. A Supplemental Bill is not a supplemental suit, but a a mere continuation of the original, which introduces supplemental matters. The whole record is one cause, and a general replication applies to the whole record, and both the original and Supplemental Bill is to be taken together. 5 *Mad. Ch. Rep.* 259.

6. Where a bill is defective in substance, and shows no equi-

ties upon its face, a general demurrer is proper; and where defective in form only, can be reached by special demurrer, and the causes of the demurrer must be assigned with certainty. *Lubes' Equity*, 347.

7. Where the demurrer is to the whole bill, if any part of the bill is good, the demurrer must be overruled; as in a Bill of Discovery and Relief, if the Complainant is entitled to relief only, the demurrer is bad. 1 *Johnson's Cases, Larghts vs. Morgan, et. al.* 433, 434; 5 *Johnson's Ch. Rep.* 186.

8. A demurrer which is bad in part must be overruled: for it is not like a plea, which may be allowed in part; but a demurrer bad in part is bad *in toto*. 1 *Atkins' Ch. Rep.* 450, *Suffolk vs. Green; Story's Eq. Pl.* 486, and Notes 707, and Sec. 692; 5 *Paige's Ch. Rep. Randolph vs. Dickenson*, 517; 1 *Paige's Ch. Rep. Insurance Co.* 284.

FULLER, C. J. The plaintiffs, being members of the firm known as the "Northern Outfit," engaged in the Indian trade, filed their bill of Complaint against their Co-partners, Rice and others, on the ground of fraud, and breach of the covenants contained in the articles of Co-partnership on the part of the defendant, Rice; and prayed a dissolution of the partnership; an injunction; the appointment of a receiver; the taking of an account; a decree against Rice, for any balance found due from him to the plaintiffs to be paid out of his individual property, if the partnership effects in his hands should prove insufficient; and for general relief. The bill was filed on the 10th day of October, 1849. A settlement was made the next day between the parties, the terms of which were reduced to writing, signed and sealed.

By the first article of the settlement, the plaintiffs released and discharged Rice from all contracts with them, and from his accounts and liabilities to them or any of them, or to the Outfit, on the Co-partnership books, or the books of the plaintiffs, P. Chouteau, Jr. & Co.

By the second article, the plaintiffs assumed all the debts and liabilities of the Co-partnership, incurred in its legitimate business.

By the fourth article, in consideration of the preceding, the partnership was dissolved.

By the fifth, Rice covenanted to transfer to the plaintiffs forthwith and without delay, the books, papers, accounts, property and effects, real and personal, in possession of himself or Lowry, or under their control, belonging to the partnership; and a schedule of the real property was annexed.

By the sixth article, Rice relinquished to the plaintiffs all claim to four thousand five hundred dollars deposited by him with B. H. Campbell of Galena, and credited in an account made up of items for his individual benefit, as well as items for the Outfit.

By the eighth article, upon the faithful performance by Rice of the stipulations on his part, so far as was immediately practicable, all proceedings upon the said Bill of Complaint were to be forthwith discontinued and withdrawn.

At a subsequent period, the plaintiffs proceeded with their original suit. The defendant, Rice, being brought into Court by process of subpœna, pleaded the articles of settlement in bar, and averred performance on his part. The plea was filed in March, 1850.

In May following, after the plea had been allowed by the Court, the plaintiffs filed a supplemental bill, reciting the original, impeaching and avoiding the settlement on the ground of fraud, and that Rice had not fulfilled on his part. To this bill Rice demurred, and the decision of the Court below, overruling the demurrer, is now brought here for review.

It is contended by the counsel for the defendant, that the matters in avoidance should have been set up by replication, and not by supplemental bill. This point is not well taken. Special replications are now disused, and general replications, denying and putting in issue the matter of the plea, are the only ones allowed. *Story's Eq. Pl.* Sec. 878.

There was, therefore, no mode of avoiding the plea in bar but by supplemental bill. It could not be done by amendment of the original bill, because the matters pleaded in bar had arisen subsequent to its exhibition; and the fraud charged could not be consummated till the articles of settlement were executed, nor the breach of them till afterwards; and, conse-

quently, the matters set up in avoidance, in part at least, must have transpired subsequent to the filing of the original bill also. The plaintiffs could not by an amendment of the original bill, avoid a settlement made after it was filed. It is true, that the accounts and inventory alleged to be false and fraudulent in the Supplemental Bill, were in *esse* and known to the plaintiffs before the commencement of their suit, and as false and deceptive then as they ever were afterwards; but if the plaintiffs did not know them to be incorrect, and, taking advantage of their ignorance, the defendant, Rice, subsequently to the filing of the original bill, fraudulently used the books and inventory to induce the plaintiffs to consent to the settlement which was made, then they can only show that by way of supplement; and the statement of the accounts and inventory, and of their falsity, is necessary, in order to show by what means the fraud was committed. For this purpose, what went before was as necessary to be set out as what happened after suit was brought, and could not be separated from it without rendering the pleading imperfect. The prior matter was indispensable for the explanation of that which followed. It is not because it was not discovered before the original bill was filed that it is properly stated by way of supplement, but because it could not possibly be used for the purpose for which it is brought forward, till afterwards. *Story's Eq. Pl.* Sec. 335. 1 *Hoff. Ch. Pr.* 42.

The objection, that the statements of the Supplemental Bill are vague and uncertain, is to their form and manner, and not good on general demurrer. *Story's Eq. Pl.* Sec. 455. *Lubes' Eq. Pl.* 347. Averments may be so vague and imperfect as not to be susceptible of an answer, or lay the foundation of a decree. *Story's Eq. Pl.* Sec. 242. Some of the statements of the bill before us are loose and indistinct, but sufficient in that respect when taken in connection with others to call for discovery and relief.

Let us next inquire, whether, admitting the statements of the Supplemental Bill to be true, they make out a case sufficient to avoid the settlement set up in bar. They are in effect, 1. That in the latter part of September, 1849, Rice furnished the plaintiffs an inventory of the goods and effects remaining

on hand, of that branch of the Northern Outfit of which he had charge, called the Winnebago and Chippewa Outfit, as required by the third article of Co-partnership; that at the time of the filing of the original bill, and at the time of the settlement, they supposed it to be true, and that it contained a correct, or nearly correct statement of the goods, effects and matters enumerated as the property of said Company; that Rice so represented to them; and that was one ground and inducement for their entering into the covenants mentioned in the plea; that said inventory was, in fact, false and deceptive, which was well known to Rice and unknown to them until after the settlement, and they were thereby deceived and defrauded. Some of the specifications, intended to show that particular items of the inventory were false and fraudulent, are insufficient for that purpose, but one or two of them, if true, tend to impeach its integrity to some extent.

The statements of the Supplemental Bill charging fraud, are in effect, 2. That the books of account of the Winnebago and Chippewa Outfit, kept by Rice, pursuant to the third article of Coparrtnership, showed at the time of filing the original bill, and at the time of the settlement, large bills and accounts standing upon them against different responsible persons, and purporting to be due from them to said Outfit; that Rice represented the same to be due and unpaid, which the plaintiffs at that time believed, supposing the books to have been truly and correctly kept, and that they showed fully and exactly the debts due the Outfit; that that was the principal consideration for entering into the agreement of settlement; but that many of those accounts and bills had been fully paid to Rice previously, others partially paid, and against others there were meritorious offsets, of which payments and offsets numerous specifications are given; and that all this was well known to Rice, and unknown to the plaintiffs. There is also a specification under this head, of a large amount of notes and bills appearing upon the books under the head of "bills receivable," to be due the concern, and so represented to be by Rice; but it does not appear, from the statements of the bill, that they were not so due, or that the amount was less than the books showed, but merely that Rice has not satisfactorily accounted for a part of them since the

settlement, and had either used in his transactions, or retained a part of them, to the amount of $17,000.

This summary of the allegations of fraud shows conclusively that they sustain the charge if true. They establish both a *suppressio veri* and a *suggestio falsi*. *Story's Eq.* Secs. 192, 207.

The deception practiced upon the plaintiffs, if any, was the gist of the fraud. If they were not deceived—if they knew the inventory to be untrue in the particulars complained of: that the books did not show the debts due the concern, and that the representations of Rice were false,—they are concluded by the settlement. *Story's Eq.* Sec. 202. The decision of this case is greatly embarrassed by the difficulty of reconciling the statements of the Original with those of the Supplemental Bill. They are apparently in conflict and inconsistent with each other. The principal averments of the original bill are incorporated with and make part of the Supplement; substantially, they make but one pleading, and, so far as they conflict, destroy each other. Inconsistent and repugnant matters are not admitted by a demurrer: they are not well pleaded, and in the language of the books, "such matters only as are well pleaded are admitted." *Gould's Pl.* 470. *Briggs vs. Dorr*, 19 *J. R.* 96.

It is alleged in the original bill, that Rice did not render any *such* account of his transactions as he was bound to, nor comply in anything with the terms of the third article of Co-partnership. The only account he was bound to render by that article was, an inventory of the goods and effects on hand at the end of the year, and a schedule of the debts due the Company. It is averred in the Supplemental Bill, that he did furnish an inventory, and that it was false. Now, if the averment in the original bill means that he had not rendered such an inventory as he was required to, because some of the items in the one furnished were false, then it is plain the plaintiffs knew they were false when that bill was filed, and were not deceived or defrauded in that respect, in the settlement. But it is not necessary to put such a construction on the averment. The pleader, probably, did not mean to convey the idea that no inventory had been rendered, but that such an one as was

required had not; and it was not such as he was bound to render, if strictly true so far as it went, but not sufficiently full or comprehensive. The defect intended to be complained of may have been, the omission of items of real estate which it was charged Rice had purchased with the Company's funds, or moneys of the Company which it was alleged he had converted to his own use: or the omission of a schedule of debts. It may not even have occurred to the plaintiffs at that time that any items of the invenfory were false; and the allegation of the Supplemental Bill, that they did not discover their falsity till after the settlement, may be strictly true and consistent with the averments of the original bill, when fairly construed.

It is further alleged in the original bill, that "Rice did not keep such books or accounts of the moneys, goods and property received by him from the plaintiffs, and of his transactions, as would give any insight into the business, or satisfactory account for the same;" * * * "that they could not arrive at any certainty in regard to the amount (they should lose by him), owing to the confused manner in which the books had been kept; and that they were quite in the dark in relation to the whole business." On the other hand, the Supplemental Bill alleges that at the time of filing the Original they supposed and believed the books had been truly and correctly kept; and that the amounts appearing from them to be due on accounts were so due and unpaid; and that the books showed fully and exactly the amount of debts due the Company, which they afterwards discovered was not the case. The averments of the original bill referred to are very indefinite, and state no particulars in which the books were false and deceptive, but merely that they did not give any insight into, and left the plaintiffs in the dark in relation to the whole business. They amount to no more than that the books were very imperfect and unsatisfactory, and the averments would probably have been held bad on general demurrer. They are inconsistent with the statement in the Supplemental Bill, that the plaintiffs supposed and believed the books had been correctly kept, but are not necessarily in conflict with the allegation that they supposed the accounts upon them appearing to be due were due, and that the

books showed fully the amount of debts due the Company. They might very well have supposed the books were defective, and even false, in other particulars, and yet correct in these; and may, at the time of the settlement, have honestly confided in Rice's representation that they were so. His statement in that respect was calculated to throw them off their guard, and to prevent further investigation and inquiry, which otherwise they might have instituted. His means of knowledge were superior to theirs; he was bound in good faith not to take advantage of that circumstance, and to represent truly, if at all, and he might have deceived them into the belief that accounts were correct which they had before supposed erroneous.

Upon a critical comparison of the statements incorporated in the Supplemental Bill, there does not appear to be so great a conflict between them as is necessarily fatal to it; and, although the Supplemental statements may be to some extent false, it does not follow that the plaintiffs were not deceived by Rice's representations. His situation, and the relation in which he had stood to them, rendered it more easy for him to mislead them than it was for them to discover the truth, and it is therefore proper that he should be more closely watched. *Story's Eq.* Secs. 218, 220. He can hardly be permitted to use vague allegations in the original bill, to show that the plaintiffs knew beforehand that his representations made for the the purpose of deceiving them, as detailed in the Supplement, were false. Still, it is but justice to the defendant to add, that if the two bills of the plaintiffs are not directly in conflict in their material allegations, so as to nullify each other, they are sufficiently at variance to cast suspicion on the Supplemental statements, and render it to some extent doubtful whether the fraud charged was in fact committed.

There would be difficulty, if there was no other ground in sustaining the Supplement Bill, solely upon the ground of the alleged non-performance by Rice of the agreements on his part, contained in the articles of settlement. The material covenants in those articles are not concurrent or dependent. Concurrent covenants are those where mutual conditions are to be performed at the same time. *Stephen's N. P.* 1071. Dependent covenants are those in which the performance of one

depends on the prior performance of another. *Ib.* The release by the plaintiffs, contained in the first article of the agreement in question, was absolute and unconditional, and fully executed on delivery. It did not wait for any act to be done on the part of Rice, to give it full force and effect. The same is true of the fourth article, by which the partnership was dissolved. No omission on the part of Rice could restore the partnership relation. The obligation of the plaintiffs to pay the debts of the Company, assumed in the third article, was complete and perfect on delivery of the instrument, and did not depend for vitality on anything which was to follow. The acts covenanted to be performed by Rice in the fifth article were not to be done simultaneously with the execution of the articles, but afterwards, and the length of time is not material. A failure to perform them would not avoid the release or the dissolution contained in the prior covenants. By the sixth article, Rice gave up his interest in four thousand five hundred dollars credited on the books of Campbell, unconditionally. And, although by the eighth, the suit was not agreed to be discontinued except upon the performance by Rice of the stipulations on his part so far as was immediately practicable, yet, the agreement, if left to stand, may have wrought such a change in the subject matter of the suit that it could not be further prosecuted effectually. And the better opinion seems to be, that that would have been the effect of it. After releasing Rice from accountability and liability, they could not still call upon him to account; after a dissolution, it would be idle for the Court to decree one; there was no occasion to adjust the profits and losses, and the claims of the partners, between themselves, after they had agreed upon the terms of settlement. It was unnecessary to continue the original suit for the purpose of obtaining relief against the defendant for the breach of his covenants, and a bill for that purpose would not be a supplemental but an original bill, or in the nature of an original bill.

But, the charge of fraud being sustained by the allegations of the bill, if true, as we have held in this case, the Court may take into consideration the circumstance that the defendant has broken his agreement, along with the fraud charged in obtain-

ing it, as an additional reason why the bill should be sustained.

It is questionable whether the agreement of settlement or compromise has not been so far executed that the plaintiffs are not entitled to the same, or all, the relief which the original bill calls for; enough appears upon the Supplemental Bill to show that the parties cannot be placed in *statu quo*. They may, however, be entitled to some relief; and the nature and extent of it are proper for the determination of the Court below, when all the facts are before it, and after a full hearing, which shall not be confined to the allegations of the Supplemental Bill alone.

It only remains for us to inquire whether the plaintiffs, since the discovery of the alleged fraud, have lain by; neglected to assert their rights to redress; still gone on under the contract of settlement, and by their acts ratified and adopted it.

The Supplemental Bill was not filed till a year and a half after the agreement of 11th of October, 1849, was entered into. In the meantime, it is fairly inferable from the bill that the books were in the possession of the plaintiffs. It is hardly possible he should not have discovered the errors in them complained of, if they existed in a shorter period. There is room for a suspicion that they slept upon their rights when they should have asserted them if they ever intended to do so.

But that is not enough. The plaintiffs complain of a breach of the covenants in the agreement, on the part of Rice in only two particulars. When he performed the balance of them is not stated, but we may presume it was immediately, or soon after their execution, as their terms required. At what time the plaintiffs discovered the alleged fraud is not averred, except that it was since the execution of the agreement. Nor does it sufficiently appear that he has done anything since the discovery by way of performance which they have accepted, to ratify and confirm the settlement. From the letter to Sibley, a copy of which is inserted, the agreement seems to have been treated as binding and in force on the eighth of November after. There is nothing in the bill to show that the fraud was discovered before.

There is some reason for supposing, from the statement that

Rice admitted to the plaintiffs, the proceeds of lots at St. Anthony belonged to them, and they were entitled either to such proceeds or the lots by virtue of his covenants—that they continued to insist upon his performance of the agreement notwithstanding the fraud. The only purpose the introduction of this allegation could serve was, to lay the foundation for a decree that Rice pay the proceeds to them. And the preceding averment in the bill, that Rice had not turned over the claim at Sauk Rapids, according to his agreement, which, with the privilege of occupying, was of great value to them, to wit, of the value of two thousand dollars,—seems to look to a specific performance, or the recovery of damages for the breach, as that claim was inventoried at only one thousand dollars. By proceeding in this suit to compel a performance on the part of Rice, or damages for his non-performance, the plaintiffs would necessarily affirm the contract and be bound by it. They cannot reap the benefit of one part of it, and repudiate the other. The bill is certainly open to the construction that the plaintiffs claim relief against Rice other than the avoidance of the contract for the breaches of it on his part. That, however, is not the construction we have put upon their allegations, but rather that the breaches are assigned for the purpose of avoiding the agreement; and what is said about the admissions of the defendant in one instance, and of the value of particular property in another, is mere surplusage, introduced through the carelessness of the pleader in not keeping the object before him steadily in view. And it is proper to add that the intention may have been to frame the bill with a double aspect, with a view to set the agreement aside for fraud, or, if that should be denied, then to enforce its provisions. Whether, upon failure to establish their right to the first, the plaintiffs could obtain the alternative relief, it is not now necessary to discuss; but their claiming it in case the Court should refuse to set aside the agreement, does not necessarily confirm the settlement.

Upon the whole, it would be hazardous to decide the question, whether they have confirmed the settlement since the discovery of the alleged fraud, against the plaintiffs, by the feeble light to be gathered from the bill; and it is better, if they have,

to leave the defendant to show it more fully by his answer and proofs.

The conclusion arrived at, from a review of the whole subject is, that the order appealed from, overruling the demurrer, should be affirmed with costs, and the cause remanded to the District Court of Washington County, for further proceedings.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

JANUARY TERM, 1854.

PIERRE CHOUTEAU ET. AL. Appellees *vs.* EDMUND RICE, Appellant.

AN APPEAL FROM AN ORDER SETTING ASIDE A JUDGMENT.

PIERRE CHOUTEAU ET. AL. Appellees, *vs.* EDMUND RICE, Appellant.

APPEAL FROM AN ORDER SETTING ASIDE REPORT OF REFEREES.

Section 11, page 414, Revised Statutes of Minnesota, 1849, does not authorize an Appeal to this Court, from an order made by the Court below, setting aside a Judgment, or the Report of Referees, and awarding a new trial.
The Statute clearly denies an Appeal from any Judgment or order which, in effect, retains the cause for further hearing in the Court below.

AMES & VAN ETTEN and WILKINSON, BABCOCK & BRISBIN, for Appellees.

G. L. BECKER and H. F. MASTERSON, for Appellant.

The facts appear from the opinion.

By the Court.—SHERBURNE, J. This action was originally brought before a Justice of the Peace, to recover the sum of one hundred dollars alleged to be due to the plaintiffs on account of sales of goods and merchandise. It was taken to the District Court by appeal, and by a rule of that Court was referred to Referees. A hearing of the parties was had by the Referees, and a report subsequently made by them to the District Court in favor of the defendant. Judgment was rendered on this report by the Referees, and afterwards, upon application of the plaintiffs, the judgment and also the report of the Referees, was set aside, and the case again referred to the Referees for a new trial.

From these two orders, one setting aside the judgment and the other setting aside the report of the Referees, the defendant appeals to this Court.

A preliminary question is interposed by the plaintiffs, as to whether these orders are appealable; and this is the first question to be considered by the Court: for, if an appeal does not lie, it will be unnecessary to examine the objections made to the orders. Appeals are regulated entirely by statute provisions, and unless statute authority can be found to sustain these appeals they must be dismissed for want of jurisdiction. Section 11, on page 414, of the Revised Statutes of this Territory authorizes Appeals in the following cases:

1. "In a judgment in an action commenced in the District "Court, or brought there from another Court; and upon the "Appeal from that judgment, to review any intermediate or- "der involving the merits and necessarily affecting the judg- "ment.

2. "In an order affecting a substantial right, made in such "action, when such order in effect determined the action, and "presents [prevents] a judgment from which an Appeal might "be taken.

3. "In a final order affecting a substantial right, made in a "special proceeding; or upon a summary application in an ac- "tion after judgment."

The leading idea to be gathered from these subdivisions of

Section 11 is, that an Appeal shall be allowed only in a judgment or order which is final in its character and which affects a substantial right. In other words, that an order affecting a substantial right, which finally disposes of that right in the Court below, is the subject of Appeal; but that an Appeal does not lie from an order or judgment which merely authorizes a rehearing of the questions at issue, or a new trial, from a judgment on which an Appeal may still be taken. The intention of the law appears to be, that while the Court below is holding a question or cause for trial or examination, it can not be brought into this Court by Appeal, to correct any supposed errors of that Court; but, when the cause or question has been finally disposed of by judgment or order, then the party aggrieved may claim a rehearing in this Court.

But the orders complained of in this cause are not final in their character. The defendant is still in the District Court, and may there be heard. The orders did not "in effect determine the action;" and the statute provisions quoted above do not embrace an order granting a new trtal.

I am strengthened in this opinion, as well by a reference to the New-York code of procedure as to the adjudicatures which have been had under it. The three subdivisions which I have copied from Section 11 of our Statutes, are a literal transcript of the code of New-York, as it stood in 1850. In 1851 the Legislature of that State amended these provisions by adding a right of Appeal in "an order granting a new trial." If the right existed by virtue of the law as it stood before the amendment, and which was in the same language of our present law, the Legislature was mistaken in its construction of it, and the amendment was mere surplusage. The fact, however, shows the view which was taken of the original law by that body, and is not, as it seems to me, an authority wholly worthless. But this amendment was an innovation upon the common-law practice, giving discretionary power to inferior Courts; and that State having witnessed its operation for the term of one year, the Legislature of 1852 repealed the clause giving the right of Appeal from "an order granting a new trial," leaving the law as it stood when ours was copied from it. If the right of Appeal exists under our law from or-

ders granting new trials, then this action of the Legislature of New-York—both the amendment and the repeal of it—were simply nugatory. The opinions of the Courts of that State were in harmony with that of the Legislature, and when taken together would seem to be conclusive authority upon the construction of a statute, even if the language admitted of doubt, which it does not, in my opinion, in this instance.

The particular provision upon which the defendant must rely to sustain the Appeal is Subdivision 3, before cited. This provision has received repeated adjudications in New-York, as already stated, and it may be considered as well settled by the Courts of that State that it does not apply to an order vacating a judgment and granting a new trial. In *Sherman and Batcheldor vs. Felt et. al.* 3 *How. Pr. Rep.* 425, which is a case in principle like the one under consideration, the Court say: "The right of Appeal given by the 11th Section of the code "from a final order made upon a summary application after "judgment, extends only in cases where the application is "based upon, or concedes, the validity of the judgment; and "not to cases where the application is, to vacate or set aside "the judgment. When the motion is to set aside either for "illegality or as a matter of favor, no Appeal to this Court will "lie, whatever may be the question. It is a mere question of "practice, and it has long been settled that there can be no re-"view in an Appellate Court in such cases."

See, also, to the same effect, 3 *Code N.* 164, *Nancy Harris, (by her next friend) vs. Ralph Clark, et. al.* 4 *How. Pr. R.* 78. *Anonymous ib.* 80.

An order setting aside a decree of Divorce, taken as confessed, and allowing alimony, is not an appealable order to the Courts of Appeal. 4 *How. R.* 139. See also *Duane vs. N. R. R. Co. Ib.* 364.

The granting or refusing new trials at common law, is matter of discretion, and not subject to exception or Appeal. The books are uniform upon this subject, or as nearly so as upon any subject where it is possible for a difference of opinion to exist. *Cutler vs. Grover*, 15 *M. R.* 159. *Walker vs. Sanborn*, 8 *M. R.* 288. *Carter vs. Thompson*, 15 *M. R.* 464. *Gray vs. Bridge*, 11 *Pick.* 189. *Ex parte Caykendoll*, 6 *Cowens*, 392.

In the latter case, the Court say that the granting or refusing a new trial is "so much a matter of discretion, that we will "not interfere by mandamus. The granting or refusing a new "trial is governed by no fixed principles. No positive rule of "law has been violated by the Court below, nor can we fix "bounds to their discretion upon this subject."

See also a well-considered opinion by the Supreme Court of this Territory [Cooper, J.], in the case of *Pierre Chouteau, Jr. et. al. vs. Henry M. Rice, et. al.* [See p. 24 of this volume.]

It is true that Courts have often looked into the reasons on account of which new trials have been granted, and made a distinction between those which were strictly within the discretion of the Court and those which involved questions of law, but the Statute of this Territory clearly contemplates no such distinction, and must be considered as refusing an Appeal from any judgment or order which in effect retains the cause for further hearing.

On the whole, we are satisfied that Appeals do not lie from the orders complained of in this case, and they must therefore be dismissed.

Appeals dismissed.

Louis C. Elfelt, et. al. Plaintiffs in Error, *vs.* George Smith, Defendant in Error.

Opinions of witnesses as to the value of services, are incompetent evidence.

The Plaintiff's recovery is limited by the amount demanded in his complaint. A case brought into the District Court by Appeal from the judgment of a Justice of the Peace, must be tried upon the pleadings below, unless they are amended by leave of the District Court; and if a jury assess the damages at a sum greater than laid in the complaint, judgment cannot be rendered thereon without a remittitur of the excess.

The case, or bill of exceptions in the case, is not attainable,

and the facts cannot be stated further than they appear from the opinion of the Court..

RICE, HOLLINSHEAD & BECKER, for Plaintiffs in Error.

AMES & VAN ETTEN, for Defendant in Error.

By the Court.—CHATFIELD, J. The first point made by the Plaintiffs in Error need not be considered, as the others are conclusive.

The evidence admitted by the District Court to prove the value of the services of the Plaintiff below, for which the action was brought, was manifestly incompetent. It was merely naked opinion, without knowledge, and that is never competent evidence.

The value of services upon a *quantum meruit* stands, in regard to the proof, upon the same principle as the value of chattels upon a *quantum valebant.* The value of chattels in such a case is always regulated by the usual or market value of such chattels, of like quality, at the time and place of sale; and before a witness can, in such a case, be permitted to testify to such value, it must appear by his own or other competent evidence that he knows with reasonable certainty what such usual or market value is. He then testifies to the value as a fact, and not as a mere matter of opinion. So in regard to services: it must appear that the witness knows the usual value of, or rate of compensation paid for such or the like services at the time when, and place where, they were rendered, before he can be properly permitted to testify what such value or rate is. He then testifies to such value or rate as a fact, and not as an opinion. A market value of property, or usual rate of compensation for services, proved to a jury, furnishes a legal rule and guide to their judgment; but a mere opinion, without knowledge, though sworn to before a jury, communicates no information to them better than their own. The opinions of the jurors themselves upon the same subject, would be just as good, and perhaps better, without such testimony than with it. *Lamoure vs. Caryl*, 4 *Denio's R.* 370; *Fish vs. Dodge*, *ib.* 311; *Norman vs. Wells*, 17 *Wend. R.* 136, 271.

It is a universal rule, that the Plaintiff in a suit at law is

limited in his recovery to the amount claimed by him in his declaration. The Defendant in Error contends that the rule is not universal, and that upon the trial in the District Court of a case brought there by Appeal from a Justice's Court, where the jurisdiction, and consequently the *ad damnum* of the declaration, is limited to one hundred dollars, the jury may properly find a verdict for a greater sum, and that a judgment perfected for the whole amount of such verdict would be good. This position is not maintainable. Such a case forms no exception to the rule. A case brought into the District Court by Appeal from a judgment in a Justice's Court is as much controlled by the material substances of the pleadings as one originally commenced there. The case upon Appeal must be tried upon the pleadings brought up from the Justice's Court, unless amended by leave of the District Court. If the verdict in such a case assess the damages of the Plaintiff at a sum greater than the amount laid in the declaration, a judgment cannot be rendered thereon without a *remittitur* of the excess. Such was the verdict in this case, and judgment was rendered thereon for the full amount of it. It is erroneous, and must be reversed, and a *venire de novo* awarded. *Fish vs. Dodge*, 4 *Denio's R.* 311.

THE UNITED STATES OF AMERICA, Appellant, *vs.* THE MINNESOTA AND NORTH-WESTERN RAILROAD COMPANY, Appellees.

The Act of Congress approved June 29th, 1854, granted to the Territory of Minnesota, a present estate in the Lands mentioned in the Act, and Section 4 of the same Act merely qualifies and restrains the power of disposal.

It was competent for the Legislature of the Territory of Minnesota to transfer any interest in Lands which might accrue to the Territory, and the Defendant, by the Act of the Territorial Legislature approved March 4th, 1854, acquired all the rights which vested in the Territory under the first-mentioned Act.

The Act of Congress approved August 4th, 1854, entitled "An Act for the relief of Thomas Bronaugh, and for the Repeal of the 'Act to Aid the Territory of Minnesota in the Construction of a Railroad therein,'" approved the 29th day of June, 1854, is void and of no effect so far as it relates to the Repeal of the Act of June 29th, 1854.

This was an action of trespass commenced in the County of Goodhue, charging the Defendant with entry upon lands of the Plaintiff, on the 12th of October, 1854, and at divers other days and times, and the commission of injuries thereupon to the Plaintiff's damage of one thousand and ten dollars.

The answer admits the commission of the acts complained of, but justifies under the Act of the Territorial Legislature of Minnesota approved March 4th, 1854, by which the Defendant was incorporated and endowed with any lands which Congress might thereafter grant to the Territory for the purpose of aiding in the construction of a Railroad between the points indicated in the Act of Incorporation, and the Act of Congress approved June 29th, 1854, entitled "An Act to aid the Territory of Minnesota in the Construction of a Railroad therein," alleging a free compliance with the provisions of the Act of Incorporation, and that the acts complained of were done in the location of the Road contemplated by the Charter of 4th March, 1854.

The reply alleges, that after the Directors and Officers of the Defendant were elected and entered upon the discharge of their duties, and before the trespasses were committed, to wit, on the 4th day of August, 1854, the Act of Congress of date 29th June, 1854, was repealed by Act of Congress.

To this reply the Defendant demurs, assigning a ground of demurrer that the Act of August 4th, 1854, is void so far as relates to the Repeal of the Act approved June 29th, 1854.

The Court below sustained the demurrer, and the Plaintiff appealed from such decision to this Court.

J. E. Warren, United States District Attorney, and John B. Brisbin, for Appellant.

Rice, Hollinshead & Becker, for Respondents.

Points of Appellant:

First. No title to the lands granted by Congress by the Act of June 29th, 1854, vested in the Territory of Minnesota, or could vest.

Second. The Defendant acquired no rights under the Act of

Incorporation and the Act of Congress approved June 29th, 1854.

Third. No rights having vested, Congress could resume the grant, and the Repealing Act was valid and effectual.

Points of Respondents:

First. By the Act of Congress approved June 29th, 1854, granting certain lands to the Territory of Minnesota to aid said Territory in constructing a railroad, the Territory *eo initanti* upon the passage of the Act, acquired an interest and property in the lands granted, which the Territory could grant and convey.

Second. By the Act of the Legislature of Minnesota approved March 4th, 1854, incorporating the Minnesota and North-Western Railroad Company, the said Company acquired an interest and property in all the land subsequently granted by Congress to the Territory for the purposes of the road: which interest became vested in said Company immediately upon the passage of the Act by Congress and the organization of the Company.

Third. The second section of the Act of Congress passed August 4th, 1854, repealing the first-mentioned Act of Congress, is repugnant to the Constitution of the United States, and also to great and fundamental principles of the common law.

By the Court.—Welch, *Chief Justice.* This is an appeal from the judgment of the District Court, for the County of Goodhue.

The United States brought an action of Trespass against the Minnesota and North Western Rail Road Company, for entering upon certain lands of the United States, in the County of Goodhue. The complaint alleges that on a certain day, the Defendants, a body corporate, broke and entered the lands in question, and cut down and carried away certain trees, &c.

The Defendants admit the acts charged in the complaint but set up by way of justification; *First*, An Act of the Legislature of Minnesota, approved March 4th, 1854, incorporat-

ing said company, and a compliance with its provisions up to the 29th of June, 1854; and

Second, The Act of Congress, approved June 29th, 1854, granting certain lands to the Territory of Minnesota, to aid in the construction of a Railroad, and a subsequent compliance with all the provisions of the act first named.

Third, That pursuant to the authority given and rights conferred by these acts, the Defendants on the tenth day of October, located the track of their Railroad, contemplated by the acts in question, upon the *locus in quo*, and that the supposed trespass, was committed by cutting and carrying away, trees upon the track of said road, and in the construction of said road.

The Plaintiff replies that the act of Congress, approved June 29th, 1854, was repealed by the act approved August 4th 1854, entitled "An Act for the relief of Thomas Bronaugh," &c.

To this reply the Defendant demurs, alleging that said act of August 4th, is null and void.

The District Court sustained the demurrer and from this judgment, the appeal in this case is taken.

The first question presenting itself for consideration in deciding this case is, did the Territory of Minnesota acquire any, and if any, what interest in the lands granted by Congress.

This question can best be answered by referring to the act of Congress making the grant.

By referring to this act it appears that the land "is hereby granted to the Territory of Minnesota." It also provides "that the land shall be held by the Territory;" again "the lands hereby granted, shall be subject to the disposal of any Legislature thereof." But again it is provided that "the lands unsold shall revert to the United States." From all this, it appears manifest, if words are to be considered as the representatives of ideas, that by the act of June 29th, 1854, a grant of a present interest in the lands in question was made to the Territory.

It is true that the fourth section of the act provides that the lands hereby granted shall be disposed of only in manner following, that is to say, no title shall rest in the said Territory of Minnesota, nor shall any protest issue until a specified con-

dition is performed. But it cannot be possible, that this section was intended to annul the grant of a present interest, which had been clearly made. The only fair and rational meaning of this section is, that the power of disposal is qualified, as it professes its object to be in the outset. In other words it provides that no title shall be given by the Territory, not subject to the condition which may divest the estate.

The phraseology of the section is probably not as well chosen as might be desirable; but in my judgment any other construction would be absurd.

The conclusion, therefore, seems to me to be inevitable, that a present estate was granted, subject to be divested, upon a condition subsequent. This construction gives full effect to the manifest intention of the parties.

The next question arising is whether the Defendants acquired any interest, and if so, what interest under this act of incorporation, and the first mentioned act of Congress.

Upon this point, the act of incorporation is clear and explicit. By this act of incorporation it is provided that all such lands as may be afterwards granted to the Territory by Congress to aid in the construction of the Railroad, shall immediately become the property of the Railroad Company, without any further act or deed. The Railroad Company, therefore, so far as this act can give it, acquired all the right and interest which the Territory had acquired under the act of June 29th.

The Legislature had an undoubted right to transfer any interest which might accrue to the Territory, and it unquestionably has done so.

The third and last question to be considered is: Had Congress the right to revoke the grant, made by the act of June 29th, 1854?

If I am right in the conclusions at which I have already arrived, it would, as it seems to me, necessarily follow that Congress had not such a right.

An interest in or right to lands, franchises, &c., once vested cannot be divested by any act of the grantor, unless by agreement of the parties to the grant.

"Every grant of a franchise (says Judge Story) is necessarily exclusive, so far as the grant extends, and cannot be resumed

or interfered with. The Legislature cannot recall its grant nor destroy it. In this respect, the grant of a franchise does not differ from a grant of lands. In each case the particular franchise or particular land is withdrawn from legislative operation, and the subject matter has passed from the hands of the government."

The old rule of law in cases of grants by the king in virtue of his prerogative, was said to be that nothing passed without clear and determinate words, and the grant was construed most strongly against the grantee, though the rule was otherwise as to private grants. This rigid rule had many qualifications and has been materially modified.

If the royal grant was not a mere donation, or bounty, but one founded on a consideration, the stern rule never applied, and the grant was always construed favorable for the grantee, or rather according to its fair meaning, for the grant is a contract. 2 *Kent*, 556.

The grant of lands in this case was made upon a good consideration.

The Act of Revocation is clearly in conflict with the Constitution of the United States. (Amendments to the Const., Art. 5.) Private property can only be taken for public use, and then only upon compensation being given.

Neither can any one be divested of his property but by due course of law, that is, according to the practice of Courts of Justice.

It is held by the Supreme Court of Pennsylvania, 2 *Dall.*, 304, that

"A man can be divested of his property by the Legislature only in three ways:

"*First*, By a stipulation between the Legislature and the owner.

"*Second*, By Commissioners mutually elected by them.

"*Third*, By a jury.

"The Legislature cannot of itself determine the amount of the compensation."

But, independent of the Constitutional provision referred to, the Repealing Act is invalid.

There is a principle inherent in the nature of society, as old

as civil government itself, which sets bounds to the powers of legislation. It is the principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative powers. If the property of an individual may be seized without compensation, our security for life, liberty and property is not as great as we have generally supposed. A claim to such a right is of a startling character. Chief-Justice MARSHALL says, *Peep vs. Fletcher*, 6 *Cranch*, 87: "If an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power."

It is not pretended that one Legislature can, in the legitimate and ordinary course of legislation, bind a succeeding Legislature; but an act not expressly permitted by the Constitution, which impairs or takes away rights vested under pre-existing laws which are in the nature of contracts, is unjust, unauthorized and void.

Such is the rule in all civilized States where the common or the civil law is established.

The government of the United States is one of limited powers. It is only sovereign in a qualified sense. Congress can do what the Constitution authorizes it to do, and no more. Certain powers undoubtedly arise by implication, but no power can be implied authorizing the Legislative department to take a man's property without compensation and without due course of law. This power is not included in any general grant of legislative powers. A power to do an act which has been regarded as dishonest among individuals from time immemorial in all civilized countries, cannot be implied from any of the powers granted by the Constitution; and, as such a power is not expressly given, it cannot be exercised.

Daniel Coit, Plaintiff in Error, *vs.* Robert C. Waples and Ephraim P. Zirkle, Defendants in Error.

Under the Statute of Replevin of Wisconsin it is necessary to allege a *wrongful* taking: and a Declaration from which such allegation is absent is bad upon demurrer, but will be cured after verdict; and after a Plea upon the merits it is too late to review an erroneous decision of the Court below in overruling the demurrer.

Under the Wisconsin Statute of Replevin, a Plea of the general issue to an action of Replevin in the *cepit* puts in issue only the taking Land, the time and place where (in cases where the place is material), but does not put in issue the title to the property.

This Court will not award a new trial on the ground that the District Court refused an adjournment asked to procure testimony impertinent to the issue, nor on account of the admission of testimony in support or rejection of testimony in controversion of an issue not made by the pleadings. Such testimony is immaterial, and, by legal necessity, cannot influence the verdict. So of instructions to the Jury upon irrelevant topics.

Where improper evidence is received, or competent evidence rejected, and exception is taken, and the party excepting afterwards introduces legal evidence of the same fact, he thereby waives all advantage of his exception.

The Court below charged the Jury "That, if they believed from the evidence that the property was forcibly taken from the Plaintiffs after its delivery to them by those under whom the Defendant claims title, they must find for the Plaintiffs." Of this the Defendant cannot complain, but rather the Plaintiffs, as proof simply of a *wrongful* taking would have warranted a verdict.

A Lien may be assigned, but such assignment must be subordinate to the rights of the principal owner. An absolute sale of the property is tortuous, forfeits the lien, and passes no benefit to the purchaser, except, in the case of an actual delivery, it protects him from an action of Trespass or Replevin in the *cepit*, against the principal owner.

The length of time a Jury shall be kept together is a matter within the discretion of the Court, and cannot be reviewed on error.

Where, upon the trial, both parties consent that the Jury may take the minutes of Testimony, and after the lapse of four hours the Judge recalls them and reads a Deposition which was introduced in evidence, it is not Error: especially in the absence of a specific objection, and where the testimony is immaterial.

"The Jury find and return a verdict for the Plaintiffs and against the Defendant, and costs of suit," in an action of Replevin, is a correct verdict in substance, and where the intention is obvious, the Court will give effect to the verdict as intended. It may be amended in matters of form. The words "and for costs" must be rejected as surplusage, but in no wise affect the finding upon the issue.

The Statute of Wisconsin which provides that the Jury shall assess the value of the property claimed in Replevin is merely directory, and need not be followed except in cases where an assessment is necessary as the foundation of judgment upon the issue.

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The question of costs must be determined by the Statutes in force at the time of the trial; and, where the Jury fails to assess the value of the property in controversy, the costs must be nominal. The Plaintiff in the action may waive this Error against him and abide the verdict, but the defendant cannot complain.

The decision of a District Court on a motion for a new trial cannot be reviewed on Error.

Where in an action of Replevin the Jury find generally for the Plaintiff *with costs*, this Court will so amend the verdict and judgment as to assess the damages at six cents and limit the costs recoverable to the same sum.

This was an action of Replevin, brought in the year 1850, in the County of Washington. The Declaration charges the Defendant with the taking, and *unjust* detention, of a quantity of lumber and lath, of the estimated value of $800, on the 12th day of September, 1850, of the Plaintiffs.

The Defendant demurred to the Declaration, assigning, among other grounds, the following, viz:

There is no allegation that the property claimed was wrongfully or illegally taken at the time and place in the Declaration mentioned.

The Declaration does not allege a wrongful taking and detention of the property claimed by the Defendant.

The demurrer was overruled by the Court below, and the Defendant pleaded ever denying the taking and detention in manner and form, &c.

The action came on for trial at the October Term, 1852. At this Term the Defendant moved for a continuance upon affidavit, showing the absence of testimony affecting the title to the property in controversy. His Honor, Judge Cooper, overruled the motion, and the trial was proceeded with.

One of the Plaintiffs being called and sworn, was shown a written Agreement purporting to be executed between the Plaintiffs and one McLaughlin, April 29th, 1850, witnessed by one Thomas Keeling. The witness testified that the Plaintiffs were partners, and he signed the instrument and saw McLaughlin sign it.

Christopher Pelon testified that lumber of the description of that claimed was taken forcibly from the possession of the Plaintiffs, and also the manner in which they acquired possession. After which the Plaintiffs offered in evidence the agreement tes-

tified to by one of the Plaintiffs as before stated. To the introduction of this agreement the Defendant objected, on the grounds: *First*, The paper is not properly proved, being authenticated by one of the parties and not by the subscribing witness. This objection was overruled, and further objection was made that the agreement was irrelevant, as neither the parties nor the property in dispute were shown to be connected with the instrument. Whereupon, the Plaintiff offered Robert C. Waples, one of the Plaintiffs: to which the Defendant objected, that he was a party to the action, and the issue having been joined before parties were made competent by statute to testify, must be tried without reference to such statutes. The Court overruled the objection, and the Defendant excepted.

Waples testified, substantially, that a contract between one Perkins and McLaughlin, of date April 18th, 1850, was not in his possession, and had not been attainable by him: that a contract between the Plaintiffs and McLaughlin, of date Nov. 14, 1849, had been torn up at the request of McLaughlin's agent.

To this evidence the Defendant objected. The objection was overruled and exception noted.

The written Agreement of April 29th, 1850, between Plaintiffs and McLaughlin, was again offered and was received under objection.

By this Agreement, in substance, so far as here relevant, the Plaintiff agreed to pay and deliver to McLaughlin certain notes and drafts, amounting to $7,580 08, in consideration of which McLaughlin agreed to deliver to the Plaintiffs 500,000 feet of white-pine lumber, to be sawed according to a contract between one Perkins and McLaughlin, of date April 18th, 1850: all of which lumber, with the lath and slats made therefrom, McLaughlin agreed to deliver to the Plaintiffs, at the Warehouse Eddy, St. Croix Falls, at $10 per thousand for lumber, and $2 per thousand for lath. It was also agreed that, in case accident prevented the lumber from being sawed, then a contract between Plaintiff and McLaughlin, of date November 14, 1849, should be of force: otherwise void. Plaintiffs agreed to superintend the sawing by an agent, witnessed by Thomas Keeling.

Waples further testified that lumber and lath, made under this contract, was afterwards in Defendant's possession, and was the lumber replevied.

Christopher Pelon, recalled, said that he superintended the sawing of the lumber and lath sawed under this contract, and that it came to Plaintiff's possession.

The Plaintiff then offered to read in evidenee the deposition of George W. Brownell, which was objected to on the ground that the certificate of the Commissioner before whom it was taken is defective and insufficient, and not in compliance with the Statute. The objection was overruled, and the decision excepted to. The purport of the testimony received under the Deposition was, to establish title to the property in dispute in the Plaintiffs.

The testimony of the Plaintiffs having closed, the Defendant was sworn, and testified that he bought the property in dispute of one Perkins.

The Defendant here offered to prove that the Plaintiffs had refused to pay one of the notes mentioned in the contract of April 29th, 1850: to which the Plaintiffs objected, and the objection was sustained. The Defendant excepted.

Testimony was also offered and received tending to show, that the Defendant purchased the lumber and lath in controversy of Perkins, who had a lien for sawing.

The testimony closed, and His Honor, the Judge, charged the jury:

First. That if they believed, from the evidence, that the lumber in controversy was delivered to the Plaintiffs, or their agent, at the Warehouse Eddy, it is a delivery to the Plaintiffs under the contract: and they must find for the Plaintiffs.

The Defendant excepted.

Second. That, if the jury believed, from the evidence, that the lumber in controversy was forcibly taken from the possession of the Plaintiffs after delivery to them, by those under whom Defendant claims title, they must find for the Plaintiffs.

The Defendant excepted.

Third. That, if the jury believed that after the lumber was sawed it was delivered to the agent of McLaughlin, or the Plaintiffs, by those who sawed it under the contract or suffered

the agent to take possession of it, and by him put into possession of Plaintiffs, the Plaintiffs' title is good, and they must recover.

The Defendant excepted.

Fourth. That, if the jury believed that those who sawed the lumber delivered it without receiving their pay, they lost their lien upon the lumber.

The Defendant excepted.

The Defendant requested the Judge to charge, that if the Plaintiffs relied upon the written contract for title to the lumber, they must show performance of the conditions precedent by them to be performed in the said contract.

The Court refused so to charge, and the Defendant excepted.

The Defendant also requested the Court to charge the jury, that if the sawyers of the lumber had a lien for their labor the raftsman who rafted it could make no delivery to deprive them of such lien.

The Judge charged, that under such facts no such delivery could be made to the prejudice of the lien unless the raftsman was the agent of, or in the employ of the sawyer or the Plaintiffs, in which case a delivery to him was a delivery to the Plaintiffs.

The Defendant also requested the Judge to charge, that the Statutes of Wisconsin gave a lien to original contractors performing labor on lumber under contract for one year.

The Judge refused so to charge, but did charge: that such lien existed for six months, and was lost upon voluntary severance of possession. The Defendant excepted.

The Defendant also requested the Judge to charge, that if they believed the sawyer was in possession under his lien, and, being so in possession, sold to the Defendant, for valuable consideration, without notice of any adverse claim, the title to the disputed property was in the Defendant.

The Judge refused so to charge, but did charge: that a lien for labor bestowed gave no right to the party having such lien to sell the property, except in pursuance of the Statute and by process of law. The Defendant excepted.

The jury retired; and, after an absence of some time, returned into Court, and informed the Court that they were un-

able to agree, and requested further instructions. The Court informed them that the questions of fact were theirs to consider exclusively, and that he could give them no instructions; but for the information of the jury, commenced to read to them the minutes of testimony: whereupon, counsel upon both sides consented that the minutes be delivered to the jury. The jury retired, and after they had been absent for four hours, the Judge discovered that by inadvertance he had omitted to submit to them the Deposition which was read in evidence: upon which the jury were recalled, and the Deposition read to them.

The record shows a general exception to the proceedings of the Judge.

The jury returned a verdict, finding the title of the property in the Plaintiffs, and the right of possession in them: and found in favor of the Plaintiffs, and against the Defendant, with costs.

The Defendant objected to the verdict,—

First. That it did not assess the value of the property, as required by statute.

Second. That it was not in accordance with the declaration, and not a correct verdict upon the issue.

Third. That it was insufficient, and judgment could not be rendered upon the issue thereon.

Fourth. That it was against the law and evidence of the case.

Upon a statement of the case, of which the substance is here given, the Defendant moved in the Court below for a new trial. The motion was denied, and the case is brought into this Court by writ of Error.

Ames & Van Etten, for Plaintiff in Error.

Emmett & Moss, for Defendants in Error.

By the Court.—Chatfield, J. I think the motion of the Defendants in Error to dismiss the writ of Error in this case, should be denied. It is not allowable to controvert the record by affidavit, and the record shows that the judgment was ren-

dered in February, previous to the issuing of the writ of Error, in August. The return day of the writ of Error is sufficiently definite.

In my opinion the District Court erred in overruling the demurrer of the Defendants below, to the Plaintiff's declaration. The first and third causes of demurrer specially assigned were good. But the Defendants below, have elected not to stand upon their demurrer in the case, and have pleaded issuably, concluding to the country. They have thereby waived all exception to the decision of the District Court on their demurrer. The case stands here precisely as if no demurrer had been interposed. 1 *Denio's Rep.* 222. 6 *Hill's Rep.* 621.

The defect in the declaration was the absence of the word "wrongful," in the charge against the Defendants below, for taking the property, the action being Replevin. The Plaintiffs below should have alleged that the Defendant *wrongfully* took the property. The language of the Statute under which the action was brought, I think such as to require it, and was this a case of first impression, I should be inclined to the opinion that the defect or omission would sustain a motion in arrest of judgment after verdict, or a writ of Error after judgment. The Statute of Replevin of New York, was, in this respect, precisely like the Statute of Wisconsin, under which this action was brought. In the case of Reynolds *vs.* Lounsbury, (6 *Hill's Rep.* 534,) which arose under the New York Statute of Replevin, this very question was made and decided. Bronson J., in delivering the opinion of the Court, said, "The Plaintiff should have alleged that the Defendant *wrongfully* took the property; but the defect is cured by the verdict. We must now presume that the Court would not have allowed a recovery unless it appeared that the taking was wrongful." This authority is too direct and of too high a character to be disregarded, especially upon a doubtful question like this. I therefore adopt the opinion of the Supreme Court of New York upon this question, and hold that the said defect in the declaration in this case, is cured by the verdict.

Before considering the other questions in this case, it is best to define the issue between the parties and their respective rights under it.

The declaration is in Replevin in the *cepit*—alleging that the Defendent below took the property and unjustly detained the same, &c. The plea is *non cepit*—that the Defendant below did not take and detain the property in manner and form, &c.

The Plaintiff in Error insists that this issue involves the question of title to the property—that the Plaintiffs below, could not, under this issue, recover the property without establishing, by proof upon the trial, their title to it, and that if the Defendant below had succeeded upon the trial of the issue, he would have been entitled to judgment *pro retorno habendo.*

The Plaintiff in error claims that, under the Statute of Wisconsin in force here when the action was brought, this is the effect and extent of the issue made by his plea, because the declaration alleges and the plea denies the unjust detention as well as the taking. He is manifestly wrong in this position.

The Statute of Wisconsin gives the action of Replevin in two distinct classes of cases and defines the effect of the plea of the general issue in each class.

1. It retains and simplifies the proceedings in the common law action of Replevin, which could be maintained only in cases in which the wrongful *taking* of the property was alleged.

2. As a substitute for the common law action of *detinue*, (which was abolished,) it gives the action of Replevin in cases in which the wrongful detention only, and not the wrongful taking is complained of.

In the former class of cases, the wrongful taking is the gist of the action, and the Statute is silent as to what the declaration shall contain; thus leaving the declaration in such a case to be guided and governed by the rules of pleading applicable thereto in the common law action of Replevin. But the Statute declares that, "the plea of the general issue shall be as heretofore (referring directly to the form of the plea of the general issue in the action at common law,) that the Defendant did not take," &c., and that "such plea shall put in issue, not only the taking, * * * but such taking in the place stated where the place is material." The only change which the Statute makes in the effect of this plea is this—that it does not put in issue the place of the taking, unless the place be material.

At common law this plea put in issue the place of taking in all cases, and required the Plaintiff to prove the taking in the place stated, or fail in his action.

In the latter class of cases, the Statute directs what the declaration shall contain as well as what the plea of the general issue shall be. This plea, which is directly responsive to the allegation which the Statute requires the declaration to contain, is exactly the same that the plea of the general issue, —*non detinet*—was in the old action of detinue. The Statute declares that this plea "shall put in issue, not only the detention of the goods, &c., but also the property of the Plaintiff therein." Such was the effect of the same plea in the old action of detinue. It is only in this class of actions of Replevin, in which the wrongful detention is, as it was in the old action of detinue, the gist of the action, that the plea of *non detinet* is allowable, and it is this plea only which the Statute declares, shall put in issue the Plaintiff's title to the property in question.

In each of these two classes of cases in Replevin, the plea of the general issue as prescribed by the Statute, is based upon this well established rule of common law pleading,—that it is the proper office of the plea of the general issue to deny the gist of action in which it is pleaded, and make the issue thereon.

The taking of the property being complained of in this case, it falls within the class first above stated; consequently the declaration plea and issue must be controlled by the common law rules governing the action, except so far as the effect of the plea is relaxed by the provisions of the Statute—a modification relieving the Plaintiffs below from making, in this case, proof of a taking in the place stated in their declaration,—the place not being material in the case, if within the county. The declaration is in the form used at common law, (except the absence of the word "wrongful" the question upon which has been disposed of,) alleging that the Defendant took the property and detained the same against sureties and pledges until, &c. Though a detainer is, in such cases, always alleged to show that the necessity for the writ continued until its issuance, the taking is the gist of the action, upon which alone can an issue be formed by the single plea of the general

issue—*non cepit*. The detainer in such a case is not traversable under that plea. The Plaintiff need only prove the wrongful taking to entitle him to a verdict. He need not go farther and prove the detainer, for a wrongful taking is *ipso facto* a wrongful detainer. A plea of *non detinet* in such a case would be a nullity, and a like plea included in a plea of *non cepit*, as in this case, is mere surplusage.

It is an indisputable rule at common law, that the plea of *non cepit* in Replevin puts in issue only the taking of the property in the place stated, and does not involve the question of title, or entitle the Defendant to judgment for a return of the property, though he succeeded upon the trial. 2 *Greenleaf's Ev.* § 562.

The sections of the Statute of Wisconsin defining the pleas and the effect of the pleas of the general issue in Replevin are literal transcripts from the New York Statute of Replevin.

The Courts of New York, during the whole time while the Statute of Replevin of that State was in force, applied to the issue upon *non cepit* in Replevin, the common law rules in every respect, except to dispense with the proof of the taking in the place stated, in cases in which the place was not material. 3 *Wend. Rep.* 667. 4 *ib.* 216. 8 *ib.* 448. 15 *ib.* 324. 3 *Comstock's Rep.* 506.

I think the rule there adopted, right, and founded upon the correct construction of the Statute applied to the pre-existing rules of the common law with reference to which it was enacted.

It follows that the only question at issue to be determined by the trial of this cause in the District Court was this,—did the Defendant below wrongfully take the property described in the declaration?

That he took it, the Defendant below, himself, testified. He took it under a contract of purchase from Mr. Perkins, but he could not, under the issue, avail himself of Perkins' title or lien, or of his own title derived from Perkins, as a defence. Had he been able to testify or show that Perkins was, at the time of making the contract of sale, in the actual and lawful possession of the property, and that he took it by *actual delivery* from Perkins, it would have been a competent and good

defence, even under this issue. It would have purged the taking of tortiousness,—not because it would have been accompanied with a title or transfer of title, but because it would have been without force and by the consent and *delivery* of a person or bailee having the lawful possession. Admitting that Perkins had the actual and lawful possession under a valid lien, the testimony of the Defendant below does not show that Perkins *delivered* the property to him,—so as to bring the case within the principle stated, and without a delivery—all the delivery of which the property was susceptible, the taking of the Defendant below was in the law wrongful. 1 *Wend. Rep.* 109; 19 *ib* 431; 3 *Com'k Rep.* 506. It does not appear that this question was raised upon the trial in the Court below.

The District Court did not err in denying the motion of the Defendant below for a continuance. The absent evidence, as set forth in the affidavits for the continuance, was not pertinent to or admissible under the issue joined in the case. It referred exclusively to the question of title to the property.

For the same reason the exceptions taken by the Defendant below to the decisions of the District Court admitting in evidence the deposition of G. W. Brownell, and the contract between the Plaintiffs below and McLaughlin, and rejecting the testimony of Mr. Ames, are not well founded. The admission or rejection of evidence to prove a fact admitted by the pleadings is not error. Such evidence is merely redundant, and whether it be competent or incompetent, sufficient or insufficient to prove the fact so admitted, it does not in the least change the case. To illustrate, suppose in an action of debt on bond, the Defendant pleads only *solvit ad diem* which admits the execution of the bond, would it be error for which the judgment against the Defendant would be reversed, for the Court to receive evidence offered by the Plaintiff to prove, simply, the execution of the bond? and would it make any difference whether such evidence was competent or incompetent for that single purpose? I think not, because it would neither strengthen, weaken or waive the Defendant's admission on the record by which he was stopped from denying the execution of the bond. So in this case the Defendant below, by his single plea of *non cepit*, admitted on the record the fact

that the property was the Plaintiff's and he was thereby estopped from denying it. Though the Plaintiffs below offered, and the Court admitted the said contract and deposition in evidence to prove that fact, it neither strengthened, weakened or waived the admission thereof on the record; consequently it could not, under the issue, injure the Defendant below or aggravate the injury which he had done himself by his plea. The evidence was certainly unnecessary to the admitted title to the property. Had such title been in issue, it would have been material to that question, and made it incumbent upon this Court to pronounce upon every exception to it. But as the title to the property was not in controversy, and this evidence of title merely redundant and useless, it is not necessary to examine the specific objections made to either the said contract or depositions.

The District Court was clearly right in rejecting the evidence of Mr. Ames offered by the Defendant below to controvert the admission and overrule the estoppel made by his plea.

The identity of the property was a proper and necessary subject of proof upon the trial, and the deposition of Brownell had some reference to it. This would have made it necessary for this Court to pass upon all the objections made to that deposition by the Defendant below, had he not by his own testimony on the trial, put the question of identity at rest. He testified how, why and where he took the property; to what place he was going and how far he had got with it, when it was replevied and taken from him, and then said, with reference to the lumber, "it is the same lumber in controversy," and relative to the lath on the raft of lumber, he added that they were "the same lath in controversy in this suit." After thus testifying, the Defendant could not consistently dispute the identity of the property.

A party waives and defeats the effect of his exception founded on the absence, or erroneous admission, of evidence of a fact against him, if he afterwards in his own behalf prove the same fact or produce and insist upon proper evidence of it. 16 *Wend. Rep.* 663; 2 *Hill's Rep.* 206, 620; 7 *Wend. Rep.* 377. This exception is within that rule, which loses nothing of its force by its application to the testimony of the party

himself, voluntarily given in his own favor, under the Statute, declaring parties competent witnesses,—a Statute which, being only remedial, applied as well to cases pending at the time when it took effect as to cases commenced after that time.

The Defendant below took exceptions to four distinct points in the charge or instructions of the District Court to the jury in this case. These exceptions, like the questions upon the admission of evidence in the case, must be considered with reference to the only issue made by the pleading therein. To do this properly, it will be useful to advert to a rule which has long obtained and is well settled, and which is applicable to the questions which arose upon the admission of evidence in this case as well as to those made upon the exceptions to the charge of the Court below to the jury. The rule referred to is this: that even upon a bill of exceptions, an error in the Court below, which, on its face and by legal necessity, could do no injury, is not cause for a new trial. *The People vs. Wiley*, 3 *Hill's Rep.* 195; *Willoughby vs. Comstock*, *ib.* 392; *Hayden vs. Palmer*, 2 *Hill's Rep.* 206; 23 *Wend. Rep.* 79.

The first, third and fourth exceptions to the charge of the District Court have reference exclusively to the question of title to the property, and could not, by any legal possibility, have any application to the only issue upon which the jury were to pass,—that of the wrongful taking. Had the title to the property been in issue, these three exceptions would have been pertinent, though not well taken; for they were correct in principle and would have been proper upon an issue of title. As the case stands, these instructions and the exceptions to them are wholly outside of the issue, and consequently they show upon their face, that, even if they had been erroneous in principle, they could not, by any legal necessity, have done any injury to the Defendant below.

The second exception is within the issue, and is taken to an instruction given by the District Court to the jury in the following language: "That if the jury believe from the evidence that the lumber in controversy was forcibly taken from the possession of the Plaintiffs after delivery to them by those under whom the Defendant claims title, they must find for the Plaintiffs."

There is no error against the Defendant below in this instruction. It is more favorable to him than he had any legal right to ask. Had the jury found a verdict for the Defendant below the Plaintiffs might well have complained of this instruction, for it imposed improper restrictions upon their right to recover under the issue. They had a right to have the jury instructed to the effect that if they believed from the evidence that the Defendant below, wrongfully took the property in controversy previous to the commencement of the action, they ought to find a verdict for the Plaintiffs below. It was Error against the Plaintiffs below, for Court to so instruct the jury as to confine or limit their right to recover to a forcible taking of the property from their possession after a delivery to them by those under whom the Defendant below claimed title. The title to the property was, by the plea of the Defendant below, admitted to be in the Plaintiffs below, and title alone without any other possession than that which it constructively give, is sufficient to maintain the action in favor of the owner against one who wrongfully takes possession. This exception on the part of the Defendant below, is not well taken.

The District Court did not commit any Error against the Defendant below, in refusing some and qualifying others of the instructions asked by him to be given to the jury. They all related to the title to the property or to an outstanding right of possession under a lien, which is a special title,—matters which the defendant below had no legal right to set up, without pleading them or giving notice thereof with his plea of the general issue. The exceptions to these decisions of the District Court are all within the principle applied to the first, third and fourth exceptions taken to the charge of the District Court to the jury. The lien, if well founded, was a personal privilege of the holder, and when he sold the property to the Defendant below, without due process of law, pursuant to the Statute of Wisconsin, authorizing proceedings for the enforcement of such lien against the property, he forfeited his lien, and it was wholly gone. Neither he or the person to whom he sold the property, could after such sale, set up such lien against the owner of the general title, even if it had been properly pleaded. Though a lien may be assignable and may

be assigned as such without forfeiture, the assignment must be made in strict subordination to, and not in violation of the property of the principal owner. If the lien-holder sell the property, as in this case, and not merely the lien, the sale is tortious and works a forfeiture of the lien. All the benefit which the purchaser in such case can derive from such a purchase is a protection against an action of trespass or replevin, in the *cepit* in favor of the principal owner, if the property be *actually delivered* to him by the lien holder. Unless the property be so actually delivered to him, the purchase affords him no protection whatever. *Nash vs. Mosher* 19, *Wend. Rep.* 431; *Ely vs. Ehle*, 3 *Com'k Rep.* 506.

Was there any error in the action of the District Court, subsequent to the submission of the case to the jury? And if so, was it of such a character, affecting the merits of the issue, as to be the subject of review on error?

The length of time during which a jury shall be kept together for consultation is a matter within the discretion of the Court. So, when a jury come into Court and report a disagreement, it rests in the discretion of the Court, whether they shall be discharged or sent out again for further consultation. The exercise of this discretion cannot be reviewed on error. *The People vs. Green*, 13 *Wend. Rep.* 55.

The first time the jury returned into Court after they had been charged and sent out, they reported that they were unable to agree and asked for further instructions relative to the testimony. The Court answered "that the matter requested by them was a matter of fact for them to ascertain, and exclusively belonged to them to find, and that he could not instruct them as requested." So far the Defendant below had no cause to complain, for the Court was within the strictest rules of propriety. But he added "that for the information of the jury the Court would read from the minutes of the trial the testimony given and submitted during the trial," and he commenced to do so. This would have been erroneous had either party objected to it; but so far from objecting, both parties consented, that the jury might, instead of waiting to hear them read, take the minutes and retire for further consultation. Neither party can now complain of that.

The Court at that time, through inadvertence, omitted to read or give to the jury, that part of the deposition of Brownell which had been read to them as evidence upon the trial. Some four hours afterwards the Court recalled the jury and stated to them his omission and then read to them that portion of the said deposition which had been admitted in evidence upon the trial. The Defendant below made no separate and distinct objection to this act of the Court, but includes it in one general objection to all the proceedings subsequent to the charge to the jury and previous to the rendition of the verdict. Though the exception is thus general and, in strict practice, of doubtful validity, I prefer, in considering it, to regard it as sufficient. The Court proposed to read to the jury "the testimony given and submitted during the trial." This deposition was part of that testimony and if he submitted any he should have submitted the whole. The testimony means the whole testimony. I think the fair construction of the consent given by the parties that the jury might take the minutes of the testimony, included such parts of this deposition as had been used upon the trial. It must be so considered in the absence of any separate and specific objection at the time when it was read. Under the circumstances, as they appear upon the record, there was no impropriety in so reading that deposition to the jury. *Vide Henlow vs. Leonard*, 7 *John. R.* 250.

But if there had been, no injury could have resulted from it to the Defendant, because the testimony was, as is hereinbefore determined, immaterial to the issue then in the hands of the jury.

The questions upon the verdict remain to be considered, and like the other questions in the case, they must be considered with reference to the only issue made by the pleadings.

So much of the verdict as finds the title and right of possession of the property in controversy to be in the Plaintiffs below, is outside of the issue—determines a fact not disputed, but directly admitted by the pleadings, and must therefore be rejected as surplusage. *Patterson vs. U. S.*, 2 *Wheat. R.* 221. *Bacon vs. Callendar*, 6 *Mass. R.* 303. *Leineweaver vs. Stoever*, 17. *Sergeant & Rawles*, *R.* 297. *Wells vs. Garland*, 2 *Virg. Cas.* 471. *Pejepscot Proprietors vs. Nicholas* 1, *Fairf. R.*

256. It cannot vitiate the remaining part of the verdict, which must stand or fall by the legal effect of the terms in which it was given. Rejecting the surplusage, the verdict would stand in the following language: "The jury find and return a verdict for said Plaintiffs, and against said Defendants, and costs of suit."

It is objected that "this verdict does not find that the property was taken or detained by the Defendants as is alleged in the declaration and denied by the plea."

I think it does so find, and as plainly as if the jury had formally said "that the Defendant did take and detain the property described in the declaration in manner and form,"&c. That such was the intention of the jury is clearly manifest; and when the intention of the jury is unequivocally, though it may be informally expressed, and is responsive to the Court, it is the obvious duty of the Court to give effect to it by rendering judgment thereon. Though a verdict cannot be changed in point of substance, it may be so amended in point of form or language as to give the real intention full expression in proper legal terms. It is usual for the Clerk, under the direction of the Court, to enter it in proper form at the time of its rendition, however informally it may be pronounced by the jury; and if the Clerk commit an error in making the entry, it may be afterwards amended by the Court, according to the truth. *Graham's Practice*, 662, *2d Ed.* It is the constant and almost invariable practice for juries upon the trials of issues in personal actions, to render their verdicts, when in favor of the Plaintiff, in this language: "We find for the Plaintiff Dollars," inserting the amount of damages,—and when in favor of the Defendant, in this language: "We find for the Defendant"; or this: "We find no cause of action." I am not aware of any case in which such a verdict has been held bad for uncertainty or insufficiency. On the contrary, such verdicts have always within the limits of my reading and practice, been received by the Courts and put in form proper for judgment; and under the *nisi prius* system which formerly prevailed in New York, upon such verdicts the *postea* was always made up in full form according to the effect of the intent of the verdict upon the issue. It was that the jury "upon their oaths do say that the said Defendant did (or

"did not" according to the real finding) undertake and promise (or "is guilty," or "not guilty," according to the issue) in manner and form as the said Plaintiff has above thereof complained against him, and (if the verdict was for the Plaintiff) they assess the damages," &c.

The verdict in this case is quite as clear, definite, direct and responsive to the issue as those mentioned above. It is *in terms* not only "for the Plaintiff," but "against the Defendant." It must be held good unless it be bad for other reasons.

It was urged upon the argument, though not made a point in the brief, that the whole verdict was erroneous because the jury thereby awarded costs to the Plaintiffs below. The jury did not specify any amount of costs.

Admitting that it was beyond the province and power of the jury to determine which party was entitled to costs, the verdict would be void to that extent only. It would not vitiate their finding upon the issue. The part relating to costs would be rejected as surplusage. 2 *Wheat. R.* 221. 6 *Mass. R.* 303. But is it true that the jury have no power to find costs? A verdict for the Plaintiff in strict form at common law always contains a nominal sum for costs, and that forms the foundation for the Court to adjudge costs *of increase* (the taxable costs) to the party. Whether or not it be proper under either the old system of practice in Wisconsin, or our present system, for the jury to find costs, it is not necessary now to decide, for that part of the verdict in this case, not finding even a nominal sum for costs, (and it could not properly do more,) is void for uncertainty, and must in any event be rejected as surplusage. Judgment for costs must in this case be given or withheld by virtue of the statute of costs alone.

The jury did not in this case assess to the Plaintiffs any damages, nor did they assess the value of the property in controversy, as the statute of Wisconsin required. The Plaintiff in error now insists that these omissions are fatal to the verdict, and that no judgment could be legally rendered upon it.

The Statute of Wisconsin under which this action was commenced, provided that "if upon the trial of the cause [upon issue of fact] the verdict be in favor of the Plaintiff, the same jury shall assess the damages which he has sustained," &c.,

and that "it shall also be the duty of the jury upon such trial of the cause **** to assess the value of the goods and chattels specified in the declaration."

The question arising upon the want of an assessment of damages, is settled by both general principles and adjudicated cases. Whenever a Plaintiff recovers upon the whole record, whether the issue or issues be of law or of fact, or both, he is, of course, and as a matter of legal right, entitled to judgment for nominal damages; and if such recovery be by the verdict of a jury upon an issue of fact, and the jury fail to assess any damages by the verdict, the Court in which the verdict was rendered, or the appellate Court to which the case may be taken, may amend the verdict by adding nominal damages. In such case the judgment will not be arrested or reversed for that cause alone, but the Court will amend the verdict by adding thereto, what the law implies in every case of legal recovery, nominal damages at least, or consider it done by the statute of jeofails and amendments. 7 *Cow. R.* 29, 425. 3 *Wend. R.* 667. 12 *Wend. R.* 161. 8 *Cow. R.* 652, *&c.*

The counsel for the respective parties differ in relation to the statute to which this Court ought to look in solving the question growing out of the absence of any assessment of value of the property by the verdict—the suit having been commenced under the old statute of Wisconsin, and the trial had and verdict rendered since the Revised Statutes of Minnesota took effect. The Plaintiff in error insists that it must be controlled by the old statutes of Wisconsin, while the Defendants in error contend that the Revised Statutes of Minnesota must govern. As it is somewhat doubtful which of these two Statutes ought to be applied, and as the Plaintiff in error contends that the verdict is, for this reason, fatally defective under either, I prefer to consider it with reference to the old Statutes of Wisconsin. I do this more readily because, to my mind, it is very clear that this case is not one in which the jury would have been required by Sec. 38 of Chap. 71 (page 356) of the Rev. Stat. of Minnesota, to assess the value of the property, because,

First, The property had been delivered to the Plaintiffs below under the writ of Replevin,

And, *Second*, The Defendant below had not by his plea

claimed a return thereof, or formed an issue entitling him to judgment for a return thereof upon a verdict in his favor.

Under that Statute it is only in cases in which the verdict may require a change, the possession of the property or payment therefor, that the value of the property is required to be assessed, and the obvious purpose of that assessment is to enable the Court to render judgment for the possession or return of the property, or for the assessed value thereof, in case a return or delivery cannot be had, as is provided by Sec. 70 of the same Chap. (p. 360.)

The Statute of Wisconsin is in direct terms, that the jury shall assess the value of the property, and it makes no distinction in this respect, between different cases, having different issues requiring different judgments. Is this Statute to be so construed as to be deemed mandatory and arbitrarily imperative in all cases, whether such assessment be necessary to the judgment upon the issue, or not? Or is it to be construed as directory only and not to be necessarily followed in cases in which such assessment is not required for the purposes of the judgment authorized by the Statute to be rendered upon the issue? I think the latter construction the reasonable and true one. The former would, in many cases, make such assessment a mere troublesome and sometimes expensive performance of legal nonsense.

In cases in which the Plaintiff failed to obtain the property on his writ of Replevin, and recovered upon the whole record, the Statute authorized a judgment in his favor, that the property be replevied and delivered to him, or in failure thereof, that he recover from the Defendant the assessed value of it. The necessity of an assessment of the value in such cases is obvious. In cases in which the Defendant, after having pleaded a plea entitling him to a return of the property replevied from him, succeeded upon the trial, he could by the Statute have judgment for a return or for the assessed value of the property, at his election. The necessity for an assessment in such cases is also obvious. So it is in cases in which the Defendant had so pleaded and the verdict was for the Plaintiff for part of the property and in favor of the Defendant for the residue. And so in cases where the Plaintiff or Defendant claimed under a

lien for a sum less than the value of the property. It was, doubtless, with reference to and for the purposes of the judgments authorized by the Statute to be rendered in these and the like cases and with reference to costs that the Statute required such assessment of the value of the property to be included in the verdict. But in a case like the one at bar, in which the property was delivered to the Plaintiff on his writ of replevin, and in which the Defendant could not under his plea, possibly have judgment for a return on a verdict in his favor, such assessment could not, it seems to me, in view of the Statute, and its object and design, be deemed to be an indispensable attribute of the verdict, which could determine nothing between the parties but the single act of taking, or an absolute pre-requisite to judgment thereon.

The decision in the case of *Hawley vs. Green & Brooks*, 18 *Wend. Rep.* 654, confirms me in this view. That case arose under a section of the Revised Statutes of New York in the same language used in the section of the Statute of Wisconsin under consideration, and the verdict in that case did not contain any assessment of the value of the property. The Plaintiff perfected and collected his judgment for costs of increase. The Defendant afterwards moved to set aside the judgment as to such costs, and that the Plaintiff refused. The motion was granted on the ground that the better construction of the Statute was, that such assessment of value was necessary to judgment for costs. The Defendant did not in that case attempt to disturb the judgment for nominal damages and nominal costs founded upon the verdict. That part of that judgment was thus admitted to be regular and valid, and to that extent that case is an authority in this.

The code of procedure in New York, from which our Statute upon this subject is copied, dispenses with such assessment of value in cases in which it is not necessary to the judgment to be rendered. While this change preserves all the rights and protects all the interests of parties dependent upon such assessment, it manifests quite clearly the design and purposes thereof under the old Statute, and that it was never necessary to make such assessment, or reasonable to require it to be made, in cases in which it could not effect the proper judgment upon the issue.

The judgment for costs in this case must rest upon the Statutes of this Territory, in force at the time of the rendition of the verdict. Section 62, page 15, of the Amendments to the Revised Statutes reaches this subject, if it does not also embrace the question arising upon the want of an assessment of the value of the property by the verdict. Section 2 of Chap. 72 of the Revised Statutes (p. 370) prescribes the cases in which costs are allowed, *of course*, to the Plaintiff upon a judgment in his favor, and sub. div. 2 of that section specifies as such a case "an action to recover the possession of personal property." Sub. div. 4 of the same section declares that in such an action the Plaintiff shall recover no more costs and charges than damages, unless he recover at least fifty dollars damages, or property, the assessed value of which, with the damages, amounts to fifty dollars.

In this case, the Plaintiffs below, by the legal effect of the verdict, recovered only nominal damages. The value of the property was not assessed. Hence that value cannot be applied to this Statute to establish the right of the Plaintiffs below to costs. Consequently, they cannot have judgment for any more costs than damages, and those are nominal —six cents. The Plaintiffs below may, if they choose, waive this error against them and abide by the legal effect of the verdict. The Defendant below cannot object that the verdict and Statute do not authorize a judgment for full costs against him. He is not legally injured but actually benefitted by it.

The decision of the District Court on the motion for a new trial cannot be reviewed in error. It is not a proper subject of exception for the purposes of a writ of error.

The result of the determination of the numerous questions in this case, is this: The verdict and judgment must be, or be deemed to be, so amended as to include an assessment of and judgment for the damages sustained by the Plaintiffs below by reason of the taking and detention of the property described in the declaration, at six cents. The judgment in favor of the Plaintiffs below for costs (which the record shows are yet unliquidated) must be limited to the same sum. And the judgment thus amended must be affirmed.

I do not think that either party ought to recover costs against

the other, in this Court. The Plaintiff in error is not entitled to the judgment he seeks here, because there was no substantial error affecting the merits under the issue in the Court below. Therefore he is not entitled to costs here. The Defendants in error have a judgment valid in substance, but defective in form—requiring it to be, or be deemed to be, so amended in this Court as to cure such defects. They stand, in some degree, upon the favor of this Court, and hence, in my judgment, they are not here entitled to costs.

PASCHAL ST. MARTIN, Respondent, *vs.* STEPHEN DESNOYER, Appellant.

Words charging the commission of an act which, if committed, would subject the person charged therewith to indictment at common law, are actionable *per se*, and the words, "You have stolen my belt," are therefore actionable *in themselves*.

Where words alleged to be slanderous are of equivocal import, it is not error to submit to the Jury the question of the intent with which the words were spoken.

A verdict will be set aside which is the quotient arising from the division by twelve of the aggegate of twelve different sums specified by each individual juror, but it is incompetent to prove such facts, or any facts impeaching the verdict, by jurors themselves, or by third persons upon hearsay from jurors.

Is it error for Counsel in addressing the Jury to comment upon the amount of a former verdict in the same action? If it be, it stands upon a footing with the introduction of improper evidence, and, unless objection is made on the trial, cannot be assigned as error.

The question of damages is the peculiar province of Juries; and unless they are so excessive as to warrant the inference of prejudice, partiality or corruption, a verdict will not be disturbed on the ground of excessive damages.

Upon an Appeal from an order refusing to award a new trial, this Court has no power to affirm the judgment with twelve per cent. damages and double costs.

This was an action of Slander, tried at the April Term of the District Court, in the County of Ramsey. The Declaration charged, among others, the utterance of the following slanderous words: "You stole my belt!" "You have stolen my belt. You might as well have stolen my belt, as you

broke open my two *cassets* (trunks) two years ago!" The Defendant pleaded the general issue. After the testimony was closed, the Defendant's counsel asked the Court to charge the jury, that the words "You have stolen my belt" were not actionable, and no recovery could be had without proof of special damage; and that the words, "You have stolen my belt, as you broke open my two *cassets* (trunks) two years ago," were not actionable, and the Defendant was not liable without proof of special damage. His Honor, the Judge, refused so to charge, and instructed the jury that, if they believed the Defendant intended to charge the Plaintiff with stealing, the words were actionable. To all of which the Defendant's counsel excepted. The Jury found a verdict for the Plaintiff for $212 50.

On the 11th day of May, 1852, the Defendant moved for a new trial, upon the exceptions taken to the charge.

And further, because the jury made up their verdict by agreeing each to specify a sum as due to the Plaintiff, to divide the aggregate of the sums so specified, by twelve, and to take the quotient as the result.

Also, because the Counsel of the Plaintiff, in his address to the jury, commented upon the amount of a verdict rendered upon a former trial of the same action.

Also, because the damages were excessive.

The affidavits of three jurors were introduced to show the manner in which the verdict was made up, and of one of the Defendant's Attorneys to show the objectionable matter of the address of Plaintiff's Counsel to the jury.

A new trial was denied, and the cause came into this Court upon an Appeal from the order denying a new trial.

Rice, Hollinshead & Becker, for Appellant.

I. Atwater, for Appellee.

By the Court.—Chatfield, J. This is an action on the case for verbal Slander, and it is brought into this Court by Appeal from an order made therein overruling the Defendant's motion for a new trial.

The causes urged for a new trial will be considered in the order in which they are stated in the motion.

The first point is, that "the Judge (before whom the cause was tried) erred, in charging the jury that the words '*You have stolen my belt*' are actionable."

The rule is: that words charging a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment, are actionable *per se*. *Young vs. Miller*, 3 *Hill's Rep.* 21, and the cases there referred to by the Court. Stealing or larceny is an act—a crime, thus punishable. All larcenies were, at common law, felonies. The words "You have stolen my belt" contain a direct and unequivocal accusation of the crime of larceny, and are therefore actionable. This instruction to the jury, given as it was in the abstract, and without assuming that the words were proved, was correct.

The second point is, that "the Judge erred in charging the jury that the words 'You have stolen my belt; you might as well steal my belt, as you broke open my cassets two years ago,' are actionable."

This point is not accurately stated according to the instruction given by the Judge, as contained in the bill of exceptions. It is there stated that upon these words the Judge charged the jury, "that if they believed the Defendant intended to charge the Plaintiff with stealing, the words were actionable. He thus left it to the jury to ascertain and determine the meaning and intent of the words—to give them construction and application—and, in effect, instructed them, as a matter of law, that the words were actionable, or not, as they should or should not find that the Defendant intended thereby to charge the Plaintiff with the crime of stealing—that if the Defendant did so intend, the words were actionable: otherwise, not. The question of intent was properly left to the jury, and the rule of law thereon was correctly given to them.

The third point is, that "the jury made up their verdict by agreeing each to specify a sum as due to the Plaintiff, and divide the aggregate of the sums so specified by 12, and to take the quotient as the result."

If this point, in the form in which it is stated, is sustained by competent proof, it is conclusive against the verdict. The evidence adduced in support of it is,—

First. The affidavit of Mr. Hollinshead, one of the Counsel for the Defendant,—that two of the jurors of the said jury informed him that the verdict "was made up by agreeing that each juror should specify a sum as due to the Plaintiff: that the sums so specified should be added together, and the aggregate amount divided by 12, and that the quotient should be their verdict; that the agreement thus made was carried out, and the verdict rendered by the jury was the result thereof."

Second. The affidavits of two of the said jurors to the same effect and extent: one of whom was one of the informants of Mr. Hollinshead.

The Plaintiff objects, that these affidavits are neither admissable nor competent evidence to prove the fact sought to be established thereby. Are they?

It is now quite conclusively settled that the affidavits of jurors will not be received when offered to prove misbehavior in the jury with regard to the verdict. 1 *Greenleaf's Ev.* Sec. 252, *A.* This rule is stated in very strong language in *Graham's Practice, second edition*, p. 315: "In no case will the affidavits of jurors be received to impeach their verdict: the fact must be established by other evidence." The affidavits of the jurors offered in this case, to show misconduct on their part, and thus impeach and avoid the verdict, must be excluded.

The policy and reasons which exclude, in such cases, the affidavits of jurors, apply with increased force against their declarations without oath to third persons. If it is not properly allowable to put a verdict within the power of the affidavits of jurors, how much less allowable it must be to place the same verdict at the mercy of their mere declarations. It would be to receive, as competent evidence, hearsay,—the acknowledged source of which is incompetent. The proposition palpably exposes its own error and impropriety. The affidavit of Mr. Hollinshead must also be excluded.

The affidavits upon which this allegation against the verdict is founded being excluded, the point is without support, and must be disregarded. And it would seem to be unnecessary to refer to the joint affidavit of three members of the jury,

produced by the Plaintiffs to controvert it. It may, however, be proper to say that this affidavit was admissible to support the verdict, had the evidence to impeach it been competent. It shows that the amount of the verdict was arrived at in the manner alleged by the Defendant, but it very explicitly denies that there was any agreement among the jurors by which they were to be bound by the result or precluded from objecting to it. It states, substantially, that each juror was at perfect liberty to object to the result—and they did object—if not satisfied: and that the operation was several times repeated; that it was proposed as a means of arriving at a fair measure of damages,—and that the verdict, as finally rendered, was agreed to by discussion among the jurors as to its justice and cor rectness which took place after the sum had been so found.

The facts stated in this affidavit do not vitiate the verdict. To have that effect, it should appear that the jury, before ascertaining the quotient, agreed among themselves to abide at all events by the contingent result as their verdict, and that it was made up and rendered accordingly. *Graham's Pr. second ed.* 315. Such seems to be the rule.

The fourth point is, "that the Attorney for the Plaintiff, in addressing the jury, referred to, and urged, in support of his case, the amount of the verdict given on the former trial."

This point rests solely upon an affidavit stating the fact urged as error. The point is not of that kind or character that ought to be allowed to stand upon *ex parte* affidavits. The fact alleged must have transpired in the course of the proceedings upon the trial in Court, and in the presence of the Counsel for the opposite party. Errors thus occurring are the proper subjects to be included in a bill of exceptions or case, to be settled by the Judge upon notice to the opposite party.

To make this allegation of error—if good at all—effectual however presented, it should appear that the act complained of was objected to at the time, the objection overruled, and exception taken.

The rules governing the admission of evidence apply to and control the question made by this point; and it cannot be contended that the admission of improper evidence to the jury,

without objection, can be alleged as error upon affidavit after verdict.

The fifth point is, that "the damages allowed by the jury are excessive."

The action is for Slander. The damages assessed by the verdict are, $212 50. It does not appear that there was any evidence in the case to show what was the Defendant's personal or pecuniary rank and influence in society at the time when the slanderous words are alleged to have been spoken. The words were therefore given to the jury without any detraction from or aggravation to the injury of the Plaintiff, which their common and ordinary meaning and effect would naturally produce. It was exclusively the right and duty of the jury to determine the extent of such injury, and the amount of damages which the Plaintiff had sustained thereby; and in this, as in all kindred cases, the liquidation by the jury is conclusive: unless the sum be so excessively large and disproportionate as to warrant the inference that they were, in making up their verdict, improperly swayed by prejudice, preference, partiality, passion or corruption. The circumstances of this case will not warrant this Court in drawing any such inference.

The order from which the Appeal in this case was taken must be affirmed with costs.

The Plaintiff asks that the *judgment* be affirmed with twelve per cent. damages and double costs. If this Court was disposed to grant this request, it has not the power to do it.

First. Because the Appeal is not from the *judgment,* but from the order refusing a new trial; and,

Second. Because the section of the Statute under which the Plaintiff claims these allowances (*R. S.* 416, Sec. 26) does not apply to appeals. Double costs may, in the discretion of the Court, be awarded to "the party prevailing on a writ of Error"—not on an Appeal.

That section of the Statute has been so amended as to preclude the recovery of *damages* by the prevailing party on a writ of Error. *Amendments*, p. 13, Sec. 52.

ROSWELL P. RUSSELL, Respondent, *vs.* THE MINNESOTA OUTFIT, Appellants.

A. and B. are tenants in common of a Steamboat with others, and engaged with them in the transportation of freight for hire. A. is Captain of and authorized to transact business on behalf of the Boat. B. incurs a debt arising out of a contract of affreightment for C., and A. with the assent and authority of a majority of the owners, but without the knowledge of B., assigns the demand against B. to C. Such an assignment held to be valid, and an action thereon brought in the name of the assignee sustained.

Although A. and B. are tenants in common of the Boat itself, they are copartners as to its business, and all the laws governing copartnerships are applicable to their transactions.

The finding of a Referee upon questions of fact is conclusive, unless there are facts in his report or in the pleadings inconsistent with such finding.

The facts and the points made are stated in the opinion of the Court.

NORTH & SECOMBE, for Respondents.

AMES & VAN ETTEN, for Appellants.

By the Court.—SHERBURNE, J. This is an action in the nature of *indebitatus assumpsit*, to recover a sum of money alleged to be due from the Defendants on account of freighting done by the Steamboat Gov. Ramsey. The Plaintiff alleges an assignment of the demand to him from the proprietors of the Boat, by one Parker, agent for and part owner of said Steamboat, "for a valuable consideration."

The action was submitted to a Referee by the District Court, who reported in substance, among other things not material to the questions at issue here—that he had heard the parties and found that the steamboat Gov. Ramsey had done the freighting for the Defendants as alleged; that one Benjamin Parker was the commander and part owner of said boat, and was duly authorized as agent of the owners to settle all accounts for carrying freight on said boat and to transact all

business and make all contracts relating thereto; that said Parker, acting as such agent, and by the express authority and consent of those who owned a majority or greater portion of the stock in said boat, on the 15th day of March, 1853, sold and assigned to the Plaintiff in this action, the said account against the Defendants "for a valuable consideration;" that the Defendants were part owners of said steamboat during the time when said freighting was done, and were partners with the other owners of the boat in the transaction of said business of carrying freight, and as partners, were jointly interested with the other owners of said boat at the time said account was assigned, as aforesaid; that the assignment was made without the knowledge or consent of the Defendants, and that they had not received any portion of the proceeds of it; and that the Minnesota Outfit are indebted to the Plaintiff on account of the demand, as aforesaid, including debt and interest, in the sum of $825 44.

Upon this report, judgment was rendered for the plaintiff in the above sum, from which judgment the Defendants have appealed to this Court.

The Defendants claim that the judgment should be reversed for the following reasons:

First. The Defendants being jointly interested in the claim with the other part owners of the boat, and it having accrued in their joint favor, they were not divested of their interest and rights in it by the pretended sale and assignment made by Parker to the Plaintiff without their knowledge or consent, and Parker had no authority or power to make such sale and assignment.

Second. It does not appear from the report, and the fact is not found, that any sufficient or adequate consideration was paid by the Plaintiff, or passed between the parties, for such sale and assignment; nor what the character or amount of the consideration was, which must appear to enable the Plaintiff to recover.

Third. The Plaintiff, as assignee of the account, bought it subject to all equities, setoffs, or other defence, existing in favor of the Defendant at the time.

Fourth. The facts found and reported by the referee, show that the Defendants were tenants in common with the other part-owners in the boat at the time the freighting was done, and when the claim accrued, and were jointly entitled to the earnings of the boat and joint-owners of this account with the other parties. Therefore the facts found are strictly the subject matter of equity jurisdiction, for an equitable adjustment between the several owners aud for equitable relief only; and that can only be obtained upon a complaint properly framed, according to the facts found, and asking the appropriate relief. And no action in the nature of an action at law can be maintained against the Defendants for want of proper parties to it.

Fifth. The facts found and reported are strictly the subject matter for equity jurisdiction upon a complaint framed in conformity to the facts asking proper relief; and the action should have been in the nature of one in equity, and the rules and principles of equity law can only be applied to the facts of this case. The action as it is brought being strictly and purely an action of law, and the complaint containing only facts constituting a purely legal cause of action in assumpsit, is not sustained by the facts found, but in conflict with them, and no judgment can be sustained under it upon the facts found.

Sixth. The judgment below is not supported or warranted by the facts found by the referee, and is contrary to law and unjust to the Defendants.

There can be no doubt that if this action had been brought in its present form in the name of the proprietors or owners of the boat, it must have failed. The Statute provisions of 1853, abolishing the distinction between law and equity, has not changed the character of the relief to which a party is entitled, but only the form and manner of obtaining it. The Legislature may have power to authorize one copartner to bring his action against another, demanding a specific sum of money, in the form of an action at law; but it has made no such attempt. The form in this respect has not been changed. The rights of the parties remain the same as before the passage of the act referred to.

How far the act has changed or blended the forms of law and equity, it is impossible now to say. Different Judges of New York, of distinguished talent, have differed widely upon the question, and up to the present time no certain rules have been adopted by the Courts of that State which may be considered as safe guides of practice in all cases. New cases will continue to develope new difficulties, and many years must pass away before these difficulties can be entirely removed, the conflicting opinions of Courts harmonized, and a well-digested, safe, and certain code of practice brought into use.

There are, however, some requisites which appear so obvious in the forms of pleading under any system, that they may be assumed as necessary without fear of mistake. One is that the party who comes into Court to obtain relief, shall distinctly state in his bill, writ or complaint, the grounds upon which he demands relief and the relief which he demands. If this were not necessary, written pleadings would be a deception, wholly useless, except to mislead. The Statute upon this point is in harmony with the general principles of law and equity. Section 60 on page 337, provides that a complaint must contain—

"*Second*, A statement of the facts constituting the cause of of action 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.

"*Third, A demand of the relief to which the Plaintiff supposes himself entitled.* If the recovery of money be demanded, the amount thereof must be stated."

Even in form then, the Statute blending law and equity has not made and cannot make so important a change as might be inferred from a first reading of it. The complaint must, as before the passage of the act, be drawn with a special view to the relief demanded; and unless it is so drawn, the action must fail, except in cases where the error is cured by amendment. It follows, then, necessarily, that as an action at law cannot lie between co-partners in order to settle any question relating to their business as co-partners; and as this is purely an action at law, demanding no relief except judgment for a sum of money, it could not have been sustained if it had been brought in the name of the proprietors of the boat.

The questions to be considered further are—

First, Had the Company a legal right to assign the account? And if so,

Second, Did they, in fact, make a legal assignment of it to the Plaintiff?

Third, If a legal assignment was made to the Plaintiff, did it authorize him to maintain this action?

The authorities are conclusive upon the point that although the proprietors or owners of the boat were tenants in common as to the boat itself, yet as to the business of the boat—the freighting, &c.—they were co-partners, and therefore subject to the laws governing co-partners and determining their own rights and the rights of others. *See Story's Abbot on Shipping, page* 82, *and cases there cited.*

The Defendants, not as members of the copartnership, but in another and distinct capacity, employed the boat to perform services as alleged in the complaint to the amount found by the referee. The debt was the property—not of the individual members of the firm in equal shares, or otherwise, but of the firm as one individual. Why, then, had not the owners authority to assign it? It the Minnesota Outfit had given their promissory note to the Company, no doubt of the authority would be pretended. Nothing is more common than for one co-partner to give his private paper running to the firm, and for this paper to be endorsed by the firm and sold in the market. I see no difference and know of no legal distinction between such a case and the one at bar, except that in the latter, the Defendants have the right to interpose any equitable set-off they may have. The right to dispose of the partnership effects by an individual member of the partnership is unlimited. *See Collyer on Partnership, Book* 3, *Chap.* 1, *Sec.* 1, *and notes.* This debt was as fully a part of the partnership effects as it would have been if standing against a stranger to the firm; and if so, no reason occurs to me why it could not have been disposed of in like manner and for like reasons as other partnership effects.

The point made by the Defendants' counsel, that the Plaintiff, as assignee of the account, took it subject to all equities, set-off, or other defence existing in favor of the Defendants at

the time, cannot affect the authority of the Company to make the assignment. If the Defendants had any right to make such set-off or other defence, they should have set it up in their answer; but they have not done so. The answer admits the services and alleges that by agreement with the agent Parker, the freighting was to be paid for in certain shares in said boat. Whether or not such an agreement was made, was the material issue made by the pleadings. No reference is made in the answer to any set-off on account of the earnings of the boat, or for any other reason except as before stated. This objection, then, if it is really is one, was waived by the Defendants, and it is now too late to make it.

As to the earnings of the boat, however, it may be well doubted whether it would have availed them if made at the proper time. The consideration of the sale or assignment of the demand went to increase the partnership fund arising from the earnings of the boat, and the Defendants are owners of that fund in proportion to their shares in the boat. Whenever a dividend of the profits of the boat is made, or the business of the boat Company is closed, the Defendants are entitled to their just proportion. To allow them to deduct it in this action, would involve a general account and adjustment of all the co-partnership business growing out of the ownership of the boat, and between all the owners. There are no facts presented in the cause which can justify such a direction to the action, even if the right to require it had not been waived. It might operate with extreme hardship upon the Plaintiff, without affording any advantage to the Defendants to which they are equitably or legally entitled.

I do not say but a case might be presented which would authorize the Court to order a general account and final adjustment of the affairs of the Company, even in an action like the present. If it should appear from the answer of Defendants standing in the place of the present Defendants that they were to be injured on account of any fraudulent or wrongful appropriation of the partnership property, or that for some reason they would be unable in the final adjustment of their business to obtain their just rights if obliged to pay the apparent indebtedness, a case would be presented very different from the one before us.

But, *Secondly*, Did the Company make a legal assignment of the account to the Plaintiff?

The Referee reports that such an assignment was made, and for a "valuable consideration." This is conclusive, unless there are facts in his report or in the pleadings, inconsistent with such a finding. Parker, who in fact made the assignment, was a part owner of the boat, was commander of it, and was agent of the other owners. He had then all the authority which the Company had to make the transfer.

The objection to the assignment, that there does not appear to have been any adequate consideration for it, comes too late. The complaint alleges that the assignment was made for a valuable consideration. If the Defendants had moved at the proper time for an order to make the complaint more certain in this respect, it is possible that it would have been granted; but instead of doing so, or making any other objection to it, they took issue on the allegation of valuable consideration, and that issue was found against them. Not a single reason occurs to me in favor of sustaining the objection. If the Defendants had reason to believe that the consideration actually paid by the Plaintiff was of no adequate legal value, they should, at the proper time, have moved the Court for an order requiring the Referee to report the facts upon that branch of the case; but as no fact appears, this Court must be governed by the conclusions of the Referee. The assignment was properly made and must be considered good.

Thirdly, If a legal assignment to the Plaintiff was made, did it authorize him to maintain this action in his own name?

The general doctrine that Courts will protect the equitable interests of an assignee of a chose in action has been so long settled and so well understood, that no authority need be cited to support it. The Revised Statutes of the Territory not only authorize, but make it obligatory upon the Plaintiff to bring the action in his own name. *R. S. page* 333, *Sec.* 27. This would seem to be, and is decisive of the question. The reasons why the members of a partnership cannot go into a Court of law to adjust their mutual differences growing out of the business of the firm, do not apply to this case in any one particular. Here the parties are distinct. The same individuals are not

found both as Defendants and Plaintiffs. The issue between the parties is direct, plain, and simple, going only to the question of indebtedness. The co-partnership found is not by this action to be separated. One portion of it is not arrayed against the other, making a general account necessary. Indeed, it is hard to perceive why the action may not be as well sustained as if the Plaintiff had been the original creditor.

The judgment of the District Court must be affirmed with costs.

PHINEAS FREEMAN, Survivor, &c. Respondent, *vs.* JAMES CURRAN and WM. B. LAWLER, Appellants.

HAYES & SNOW, Respondents, *vs.* Same, Appellants.

LYNE, STARLING, ET. AL. Respondents, *vs.* Same, Appellants.

A denial of any knowledge or information sufficient to form a belief as to whether a Bill of Exchange made by the Plaintiff and accepted by the Defendants was presented at the place of payment indicated in the Bill, is a denial of an immaterial allegation.

Where a Plaintiff sues as survivor of a Co-partnership, a denial of any knowledge or information sufficient to form a belief as to the survivorship, or as to whether the Plaintiff was one of the copartners, is a denial of an immaterial allegation.

A denial that the Plaintiff is the legal owner and holder of the instrument sued upon, and of indebtedness, simply denies a conclusion of law, and is bad.

Where a complaint contains immaterial allegations, and the answer takes issue upon such allegations, it is doubted that a motion to strike out such denials, where they are coupled with other good matter of defence, would be entertained: otherwise, where the answer is entirely bad.

A motion to strike out an answer, and for judgment, need not be made within twenty days after the service of the answer.

Although, as a general rule, it is too late to move for judgment—notwithstanding the answer—after the action has been noticed for trial, exception will be made to this rule in cases where the answer contains no merits.

WILKINSON, BABCOCK & BRISBIN, for Appellants.

RICE, HOLLINSHEAD & BECKER, for Respondents.

The principles enunciated in the three foregoing cases are identical, and the facts are apparent from the opinion.

By the Court—WELCH, C. J. The Plaintiff brought an ac- in the District Court for the County of Ramsey, on a bill of exchange drawn by Charles P. Freeman & Co. on the Defendants, and payable to the order of Charles P. Freeman & Co. at the office of Carter & Co. Chicago.

The complaint is in the usual form. It avers, among other things, that the Plaintiff and Charles P. Freeman, since deceased, being partners in business, made their certain bill of exchange, by the name of Charles P. Freeman & Co.: that the bill was duly accepted by the Defendants, and afterwards was duly presented at the office of Carter & Co. and payment thereof demanded and refused; that the said Charles Freeman is now deceased, and that the Plaintiff, as surviving partner, is now the lawful owner and holder of said bill of exchange.

The Defendants in their answer admit that Charles P. Freeman & Co. made their certain bill of exchange as stated in the complaint, and that the Defendants accepted the bill as averred. The answer then denies any knowledge or information thereof sufficient to form a belief as to whether the bill was presented and payment demanded: as to whether the Plaintiff is surviving partner of the late firm of Charles P. Freeman & Co.: or as to whether the Plaintiff is the lawful owner and holder of the bill, or as to whether the Defendants are indebted to the Plaintiff.

On motion of Plaintiff's counsel, this answer was stricken out, and judgment rendered for the amount claimed in the complaint. From this judgment the Defendants have appealed to this Court.

The question presented is, whether there was any material issue of fact raised by the answer.

I will briefly examine the denials contained in the answer.

In the first place, Defendants deny any knowledge or information as to the presentment and demand for payment. There was no issue raised by this denial. It was unnecessary to aver or prove a presentment and demand at the office of Carter. If the Defendants had funds at the place of payment, which would have been paid on demand, they might have shown that fact in defence, and that would have relieved them from damages and costs, but not from the debt. 17 *Mass.* 389. 17 *John. R.* 248. 3 *Wend. R.* 1. 13 *Peters R.* 36.

The next denial is as follows: and the said Defendants say that they have no knowledge or information sufficient to form a belief as to whether the Plaintiff is the surviving partner of the late firm of Charles P. Freeman & Co., or as to whether Phineas Freeman was one of the members of that firm.

It will be observed that this part of the answer is evasive and does not directly meet the main allegation in the complaint. This allegation is, that the Plaintiff and Phineas Freeman made their certain bill of exchange by the name of Charles P. Freeman & Co. (Where an answer is put in for the evident purpose of delay, as is shown in this case, not only from the nature of the answer, but also from the fact that no request was made, to file an amended answer, which is always allowed upon affidavit of merits, it is not only proper, but strict justice requires that the party thus attempting to evade the law, should be held to its strict letter.)

Now the allegation of partnership was merely incidental, and was by way of recital merely. It was not necessary to make an averment of partnership in the complaint. It might be necessary to prove that Charles P. Freeman and Phineas Freeman were partners on the trial of an issue raised by a denial that Charles P. Freeman and Plaintiff executed the bill in question, but that main fact—the execution of the bill, is not denied, and consequently is admitted.

Now, it being admitted that Charles P. Freeman and the Plaintiff executed the bill in question, and it being also admitted that Charles P. Freeman is deceased, it is very clear that

Phineas Freeman would have the right to maintain this action, (in fact no other person could do so) even if it could not be shown that he and Charles P. Freeman were partners. It is not necessary, by any means, as counsel in their printed argument assume, that a partnership is always necessary to enable a survivor to sue in his own name. An action can be brought, not only by a surviving partner, but also by any survivor of parties who had a joint legal interest. 1 *Chitty Pl.* 21. In this case the interest of Charles P. and Phineas Freeman was joint, and consequently the survivor, Phineas Freeman could alone bring the action. It was urged upon the argument, that if the Freemans were not partners, the legal representatives of Charles should have been joined with the Plaintiff. This is a mistake, such a joinder would have been a fatal error. The Plaintiff and he alone was authorized to bring the suit. 2 *Mass.* 257.

The next denial is that the Defendants have no knowledge or information as to whether the Plaintiff is the legal owner and holder of the bill, &c.

Under the old practice an issue could not be raised by a denial of this kind. Has the code made any change in this regard? and here I would premise that counsel are mistaken in assuming that under the old system, "it was not necessary for the Plaintiff to aver or prove his interest in a negotiable note or bill." I apprehend no instance can be found in which a Plaintiff in an action upon a negotiable promissory note or bill ever recovered, where he did not aver and prove his interest in such note or bill. The rule, so far as negotiable paper is concerned, is the same now that it always was. The old rule required that the action should be brought by the person having the legal interest. The common law prohibited the assigment of a thing in action. The Courts of Equity, on the other hand, allowed, and protected the assignment. In equity therefore, the assignee could bring a suit upon a demand assigned, while the law looked upon him as having no rights in regard to it, and forbade his appearance in its Courts.

As commerce increased, and more liberal opinions obtained, the common law Courts began to look upon the assignee with some forbearance, and denied the right of the assignor to re-

lease the debt; but they still refused to recognize the right of the assignee to sue. If the assignee sued at law, he was turned out of Court; if the assignor sued in equity, he also was turned out.

The true rule undoubtedly was that which prevailed in equity, that he who had the right, should pursue the remedy.

The Legislature have merely adopted the old rule in equity.

Promissory notes and bills of exchange, however, having been previously assignable by Statute or the law merchant, always were subjected to this rule, and the person bringing suit upon such paper, now as heretofore, must aver, and if disputed, must prove his interest in the same.

But how is this interest to be shown? Undoubtedly by stating facts which show the interest. This is especially true, under the code, as now facts alone must be stated and not legal conclusions.

Now when a Plaintiff states certain facts, which, unless they are contradicted or are confessed and avoided, show that such party has an interest, what necessity is there of going further and stating the conclusion or presumption arising from such statement.

As has been before remarked, the code requires the statement of facts, and facts alone; and therefore the propriety of the old rule of pleading would seem more apparent now than formerly.

From the facts stated in this case, the law presumes that the Plaintiff is the legal owner and holder of the bill, upon which suit is brought. This, in the first instance, is all that he was required to do.

It is urged that although the allegation that the Plaintiff was the legal owner and holder might be immaterial, still, as the Plaintiff saw fit to make it, he could not move to strike out an answer, thus taking issue upon that immaterial averment. This position in a qualified sense is correct, and were a motion made to strike out such an answer, when enough was left to constitute a good answer, it is doubtful whether such motion should be granted; but when the answer is entirely bad, and the motion comprehends the whole answer, there can be no propriety in applying this principle.

It is claimed that a Judge in New York has decided at Chambers, that an issue can be raised, upon a denial of this nature. Such seems to be the fact from the report of the case. The Judge making this decision is probably a very respectable lawyer, but we know nothing of him, except from the ephemeral report of this decision. A decision made by any Judge of New York or any other State, when supported by good sense, and showing evidence of its adherence to well settled legal principles, is, of course, entitled to high respect, otherwise it is entitled to no more regard than the opinion of any other lawyer.

The next and last denial relied upon by Defendants, is a general denial of indebtedness. That such a denial is not good, it being merely a denial of a conclusion of law, has been too often decided to be considered an open question, and I shall pass it without further comment.

It remains to notice one other objection relied upon, to the judgment of the Court below.

It is urged that the motion to strike out the answer and for judgment, was improperly made, as it was not within twenty days after the service of the answer, and not until the cause was noticed for trial.

As to the first branch of the objection and to sustain which, a case is cited from 2 *Sand. S. C. R.*, it is only necessary to say that the decision referred to was made in consequence of a rule of Court in New York, requiring a motion to be made within twenty days. As we have no such rule, it is unnecessary to inquire whether that decision would be applicable, in any event to this case.

The case cited to support the second branch of the objection, *i. e.* that the motion was made after the notice of trial, is, as a general rule, correct. The decision is that by noticing a cause for trial, a party waives the right of moving to strike out redundant matter. But it would be difficult to give any reason, for sending a cause to the jury, when there is nothing for them to pass upon.

When the objections to the answer are merely formal, or when something is left besides the part included in the motion, or when the error is of such a nature that it does not necessa-

rily vitiate the pleading, and may be waived, the rule is a very proper one, but if the answer is good for nothing, if there is nothing in it upon which the Defendant can rely, it is as if there was no answer, and there can be no reason given why the Plaintiff should not have judgment.

Delay can never make a radically defective answer good, and it would be useless and worse than useless to send a cause to a jury when the Defendant has admitted all that the Plaintiff claims.

The rule contended for, when properly applied, is a sensible one, and to prevent frivilous motions, it should be adopted in our practice. In this case, if the Court below had had doubts upon the question presented, it might, without impropriety, have waived a decision: but as that Court saw fit to act, and decided virtually that the material allegations of the complaint were admitted, the question is whether that decision was correct. If the decision was correct, it certainly would be an unheard of thing, to set it aside, because the Court could have declined acting at the time, and when the declining to act could have done no possible good, but would have enabled a party by a mere evasion, to prevent or delay the collection of a debt.

A rule of practice which would lead to such absurd and unjust results, will, I trust, never be adopted by this Court.

We are therefore of opinion that the judgment of the District Court, should be affirmed with costs.

DAVID B. LOOMIS, Plaintiff in Error, *vs.* ALEXIS S. YOULE, Defendant in Error.

The party who commits the first fault in pleading must fail upon demurrer.

A pleading which contains substantial merits cannot be reached by demurrer. If irrelevant or redundant matter be incorporated with such pleading, it can only be cured by motion.

Loomis v. Youle.

In an action to recover the possession of personal property, it is an indispensable allegation that the Plaintiff is either the owner or entitled to the possession of the property; and the absence of such averments is not cured by the provisions of Sections 86, 87 and 88, of Chapter 70, of the Revised Statutes.

In this action, an answer is sufficient which sets up an outstanding title in a third person, and it is unnecessary for the party to connect himself with such title.

This action was brought in the County of Chisago, to recover the possession of certain personal property. The complaint alleges that in June, 1852, the Defendant wrongfully took and detained from the Plaintiff the property in suit, which was of the value of two hundred dollars.

The answer denies property in the Plaintiff, and asserts it to have been in a third person. It is further alleged that the logs in suit were taken and held by the Defendant as Sheriff of St. Croix County, Wisconsin, under an execution issued upon a a judgment against the party in whom the ownership of the property is alleged to be.

The Plaintiff demurred to the answer, on the following grounds:

First. The answer does not state in concise language sufficient to constitute a defence.

Second. Conclusions of law, instead of fact, are stated.

Third. The answer does not show that any valid judgment has ever been rendered, or remained unreversed or unsatisfied.

Fourth. The answer does not show that the execution was regular and valid on its face.

Fifth. It does not show where the execution was issued or returnable, or where the levy was made.

Sixth. It does not show that the Defendant had any legal right to take or hold the property.

Seventh. It does not allege that the Defendant was Sheriff, or acted as such.

Eighth. It is informal, uncertain and insufficient.

The demurrer was overruled.

The action was brought to this Court by writ of Error to the District Court of Washington County.

Ames & Van Etten, for Plaintiff in Error.

Thompson & Parker, for Defendant in Error.

By the Court—CHATFIELD, J. In this case, the Plaintiff's demurrer to the Defendant's answer was overruled, and judgment rendered thereon in favor of the Defendant.

The rule that a demurrer puts to the test of leading sufficiency all prior pleadings in the cause, is retained, and to be applied under our present system, though the rules by which such sufficiency is to be determined are in several respects changed. The former strictness and nicety of form are very much relaxed, but every material and necessary substance of the pleading is rigidly required to be directly and plainly stated.

If the facts so stated in a complaint constitute a valid and sufficient cause of action, such complaint is not demurrable, though other and unnecessary immaterial or redundant statements be contained in it. The same rule applies to answers. If any fact or facts so stated in an answer constitute a defence, the answer is not demurrable, though it contain other statements of matter immaterial to or insufficient for a defence. The proper course to pursue in such cases is to prune the pleading by a motion to strike out.

This case must be determined by the pleadings tested by the rule above stated.

The Plaintiff's complaint, which is in an action for the recovery of the possession of personal property, alleges, with sufficient certainty of time and place, that "the Defendant wrongfully took and detained from the Plaintiff" the property mentioned therein, but wholly fails to state or allege either that the property was the Plaintiff's, or that he was in any manner or for any reason entitled to the possession of it.

This action, like the old action of Replevin, cannot be sustained by the Plaintiff, unless he has, at the time when he brings it, such general or special title to the property as to give him an absolute right to the possession of it. The Plaintiff must, at the time when he brings his action, have an existing legal right to have the property delivered to him, or he cannot maintain it. *Sharp vs. Whittenhall*, 3 *Hill's Rep.* 576. *Wheeler vs. Train*, 3 *Pick. Rep.* 255. It is therefore indispensably necessary for him in his complaint to allege such a title as will be legally sufficient to give him the right of possession, for without such allegation the complaint would nei-

ther admit proof thereof, or support a verdict, or authorize a judgment in his favor. *Pattison vs. Adams*, 7 *Hill's Reports*, 126. The complaint is fatally defective. The affidavft on which the Plaintiff claimed a delivery of the property, forms no part of the pleadings, and cannot be referred to, or otherwise used, to supply deficiencies in the complaint. Nor is this absence of an allegation which is indispensable to the maintainance of the action, cured by the provisions of Sections 86, 87 and 88, of Chapter 70, of the Revised Statutes, page 340. "When, as in this case, there is a total want of any allegation in the pleading of the subject-matter, as a ground of action or defence, the want of such allegation is not cured by the the code, so as to allow of a decree to be founded upon the proof without allegation." This language of JEWETT, Chief Justice, in the case of *Kelsey vs. Western*, 2 *Com'k. Rep.* 507, refers to the sections of the New-York code, of which the sections of our statutes before cited are literal copies. Though that opinion was given in a case in Chancery commenced before the enactment of the New-York code of proceedure, it states clearly and accurately the rule which is applicable to cases under the new as well as the old system, and to judgments as well as decrees.

If the complaint in this case had been in all respects sufficient, still in my opinion the Defendant was entitled to judgment in his favor, upon the demurrer to his answer. Almost the only thing which is well stated in the answer is, the allegation that the property mentioned "was not the property of the said Plaintiff, but was the property of P. G. Cullen." That allegation alone constitutes a good defence to this action, as it would in the old action of Replevin. It denies and traverses the Plaintiff's title and his right to have the property delivered to him. Though the Defendant did, in one part of his answer, attempt to connect himself with Cullen's title, it was not necessary for him in this action to do so. If Cullen owned the property, the Plaintiff did not; and if the Plaintiff did not own it, he had, in the absence of any allegation of a special possessor's title, no right to have it delivered to him, or to recover the possession of it. It has always been held that in Replevin, especially in the *cepit*, it was competent for the De-

fendant to set up title in a third person as inducement to the traverse of the Plaintiff's title: and if he succeeded upon such issue, he was entitled to judgment *pro retorno habendo*, without connecting himself, by his pleadings or proofs, with such outstanding title. *Harrison vs. McIntosh*, 1 *John. Rep.* 380; *Rogers vs. Arnold*, 12 *Wend. Rep.* 30; *Prosser vs. Woodward*, 21 *Wend. Rep.* 205; *Ingraham vs. Hammond and Mead*, 1 *Hill's Rep.* 353. In the case of *Rogers vs. Arnold*, this rule, or rather the reason for it, was doubted, but the subsequent cases cited fully dispel such doubts.

The judgment of the District Court in this case must be affirmed.

GEORGE FALLMAN and DAVID FALLMAN, Plaintiffs in Error, *vs.* ENOCH GILMAN, Defendant in Error.

A complaint under Chapter 87, Revised Statutes, for forcible entry and detainer, before a Justice of the Peace, which simply charges that the Defendant forcibly entered, and does detain from the Plaintiff certain lands, describing them, is fatally defective; and a summons served in such case by reading it in the presence of the Defendants is no service.

When an appeal from the judgment of a Justice of the Peace is properly taken and a return thereto made, the whole proceedings before the Justice, become a mere *lis pendens* in the District Court, and the Plaintiff then has the same right to dismiss the action at any time before trial, as he would have had in the Court below—and where the District Court has allowed the dismissal of the action upon the motion of the Plaintiff, a writ of Error will not lie.

This was an action of forcible entry and detainer under Chapter 87, Revised Statutes, commenced before a Justice of the Peace of Washington County. The complaint charged that the Defendants forcibly entered and did detain certain lands, describing them, and demanded restitution of the premises. The summons was served by reading it in the presence

of the Defendants. There was no appearance on the part of the Defendants before the Justice. The Justice allowed restitution and fined the Defendants $30, and judgment was rendered accordingly with costs. The Defendants appealed from the judgment to the District Court, and upon the cause coming into that Court, moved that the proceedings before the Justice be quashed with costs. The motion was overruled. The Plaintiff below then moved to dismiss the action, which motion was allowed. The Defendants appealed to this Court from the order of dismissal.

AMES & VAN ETTAN, for Plaintiffs in Error.

EMMETT & MOSS, for Defendant in Error.

M. E. Ames, *arguendo*, made the following points:

First, This was a proceeding under a Criminal Statute and is governed by the strongest rules applicable to criminal proceedings. The complaint was insufficient and gave the Justice no jurisdiction, but a judgment was rendered and the appeal brings the action regularly before the District Court, and that Court erred in refusing to quash the proceedings before the Justice.

Second, The proceedings before the Justice were fatally defective, and he had no jurisdiction to render a judgment against the Defendants or impose a fine.

Third, The Justice having assumed jurisdiction and rendered a judgment, the remedy of the Defendant was by appeal to avoid and reverse the judgment.

Fourth, The District Court erred in dismissing the action for want of jurisdiction, because the appeal had given that Court complete jurisdiction and the case should have been proceeded with in the ordinary manner. The Defendants were entitled to a trial.

H. L. Moss, *arguendo* for Respondent, rested upon the following points:

First, The Justice had no jurisdiction of the case.

Second, The Defendants should have proceeded by *Certiorari* and not by appeal.

Third, Having appealed, the Defendants should have pleaded to the jurisdiction or demurred for want thereof.

Fourth, If the Justice's Court had no jurisdiction, the District Court could not obtain it by appeal, and could render judgment for no purpose.

Fifth, The Plaintiff has the right to dismiss his action at any time, no provisional remedy having been allowed.

By the Court.—CHATFIELD, J. This action was commenced before a Justice of the Peace by the Defendant in Error against the Plaintiffs in Error, under the Statute "of Forcible Entries and Detainers." *Rev. Stat.* Chap. 87.

The complaint before the Justice was manifestly and fatally defective, and the summons issued by him, was not served in the manner prescribed by the Statute.

The Defendants below did not appear before the Justice and the Plaintiff there proceeded to a hearing. Upon that hearing the Justice rendered judgment against the Defendants, for restitution, for a fine of thirty dollars and for costs.

From that judgment the Defendants appealed to the District Court.

In the District Court the Defendants moved that the proceedings and judgment before the Justice be quashed with costs. That motion was overruled by the Court and the Defendants excepted.

The Plaintiff below then moved that the cause be dismissed. That motion was resisted by the Defendants who insisted that they had a right to have the cause tried in its order upon the calendar. The Court, however, dismissed the cause and proceedings and the Defendants excepted, and thereupon brought their writ of Error to this Court.

Though the District Court may have erred in overruling the motion to quash the proceedings and judgment before the Justice, the error was cured by the subsequent dismissal of the cause and proceedings on motion of the Plaintiff below.

When an appeal from the judgment of a Justice of the Peace is properly taken, and a return thereto is made, the whole proceedings before the Justice become mere *lis pendens* in the District Court. *Rev. Stat.* 316, Chap. 69, § 127; 4

Denio's R., 377, *note b.* The parties stand in relation to each other there, the same as they did at the commencement of the trial before the Justice. Being in this position before the District Court, the Plaintiff there has the right to submit to a nonsuit, or in the language of the code, "dismiss the action at any time before the trial," the same and as fully as he had previous to the trial before the Justice. Such dismissal in the District Court has the same force and effect as if taken before the Justice previous to the trial there.

When the Plaintiff in the District Court dismissed the "cause and proceedings," he dismissed the *action* and not merely the appeal. Every thing from the commencement of the proceedings before the Justice was thereby vacated, and the "proceedings and judgment before the Justice" were, in the language of the motion of the Defendants below, *quashed* effectually.

There having been neither any provisional remedy allowed or any pleading on the part of the Defendants below, in the case, the Plaintiff below had the absolute and Statutory right to dismiss the action without the leave of either the Court or the other party. *Rev. Stat.* 349, Chap. 70, § 162, *Sub. Div.* 1. Consequently, though the order of the dismissal be final, I am at a loss to perceive how a writ of Error thereon can be maintained by either party. The Plaintiff below could not bring such writ, because the order is against him on his own voluntary motion. The Defendants below cannot do it, because the order disposes of the whole case in their favor. Had the Defendants below asked for and been denied a judgment against the Plaintiff below, for their costs, their right to a writ of Error would be very questionable, because upon a writ of Error, the judgment below cannot be merely modified, but must be affirmed or reversed *in toto* unless it be composed of distinct parts, some of which may be affirmed and others reversed. The Defendants below could not, upon a writ of Error obtain a judgment for the costs in the Court below. That could only be done by motion to that Court, and if refused, by appeal to or mandamus from this Court.

Upon the Plaintiff's dismissal of the action in the District Court, the Defendants were entitled to a judgment for their

costs, and I have no doubt but that the District Court had jurisdiction of the parties sufficient to enable it to render and enforce such judgment; but it does not appear that the Defendants below asked for such judgment, or that it was denied.

There is no such exception upon the record, and if there had been, it would not, in my opinion, have been effectual to sustain the writ.

As the case stands, I do not see how this Court can either affirm or reverse the said order of disposal, consequently the writ of Error in this case, should, in my opinion, be dismissed with costs.

CHARLES TILLMAN and JOHN CHRISTY, Respondents, *vs.* HENRY JACKSON, Appellant.

An order made by the District Court, setting aside a sale upon an execution issued out of that Court, vacating the Sheriff's return thereon, and directing the issuance of a new execution, is an appealable order.

Chapter Second, Section Third, of the Revised Statutes, providing that where a sale upon execution "is of real estate, which consists of several known lots or parcels, they must be sold separately," is merely directory to the Sheriff, and a violation of its provisions by the officer will not invalidate the sale—the only remedy in such cases being upon the officer.

AMES & NELSON, and WILKINSON, BABCOCK & BRISBIN, for Appellant.

EMMETT & MOSS for Respondents.

J. B. BRISBIN, *arguendo*, on behalf of the Appellant, insisted upon the following points:

First, This was a final order, affecting a substantial right, made on a summary application of the judgment, and is therefore appealable. *Vide Rev. Stat. Chap.* 81, *S.* 11, *Sub.* 3.

Second, The relief sought by this proceeding, if at all attain-

able, must be sought in a Court of Equity. The Court will not foreclose the rights of strangers to the record, summarily upon motion. *Lansing et al. vs. Quackenbush*, 5 *Cow.* 38. *Vanderburg vs. Briggs*, 7 *ib.* 367.

Third, Sec. 3, Chap. 71, is simply directory to the Sheriff, and its provisions being violated does not invalidate a sale upon execution. The only remedy is upon the officer. *Vide Groff vs. Jones*, 6 *Wend.* 522. *Neilson vs. Neilson*, 5 *Barb.* 565. *Wood vs. Monell*, 1 *John Ch. R.* 502. 1 *Burrill's Practice, page* 301, *and cases cited.*

H. L. Moss, for the Respondents, relied upon the following points:

First, This is not an appealable order. *Rev. Stat. p.* 414, § 11, *Sub.* 3.

Second, The Court below has control of its own process to remedy any irregularity. *Vide* 3 *Johns. P.* 144. 2 *Wend.* 260. 5 *Cowen*, 280. 1 *Eq. Dig. P.* 482, § 42. 4 *Rand.* 427.

The facts are sufficiently apparent from the opinion. SHERBURNE J. delivered the opinion of the Court.

By the Court—SHERBURNE J. This is an appeal from an order made in the District Court, setting aside a sale or an execution issued from said Court, vacating the Sheriff's return thereon, and directing the issuing of an alias execution. The order was granted on motion of the creditors in execution, wherein they alleged that two lots of land had been sold in one body by the Sheriff, whereas the Statute required that "when the sale is of real property and consisting of several known lots or parcels, they must be sold separately," and that for such reason the sale was void.

The first question presented for the consideration of this Court, is whether the Defendants in the original action had the right of appeal from the order complained of. This must depend entirely upon our Statute provisions upon this subject.

Subdivision 3 of Section 11, Chap. 80, of the Revised Statutes of this Territory provides that appeals may be taken "in a final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment."

Is this a "final order affecting a substantial right made upon

a summary application after judgment," within the meaning of the Statutes? No authorities have been cited by Counsel showing that any judicial construction has been given to this provision of Statute as applicable to this question, nor am I aware that there has been any adjudication upon the subject.

Looking, then, to the Statute alone in its bearing upon the point under consideration, it does not appear to me to be ambiguous or doubtful. The order is "final," of course. That it "affects a substantial right," is also equally clear. The Defendant's debt had been paid by a sale of his property. It is very easy to perceive that his rights might be affected in various ways by reviving the old debt against him. A second sale of the property might produce a less sum. Other real estate which he might desire to hold could be sold. Personal property could be sold, if any could be found belonging to him. But it requires no argument or illustration to demonstrate the truth of the position that to revive an execution against a person, which has been actually paid, affects a "substantial right."

The order was also made a "summary application after jugdment." It is difficult to perceive how the Legislature could have found language more apt than that contained in subdivision 3 above referred to, if the intention had been to provide expressly for the case now under consideration. The opinion of the Court is that the order is appealable.

The question then arises as to whether the Court below erred in making the order complained of. The Appellant insists, in the first place that an order of this character cannot be made under any state of facts, and that the Plaintiff in execution must apply for relief to a Court of Equity, and cites some authorities to sustain this position; but such orders have often been granted by Courts whose opinions are entitled to great respect, nor does it seem to me an objectionable exercise of the powers of the District Court when the exigencies of the case are such as to demand it. *The President vs. Lansing*, 2 *Wend.* 260. *Adams vs. Smith & Poindexter*, 5 *Cow.* 280. *Dumond vs. Carpenter*, 3 *Johns.* 140.

But in the view we take of this case, it becomes unnecessary to inquire whether such an order would be regular under any

circumstances, because we are satisfied that in this case there was not sufficient reason for granting it, admitting the Court had the power.

The reason upon which the application for the order was founded was, that distinct lots of land were sold together in violation of the provisions of Statute that each lot should be sold separately, and that the sale for that reason was void. Without examining the question of whether this would be the proper mode of relief, if the sale were void, we will first enquire if the Respondents are warranted in their conclusion that they had acquired no title by the original sale of the officer for the reason stated.

Courts have differed widely in determining what defects in the acts of an officer shall vacate or avoid a sale of, or a levy upon real estate by virtue of execution. And amidst the conflicting decisions, it becomes important to inquire what rule of law is most consistent with the rights of the parties, and the interests of a business people, by whom resort is constantly had to Courts and officers of the law for the collection of debts.

It often happens that the decision of a question of law, even of general application, is wholly unimportant outside of the parties to the cause, except as a guide to the future; and that whether the decision is one way or the other, is totally immaterial to the public generally—they being only interested in having a certain rule established. In such case, the Court would inquire on which side was the weight of authority and would decide accordingly.

But such will not be the action of the Court when the question before them has a material and important bearing upon the general interests. It cannot be doubted that a decision of this Court which shall tend to render the titles to real property sold upon execution either more or less certain, will affect the interests of the debtor or creditor to a greater or less extent in all cases where debts are collected by sale of property under process of law.

It is, of course, for the interests of both debtor and creditor that property so sold should command a full price. To obtain this result is the principal if not the only object of most of the pre-requisites of sale, such as notice, &c.: but they fail in their

intended object, and indeed are often the very means of preventing it, when a non-compliance by the officer with any of the minute directions of law endanger the title which he attempts to convey. Every doubt thrown into the scale which weighs the officer's title, will decrease, in a ten-fold proportion, the price which his title will command. It is obvious, then, that if it is the policy of the law to prevent as far as possible the sacrifice of property by sale upon execution for less than a fair value, it should also be its policy to relieve the purchaser from all doubt in the officer's capacity and power to convey a good title.

Purchasers rarely have the means of determining whether an officer has taken all the steps necessary to a full compliance with the provisions of law prior to a sale, and must generally rely alone upon the facts, that the officer had the power to act. It may be true that in this particular instance the purchaser had the means of knowing that two lots being sold together was in violation of a Statute provision; but it would only happen occasionally that he would have any knowledge of the divisions, and this should not change a rule of law which is consistent and favorable in its operation. The provision is at best only directory, and if the debtor has suffered from this error of the officer, the latter alone is responsible for it. *Groff vs. Jones*, 6 *Wend.* 522. *Neilson vs. Neilson*, 5 *Barb.* 565. *Wood vs. Monell*, 1 *Johns. Ch. Rep.* 502.

It appears to me, therefore, that when the purchaser has satisfied himself that the officer is duly qualified to act and has legal process in his hand authorizing him to sell, our laws should be so construed, if possible, as to relieve his mind of all doubt as to the title which he is to obtain, and justify him as a prudent man in paying a fair consideration—the only exception to this rule being when the transaction is tainted with fraud.

I have had occasion in one instance in this Territory to declare a sale void where the levy was not made in compliance with the Statute, but this was under a positive provision that "until a levy, *property is not affected by the execution.*" *Revised Statutes Ch.* 71, *Sec.* 91, *page* 363, *and Ch.* 70, *Sec.* 140, *page* 346.

In most if not all the New England State, a non-compliance by the officer with the directions of the law regarding a levy upon real estate in any material matter, has been adjudged by the Courts as sufficient cause for declaring the "levy" void. But it is to be recollected, in these States real estate is not sold to the highest bidder, as in this Territory, but is set off to the creditors at the valuation of disinterested sworn appraisers, one of whom is generally selected by the debtor himself. The reasons, therefore, which have been suggested as favoring the validity of the title, notwithstanding omissions in the acts of the officer, do not apply in one important particular under their Statute laws. *Means et al. vs. Osgood*, 7 *Greenl.* 146. *Chamberlain vs. Doty*, 18 *Pick.* 495. *Morton et al. vs. Edwin*, 19 *Vt.* 77.

In this Territory, many of the Western States, and indeed in some of the old States, where the rapid increase of population and consequent advance in the price of real estate have induced their legislators, as a measure of mutual protection amongst their citizens in their mutual dealings, to adopt some summary measures for enforcing legal obligations, real estate is sold to the highest bidder, and the term of redemption by the judgment debtor is comparatively short. It is under such laws that no unnecessary doubt should intervene between the title and the price; and it is, I have no doubt, for this reason that Courts in those States have generally adopted a rule most favorable to the perfection of the title in such cases. *Lessee of F. M. Stall vs. C. & E. Macalaster*, 9 *Ohio R.* 19. *Wheaton vs. Sexton*, 4 *Wheaton R.* 503. *See, also, Groff vs. Jones, Neilson vs. Neilson, and Wood vs. Monell, before cited. Hayden, &c., vs. Dunlap*, 3 *Bibb.* 216.

The law, I believe, is uniform everywhere that no omission of the duty of an officer in the sale of *personal* property, nor any mistake of his in the manner of discharging his duty, will vitiate the title to the property in the hands of a bona fide purchaser. In such case, it is only necessary, in order to establish a title in the purchaser, to show that the officer was duly qualified to act, that he had in his hands legal process authorizing him to sell, and that the sale was in fact made.

It is not readily perceived why a different rule should apply

to the sale of real estate under our laws. The reasons for the old common law doctrine which threw about it an odor of sanctity which had no existence in relation to the personal property, lose much of their force in a new country where land is quite as easily obtained and quite as little regarded as any other kind of property. This is the view which seems to have been taken of the matter by the Legislature of this Territory, and but very little distinction has been made between the two in the forms and solemnities of a sale by an officer.

We are, on the whole, well agreed in the opinion that the error of the officer in making the first sale did not vitiate the title of the purchaser; and that if the debtor was injured by the error, his claim was upon the officer.

The order must be reversed with ten dollars costs.

The following, involving a question of practice of some interest, is appended to the report of this case.

TILLMAN & CHRISTY *vs.* HENRY JACKSON.

This is a question of costs allowed by the Clerk, and brought before me by appeal from his decision.

The Plaintiff had caused an execution to be issued against the Defendant and certain property to be levied upon and sold by virtue of it. Subsequent to the sale, the Plaintiff moved the Judge at Chambers to vacate the proceedings under the execution or sale, and order the issuing of an *alias* execution, and the motion was sustained. From this order of the Judge the Defendant appealed to the Supreme Court. The Supreme Court reversed the order, "with costs," without specifying the amount.

The Defendant claims full costs as in case of a trial. The Plaintiff resists this claim and contends that only ten dollars can be allowed in such case, and that in this particular case, none can be allowed, as the Court did not specify the amount.

Section 12, in page 372 of the Revised Statutes provides that "costs may be allowed on an original motion or on an appeal from an order in the discretion of the Court, not exceeding ten dollars."

Again Section 16 on the same page, as amended in page 12 of the Amendments, provides that "where the decision of a Court of inferior jurisdiction in a *special proceeding* is brought before the Supreme Court or a District Court for review, such proceeding is for the purposes of costs to be deemed an action at issue on a question of law from the time the same is brought into the Supreme Court or District Court, and costs thereon may be awarded," &c.

Now, is this motion within the meaning of the Statute, a special proceeding? If it is so, then it seems to me that all motions or special proceedings, and that Section 12 first quoted can apply to no class of cases whatever, and must be inoperative and useless. But it is a well established rule of law in the exposition of Statutes, that the intention of the Legislature shall be derived from the whole Statute, comparing each and every part of it. Section 12 then should be considered, if possible, as applying to some class of cases authorized by the Statute.

That a distinction is made by Statute between motions and special proceedings cannot be doubted. Section 2 of Chapter 83 declares that "a judgment in a special proceeding is a final determination of the rights of the parties therein," but an order upon a motion is not the final determination of the rights of the parties, but is generally, if not always, merely incidental to the main question, or used in aid of some more important matters pending between the parties.

Immediately following the provision of Statute last above quoted, and in the same Section, it is declared that, "the definitions of a motion and an order in a civil action are applicable to similar acts in special proceedings." It can hardly be a reasonable interpretation of this language to hold that "motion" in the first part of the sentence and "special proceeding," in the last are intended to represent the same form or kind of process.

Sections 315 and 318 of the New York code of procedure are in substance the same as Sections 12 and 16 of our Statute above quoted. Section 315 of the New York code, reads as follows: "Costs may be allowed on a motion in the discretion of the Court, not exceeding ten dollars."

In *Ellsworth vs. Gooding*, 8 *How. Prac. R.* 3, Mr. Justice Harris, in giving his opinion upon a question of costs arising upon a motion for a new trial, and referring to this section, says: "The 315th Section of the code was undoubtedly intended as a substitute for the 93d rule of 1847. It was intended to apply to special or non-enumerated motions and those only." He also remarks that "the rule was always understood as applicable to non-enumerated motions alone, and cites *Thomas vs. Clark*, 5 *How. Pr. R.* 375, and *Mitchell vs. Westervelt*, 6 *How. Pr.* 275.

In the case of *Thomas vs. Clark*, Justice Wells says in his opinion that, "Section 315 was designed to provide for cases of collateral motions, such as a motion to vacate or set aside some proceedings, or for relief of some kind, and which were not in the direct and regular progress of the suit." The motion in the case under consideration, to set aside the sale upon execution is one of the character referred to by Mr. Justice Wells, and is a non-enumerated motion. See 1 *Burrill's Pr.* 335. I am, on the whole, well satisfied that the costs must be governed in this matter by Section 12, on page 372 of our Statute, and that the costs of a trial on an issue of law cannot be allowed.

But can I allow any costs? The Supreme Court allowed costs without specifying the amount, under the impression that the Defendant was entitled to full costs, and that they could be taxed or adjusted as in ordinary cases of trial. Equity would seem to require that they should be so taxed; but having omitted to state the amount of costs, can I, sitting as a single Justice, modify or correct the order? I think I have no such power. See *Van Schaick vs. Winne*, 8 *How. Pr.* 6.

My opinion is that as the matter now stands, I can allow no costs. The Supreme Court, upon application, and probably upon an informal one, would allow ten dollars.

M. SHERBURNE, *Judge.*

At Chambers, Nov. 24, 1854.

Upon a subsequent informal application to the Supreme Court, the order was so modified as to allow ten dollars costs,

and the Court decided that in such cases the disbursements could not be allowed in addition to the ten dollars.

PIERRE CHOTEAU, ET. AL. Appellants, *vs.* HENRY M. RICE, ET. AL. Respondents.

An Appearance, in a Court having jurisdiction of the subject-matter and the parties in controversy, is a waiver of any irregularity in the service of the original process by which the parties are brought into Court.

The Territorial Courts, although not organized under the Constitution, are, nevertheless, in a qualified sense, United States Courts, because they are created by authority of the United States; and it is not Error to describe them as "United States District Courts."

APPEAL FROM AN ORDER DISMISSING FOR WANT OF JURISDICTION.

This was an action for an accounting between Co-partners, commenced on the 9th day of October, 1849. The action was entitled: "In the United States District Court, sitting in Chancery in and for the County of St. Croix and Territory of Minnesota." The bill was addressed to the "Hon. Aaron Goodrich, Judge of the First Judicial District of the Territory of Minnesota, sitting in Chancery in the United States District Court in and for the County of St. Croix and Territory aforesaid"; and the subpœna was served upon the Defendants by the United States Marshal of the Territory.

Henry M. Rice, one of the Defendants, appeared and pleaded to the bill, to which plea the complainants filed a replication.

After the cause was then placed in issue, the Defendant, Rice, moved to dismiss it, on the ground that the cause of action did not arise under the Constitution and Laws of the United States, and was not therefore brought in a Court having jurisdiction. The motion was allowed and the action dismissed.

The cause came into this Court from an Appeal taken by the complainants, from the order made by the Court below dismissing the action.

AMES & NELSON, and WILKINSON, BABCOCK & BRISBIN, for Complainants.

RICE, HOLLINSHEAD & BECKER, for Respondents.

Argued by J. B. BRISBIN, on behalf of the Complainants.

Argued by EDMUND RICE, on behalf of the Respondents.

By the Court—WELCH, J. This case is brought before the Court by Appeal from an order of the District Court sitting in Chancery, dismissing the cause for want of jurisdiction.

The bill of complaint in the case is addressed to the "Judge of the First Judicial District of the Territory of Minnesota, sitting in Chancery in the United States District Court in and for the County of St. Croix and Territory aforesaid."

The motion to dismiss assigns as a reason for dismissal, that the case is not one arising under the Constitution and laws of the United States, and that none other is cognizable in said Court.

In the order of dismissal, the entitling of the case is: "District Court of the United States for the First Judicial District."

The subpœna in the case was served by the United States Marshal for the Territory, and, up to the time of dismissal, the case seems to have been treated as one arising under the Constitution and Laws of the United States; and the reason of its dismissal was, an Appeal from the order, that it was not such a case, and therefore that the Court had not jurisdiction of it.

This certainly is not a case arising under the Constitution and Laws of the United States, and the service of process by Marshal was inoperative as a legal notice; but the Defendant, Rice, by appearing, waived the service, and gave the Court jurisdiction of his person: and, as it had jurisdiction of the subject-matter, it became properly possessed of the case.

The District Courts of the Territory have been regarded by

some as Territorial or United States Courts, according to the nature of the cases pending before them for the time being. This, in my judgment, is a mistake. The Court is at all times the same Court, whatever may be the nature of the controversy pending, and is to be designated by the same name. The District Courts may entertain and exercise Chancery jurisdiction, but still they remain District Courts. The Organic Act merely authorizes the District Courts to exercise the same jurisdiction in all cases arising under the Constitution and Laws of the United States as is vested in the Circuit and District Courts of the United States; but I cannot conceive why the name of the Court should be changed because it happens to exercise the particular jurisdiction thus conferred.

The name of a Court is fixed by the law establishing it, and must be known and designated by such name at all times, without regard to the particular matters over which it may happen to be exercising jurisdiction.

The only question, then which arises is, Was the cause properly entitled? To determine this question, it is necessary to enquire whether the Courts of the Territory are United States Courts.

The District Courts of the Territory are not District Courts of the United States, according to the usual acceptation, as the distinction between Federal and State jurisdiction under the Constitution has no foundation in these Territorial Governments, and consequently there is no distinction in respect to the jurisdiction of these Territorial Courts on the matters submitted to their cognizance.

They are not organized under the Constitution, but are creations exclusively of the Legislative department, and subject to its control.

Indeed, it must be a solecism to speak of a Territorial Court as a United States Court, except in a qualified sense. The inhabitants of the Territories are not legally citizens of the United States, and the citizens of the Territories are not entitled to bring suit in the United States Courts under the general Constitutional provision, in Article 3, Section 2, of the Constitution.

Still, the Territorial Courts, in a qualified sense, may be de-

signated as United States Courts, and when the meaning of the term is properly understood no confusion or misunderstanding can arise from its use. They are United States Courts because they are created by authority of the United States, and for no other reasons.

In my opinion, the most proper designation of these Courts is, simply District Courts of the Territory of Minnesota, for the proper district, &c. but I do not consider it a fatal error for a party to give a more full description of the Court if that description is correct. A Court undoubtedly must be designated by its proper name, and when a particular name is given that name must be used.

The Organic Act declares that the judicial power of the Territory shall be vested in a Supreme Court, District Court, &c. but it does not prescribe a specific name and style, except the general one of District Court, by which these Courts shall be designated, to the exclusion of any additional description.

The Courts held by the Justices of the Supreme Court in the Districts, must unquestionably be designated as District Courts; but the additional description of United States District Courts, such description being in accordance with the fact, I cannot regard as erroneous.

Order reversed.

REUBEN GOODRICH, Appellant, *vs.* RODNEY and E. C. PARKER, Respondents.

It is not Error for the Chancellor to hear and allow or disallow exceptions to a bill in Chancery, without referring the same to a Master.

The Pleader may insert in a bill in Chancery, not merely issuable facts, but any matter of evidence or collateral facts which, if admitted, may establish, or tend to establish, the material allegations in the bill, or which may bear upon the relief sought. Other matter is impertinent.

Matter inserted in a Pleading must be impertinent to be scandalous, and it must be clearly irrelevant, or the Court will not strike it out.

Goodrich v. Rodney and E. C. Parker.

Deeds, records and writings set forth in *haec verba* will be stricken out as impertinent.
An exception for impertinence must be sustained *in toto*, and if it include any passage which is not impertinent, it must fall altogether.

Complainant, on the 2d day of April, 1853, filed his bill in the District Court for the County of Ramsey, to which Defendants filed sundry exceptions.

These exceptions were heard, and a portion of them allowed by the Court below, from which order Complainant appeals to this Court.

All of which, (in view of the following extract from Chapter 1 of the Acts of our Legislature, approved March 5th, 1853: "The Court of Chancery, and the right to commence or institute Chancery suits and proceedings, and all statutes and statutory provisions inconsistent with this act, shall be, and are hereby abrogated and abolished:") are more fully and, for all practical purposes, sufficiently set forth in the following Opinion.

Ames & Van Etten, for Appellant.

Rice, Hollinshead & Becker, for Respondents.

By the Court—Sherburne, J. This cause is brought into this Court by Appeal from an order of the District Court allowing exceptions to the bill.

It is objected by the Complainant's Counsel, that the proceedings in the Court were irregular, inasmuch as the exceptions were not referred to a Master. The objection, in the opinion of the Court, cannot be sustained. The duties of a Master in Chancery are not separate and distinct from those of the Chancellor, but in aid of him. Masters in Chancery were considered in England as "assistants to the Lord Chancellor," and Tomlin says: "some sit in Court every day, and have referred to them interlocutory orders for stating accounts, computing damages," &c. "and they also examine, *on reference*, the propriety of bills in Chancery," &c. But, I am not aware of any rule making it imperative on the Chancellor to refer the question of propriety of the bill to a Master, if he should choose to hear it himself. I do not find that the question

has ever been raised: but, in practice, it has been common in the States for Courts sitting in Chancery to examine and determine questions of a character similar to the present case of exceptions, without the intervention of a Master; and the very section of our Statutes which is relied on by the Complainant's Counsel as supporting his objection, goes very far to avoid it. The language is, that "whenever it shall be deemed *necessary*, pending any suit or proceeding, the Court *may* appoint a special Master," &c. See *Statutes*, Sec. 73, p. 470. Who but the Chancellor is to determine when he needs asssistance? and, when he does not need it, what anthority has he under the Statute for appointing an assistant? I apprehend, that we have only to look to the reason for the appointment of a Master, to arrive at the conclusion that the whole matter lies within the choice of the Chancellor. To examine exceptions is one of his duties, which he may, or may not, as he deems necessary, refer to a Master, who acts in some respects in the character of a referee in a Court of law.

Upon the question of allowing exceptions, the following Opinion of Chief-Justice HAYNE, in the District Court, is approved by this Court, and has been adopted as our opinion:—

In examining the question whether allegations or statements in a bill are relevant or pertinent, it must be recollected that a bill in Chancery is not only a pleading for putting in issue the material allegations and charges upon which the Complainant's right to relief rests, but, in most cases, it is also an examination of the Defendant on oath, for the purpose of obtaining evidence to establish, or tending to establish, the Complainant's case, or to countervale the allegations contained in the Defendant's answer. 5 *Paige*, 522, 523; 3 *Paige*, 606; *Story's Eq. Pl.* Sec. 268.

The Complainant may therefore state any issuable fact, and also any matter of evidence in the bill, or any collateral fact the admission of which by the Defendant may be material in establishing the general allegations of the bill, as a pleading, or in ascertaining or determining the *nature* or extent of the relief to which the Complainant may be entitled consistently with the case made by the bill. 5 *Paige*, 523; 3 *Ib.* 606;

Story's Eq. Pl. Sec. 268. And where the allegations or statements contained in the bill may thus affect the decision of the cause, if proved or admitted by the Defendant, it is relevant, and cannot be excepted to as impertinent. 5 *Paige*, 523; 3 *Ib.* 606; *Story's Eq. Pl.* Sec. 268.

To ascertain whether an allegation or statement in a bill is pertinent as a matter of pleading, it is proper to see if an issue can be framed out of it which will be material, if proved or admitted, to aid in obtaining the relief to which Complainant would be entitled by the bill. And a good test of relevancy as to the discoveries of facts sought of the Defendant in the bill, as evidence or proof for the Complainant, is, to examine and ascertain whether if the facts admitted or proved would establish, or have a tendency to establish, the issuable matter contained in the bill. *Story's Eq. Pl.* Sec. 853.

Matters alleged, not material for the above purposes, are impertinent, and if reproachful, are scandalous. 1 *J.* (*Ch.*) *R.* 103; 5 *Paige*, 522; *Story's Eq. Pl.* Sec. 270. But a matter must be impertinent in order to be scandalous, for however scandalous in its nature it may be, if relevant it cannot be expunged as scandalous. 15 *Vesay*, 477.

Before expunging the matter alleged to be impertinent, it should be fully and clearly made out that it is impertinent: for if it be erroneously struck out, the injury will be irreparable. *Story's Eq. Pl.* Sec. 207; 6 *Beavan's Rep.* 444; 2 *Young & Coll. N. R.* 444. On the other hand, care must be taken not to overload bills by superfluous allegations and redundant and unnecessary statements, or by scandalous and impertinent matter, when tested by the foregoing rules. *Story's Eq. Pl.* Sec. 266.

It is perfectly consistent with the principles suggested in many cases to strike out deeds, writings and records recited in a bill in *haec verba* as impertinent. *Story's Eq. Pldgs Sec.* 266 and *note* 1, and authorities there quoted, 4 *J. Ch. R.* 437; 17 *Peters* 65, 66 *Appendix*, 1 *Howard Rep. Int.*, 49, 50.

The Defendants' first exception seeks to expunge the reference to the schedule, (incorrectly called exhibit A.,) the prayer that the schedule be taken as a part of the bill, and the schedule itself, containing a copy of lease of the American House to the complaint.

This exception is well taken and must be allowed. The lease is sufficiently and properly pleaded, without setting forth a copy of it in the bill. The Complainant seeks no discovery respecting it, of the Defendants, and from the fact that he has been enabled to furnish a copy of it in his bill, it clearly appears to be in his possession or under his control: nor does he, on the other hand, allege that Defendants have any knowledge respecting it, is material to him as evidence or otherwise. The copy of the lease can only be taken as a part of the bill as a pleading, and as the lean was already sufficiently pleaded, it must be expunged. It is not admissable to insert the same matter twice in a pleading. 6 *Paige* 247. At a proper time the complainant may prove the allegation in the bill by the evidence in his possesion, to wit: the original lease. It is only matter of evidence to be shown at large at the hearing. *Hood vs. Inman*, 4 *J. Ch'y Reps.* 438; *Alsager vs. Johnson*, 4 *Vesay* 217.

The remarks made as to the first exception, may, with great propriety, be applied to the second exception; also further, if the Defendants should, in their answer, admit that the schedule B. contains copies of the receipts, the admission would not be competent evidence of the payment of the rent by the Complainant. *Whereas*, if the Defendants admit the general allegation that the Complainant has paid the rent, as alleged in the bill, the admission will be good evidence of payment. The second exception must therefore also be allowed.

The 14th, 15th, 16th, 18th, 36th and 40th exceptions may all be included in the same category, and must be allowed for the same or similar reasons.

As to the 3rd exception, it must appear very obvious that it can make no possible difference with this cause, whether the Defendants resided in Massachusetts, or not, before 1849, or that their business had become nearly or quite broken up there, or that their pecuniary affairs were much embarrassed, inasmuch as the statement contains a charge of their utter insolvency. The allegation of utter insolvency may, perhaps, be material in the event that Complainant establishes the right to call the Defendants to account for the avails of the business of the American House, in order to raise the presumption that

all the property the Defendants now have in their possession was made out of said business, and therefore belonging to Complainant, unless Defendants show that they obtained it from some other source.

An exception for impertinence must be supported *in toto*, and if it include any passage which is not impertinent, it must fail altogether. *Van Rensalaer vs. Bine*, 4 *Paige* 174, 176; *Wagstaff vs. Bryan*, 1 *Paige* and *Myln Reps.* 30. The 3rd exception cannot therefore be allowed, but is overruled.

The 4th, 5th, and 6th exceptions relate to allegations, that, if admitted by the Defendants' answer, would have a tendency to show the insolvency of Defendants at the time alleged, and might, therefore, have a tendency to raise the presumption named in respect to the 3rd exception, that all the property now in the possession of Defendants, they had accumulated from the business of the American House. These exceptions are not allowed but overruled.

The allegations to which the 7th, 8th, 9th and 10th exceptions relate, can, it appears to me, in no point of view be material, and if admitted to be true by the answer, can prove nothing pertinent or issuable in the bill. These exceptions are therefore allowed.

The 11th exception is, to matter clearly impertinent, and a part of the allegation to which it relates, is grossly scandalous. There is not a fact contained in the allegations or statements upon which a material issue could be raised, nor if admitted by the answer, would it prove or have a tendency to prove a legitimate matter that could be raised by the bill. It must be allowed.

As to the 12th exception, I am some what doubtful whether the allegation that the four months' intervening between the opening of the House, (the American House,) and the close of navigation were rendered nearly or quite unproductive and thus continued during the following winter, might not possibly have some slight materiality, but stuffed as the allegation is with reasons and causes that are impertinent and improper and even scandalous, I shall allow the exception.

The 13th exception cannot be allowed. The allegation that

a letter of credit was given to the house of Wm. Rogers or Wm. and Geo. Rogers, cannot be material as it is not accompanied with any averment or allegation that Complainant paid it, or any part of it, or was or became responsible for it or any part of it. Had it, therefore, been separately excepted, it would have been held impertinent. The other allegation to which this exception relates does not, certainly, in direct terms, state that the Defendants have seized upon the bills, receipts, books and accounts, but it does make an averment argumentatively that I think material. As before stated, an exception that fails in part must be disallowed *in toto.*

The remarks I made in respect to the allegations covered by exception 11th, apply with greater force to the allegations and statements comprehended within the 17th exception, which is also allowed.

If the whole of the allegations contained in the 19th and 20th exceptions, were admitted by the Defendants' answer, they could prove nothing material contained in the bill. The allegation was made in a previous part of the bill that Complainant paid the whole rent of said American House, and it cannot strengthen it any that the Defendants did not contribute any to the payment of $750 of the same, nor would the admission of the fact amount to anything toward proving the allegation true; nor does he show that Defendants have any knowledge of the fact that he paid it. Exceptions 19 and 20 are therefore well taken, and must be allowed.

The exceptions 21 and 22 are justly interposed, and must be allowed. There is not a pertinent fact, either issuable, or if admitted by answer as evidence, perceivable within their entire scope.

The 23d, 24th, 25th, 26th, 27th, 28th, 29th, and 33d exceptions cover ground that may be material, and must be disallowed and overruled. There are some matters within th purview of these exceptions clearly impertinent, but as each includes matters that may be pertinent, the exceptions mus fall.

Exceptions 30, 31, and 32 must be allowed. The allegations are only repetitions, and are unimportant.

In relation to the allegations embraced within the 34th

exception, it may be observed that the proposal made to the agent of the lessors was too absurd, if admitted, to derive any inference of fraud from it. How could the agent of the lessors repudiate the lease or set it up in Defendants, if the lease was executed and delivered to Complainant as lessee, as alleged in the bill? Or how could the Defendants release the lessors from liabilities for repairs to be made for the benefit of Complainant? This exception is rightly interposed, and must be allowed.

The grounds alleged for damage in the allegations comprehended within the 35th exception are not legitimate, and the exception must be allowed for their impertinency.

Upon the most casual observation, it will also be clearly perceived that on no recognized principle can any of the statements or allegations contained in the parts of the bill to which the exceptions 37, 38, and 39, by any possibility be, or be rendered, material to the relief sought by the bill. They are impertinent, wholly so, and the exceptions must be allowed.

All the exceptions allowed must be expunged from the bill; and more than two-thirds of the exceptions having been allowed, the Complainant must pay to the Defendants two-thirds of the costs that would have been allowable had all the exceptions been sustained.

MOSES PERRIN, Appellant, *vs.* WILLIAM H. OLIVER, Respondent.

APPEAL FROM AN ORDER VACATING A JUDGMENT TAKEN PRO CONFESSO, AND DISSOLVING AN INJUNCTION.

A party is never in contempt by an omission to plead, except in cases where the object of the bill is to compel an answer.

An order vacating a judgment taken *pro confesso* upon failure to answer, and allowing the Defendant to plead, is discretionary with the Court making the order, and not subject to review in this Court.

Although it is better practice to move for the dissolution of an injunction after answer filed, it is not error to incorporate this motion with one for leave to plead; and a conditional order, dissolving the Injunction upon the coming in of the answer, will not be reversed.

That the Legislature has power to amend or repeal a charter where it has reserved the power to do so in the charter itself, admits of no doubt, and the Act of the Legislature of Wisconsin, passed in 1852, and that of the Territorial Legislature of Minnesota, approved March 6, 1852, so modified the Act of the Legislature of the Territory of Wisconsin of March, 1848, granting to Wm. H. Nobles, his representatives and assigns, exclusive ferry franchises for the term of ten years across Lake St. Croix, from the mouth of Willow River to a point directly opposite thereto, for a distance of two miles, as to limit the enjoyment of exclusive franchises to a distance of a quarter of a mile.

W. H. SEMMER, and AMES & NELSON, for Complainants and Appellants.

RICE, HOLLINSHEAD & BECKER, for Respondent and Appellee.

Points and authorities relied upon by the Defendant and Appellee.

First, It was proper to open the order *pro confesso*, as the Defendant showed a good excuse for his default. 1 *Barb. Chy. Pr.* 595. 1 *Hoff. Chy. Pr.* 551-2.

Second, The order dissolving the Injunction was proper, as there was no equity in the Bill. *Gordon's Digest L. U. S., Art.* 1112 *and note Cox vs. State*, 3 *Blackford R.* 193, *Ord.* 1787, *Art.* 4; *Act Cong.* 20*th Feb.* 1811, *and* 8*th April* 1812, *and* 4*th June*, 1812. *Laws Mich.* 1837, *p.* 154; *ib.* 1837, 8 *p.* 99.

Third, If there was equity in the Bill, the answer, setting up the modifications of the grant to Nobles by the Legislature of Wisconsin and Minnesota, showed conclusively that, *in fact*, there was no foundation for the Injunction.

By the Court—WELSH, C. J. This case is brought here by appeal from the decision of the District Court for the County of Washington, sitting as a Court of Chancery.

The Appellant filed his Bill in that Court on or about the 20th day of June, A. D. 1852, stating, among other matters, that in March, 1848, the Legislature of the Territory of Wisconsin gave the exclusive right to William Nobles, his heirs, executors, administrators or assigns, to establish and maintain

a ferry for the period of ten years, across Lake St. Croix, from the mouth of Willow River to a point directly opposite, and that by the terms of said grant, no other ferry could be established within two miles of the same; that the said Charter also contained a provision that the same might be amended or repealed by any future Legislature of the Territory or State within which such Ferry might be situated; that as Assignee of said Nobles, the Appellant, about the first day of May, 1850, established a Ferry across said Lake St. Croix, according to said grant, and has ever since maintained the same; that the Defendant, Oliver, has, since said assignment, established and kept up a Ferry across said Lake, and within two miles of the line of the Ferry established by Appellant; that said Oliver persisted in transporting passengers and freight at his Ferry against the wishes of Appellant. The Bill then prays for the amount of ferriage received by said Oliver, and also for an Injunction restraining the said Oliver from ferrying within two miles of the mouth of Willow River.

Pursuant to the prayer of the Bill, an Injunction was issued on the 22d day of June, 1852. On the 4th day of August, 1852, an order was entered in the cause, that the Bill of complaint be taken as confessed, the Defendant having failed to answer said Bill as he was required.

Soon after the entry of the order *pro confesso*, the Defendant made a motion founded upon an affidavit, excusing the neglect to answer, to vacate the order, and for leave to file an answer, a copy of which was exhibited, and for a dissolution of the injunction.

Upon the hearing of this motion, the Court ordered that the order *pro confesso* be vacated; that the Defendant have leave to answer within ten days from the filing of the order, and that the injunction be dissolved.

It is from this order that the Appeal is taken.

Upon the argument it was urged that the Defendant was in contempt for not answering, and therefore had no right to make any motion in the case. Admitting that the defendant was in contempt, it certainly would be proper for him to take some steps to purge the contempt. Now, in this case the Defendant gives a reason for not answering in season, and the Court con-

sidered the excuse a good one; and thus the contempt, if there was one, was purged. But the Defendant was not in contempt. A party is never guilty of a contempt of Court by merely neglecting to plead. By the ancient English practice, the whole process of contempt was necessarily resorted to before an order to take a bill as confessed could be obtained. The object of resorting to this process was not to punish, but to enable the Complainant to get his order *pro confesso*. By our law, the order *pro confesso*, upon the neglect of the Defendant to answer, may be obtained in a summary manner. In a case where an answer is needed, where it is the object for which the bill is filed, as in the case of a bill of discovery, the Defendant might undoubtedly be proceeded against for not answering; but in this case the order taken was that the bill should be taken as confessed, on account of the neglect to answer. If the Appellant's object was to get an answer, he could have done so by getting a proper order, but he did not see fit to do so. In my opinion, the Defendant had a right to make the motion in question. Whether the order should be vacated, and the Defendant allowed to plead, was a matter resting in the discretion of the Court, and cannot be reviewed here, but if we were called upon to decide the question I have no doubt of the correctness of the decision in this regard.

It would, perhaps, have been more strictly correct to have made a distinct motion to dissolve the injunction after the answer was put in, but as the answer was exhibited, and the injunction was not discovered until after the time allowed for filing the answer, I do not consider the course taken as so erroneous, as upon an Appeal to vitiate the order.

I now come to the only question remaining in the cause,—Was the injunction properly dissolved?

To decide this question it is proper to examine the Defendant's answer.

The answer admits all the facts charged in relation to the grant to Nobles, but avers that the charter set up by Complainant was modified and partially repealed by an Act of the Legislature of Wisconsin approved April 16th, 1852, which repealed that section of the charter which forbids the establishment of any other ferry within two miles of Complainant's ferry; and

that by an Act of the Legislature of the Territory of Minnesota approved March 6th, 1852, that part of the grant which gave Nobles and his assigns an exclusive right for two miles was repealed: and that by the same Act said Nobles and his assigns were allowed the exclusive right, as provided in the original Act, of landing for the distance of one-fourth of a mile each way from a point on the west bank of Lake St.-Croix, known as Fisher's Ravine.

The Defendant also avers that he established a ferry on Lake St. Croix, and carried passengers between certain points, upon which points he had permission of the owners to land; and that the western terminus of his said ferry is at least half a mile from the point designated as the western terminus of Nobles' original ferry grant. The Defendant also avers that he was duly licensed by the County Commissioners of the County of St. Croix, Wisconsin, and the County of Washington, in this Territory.

On the part of the Defendant, it was urged:

First. That the grant to Nobles of an exclusive ferry right was invalid: it being in conflict with the Ordinance of 1787, which made the Lake St.-Croix a common highway forever free to the citizens of the United States.

Second. That if the Legislature had the right to impose this restriction, the restriction has been so modified by the Legislative authority as to legalize the acts of the Defendant.

From the view I have taken of this case it will not be necessary to consider the first objection, and I will at once proceed to examine the second.

It was strenuously urged upon the argument, that the Legislature had no power to repeal or modify Nobles' grant. Were this a new question it might be necessary to enter into an examination of it at length, but the question is not an open one. The power of the Legislature to amend and repeal a charter, where it has the power reserved to do so in the charter itself, is, in my judgment, too plain and well-settled to admit of a doubt.

The only question, then, is: Have the Legislature so modified Nobles' grant as to legalize the acts of the Defendant.

The Legislatures of Wisconsin and Minnesota have each re-

pealed the exclusive grant to Nobles to the extent of two miles. As the result of this legislation, it would seem to me that the acts complained of by the Appellant were not an infringement of his legal rights.

It may be urged that a ferry right is necessarily exclusive, and, consequently, that the Complainant has an exclusive right unless his charter is repealed altogether. This position, I think, is not tenable. If the grant to Nobles was a mere emanation of a royal prerogative, or if it was a grant of some right which the citizen did not before possess—as, to build a bridge across a navigable stream—this position might be correct. In this case, however, every citizen has a right, without any grant, to transport passengers and freight across Lake St.-Croix, and to land upon the shores, provided the owner of the land does not object. How, then, can the granting of a charter to one man exclude another, unless the terms of the charter are exclusive?

The conclusion, therefore, at which I have arrived is, that the Defendant had been guilty of no infringement of the legal rights of the Appellants, and that the order of the District Court must be affirmed.

Order affirmed.

WYMAN BAKER, Plaintiff in Error, *vs.* THE UNITED STATES, Defendant in Error.

The evidence of Co-Defendants in a criminal prosecution is inadmissable, and they will not be permitted to testify for, or obliged to testify against, each other, and if the Defendants are tried separately, the rule is the same.

But a Defendant, after being discharged, or after judgment rendered against him, may be a competent witness for a Co-Defendant.

In cases of criminal prosecution before a Justice of the Peace, the District Court may, upon *Certiorari*, affirm the judgment of the Justice with costs in both Courts, and render such judgment against the Defendant and the sureties upon his recognizance.

This was a criminal prosecution against Wyman Baker and Thomas Baker for assault and battery, before Orlando Simons, Esq., a Justice of the Peace for Ramsey County.

Wyman Baker was fined, and the cause was removed to the District Court by *Certiorari*, in which Court the judgment of the Justice was affirmed, and now comes to this Court by Writ of Error to the District Court of Ramsey County. The facts appear in the opinion of the Court.

Assignment of errors on behalf of the Plaintiff in Error:

First, The District Court erred in affirming the judgment of Orlando Simons, the Justice below, for the reason that said Justice erred in excluding the witness, Thomas Baker.

Second, The District Court erred in rendering judgment against Joseph W. Marshall, the surety on the recognizance for Writ of *Certiorari*.

Third, The District Court erred in rendering judgment for, or affirming judgment below with Ten Dollars costs to, the United States.

H. L. Moss, Counsel for Plaintiff in Error.

[Points and Authorities of Defendants in Error not on file.]

Rice, Hollinshead & Becker, Counsel for Defendants in Error.

By the Court—Sherburne, J. Wyman Baker, the Plaintiff in Error, and one Thomas Baker, were Defendants in a criminal prosecution for assault and battery. Wyman Baker was first tried, and upon his trial offered the said Thomas Baker, his Co-Defendant, as a witness in his behalf. This witness was objected to by the Counsel for the Government, and the objection was sustained by the magistrate before whom the cause was tried, and the witness excluded.

The exclusion of this witness is alleged to be error, and the Counsel for the Plaintiff in Error, in order to sustain his position, relies upon Sec. 93, on page 20, of the Amendments to the Revised Statutes, allowing parties and others to be witnesses, in derogation of the common law. But that Section of Statute contains the following clause:

"But no Defendant in a criminal action or proceeding shall be a witness therein for himself." It is a well settled rule of evidence at common law, that parties to the record are inadmissible as witnesses, either in civil actions or criminal prosecutions; they are neither permitted to testify for, nor obliged to testify against each other. And the rule is the same, whether the Defendants are tried together or separately. *Commonwealth vs. Marsh*, 10 *Pick.* 57. *The People of New York vs. Bill* 10 *Johns.* 95.

It should not be presumed that the Legislature intended to change this salutary rule, unless such intention clearly appears from the language used. In other words, a law authorizing such a departure from well established rules, and especially those commending themselves to general favor, should be strictly construed. 1 *Kent's Com.* 464. *Commonwealth vs. Knapp*, 9 *Pick.* 514.

As the Common Law rule now stands, we do not find, as before stated, that any distinction is made as to the admissibility of parties to the record as witnesses between the case of a trial of all the Defendants at the same time, and that of separate trials; nor, indeed, does there seem to be any reason for such distinction. If Wyman and Thomas Baker had been tried together, Wyman might have offered Thomas as a witness, with the same reason that he offered him upon a separate trial. They were both Defendants in the same case, and as to the effect of their testimony for each other, it was immaterial whether they were tried separately or at the same time.

The rule for admitting parties defendant as witnesses, after discharge, or judgment against them, is based entirely on different grounds, and even this has sometimes been denied by high authority. *Rex vs. Lafone et. al.*, 5 *Esp. R.* 155.

The later authorities, however, are otherwise. We are of the opinion that the Statute was intended to mean nothing more than that a defendant in a criminal action should not be permitted to testify in defence of his own cause; and such a provision is in affirmance and not in derogation of the common-law rule: which is founded not merely on the consideration of interest but—partly at least—in a principle of policy for the prevention of perjury. 3 *Stark. Ev.* 1062.

It is said in the case of *Commonwealth vs. Marsh*, above cited, that "if parties charged with an offence are permitted "to testify for each other, they might escape punishment by "perjury. If in the present case, Barton, whose trial was post-"poned, had been admitted as a witness for the Defendant, he "might have been acquitted, and then, on the trial of Barton, "the Defendant in his turn might be admitted to testify: and "thus they would be allowed mutually to protect each other, "and evade the ends of justice."

The statements of persons charged with crime, upon the subject of the charge are entitled to very little confidence. This has been demonstrated by the uniform experience of ages. So uncertain have such statements proved to be, as shown by the history of criminal proceedings, that Courts have admitted them as evidence with great caution, and with many checks and limitations, even when made against the party making them.

The fear of death, imprisonment, or loss of character—the hope of sympathy, or pardon, or modified punishment: or perhaps all of these feelings operating in some degree, at the same time,—madden the mind of even the entirely innocent, when placed under suspicious circumstances: and while writhing under the tortures of suspense, he commits the grossest errors—is guilty of the wildest falsehoods, and has often been known to confess himself guilty of the crime of which he knew nothing.

If the statements of the accused when against themselves are liable to objections, how little weight should be allowed to those which are made in favor of the party making them!

It is perhaps just, to infer, as a general rule, that the class of persons who do not hesitate to be guilty of crime will be equally ready to screen themselves from the disgrace and punishment of conviction by false swearing.

A case of simple assault and battery, like the present, may be an exception, but the law makes no distinction; and if the testimony is admissible in this case, it would be also admissible if the charge were Murder.

For these reasons, we are all of the opinion that the Justice was right in excluding the witness.

The second and third errors assigned are as follows:

"*Second.* The District Court erred in rendering judgment against Joseph M. Marshall, on the recognizance for the writ of Certiorari.

"*Third.* The District Court erred in rendering judgment for, or affirming the judgment of the Court below, with ten dollars costs to the United States."

Section 198 on page 325 of the Revised Statutes is found in the chapter relating to proceedings before Justices of the Peace, under the title or head of "Miscellaneous Provisions in Criminal Cases," and reads as follows:—"If the judgment of the "Justice shall be affirmed, or, upon any trial in the District "Court, the Defendant shall be convicted and any fine assessed, "judgment shall be rendered for such fine, and costs in both "Courts, against the Defendant and his sureties."

There can be no doubt that this section was intended to apply cases taken up from a Justice to Court by Certiorari, as well as to those taken up by Appeal; and if so, the authority for affirming the judgment with ten dollars cost, by the District Court, is too clear and evident to admit of argument.

It is indeed difficult to perceive how language could have been better chosen to effect the apparent object, which was to authorize judgment for costs in *both Courts*, against the principal and his sureties.

Section 120 on page 315 of the Revised Statutes, regulating the action of the District Court in cases of Certiorari, is silent as to costs, and also as to judgment against the sureties: and this is left to be governed by Section 198 above recited. We do not, however, see any authority for taxing costs in this case in the Supreme Court.

HOYT & AMES, Respondents, *vs.* IRA SANFORD, Appellant.

This was an Appeal from a judgment in the District Court of Ramsey County.

The action was originally commenced before TRUMAN M. SMITH, Esq. a Justice of the Peace of Ramsey County, by complaint filed December 26th, 1853.

The complaint sets forth that on the 7th day of May, 1852, one Lyman Dayton leased to Hoyt & Ames, for the term of five years, certain lands therein described, "for the purpose of booming, hauling, rafting, securing and keeping logs and lumber, and removing the same therefrom," &c. and reserving the right to the lessor to "fill up and raise said land, for building purposes and other improvements."

That said Dayton was, at the date of said lease, the owner of said land, and that the Plaintiffs took possession thereof as tenants under said lease.

That, afterwards, the Defendant Sandford entered said land, hauled and placed thereon certain logs, &c. to the damage of the Plaintiff in the sum of fifty dollars.

The Defendant demurred to the complaint, because

The Complaint recites a lease containing a reservation to the lessor of certain rights and privileges therein recited, and because the acts of the Defendant complained of are within the said reservation, and not inconsistent therewith: and because it does not appear that the Defendant is not the grantee of said Dayton, the Plaintiffs' lessor.

And because it does not appear that the acts of the Defendant were not done under a license from, and authorized by, said Dayton.

And because the acts complained of are not inconsistent with and do not conflict with the Plaintiffs' rights under the lease.

The Justice sustained the demurrer, and the Plaintiffs refusing to amend their complaint, judgment was rendered against them for costs.

The cause was afterwards removed to the District Court by Certiorari, where the judgment of the Justice was reversed with costs.

From this judgment the defendant appealed to the Supreme Court.

MERRITT ALLEN and AMES & VAN ETTEN, Counsel for Appellants.

MASTERSON & SIMONS, Counsel for Respondents.

[No "Points and authorities" are found with the files, and a judgment of Affirmance was entered by consent of Appelant's Counsel, without argument.]

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

JANUARY TERM, 1856.

JOHN N. AHL, Respondent, *vs.* ROSWELL B. JOHNSON, Appellant.

An Agreement to *sell* and *convey* Real Estate upon condition of payment of the consideration-money at a future specified time, is an executory contract; and no sale is made or consummated, and no rights acquired, except upon full payment of the consideration-money, and performance of the condition, at or before the time agreed upon.

In such a contract, the time of payment or performance of the condition precedent is an essential element; and such condition must be performed within the specified time, before a party may claim any right to the property.

But Courts of Equity will relieve where unavoidable events or circumstances beyond the control of the party seeking relief have rendered the performance of the condition within the specified time an impossibility; but in such case, the party seeking relief must show affirmatively that his failure to perform was not the result of gross negligence or *laches* on his part.

A Complainant seeking relief by a decree for specific performance, must show performance of all conditions, or satisfactorily excuse any default or negligence; and a Court of Equity has no more power than a Court of Law to administer relief to the gross negligence of suitors.

This suit was commenced by Bill in Chancery, in the District Court for the County of Washington, Second Judicial District, and was brought to compel the specific performance on the part of Appellant of a written Agreement to sell and convey a town-lot in the City of Stillwater, in said County.

The Bill recites a written Agreement executed by the parties, dated the 15th of June, 1850, by the terms of which the Defendant Johnson agreed to sell and convey to the Complainant the lot in question, upon the payment of the consideration-money (one hundred and ninety dollars) with interest, at a future day, to wit: the first of May, 1851—which sum the Complainant undertook to pay on or before that day.

The Bill further states that on the 2d of July, 1850, the Complainant made a payment of sixty dollars, to apply upon the purchase-money: and that the Defendant agreed to allow the further sum of thirty dollars and thirty-three cents, in consequence of an alleged mistake or misrepresentation concerning the western boundary line of the lot.

And further states, that the Complainant had tendered and offered unto the Defendant the full balance of said purchase money and interest due and owing by virtue of the Agreement, and that he had always been ready and willing to perform his part of the said agreement, &c. and that the balance was unproductive in his hands: with the usual prayer for a specific performance, Injunction, &c.

The Answer of the Defendant (upon oath) admits the execution and delivery of the Agreement recited in the Bill—the payment of sixty dollars of the purchase-money on the 2d of July 1850, and that he consented to remit the sum of thirty-three dollars and thirty-three cents, on account of the mistake in the boundary line of the lot, but denies that such mistake was on account of misrepresentations, and denies that he was in equity bound to make any such deduction from the purchase money.

But the Answer expressly denies that the Defendant ever gave possession of the lot to the Complainant, or that he consented to his taking possession thereof until the full amount of the purchase money should be paid.

And denies that the Complainant had always been ready

or willing to pay the balance due upon the purchase, but, on the contrary, charges the truth to be: that when the same became due and payable, the Defendant demanded payment from the Complainant, and then offered to execute and deliver to him a warranty deed for the lot, in compliance with the agreement, upon the payment of the purchase-money, and that the Complainant refused to pay the same: and that he had at different times between the first of May, 1851, (the date when the purchase-money became due,) and the middle of October following, called upon Complainant and requested payment, and offered and tendered to him a deed of the lot, and that the the Complainant on every occasion of such request refused to pay.

To which answer, Complainant filed a general Replication.

William Holcombe was afterwards appointed a Special Master in the cause, before whom the testimony was afterwards taken and reduced to writing.

Upon the part of the Defendant, the articles of agreement admitted in the pleadings, were offered and filed.

William H. Morse testified that while acting as Clerk in the employ of the Defendant between the 20th of October and the 18th of November, 1851, he heard the Defendant ask the Complainant for the balance due on that lot, which lot witness understood to be the same that he (Complainant) had built a house on. That said Ahl complained, in reply, that he had a good many debts out, which, as soon as he could collect in, he would settle up with Defendant. Heard Defendant ask Complainant for the balance due on the lot, at least twice, if not three times. Complainant replied that he had no money, that he didn't want Defendant to shove him, and would pay the balance due on the lot as soon as he could collect in. Understood Johnson to say to Complainant that he was ready to make him a deed whenever he paid the balance. Had no recollection of hearing the Defendant say that the time of payment had expired, and that he (Complainant) would not get a deed from him for the lot.

Elijah A. Bissell testified that he was at the house of Complainant in Stillwater about the 20th of December, 1852, when he visited said Ahl on his own business, when Defendant,

Johnson, called and said he understood that he, the Complainant, had a sum of money for him for the lot, and that he, Defendant, was ready to give him a deed for the lot upon the receipt of the money, which money Johnson then demanded of the Complainant and called witness to notice the same. The amount of money demanded by Defendant was $106,12. At the same time, Johnson tendered the deed for the lot, (which is exhibited to witness,) upon which witness put his private mark (the letter "B") at that time. Complainant replied that he had had some money, but that he had paid it out. He had not the money then, and did not offer to give the Defendant any money.

Upon cross examination, witness states that the deed was not read to or by Complainant at the time of the tender. Witness put his private mark on the deed at Dr. Ahl's house. Witness never read the deed before to-day, and had not seen it since he put his mark on it. It was tendered in the evening about seven o'clock, at the same time the money was demanded. Witness knows the deed only by his private mark; does not know whether the same was filled up when tendered, as it now appears. About the time Johnson was leaving the house, Complainant stated that he had deposited some money with Bartlett, which witness understood to be to pay Johnson for the lot.

Charles D. Gilfillan testified that he was a Notary Public, and took the acknowledgment of the deed from Johnson and wife to Complainant on the 18th of December, 1852, and that said deed was filled up and executed as it purports to have been, at the time he took the acknowledgment. He witnessed the execution thereof. Said deed was tendered to Complainant by M. E. Ames on the 23d of December, 1852, at his law office in Stillwater, and at the same time demanded the money due the Defendant for the premises mentioned in the deed, stating that he was instructed by Defendant to make such tender and demand, and that Complainant replied that he had no money, not even enough to pay his taxes. That he had given some money to Bartlett, and Johnson ought to have taken it from him then. That Bartlett was away, and Johnson must wait until he came back. Harley Curtis was present at the time.

On cross examination, states that Solicitor Ames did not, as he thinks, demand any particular sum of money; thinks the deed was not read to Complainant by Ames, or any one else.

Harley Curtis, in his testimony, corroborates the evidence of Gilfillan; and says further, that at the time of the tender, Solicitor Ames "demanded from Ahl the sum of money which "the Complainant's Bill in this suit alleges had been tendered "to the Defendant." He, witness, marked the deed with his name, "H. Curtis," at the time of the tender.

M. E. Ames testified that the agreement was placed in his hands as an Attorney by the Defendant, in the latter part of October, 1851, with instructions to call upon and collect the money from Mr. Ahl, and in case of payment to deliver him a deed. Witness met Complainant at the "Lake House," about the last of October or first of November, and told him he would deliver him a deed upon payment of the money. Complainant replied that he could not raise the money at that time, and that Mr. Johnson must hold on in the matter. Defendant directed the witness, as his Solicitor, to deliver the deed to the Complainant upon his paying into his, Solicitor's, hands the balance that was admitted to be due upon the lot, as stated in the Bill of Complaint, (and further corroborated the testimony of the witnesses Gilfillan and Curtis.)

Cross examined, says, at the time he saw Complainant at the "Lake House" in October or November, 1851, no suit had been commenced; and at the time of the tender of the deed, nothing was said about settling this suit or the costs of it.

The original deed from Johnson and wife to the Complainant, was annexed to the Depositions and referred to as exhibit "B."

The Complainant offered the Deposition of Frederick K. Bartlett, who testified that on the 1st of November, 1851, he tendered the Defendant $107,10 in lawful currency of the United States, (giving a description of each piece,) and said to Mr. Johnson, "I hereby offer and tender to you $107,10, as "principal and interest in full to this 1st day of November, "1851, due upon contract signed by yourself," &c., (giving description of the contract mentioned in the Bill,) and then and there demanded a deed of said property. "And you are here-

"by notified that the said sum so tendered is always in readi-
"ness to be paid by F. K. Bartlett, at his house in Stillwater."
The money was placed upon the table, Mr. Johnson sitting near the same, and I said, there is the money. He got up and went out of the office, and did not take it, nor did he offer to give me a deed, at any time, for said Ahl.

The foregoing is the substance of the evidence offered on the part of the Complainant and Defendant on the trial of the issues of fact herein, touching the questions of "tender," and upon the hearing the Court decreed a specific performance of the contract upon the payment by the Complainant to the Defendant, of the balance admitted to be due in the Bill, for principal and interest, and for costs, &c.

And the cause comes to this Court upon Appeal from the final decree of the District Court.

Points relied upon by the Appellant's Counsel for a reversal of the decree:

First. That the Agreement made on the 15th day of June 1850, between the parties, and set forth in the Bill and contained in the evidence, was an *executory agreement* by the Defendant *to sell* and convey the premises therein mentioned at a future specified time, upon condition of the payment of the consideration-money *at the time* agreed upon, but no sale was ever made or consummated.

Second. That it was the intention of the parties in this case to make *the time* of payment specified an essential part of the contract to sell, and the *time* of payment was an essential element by the terms of Agreement, and the Agreement is conclusive evidence thereof. 7 *Paige's Ch. Rep. p.* 22, *Wells vs. Smith;* 4 *Johnson's Ch. Rep. p.* 559, *Hatch vs. Calb;* 2*d Vol. Story's Eq. Juris. p.* 96, *Sec.* 771; 1 *Johnson's Ch. Rep. p.* 370, *Beuedick vs. Lynch.*

Third. That the payment of the whole amount of the consideration money, and the interest at the time it became due, viz: on the first day of May, 1851,—was a condition precedent in the agreement to be performed by the Complainant at the time specified.

Fourth. The condition precedent, contained in an agree-

ment to be performed by a party, must be fully performed on his part, and at the time agreed upon, before he is entitled to ask a specific performance of the other party, and without which Courts will not compel a specific performance. 10 *Johnson's Rep. p.* 203, *Cunningham vs. Morrell;* 5 *Denio's Rep. p.* 406, *Paige vs. Att;* 18 *Wendell's Rep. p.* 187; 13 *ib. p.* 258; 8 *ib. p.* 615, *Slocum vs. Despard; Chitty on Contracts* (*4th Am. Ed.*) *pp.* 737, 738; *Story on Contracts* (*2d Ed.*) *Secs.* 27, 32; *Ib. Sec.* 633; 2*d Vol. Blackstone's Com. p.* 431; 3 *Vesey's R. p.* 692; *Story on Contracts* (*2d Ed.*) *Sec.* 971.

Fifth. That the Complainant having failed and refused to pay the amount of the consideration-money, and by such failure and refusal having broken and presumptively abandoned the agreement on his part, is not entitled to have it performed on the part of the Defendant.

Sixth. The Complainant having neglected and peremptorily refused to pay the consideration-money for the lot, for an unreasonable length of time after the time fixed for payment by the terms of the Agreement, without assigning or showing *any* excuse or justification for his *laches* and default, has no equities—is not entitled to have it performed on the part of the Defendant; and a Court of Equity ought not to compel a specific performance, and will not administer relief where there is gross negligence on the part of a Complainant. 2 *Story's Eq. Juris. p.* 96, *Sec.* 771; 2 *Wheaton's U. S. Rep. p.* 336; 2 *Sumner's U. S. Rep. p.* 278; 6 *Wheaton's U. S. Rep. p.* 528; 9 *Peters' U. S. Rep. p.* 62; 1 *Harrington's Ch. Rep. pp.* 124, 128; 6 *Johnson's Ch. Rep. p.* 222; 1 *Maddock's Rep.* 423; 1 *Johnson's Ch. Rep. p.* 370.

Seventh. The possession taken of the premises by the Complainant was unauthorized by the Agreement and without the consent of the Defendant and in fraud of the Defendant's rights: therefore the Complainant acquired no rights or equities by making improvements thereon.

Eighth. No legal or sufficient tender of the purchase-money admitted to be due to the Defendant is stated in the Bill or proved by the evidence in the cause, and the pretended tender attempted to be proved was coupled with a condition that defeated it.

Ninth. The pretended tender to the Defendant of the balance of the consideration-money admitted to be due, was subsequently abandoned by the Complainant's acts, and the tender has wholly failed and the Complainant lost all benefit from it, and the case stands as if no tender had been made or attempted,—Because the tender has not been kept good, nor the money paid into Court or placed under its control; and because, a subsequent demand of the money tendered has been made by the Defendant and refused by Complainant. 2 *Greenleaf's Ev. Sec.* 608; 24 *Pickering's Rep. p.* 168, *Town vs. Trow;* 6 *Cowen's Rep. p.* 13, *Fuller vs. Hulben.*

Tenth. The Complainant comes into Court himself in default and without offering any excuse, explanation or justification for his own default, *laches* and gross negligence, and is not entitled to any relief or decree in a Court of Equity. 1 *Story's Eq. Jurisprudence, p.* 78.

Ames & Van Etten, Counsel for Appellant.

Thompson & Parker, Counsel for Respondent.

Upon argument in this Court, the Final Decree of the District Court, appealed from, was reversed; but no opinion has been filed.

Note.—This cause is now pending in the Supreme Court of the United States, upon Appeal from the Supreme Court of this Territory.—*Reporter.*

David C. Murray, Appellant, *vs.* Marcus S. Johnson, Respondent.

This was an Appeal to the Supreme Court from an order of the District Court for the County of Ramsey.

The action was to recover the amount of a promissory note, dated March 28, 1854, made by the Defendant below, and payable one day after date to the order of the Plaintiff, with interest.

An affidavit for a Warrant of Attachment was made by one of the Plaintiff's Attorneys, which affidavit set forth that the Defendant was "about to depart for the Territory of Kansas, "as soon as he can get away." That it was a matter of general belief that the Defendant owned one-third of a Saloon in Saint Paul, the assets of which amounted to $1400, but that the Defendant had stated to Affiant that he was not worth a dollar in the world.

The warrant was issued on the 27th of October, 1854. On the 6th day of November following, the Defendant appeared and moved to vacate and set aside the Warrant,

Because, the Bond filed by the Plaintiff was insufficient in this, that it is a Bond, and not an undertaking, as required by law; and

Because, the affidavit is insufficient and inconsistent, and does not state facts showing or tending to show that the Defendant "owns the one-third interest of a certain Saloon in Saint Paul"; and

Because, said affidavit does not state any facts showing or tending to show that the Defendant "intends to depart for the "Territory of Kansas as soon as he can get away," or that he is about to assign, secrete or dispose of his property, with intent to delay or defraud his creditors; and

Because, the said affidavit does not show an existing cause of action against the Defendant, or the amount of the claim of the Plaintiff against him.

Upon argument of this motion, the District Court ordered that the Warrant and all proceedings therein, be vacated and set aside, with costs.

From which order the Plaintiff appealed to this Court.

Newell & Tompkins, Counsel for Appellant.

Ames & Van Etten, Counsel for Respondent.

There being no appearance in the Supreme Court, on behalf of the Appellant, the order of the District Court was affirmed, with costs.

DAVID C. MURRAY, Appellant, *vs.* MARCUS S. JOHNSON, Respondent.

This was an Appeal from an order of the District Court for the Second Judicial District and County of Ramsey.

The object of the action was to recover the amount of a promissory note, made by the Defendant below, for Two Hundred Dollars with interest.

The summons and complaint were served upon the Defendant by the Sheriff of Ramsey County, by leaving certified copies at the usual last place of abode of the Defendant, on the 28th day of October, 1854.

Within ten days from the date of such service the Defendant appeared by attorneys, who served notice of Retainer and Appearance, and a demand of a copy of the Complaint, upon the Plaintiff's Attorneys.

On the 18th of November following, the complaint and summons were filed in the Clerk's office, together with the affidavit of one of the Plaintiff's Attorneys, setting forth the time of the service of the summons and complaint, and stating that no answer or demurrer had been received from the Defendant within the twenty days prescribed by law.

Whereupon, judgment was rendered and entered in favor of the Plaintiff, for the full amount claimed.

On the 23d day of November following, the Defendant's Attorneys moved to vacate and set aside this judgment,

Because, no affidavit had been filed showing that twenty days had expired since the service of the summons; —

And because, no proof was made or furnished to the Court before the entry of said judgment, of the demand mentioned in the complaint;—

Because no one was examined on behalf of the Plaintiff, before the entry of judgment, "respecting any payment made to "the Plaintiff, on account of said demand," mentioned in said complaint;—

Because no security to "abide the order of the Court touch- "ing the restitution of any property collected or received un- "der the judgment," was filed on behalf of the Plaintiff, before the entry of such judgment;—

And because, no notice of an application for judgment was served upon the Defendant's Attorneys, as required by statute, before the entry of such judgment.

Upon argument of this motion, the District Court ordered that the said judgment be vacated and set aside, with costs. From which order, the Plaintiff appealed to this Court.

NEWELL & TOMPKINS, Counsel for Appellant.

AMES & VAN ETTEN, Counsel for Respondent.

There being no appearance in the Supreme Court on behalf of the Appellant the order of the District Court was affirmed with costs.

ALLEN TAYLOR, Respondent, *vs.* E. A. BISSELL, Appellant.

Evidence tending to prove facts not in issue in the pleadings is inadmissible.

New matter, or a counter claim, set up in an answer, will be taken as true unless controverted by a Reply; and if not denied or controverted, it is unnecessary to introduce evidence in support of such new matter or counter claim.

Pleadings in an action before a Justice of the Peace must be verified: and it seems that a Justice has no jurisdiction of a case wherein the pleadings are not verified, except by his own consent and by waiver of the parties; and a cause may be dismissed by a Magistrate upon his own motion, if the pleadings are not verified.

Taylor v. Bissell.

The District Court, in reviewing the proceedings of a Justice of the Peace, for alleged errors, upon Certiorari, is confined to the facts found in the Return of the Magistrate without reference to the affidavit upon which the Writ was obtained.

This cause was originally commenced before N. GIBBS, Esq. a Justice of the Peace for Ramsey County.

The Plaintiff filed as a Complaint an account amounting to Twenty-Four Dollars, which was not verified. The Defendant answered, denying the indebtedness and setting up a counter claim amounting to Seventy-Four Dollars and Forty Cents, which Answer the Defendant in his verification thereto alleged that he believed it to be true. The Plaintiff filed no reply, and the Justice gave judgment against the Plaintiff for $51 40, and costs.

The cause was afterwards removed by Certiorari, to the District Court for the County of Ramsey.

Upon argument in that Court, the judgment of the Justice was reversed and the cause dismissed, without prejudice to the Plaintiff's right to bring a new action.

From which order the Defendant appealed to the Supreme Court of the Territory.

Appellant's points and authorities:

All grounds of error relied upon by a party suing out a writ of Certiorari should appear affirmatively in the affidavit; and if the case presented to the Court upon the affidavit, and the Return of the Writ, shows no error, the judgment of the Court below should be affirmed. See *Rev. Statutes, p.* 314, *Sec.* 111.

Where new matter is set up in answer, and the Plaintiff fails to reply, he thereby admits such new matter, and cannot introduce evidence to disprove the same.

A mistake as to the decision of the Justice is no ground for the reversal of a judgment upon Certiorari.

[No "Points and authorities" on file on behalf of Respondent.]

MASTERSON & SIMONS, Counsel for Appellant.

PALMER & HAYWARD, Counsel for Respondent.

By the Court—SHERBURNE J.—This is an action in the nature of Assumpsit, on an account annexed, originally brought before a Justice of the Peace, and carried into the District Court by writ of Certiorari.

The Defendant in his Answer set up an account in set-off greater, by the sum of about fifty dollars, than that charged in the Plaintiff's complaint. To this answer there was no reply upon the part of the Plaintiff.

Upon the trial before the Magistrate the Plaintiff offered to introduce testimony for the purpose of disproving one or more of the charges alleged in the Defendant's answer. This testimony was objected to by the Defendant, and the objection was sustained by the Magistrate.

The exclusion of this testimony by the Magistrate is alleged by the Plaintiff's Counsel to be error. I have no doubt, however, that the testimony was properly excluded. The statute provision upon the subject is plain and conclusive. The account set up in the answer, and not denied by any reply of the Plaintiff, was rightly taken as admitted, and any testimony offered by the Plaintiff was outside of the issue made by the parties, and therefore irrelevant.

The admission of the testimony would have been clearly erroneous. The language of the Statute is: (see page 303, Sec. 33) "Every material allegation in a complaint, or relating to a counter claim in an answer, not denied by the pleading of the adverse party, must on the trial be taken to be true," &c.

In this conclusion I have not overlooked the fact that neither the *complaint* or *answer* are properly verified. It is urged by the Counsel for the Plaintiff that for this reason the allegations in the answer cannot be taken as admitted, although not denied: and that judgment should not have been given for the Defendant without proof of the facts alleged in the answer. Our Statute is imperative that the pleadings in an action before a Justice of the Peace must be verified. *Rev. Statutes*, Sec. 32, p. 302.

The complaint not being verified, the Plaintiff therefore committed the first error in this respect. The Defendant attempted to verify his answer, but the verification is imperfect. Upon this state of the pleadings the parties went to trial, without

objection upon either side on account of their insufficiency. If the irregularity was waived—and it certainly was, as far as the party had the power to do so—it is too late now to make the objection. The Plaintiff insists, as before stated, that although the pleadings may present an issue which can be tried by the Court, still the answer is not evidence: or, in other words, that no material fact alleged in it is admitted by the want of a reply.

In this case, neither the complaint or answer were in accordance with the positive requirements of the Statute, and in my own opinion the whole matter might properly have been dismissed by the Magistrate upon his own motion.

There are other interests at stake in the trial of causes than those which pertain to the parties litigant. The object of the statute provision requiring that pleadings before Magistrates shall be verified was intended not only to protect parties against sham complaints, answers and defences, but also to relieve Magistrates and jurors from an examination of them, and the Government from expense. It is a matter of public policy, as well as private interest, that parties shall as far as possible be denied the power of trifling with Courts by a pretence of rights which have no substantial foundation.

The most favorable view which can be taken of this cause is, that the Magistrate had jurisdiction by consent of the parties. If he had such jurisdiction, then the cause must be entertained by this Court.

There is in our Code but one form of pleading before Justices of the Peace, in this respect. In every case the pleading, in order to conform to the Statute, must, as before stated, be verified. It is evident, therefore, that the pleadings in this case must answer the purpose designed or no purpose at all. If the consent or waiver of Counsel have given to them vitality, and to the Court, jurisdiction, they are good for all purposes intended by the Statute; if not, then they are a mere nullity, and neither of the Courts which have assumed jurisdiction has had any legal authority to do so.

There having been no objection to the irregularity, we think the action may be entertained. See *Day vs. Wilbur*, 2*d Caine's R.* 134; *Onderdonk vs. Ranlett*, 3 *Hill*, 323. It must, however, be held for all the purposes of verified pleadings.

If the answer is not denied, it is admitted. The whole question must be determined by our statute provisions. And the authority cited by the Plaintiff's Counsel, from 1st volume of *Monell's Practice*, page 586, is not in point.

The third cause for reversing the judgment of the Magistrate is, that "upon a motion to dismiss the action, judgment upon the merits or in chief cannot be given." Whether this position is correct or not, the facts in the case do not sustain it. That part of the return of the Justice applicable to the objection is in the following words: "Defendant made a motion to "dismiss the suit, as Plaintiff had failed to prove the board-"bill: motion not sustained. Defendant here said he closed, "but asked for a judgment for Defendant for a balance due on "account, as it had not been denied, and had been verified by "oath of Defendant. Parties left. Upon examination of the "testimony, I considered the Plaintiff had proved what he de-"clared for $24 00. Defendant claiming $75 40 not being "denied, I gave judgment for Defendant for $51 40 and costs "of suit." The return, therefore, shows that the judgment was not given by the Magistrate upon motion to dismiss the suit, but upon the motion of the Defendant for judgment in his favor for the balance due on account. Whether he could do do so or not without proof of the Defendant's account, has already been considered.

I do not see that the fourth error assigned has any point whatever. It is in these words: "The judgment involves the "absurdity of allowing the value of one portion of an indivis-"ible article sold Defendant and disallowing the rest." The objection is probably based upon facts stated in the affidavit of the Plaintiff to obtain his Writ of Certiorari. The Court is, however, confined to the facts found in the return of the Magistrate who tried the cause.

There is nothing in the return to which this objection can possibly have any application.

The fifth error assigned has already been disposed of.

The sixth is in the following words: "The Plaintiff and his "Counsel, without fault upon their part, were under a mistake "respecting a decision of the Justice upon a motion to dismiss, "and were thus deprived of the right to be heard on the mer-

"its of the case, or of making a motion to amend proceedings."

In this there is no error in law. If the statement is true, the Plaintiff might or might not have been entitled to some remedy: but that would have depended upon the whole circumstances of the case. It is not a question which can be noticed in this form of proceeding. The judgment of the Magistrate in which the cause originated must be affirmed.

MARIE D. BRISBOIS, and others, Appellants, *vs.* SIBLEY & ROBERTS, Respondents.

APPEAL FROM AN ORDER DISMISSING A BILL OF COMPLAINT.

A Deed or other instrument executed with intent to convey property, before the same has been purchased from the United States Government, is a mere nullity, and no title or interest passes to the grantee in such conveyance.

A party claiming title by pre-emption, must prove actual residence upon the land, and improvements made thereon by him.

A meeting of occupants of the public lands belonging to the United States, held at St. Paul on the 10th day of July, 1848, for the purpose of adopting such measures as they might deem expedient to protect and to secure to the settlers and owners their rights and claims to land upon which the Village of Saint Paul was located, (to wit, upon lands belonging to the United States Government,) at the land sales to be held in August, 1848, was a meeting opposed to the policy and laws of the Government of the United States, and any act or acts of such meeting, to carry out the purposes and objects thereof, were illegal and void.

Courts will not interfere for the purpose of adjusting the differences and supposed rights of parties claiming by virtue of the acts of such a "claim meeting," as they are illegal and void, *ab initio.*

This was an appeal from an order of the District Court of Ramsey County, dismissing a Bill of Complaint.

The Bill was filed in said District Court, sitting in Equity, on the 20th day of October, 1851, by the Complainants, the Widow and heirs of Joseph Brisbois, deceased, against Henry H. Sibley and Louis Roberts; and the object of the suit was

to recover the possession of, and legal title to, an acre of land within the limits of the original Town of Saint Paul; and for relief by injunction, &c., &c.

The Bill sets forth, that previous to the purchase from the United States, of the site of the present Town of Saint Paul, (then in Wisconsin,) the same was claimed, occupied and improved by various individuals, under the laws of the United States giving the right of pre-emption to actual settlers upon the public lands, and that said Joseph Brisbois, deceased, in his life time, claimed and owned the pre-emption right to the acre of land, the tile to which was sought by the Complainants; that on the 10th day of July, 1848, a meeting of the various claimants to the site of the Town of Saint Paul was held at the house of Henry Jackson, in said Town, for the purpose of adopting such measures as they might deem expedient to protect and secure to the settlers and owners, their rights and claims to land upon which the Village of Saint Paul was located, at the land sales to be held in August (then) next; that said meeting then and there adopted a Resolution, whereby they bound themselves to support and maintain certain articles, that is to say: that there should be appointed three suitable persons residing or having an interest in Saint Paul, whose duty it should be to enter the land at the land sales in August (then) next, or before, if convenient, upon which Saint Paul stood, with the express understanding and intention that the persons who shall make such entries should act therein as the joint agents of the occupants or owners of the claims in said Village. And it should be their duty, as soon as might be, after such land should be entered, to deed so much of the same to each citizen or owner of property in said Village, as should of right belong to him; that a Committee of seven should be appointed to decide all cases of conflicting claims in relation to said land, and that the said agents should deed said lands, in pursuance of the decision of said Committee; that each claimant should hand to the chairman of that Committee, a description of his claim, and in case of disputed claims, the same were to be decided by said Committee before the 28th of August (then) next, giving to claimants notice of time and place, &c.

The said committee were to collect from the claimants the amount of money necessary to enter their respective claims, and were to hand this money to the agents on or before the day of sale.

All Deeds were to be made out according to the town plot as surveyed by Ira Bronson, which plot was to be recorded.

It was further declared to be the duty of the citizens in general, to guard and protect the rights of each other against speculators purchasing lands upon which they live, and *Provided* that no claimant could claim more than one hundred and sixty acres of land.

The Bill further states, that Henry H. Sibley and six others were appointed as said committee, and that said Henry H. Sibley, Franklin Steele and Louis Roberts, were selected as the agents to enter said land according to the provisions of the said Resolution.

That afterwards, the said Henry H. Sibley entered and purchased from the United States Government, that portion of the site of Saint Paul, within the limits of which the parcel of land described in the Bill was situated. That the said committee of seven, appointed as aforesaid, afterwards allotted said parcel of land to the said Joseph Brisbois, in his lifetime, and directed a Deed to be made to him therefor, according to the said Resolution.

That afterwards, the said Henry H. Sibley, being about to leave said Territory, temporarily, did, on the 7th day of November, 1848, with his wife, make, execute and deliver a Power of Attorney to one David Lambert, giving him full power to make, execute and deliver Warranty Deeds "of "all the lands entered by me at the Land Office for the Chip-"pewa Land District, as one of the Committee of the Board of "Arbitrators chosen for that purpose, said Deeds to be made to "the parties who fairly claim the same, only upon certificates "of the Board of Arbitrators aforesaid, the said parties paying "to my said Attorney the amount of the consideration paid "by me for each of them." And which Power of Attorney was duly recorded, &c., &c.

Afterwards, on the 7th day of February, 1847, the said David Lambert, as Attorney in fact for the said Henry H. Sibley,

and professedly under and by virtue of said Power of Attorney, but in direct violation of the authority to him given, did make, execute and deliver a deed of conveyance for said land, claimed, owned and allotted to Joseph Brisbois as aforesaid, to the said Louis Roberts.

That said Joseph Brisbois departed this life at Prairie du Chien, Wisconsin, on the 14th day of January, 1847, intestate.

That said Louis Roberts had taken possession of said land, and was making excavations thereon, and removing therefrom large quantities of building stone, to the irreparable injury of the Complainants.

That they had demanded from the said Sibley a Deed for said land, and had requested the said Louis Roberts to deliver up and cancel the Deed so received from the said Lambert, and to desist from the quarrying and removal of building stone, as aforesaid, which demands had been refused by the Defendants.

And the Complainants ask that the Defendant Sibley may be required to Deed the premises and land to them; that the Deed from Sibley, by his Attorney, to Roberts, be cancelled and delivered up, and that said Roberts be restrained by injunction from quarrying and removing stone from the land, and for general relief, &c.

Upon filing the Bill of Complaint, Bond, &c., a Writ of Injunction was granted and issued as prayed for.

Afterwards, the Bill of Complaint was taken as confessed by the Defendant, Henry H. Sibley.

On the 3d of December, 1851, the Defendant, Louis Roberts filed his answer, a great portion of which was, upon exceptions, filed, expunged and stricken out, as impertinent and scandalous.

On the 12th day of April, 1852, the Defendant, Louis Roberts, filed in said Court his "further answer," which admits many of the allegations in the Bill, but denying fraud, &c., and expressly denying that the said Brisbois ever had a pre-emption right to the lot of land in question, as he never resided thereon, nor in, or near the town of Saint Paul.

That before the land was entered, and while it was owned by the United States, one Alex. P. McCloud, who had a pre-emption claim in conjunction with others to it, desiring that the said

Brisbois should become a citizen of Saint Paul, agreed to give him an acre, (and did quit claim the same to him,) on condition that he would settle and reside here: but that he never did so, and not complying with the conditions upon which the said land was to be given to him, forfeited all right thereto.

That he had never paid any consideration therefor to McCloud, or to any one else, never improved it, or resided on or near it, at any time.

That, notwithstanding all this, it was the intention of the said McCloud to permit the said Brisbois to have an acre of ground, by complying with the terms which those actually here had to comply with, to wit: pay the entrance money and the expense of conveyance: that such being the understanding, and the said Brisbois being indebted to the said Roberts in the sum of One Hundred Dollars, and he, (Roberts,) having no other way of securing his money, accepted the claim of said Brisbois, on McCloud's liberality, as the only hope of securing such indebtedness. And when the Arbitrators adjudicated the lands to the several claimants, they awarded the acre in question to said Roberts, he paying the entrance money, &c., and giving a bond to make a Deed to the said Brisbois therefor, if he, (Brisbois,) should thereafter pay the amount he owed Roberts, and said entrance money, within six months.

That said term of six months had expired before the commencement of this suit, and no payment or tender or offer of payment had ever been made by Brisbois, or by any one for him.

That at the time said land was so awarded to him as aforesaid, it was not considered worth the amount of such indebtedness, but that he, (Roberts,) had taken it as all he could get, and that he had never obtained any title thereto, by, through, or under said Brisbois.

And the Defendant admits that Brisbois *claimed* the acre of ground, but denies that he claimed the *pre-emption right*, and says that his claim was based solely upon the promises of said McCloud, set forth in the Answer.

And denies that said committee, or Board of Arbitration, ever allotted the said acre of land to said Brisbois, or that they ever directed a deed therefor to be made to him.

The Respondent further admits that he was in possession of the property in question, but says that the statement contained in the Bill, concerning a stone quarry, excavations, &c., is wholly untrue.

To this Answer was annexed the Affidavit of Alex. R. McCloud, who says that he had read the Answer, and that as far as it related to him and his disposition of the acre in question, it was true, to wit: that he gave the same to Brisbois on condition that he would move here with his family; and "I "gave him a quit-claim to an acre, before the land was pur- "chased of the United States. When the purchase was made, "and the land was about to bo divided, I consented, although "Brisbois had not complied with the terms on which I gave him "the said acre, and therefore had no right to claim it, still I "consented for it to be awarded by the Arbitrators to Louis "Roberts, in satisfaction of a debt, or to secure a debt, of Bris- "bois."

The Complainants filed a general Replication to the Answer, and afterwards upon a hearing, the Bill of Complaint was dismissed with costs; and the following opinion was filed by Judge Sherburne.

By the Court—SHERBURNE, J. Upon reading the pleadings and proof in this matter, I discovered no ground upon which, in my opinion, the prayer of the bill could be granted, and should have disposed of it without further attention, but for the great confidence which I have in the learning and ability of the Counsel who instituted and have prosecuted the proceedings, mistrusting therefore my own first impressions. I have given the case all the attention which the pressure of business has allowed me, but it has only served to confirm my original opinion. The deed from McLeod to Brisbois was a mere nullity. If McLeod had the right to convey his pre-emption right to the acre in controversy, Brisbois could not hold it. He never resided upon the land, nor in the Territory even. If the consideration of the deed were a proper subject of inquiry, it would further appear that he never paid one farthing for it. The claim is made on account of a pre-emption title, and yet the case shows that the person under whom the claim is made never resided upon the land, nor improved, saw it, or paid for it.

It is doubtful whether the award of the Committee of the claim-meeting, if it had been made to Brisbois, would have aided him. The meeting was opposed to the policy and Laws of the Government, and its acts were void. The fact that such meetings are common, and their doings "winked at" by the Government and the public, does not aid these complainants in a Court of Law. If Brisbois was one of the parties assenting to and aiding the claim-meeting, he was aiding a combination for an illegal purpose, and a Court will not adjust their differences.

The maxim "*In pari delicto*," &c. well applies. If he did not assent to the meeting, and was not a party to their proceedings, their acts are certainly not binding upon him, nor could he take advantage of those in his favor. They should be assented to and mutual to be of force, if proper in other respects.

If Brisbois had had a right to the land, or to the purchase of it from Government, the action of the Committee and of Sibley's Attorney might be inquired into: but having no right at the time, those claiming under him are without any legal or equitable right to question the correctness of either.

But I am clearly of opinion that the weight of evidence is in favor of the position taken by the Defendant, Roberts, that the award of the arbitrators was that the land be conveyed to him subject to the conditions of the bond mentioned in the answer.

The case showing therefore that the Committee awarded the land to Roberts, there seems to me nothing upon which a decision in favor of the Plaintiffs can be founded.

The Complainants do not rely upon the bond to Sibley: but had they done so, it is a sufficient answer that its conditions were in no respect complied with.

There is another view of this question, which renders the Complainants' claim at least very doubtful. Contracts, to be binding between the parties, must be mutual. This, as a general principle, is well understood. Suppose these lands had fallen in value to one-fourth of the Government price,—there would have been no claim upon Brisbois or his heirs for the loss.

It does not even appear in this case that the Government price has been offered or tendered.

I have no hesitation in determining that the bill cannot be sustained, and it must therefore be dismissed with costs.

The Complainants afterwards appealed to this Court from the order dismissing the Bill of Complaint.

Points and authorities submitted by Appellants:

First. Henry H. Sibley held the land in trust for the different claimants, which trust was sufficiently evinced by his written power of attorney to D. Lambert: and such trust was not in contravention to the Laws of the United States, nor in violation of public policy.

Second. Joseph Brisbois held the beneficial interest in the acre of land in question, and was entitled to a conveyance thereof from Henry H. Sibley, who was merely his agent or trustee, making the purchase.

Third. Louis Roberts has not shown any title whatever to the land.

Fourth. That as between Mr. Sibley and the Complainants, the said Complainants are entitled to a decree.

Fifth. That the Complainants are entitled to a decree against Roberts, who has not established a defence.

Sixth. That the Court below erred in excluding in the decision of the case the acts and proceedings of the meeting of the claimants and the award of the Committee, set forth in the bill, as being opposed to the policy and Laws of the Government and void.

Seventh. The Court erred in dismissing the bill.

Authorities: *Revised Statutes, Sec.* 6. *p.* 267; *ibid, Sec.* 11, *p.* 203; *ibid, Sec.* 21, *p.* 204; *ibid, Sec.* 23, *p.* 204; *Story's Equity Jurisprudence, 2d vol. p.* 439, *Sec.* 1065; *ibid, Sec.* 1195—1201; 2*d Fonblangue's Equity, p.* 116.

Points and authorities relied upon by Respondents:

First. The bill does not contain an equitable case: and if the Complainant omits to state an equitable case in his bill the Court cannot notice it, although established by proof. *Dilly vs. Heckwith,* 8 *Gill & Johnson,* 171.

Second. The Complainants fail to show performance on their part, and cannot exact it. 1 *Desau,* 160; 2 *ib.* 582, *et passim.*

Third. The answer being sworn to, and taking issue upon all of the material allegations of the bill, must be taken as true, unless disproved by two witnesses, or one with pregnant circumstances. 2 *Wheaton*, 380; 1 *Paige*, 239; 2 *John's Ch. R.* 92; 9 *Cranch*, 153.

Fourth. The Complainants having filed a replication to the answer, have admitted its sufficiency as a bar. *Daniels vs. Taggart*, 1 *Gill & Johns.* 312; *Hughes vs. Blake*, 6 *Wheaton*, 472.

Fifth. The proof establishes no equities in the Complanants. The deed of McLeod was made before the patent emanated, passed no interest, was voluntary, without consideration, and against public policy: as was the whole train of circumstances upon which the Complainants rely. *Shakleford vs. Hambley's Ex'rs. A. K. Marsh's R.* 501; 3 *Story's Rep.* 365; *Caldwell vs. Williams*, *Bailley's Eq. Rep.* 175; *Acker & Chapman vs. Phenix*, 4 *Paige*, 205; 2 *Paige*, 84; *Carrington vs. Callen*, 2 *Stewart's Rep.* 175.

Sixth. The bond of Roberts was voluntary, immutual, not duly prosecuted, nor its conditions performed, and cannot be enforced. 4 *Paige*, 305; 2 *Har. & Gill*, 100; 1 *Story's Rep.* 204; 3 *ib.* 612.

Seventh. The preponderance of proof is with the Respondents.

Hollinshead & Becker, Counsel for Appellants.

Murray & Williams, and Brisbin & Bigelow, Counsel for Respondents.

The opinion of the District Court is reported at length, for the reason that upon argument in the Supreme Court the order appealed from was affirmed with costs, and no further opinion filed.

JAMES K. HUMPHREY, Appellant, *vs.* GEORGE HEZLEP, Respondent.

An order of the District Court vacating and quashing a Warrant of Attachment, is not an appealable order.

This was a motion to dismiss an Appeal to the Supreme Court from an order of the District Court vacating a warrant of Attachment.

The Plaintiff below filed his affidavit for a warrant of Attachment, on the 2d day of September 1854, in the District Court of Ramsey County, setting forth the amount of his claim, causes of action, &c. and that the Defendant had assigned and secreted his property with intent to delay or defraud his creditors, and stated several facts and circumstances upon which this allegation was made: among others, that the Defendant was largely indebted in New-York; that he had left his creditors in Ohio entirely unpaid and unsatisfied; and that since coming to Minnesota he had been extensively engaged in buying and selling real-estate and dealing in money and exchange, in the name of one Swift: that he had purchased a house and lot, in which he resided, from Henry M. Rice, and took the deed thereof in the name of said Swift; and that he was living in a sumptuous and luxurious manner, without any independent income, and without means or property except that which he is concealing from his creditors.

Upon this affidavit, a warrant of Attachment was issued against the property of the Defendant,

Who afterwards appeared by Attorneys, and moved to vacate and set aside the warrant:

Because, the affidavit on which it was obtained was insufficient;

Because, the facts stated as the ground on which the warrant of Attachment was obtained, are not true; and

Because, the service and return of the warrant were insufficient, irregular and void.

The motion was accompanied by the affidavit of the Defendant, admitting his indebtedness in the State of New-York, but denying that he had been engaged in real-estate, exchange or money transactions in Minnesota, except as the agent of George K. Swift and others, and that in such business and transactions he had used no means of his own directly or indirectly, and that he had no interest in the profit or loss thereof. He further denies that the house and lot in which he lived belonged to him, or that he had any interest therein, but avers that the same was the property of said Swift, and that he (Swift) had paid the full consideration therefor.

The affidavit of Henry L. Moss was also used in the hearing of the motion, which corroborated the statements of the Defendant in regard to the ownership of the house and lot occupied by him.

Upon this motion, and the affidavit in support thereof, the District Court ordered that the warrant of Attachment be vacated and all proceedings thereon quashed.

From this order the Plaintiff appealed to the Supreme Court.

Afterwards, the Respondent moved to dismiss this Appeal:

Because, the Supreme Court had no jurisdiction of the subject matter; and

Because, it is not such an order or decision wherein an Appeal will lie.

The following are the points and authorities relied upon by the Appellant, resisting the motion to dismiss the Appeal:

First. The order quashing an Attachment is an appealable order, and the motion to dismiss the Appeal ought not to be sustained. *Rev. Statutes, Sec.* 134, *p.* 346, *and amendments thereto; 3d Sub. of Sec.* 11, *Rev. Stat. p.* 414; *Voorhies' N. Y. Code, 3d Ed. pp.* 18, 19; *Whittaker's Pr. Vol.* 1, *p.* 205, *2d Ed.; Monell's Pr. 2d Ed. Part* 2, *Sec.* 3, *p.* 289.

Second. The order to quash the Attachment was illegal and improper. See *Am. Rev. Statutes, Sec.* 136, *p.* 346.

[The Points and authorities of the Respondent, in support of the motion to dismiss the Appeal, are not on file.]

HOLLINSHEAD & BECKER, Counsel for Appellant.

EMMETT & MOSS, Counsel for Respondent.

The Supreme Court dismissed the Appeal, reserving the question of Costs for further argument.

[No Opinion filed.]

JOHN FARRINGTON, Plaintiff in Error, *v.* JOHN W. WRIGHT, Defendant in Error.

An Attorney cannot be compelled to file the evidence of his authority under our Statute.

An Order for that purpose, obtained *Exparte*, upon the application of one party without notice to the other party or his Attorney, is void.

An Order staying all proceedings in a cause, until the authority of the Attorney is produced, is void. It should only stay the proceedings of such Attorney in the Action, until his authority was proved.

A notice of a motion for a Judgment notwithstanding an answer, is a regular and valid proceeding under our practice, and the party noticing the motion, may, upon default, take his order. The party taking such order, however, must see that all former proceedings on his part are regular, and that his order is founded upon the record and practice of the Court.

This Court will, upon Writ of Error, correct an order taken upon default, where such order is not sustained by the record and practice.

The allegation in an answer that the Defendant "*charged* twenty-five dollars for his Commissions," will not be available as a counter claim. It should allege that his services were worth that, or some other sum, and that the charge therefor was just and reasonable. Evidence could not be admitted under such an allegation, to prove that the charge was just and reasonable, or that the services were worth the amount charged.

Such an allegation would not be cured by a proper verification; in verifying the answer he, in effect, only swears that he charged such an amount; not that such charge was just and true.

This cause was brought to this Court by Writ of Error, to the District Court of the County of Ramsey, and Second Judicial District.

The Plaintiff in the Court below, commenced the action by Summons and Complaint, served on the 20th day of January, 1855, for the recovery of $300, and interest, alleged to be a balance of $1000, entrusted by the Plaintiff to the Defendant, "to purchase Eastern Exchange, and to send the same, less the "current rates of Exchange, to the correspondents of the "Plaintiff in New York," to be placed to Defendant's credit. $700 of the amount had been so disposed of, but the Defendant refused to pay the balance.

The Defendant appeared and moved to strike out the Complaint and verification, because the verification was defective and did not comply with the Statute.

The Court below refused to strike out the Complaint, because the course pursued by the Defendant, was not the proper remedy.

On the 6th of March following, the Defendant answered, admitting all the material allegations of the Complaint, and alleging by way of counter claim, that, "the Defendant charged "for his commissions thereon, twenty-five dollars, leaving a "balance of $268 in favor of the Plaintiff."

On the 19th of March, the Plaintiff's Attorney served upon the Attorneys for the Defendant, a notice of motion for Judgment, notwithstanding the answer, which motion was afterwards, on the 28th of March, argued and sustained, and Judgment entered in favor of the Plaintiff for the amount claimed, and costs.

On the 20th of March an order was obtained *Exparte*, on the application and affidavit of the Defendant, and without notice to the Plaintiff's Attorney, requiring W. G. Le Duc, the Attorney of record for the Plaintiff to file therein the evidence of his authority from the Plaintiff, for commencing and prosecuting the action, and that further proceedings therein be stayed until such evidence should be filed.

Notice of this order was served upon the Plaintiff's Attorney on the day of its date.

Afterwards on the 30th "April, 1855, on motion of the Plaintiff's Attorney, this order was vacated and set aside, and on the 14th of May following the Defendant sued out his Writ of Error, to remove the cause to this Court.

The following points and authorities were relied upon by the Plaintiff in Error.

1. The Court below erred in proceeding to Judgment in this case, because the Complaint and verification were defective and not in conformity with the Statute.

Sec. 73, *R. S.*, 338; *Peers vs. Carter*, 4 *Little's Kentucky R.*, 368; *Gaddis vs. Durashy*, 1 *Green's N. J. R.*, 324; *Chitty's C. L.*, 853, *Arch. Pr.* 11, 3 *Chitt. Gen. Pr.*; *Webb vs. Clark*, 2 *Sandf.* 647, *Mason vs. Brown*, 6 *How. Pr. R.*, 481.

2. The order of the 20th March, 1855, staying proceedings in the action in the Court below, until W. G. Le Duc, Esq., Attorney for the Plaintiff should file in the action, the evidence of his authority, from the Plaintiff, for commencing and prosecuting the same, and requiring him to file such evidence and notify Defendant's Attorney, was a legal and proper order, and was authorized by Statute; and, whether so or not, was good, valid and binding upon the Court and the parties until duly and regularly vacated; and therefore, the order for Judgment on 28th March, 1855, was in violation of the order of 20th March, 1855, and illegal.

1 *Tidd's Pr.*, 93; 1 *Durnf. and East*, 62; 1 *Chitt. Rep.* 194; 1 *Tidd's Pr.*, 95; 1 *Tidd's Pr.*, 516; 1 *Tidd's Pr.*, 527; 1 *Bunnill's Pr.*, 39; 1 *Troubat and Haly's Pr.*, 154; *Howe's Pr.*, 31; *Sec.* 12, *R. S.*, 458; *Sec.* 17, *R. S.*, 419; 1 *Monell*, 174; *Sec.* 90, *R.* S., 340; 4 *Howe's* 34; *Am. Rev. Stat.*, *Sec.* 55, 13 *and* 14; *Mitchell vs. Hall*, 7 *How. Pr. Rep.*, 492.

3. The answer in the action presents a just and legal defense as to part of the Plaintiff's claim, and therefore a judgment for the whole of that claim was unjust, and not warranted by the Pleadings.

The following are the points and authorities relied upon by the Defendant in Error.

First. There is no error in the record or proceedings of the Court below.

Second. The motion on behalf of the Defendant below, to set aside the Complaint and verification, was properly denied.

5 *How. Pr. R.*, 257; 6 *How. Pr. R.*, 394; 8 *How. Pr. R.*, 212; 1 *Code R. N. S.*, 318; *Rev. Stat.*, *p.* 338, *Sec.* 73.

Third. The order of 20th March, staying proceedings, &c.,

was of no binding force upon the Plaintiff or his Attorney, prior to the order for Judgment, because,

1st. The order was obtained *Exparte*, without notice to the Plaintiff or his Attorney.

2d. It was not served upon the Plaintiff or his Attorney.

3d. The order was not authorized by law, nor by the practice of the Court.

Rev. Stat. p. 438, *Sec.* 12, *and Amendments to Rev. Stat., pp.* 13 *and* 14, *Sec.* 55; *Voorhie's N. Y. Code of* 1852, *p.* 411; 5 *Cow. R.*, 438; 5 *Hill.* 568; 2 *Code R.*, 139; 4 *How. Pr. R.*, 248; 8 *Pr. R.*, 50 *and* 349; 6 *Pr. R.* 370, 371 *and* 372.

Fourth. This answer presents no defense whatever to the whole, or any part of the claim set forth in the Complaint, and besides, the Defendant below failed to appear and oppose the motion for Judgment, and the Plaintiff was therefore entitled to the order asked for, without regard to the merit.

Rule 16 *of Rules of District Court in proceedings at law.*

Fifth. Admitting every proceeding and decision in the Court below to have been irregular, in the full extent contended for by the Plaintiff in Error: none of these proceedings or decisions can be alleged for Error in this Court.

6 *Hill*, 288–9; 21 *Wend.*, 52; 2*d Bun. Pl.*, (2*d ed.*,) 159; *Graham's Pl.*, (2*d ed.*,) 944; 2 *Cow. R.*, 49; *Rev. Stat., p.* 25, *Sec.* 9; *also p.* 416, *Sec.* 32; *Amendments to R. S., p.* 13, *Sec.* 51 *and* 52; *Rule* 9 *of this Court.*

Hollinshead & Becker, Counsel for Plaintiff in Error.

W. G. Le Duc, and H. R. Bigelow, Counsel for Defendants in Error.

By the Court—Chatfield, J. The order requiring the Attorney for the Plaintiff below to *file* proof of his authority was properly disregarded by the District Court. The order was wholly void. It was not authorized by the Statute, which regulates the practice and proceedings in such cases, and supersedes the old practice of filing warrants of Attorney. The Statute authorizes an order to require the Attorney to produce or prove the authority under which he appears. The order in

this case required the Attorney for the Plaintiff to *file the evidence* of his authority, which is another and different thing. The Statute authorizes an order staying all proceedings by an Attorney on behalf of the party until he does produce or prove his authority. The order in this case stayed all proceedings on the part of the Plaintiff, by the same or any other Attorney, until, &c., a stay not authorized for that cause. Had the order been valid for any purpose, the record does not show that it was so served as to make it effectual.

The Plaintiff had by the practice, the right to take his Judgment notwithstanding the answer, pursuant to his notice of motion therefor, the Defendant not appearing. A party noticing a motion, may, if his opponent make default, take his order, but he takes it at his peril, and must see to it, that his proceedings are regular, and that he takes no more than he is entitled to by the record or the practice. If the practice or record will not sustain the order which he thus takes, it is subject to correction, and if, as in this case, the order be for final judgment, and not sustained by the record, the error may be corrected in this Court upon Writ of Error. In this case I think the judgment is sustained by the record.

The cause of action is confessed by the answer, and is not to any extent avoided. It appears by the amount of the Judgment that the full current rate of Exchange on the seven hundred dollars remitted by the Defendant below, was allowed.

The counter-claim for commissions is not adequately alleged in the answer to make it available to the Defendant below. The allegation is that he "*charged* twenty-five dollars for his commission." He does not allege that the charge was true, or that the services for which he made the charge, were worth that or any other sum. In verifying the answer, he, in effect, only swears that he *charged* that sum, and not that the charge itself was true or just. I do not think that the allegation is sufficient to admit proof to sustain a claim of twenty-five dollars or any less sum for Commissions. The existence of such a claim is not alleged, nor can it be implied from the statement that he charged it. Proof that he made the charge, which is all that is alleged, would not alone sustain a claim for the amount charged, or any less sum. Proof of other facts, not

alleged, would be required to resolve the charge into a valid legal claim.

The judgment of the District Court must be affirmed.

SAINT ANTHONY MILL COMPANY, Plaintiff in Error, *vs.* CLEMENT VANDALL, Defendant in Error.

If a chose in action is assigned after the commencement of an action thereon, the assignee must show affirmatively that the assignment was made *pendete lite*, to enable him to prosecute in the name of the assignor.

And if the assignment is made in trust for the benefit of a third person, the assignee may prosecute the action without joining the *cestui que trust* as a party Plaintiff, by virtue of Section 29, page 333, Revised Statutes of Minnesota.

A Writ of Error will not subject to review, questions of law arising upon the evidence offered in the Court below. Such questions can only be incorporated in the record by Bill of Exceptions.

This was a Writ of Error to the District Court of Ramsey County. The action was brought in the District Court to recover the amount of a Bill of Exchange, made by Ard. Godfrey as Agent for the Saint Anthony Mill Company, Defendant below, bearing date on the 3d day of July, 1852, for the sum of $328 97, payable to the order of Clement Vandall, the Plaintiff below, and directed to Henry M. Rice.

The Complaint further alleged that the same was duly presented to the said H. M. Rice for acceptance and payment, and that he refused to accept or pay the same, of which the Defendants below then had due notice.

The Complaint further alleged that the Plaintiff was the lawful owner and holder of the said Bill of Exchange, and that the Defendants were indebted to him thereon in the sum of $328 97 principal, with interest from July 28, 1852.

The original answer admitted the making and delivery of

the Bill of Exchange as set forth in the Complaint, but denied upon information and belief, each and every other allegation contained in the Complaint.

Afterwards, by leave of the Court, a supplemental answer was filed and served, alleging that since the service of a copy of the original answer, and on the 18th of October, 1852, the Defendants paid to the Plaintiff the full amount claimed to be due upon the Bill of Exchange set forth in the Complaint, and that the Plaintiff had thereupon executed and delivered to the Defendants his receipt in writing, whereby he acknowledged full payment of the amount claimed to be due.

The Reply of the Plaintiff to the Defendant's supplemental answer, alleged that the draft or bill mentioned in the Complaint was transferred and assigned to Lafayette Emmett and Henry L. Moss, for a good and valuable consideration, previous to the 18th of October, 1852, and that the Defendant had due notice that the said draft or bill had been transferred and assigned by the Plaintiff to the said Emmett and Moss, and that they were entitled to the same, previous to the time of payment and taking the receipt mentioned in the supplemental answer.

The cause came on for trial at the March Term, 1854, and a Jury trial having been waived by the parties, it was heard and determined by the Court, who "found the facts in favor of the Plaintiff as set forth in the Complaint and Reply." And also decided, that whether the action was brought before or after the assignment, it might be sustained in the name of the Plaintiff in the cause, and without leave of the Court, and rendered judgment in favor of the Plaintiff for the amount claimed in the Complaint, with interest.

The Judgment is removed to this Court by Writ of Error.

Hollinshead & Becker, Counsel for Plaintiff in Error.

Emmett & Moss, Counsel for Defendants in Error.

By the Court—Chatfield, J. The judgment of the District Court in this case must be reversed.

The Complaint of the Plaintiff below, and his reply to the

Defendant's Supplemental Answer, are inconsistent with each other.

The Complaint being true, the Plaintiff below was the real party in interest, and payment to him as alleged in the Defendant's Supplemental Answer, constituted a valid defence to the action.

The Reply to the Supplemental Answer being true, the Plaintiff below was not the party in interest, and for that reason, could not maintain the action at all.

It cannot be answered in avoidance of his dilemma, that the assignment mentioned in the said Reply was made *pendente lite*, so as to allow the action to proceed in the name of the original Plaintiff; for the Reply fails to show the time of the assignment. It simply alleges that it was previous to the 18th day of October, 1852; the time of the payment alleged in the Supplemental Answer. At that time the action had been pending more than a month. The assignment may have been either before or after the commencement of the action, and the Reply be strictly true, while the right to prosecute the action in the name of the Plaintiff, rests wholly upon the fact that the assignment was made *pendente lite*. If the assignment was previous to the commencement of the suit, the action should have been brought in the name of the Assignee, the party in interest.

In cases like this, in which an answer is sought to be avoided by an assignment of the cause of action, *pendente lite*, it is manifestly necessary for the assignee, by his Reply, to show affirmatively that the assignment was made *pendente lite*, to make it effectual, and at the same time, entitle him to proceed in the action in the name of the Plaintiff on the record; the assignor; for it is in such cases only that an action can proceed in the name of a Plaintiff not owning the interest. The time of an assignment of a chose in action cannot be presumed, and it is a plain and familiar principle, that a party prosecuting an action, must, by his pleadings affirmatively show, that he is lawfully entitled to the action which he prosecutes, both in form and substance.

The defect in the Reply in this case is, in my judgment, one of substance, because, by reason of it, the record fails to show

that the Plaintiff was the party in interest entitled to bring the action, at the time of its commencement. The defect cannot, therefore, be deemed to be cured by verdict, or by the finding of the Court standing in lieu of a verdict upon the trial before him without a Jury.

But were it otherwise, so as to require this Court to go beyond the pleadings and look into the finding or report of the District Court, before whom the cause was tried without a jury: the cause is there found to stand in precisely the same light and position in which it does upon the pleadings, and subject to the same objection for incongruity and inconsistency so far as the facts are concerned.

The District Court simply says, that he finds "the facts as set forth in the Complaint and Reply," without determining the *time* of the assignment. It would appear by the Report of the District Court, and without reference to the evidence in the case, that it was, upon the trial, made a question whether the facts proved, constituted, in law, an assignment of the cause of action, because in the report or finding, he determines that the facts proved "in the cause were sufficient in law to constitute an assignment," but he does not determine at what *time* such assignment was made or took effect. The principle upon which he sustained the action, did not require him to determine, (if he might do so under the pleadings,) the *time* of the assignment, for he decided "that whether the action was "brought before or after the assignment, it may be sustained "in the name of the Plaintiff without leave of the Court."

In this conclusion I think the District Court erred. If there was in fact, an assignment of the absolute kind and character alleged in the Reply, and by the Court found in both fact and law, then it is very clear that the action cannot be sustained in the name of the Plaintiff, unless the assignment was made subsequent to the commencement of the action; for the Statute is positive that every action arising upon contract, like this, "must be prosecuted in the name of the real party in interest." The only exception which the Statute makes to this rule established by it, is of cases of assignment *pendente lite*. In such cases, the Statute allows the action to proceed in the name of the original party Plaintiff, or the assignee to be, upon motion,

substituted as Plaintiff. Hence the manifest necessity that the *time* of the assignment should be alleged in the pleadings, and proved upon the trial in cases like this, in which the Plaintiff's right to prosecute or maintain the action is involved in the issue.

Thus stands this case upon the pleadings and the finding or report of the District Court, and in strictness, they and the judgment constitute the whole record. There is not any Bill of Exceptions to bring into the record the evidence upon which the conclusions stated in the report or finding of the District Court rests. The only way to incorporate the evidence or any part of it, into the record, so as to subject to review upon Writ of Error, the questions of law arising thereon, is by Bill of Exceptions. The Writ of Error brings up only the record of the Judgment in the Court below, and that record, in the absence of a Bill of Exceptions, duly signed, consists only of the pleadings, verdict and Judgment, and, in cases of Judgment by default, of the process and the proceedings thereon, showing whether or not the Court had acquired jurisdiction.

Though there is included in the paper book in this cause, a case used upon a motion for a new trial therein, containing a statement of the evidence upon the trial, and settled by the stipulation of the parties, it forms no part of the record; nor does the opinion of the Judge of the District Court upon the motion for a new trial, which is also included in the paper book. This Court cannot look into either the case or the opinion, for the purpose of determining whether or not the Judgment of the Court below is sustained by the law and the evidence. Not being of the record, they cannot be allowed to control the effect of the record. Nor can I perceive how they could avoid the consequences of the inconsistency between the Complaint and the Reply to the Supplemental Answer, or cure the material defect in the said Reply.

If, as was indicated upon the argument, (and as would appear by the said case and opinion, could this Court properly consider them,) the assigment proved (if any,) was to the Assignees, in trust for the creditors of the Plaintiff below, then the question would arise, whether or not the proof would support the Reply, for the Assignment alleged in the Reply is

absolute of the whole interest, to the assignees, to their own use. The character of the assignment might materially affect the rights of the parties, and hence such variance between the pleading and the proof, might become essential in making up a record by which such rights are determined or affected. Whether or not such variance be material, need not, if it could properly, be decided in this case, for in my view of the provisions of the Statute, the effect of the assignment upon the right to prosecute or proceed in the action in the name of the Assignor, as Plaintiff, would be the same, whether the assignment was absolute or in trust. In case of an assignment of a chose in action, arising on contract, by the owner to an Assignee in trust to pay or secure the payment of debts, owing by the Assignor, a strict construction of Section 27 of the Statute of civil actions would require the Assignor, Assignees and the *cestuis qui trust* to be joined as Plaintiffs in an action on the chose in an action thus assigned.

The Assignor would have a real and substantial interest in the action, because the collection would liquidate his debt *pro tanto*. The Assignee would have a material interest in the action founded upon his title, compensation and liabilities as Trustee, and the *cestuis qui trust* would be the owners of the money in the hands of the Trustee when collected, and would hold the equitable title and essential interest in the chose from the time of the assignment.

Hence it became necessary to avoid the consequences which the provision of section 27 would produce in such cases, to provide some other means of prosecuting choses in action in such a condition; section 29 of the same Statute, (*Rev. Stat.* 333) was designed for that purpose. That section provides that "a Trustee of an expressed trust may sue without joining "with him the person for whose benefit the action is prose- "cuted," and it defines that "a person with whom, or in whose "name a contract is made for the benefit of another, is a trustee "of an express trust within the meaning of this section."

An assignment is a contract made between the assignor and Assignee, and when made to the Assignee in trust for the benefit of a third person it is within the definition of an express trust contained in section 29.

This section seems to regard such an assignment as of the same effect as an absolute one, upon the right of the assignor to prosecute the demand assigned, for it recognizes the right of the assignee to sue thereon and permits him to bring the action without joining the *cestuis qui trust.*

If this be the true construction of the different provisions of the Statute when considered together as they should be, then the case as it stands upon the pleadings and finding of the District Court, would not be so changed as to effect the result in this Court, even though the case made for the purposes of the motion for a new trial, and the opinion of the Judge of the District Court thereon, constituted a part of the Record.

The time of the assignment would be in the same degree material, whether it was absolute or in trust, because its effect upon the Plaintiff's right to prosecute or proceed in the action would be the same in either case.

Judgment reversed.

DAVID S. BILLIS, Plaintiff in Error, *vs.* The Steamboat "HENRIETTA," Defendant in Error.

This cause was brought to the Supreme Court by Writ of Error to the District Court of Ramsey County.

The Complaint set forth that on the 1st of May, 1854, at Tabula, Iowa, four boxes belonging to the Plaintiff, were shipped on board the Defendant, and which, by a certain contract, or agreement in writing, made by the proper officer or agent of said boat, were to be transported on said boat and delivered, without delay, &c, unto J. W. Bass & Co., they paying freight, &c.; that said boxes were marked "D. S. Bellis, care of J. W. Bass & Co., St. Paul."

That two of said boxes had not been delivered in pursuance

of said contract, but that they had been lost by the negligence and carelessness of the officers of the boat, and that the contents of said boxes were worth four hundred dollars.

The Defendant demurred to the Complaint, because it did not state or show that the steamboat "Henrietta," was, or is used in navigating the waters of this Territory,

And because it did not state facts showing that said boat was liable for the Plaintiff's supposed demand,

And because it did not set forth the Plaintiff's demand in all its particulars, or with sufficient certainty,

And because it did not state on whose account the claim accrued,

And because it did not appear that said Complaint was filed with the Clerk of the District Court of the county in which said steamboat "Henrietta" was then lying, or that the said boat was then within the jurisdiction of the Court.

A motion was made by the Defendants to vacate the attachment against the boat, founded upon the same objections to the complaint.

The motion and demurrer were noticed for argument on the same day. The motion was allowed on the 20th day of December, 1854, and the order sustaining the demurrer was dated the 25th day of January, 1855.

The following opinion was filed by M. Sherburne, Judge of the District Court:

By the Court—SHERBURNE J. This is a demurrer to the Complaint. The action is brought by virtue of a provision of the Statute of this Territory, is summary in its character, and is unknown to the common law. It is unnecessary therefore to cite authorities to sustain the position that in such process, the provisions of the Statute, must be substantially, if not literally complied with. Without form, registry, or any notice whatever to the public, a lien upon steamboats navigating the waters of this Territory is created by law for the discharge of all claims, which have accrued, or demands which have arisen on account of the same, when contracted by the master, owner, agent, or consignee.

That owners and subsequent purchasers may have some pro-

tection against this extraordinary provision of law, the Statute is imperative that the Complaint *shall* set forth the Plaintiff's demand in all its particulars and on whose account the same accrued.

It is unnecessary to decide whether the particulars of the demand are sufficiently set forth in this case, for there is no attempt whatever in the complaint to show on whose account the demand accrued, and this must be fatal to the proceeding. There is an attempt to set up a contract with the boat, but it should appear distinctly in the complaint with what person by name, such contract was made. It is not sufficient to allege that it was made with the Clerk, or master or agent of the boat, but his name should be stated. This is a matter of substance and not of form. Masters, agents and owners of steamboats are constantly changing, and their consignees are even more uncertain.

The allegation in this complaint is that the contract was "made and entered into by the proper officer or agent of the boat." This furnishes no information whatever to its present owners or agents, and while it may be tied up by virtue of attachment, they will stand an even chance of not knowing whether such contract was ever made, or, if made, who made it and is responsible for its violation; a branch of business in which a whole community is so largely interested as this is in steamboating, should not be thus jeopardized, unless the necessity arises from some positive provision of law. But the law in this case is otherwise. It is positive in its character and should not be frittered away by construction.

The demurrer must be sustained.—*Sec.* 3, *Scammon's Rep.*, 144; 18 *Missouri Reps.* 558; 6 *ibid*, 375.

The following are the points and authorities relied upon by Counsel for the Plaintiff in Error:

The following are the points upon which the Plaintiff in Error relies for a revisal of the Judgment and proceedings of Court below.

First. The Court below, on motion of the Defendant, granted an order vacating and setting aside the warrant, on the ground

of alleged defection in the complaint: In this there is a manifest error, because,

1. The Complaint is sufficient in all respects.—*Rev. Stat., Chap.* 86; *also p.* 337, *Sec.* 60; 6 *Missouri R.*, 37, 381, 552 *and* 555; 7 *Missouri R.* 213; 8 *Missouri R.*, 358; 13 *Missouri R.*, 519.

2. The defect (if any,) is one of form only, and furnishes no ground for quashing the writ.

3. The Complaint in this class of cases is not in the nature of preliminary proofs for the purpose of conferring jurisdiction to issue process, but the jurisdiction is created by the express terms of the Statute; hence however defective the Complaint, it furnishes no grounds for quashing the writ.

4. The Defendant before the notice of motion, appeared generally in the action, and thereby waived all defects in the process and proceedings, by which he was brought into Court. After such appearance, it was too late to object to the writ for any cause.—*Rev. Stat. p.* 420, *Sec.* 26; 2 *Caine's R.*, 134; 2 *Cow. R.*, 467 *and* 468; 5 *Cow. R.*, 15; 7 *Cow. R.*, 366; 6 *Wend.* 594; 17 *Wend.*, 134; 18 *Wend.*, 581; 2 *Hill.* 362; 2 *How. Pr. R.*, 241; 3 *How. Pr. R.*, 27; 5 *How. Pr. R.*, 233; 6 *How. Pr. R.*, 437; 2 *Burr. Pr.*, 11; 6 *Missouri R.*, 50.

Second. The Court below, after granting the Defendant's motion, to vacate and set aside the said writ, together with all proceedings under the same, rendered judgment for the Defendant upon demurrer to the Complaint; in which there was also manifest error, because,

1. The Complaint was sufficient in law, and substantially conformable to the Statute, in all respects.—*Rev. Stat., p.* 337, *and Chaps.* 86 *of Rev. Stat., Russell vs. St. Boat Elk*; 6 *Missouri R.*, 552; *Byran vs. same boat*, 6 *Missouri R.*, 555; *Camden & Co. vs. St. Boat Georgia, Missouri R.*, 381; *Erskin & Glen, vs. S. B. Thomas, Missouri R.*, 37; 7 *Missouri R.*, 213, 8 *do.* 358, 13 *do*, 519.

2. If defective, the defect is not a demurrable one.—*Rev. Stat., p.* 337; 3 *How. Pr.*, 410; 1 *Hill*, 130; *Van Sanford's Pr.*, 377 *and* 380; 6 *Missouri R.*, 522 *and* 555; *vide also authorities in Mo. R. above cited.*

3. Admitting the defect to be ground of demurrer, it was a

defect in form only, and the Plaintiff should have been allowed to amend upon terms.—*R. S. amend'ts, p.* 9, *Sec.* 28; 6 *Missouri R.*, 381; 9 *Missouri R.* 146 *and* 629.

4. The motion to vacate and set aside the writ, and all proceedings under the same, was granted, December 20th, 1854. This was equivalent to a dismissal of the action, and was a final determination thereof, and the subsequent proceedings upon the demurrer, including the judgment, were *coram non judice* and void.—*Bigelow vs. Stearns*, 19 *John R.*, 41; *Colier vs. Luther*, 9 *Cow.* 63; *Blom vs. Burdick*, 1 *Hill*, 139.

The Points and authorities of the Defendant in Error are not on file, and there is no opinion on file in the Supreme Court, and no record of the order of that Court upon the final hearing of the cause.

H. R. Bigelow, Counsel for Plaintiff in Error.

Ames & Van Etten, Counsel for Defendant in Error.

The Steamboat "War Eagle," Plaintiff in Error, *vs.* Alonzo Nutting, Defendant in Error.

A complaint set forth fully all the facts necessary to constitute a cause of action upon a claim against a steamboat, (under Chap. 86, Rev. Stat.) and also a special contract made with the Captain of the boat, in relation to the same cause of action.

Held, that if, upon the trial, the evidence was sufficient to prove the facts set forth in the complaint, constituting a cause of action, the allegation as to the special contract will be deemed surplusage; and no proof of such special contract will be necessary to maintain the action.

Alonzo Nutting, the Plaintiff below, commenced this action in the District Court for Ramsey County, to recover the value of certain baggage alleged to have been lost by the Steamboat "War Eagle." The complaint set forth facts sufficient to constitute a cause of action under Chapter 86 of the Revised

Statutes, (concerning proceedings for the collection of demands against boats and vessels,) and in addition, set forth a *special* contract made with the Captain of the boat at Galena, for the delivery of the trunk at Saint Paul.

A Jury trial was waived by the parties, and the cause submitted to the Court.

The District Court found for the Plaintiff, and judgment was entered accordingly. The cause comes to this Court by Writ of Error.

The following are the points and authorities relied upon by the Plaintiff in Error:

First. That the Court erred in finding for the Plaintiff.

1. Because the complaint set up an express contract between the parties to carry the said trunk or baggage and there was no evidence of such contract.

2. Because no material issue was found by the evidence.

3. Because the facts found by the Court were insufficient in law to warrant a decision and judgment in favor of the Plaintiff.

4. Because the facts found by the Court were irrelavent, insufficient and at variance with the pleadings.

Second. That the Court erred in allowing the Plaintiff to recover the enhanced value of the articles at Saint Paul.

AUTHORITIES.

Van Santvoord's Pleading, 146, 147, 151, 154 *and* 160; *Glenny vs. Hitching's*, 4 *How. P. R.*, 88; *Baker vs. Russell*, 11 *Barb.*, 307; *Saunders' Pl. and Ev.*, 2 *Am. Ed.*, 1 *Vol.*, 379; *Revised Statutes, Sec.* 2, *p.* 337; 1 *Monell's Pr.*, 380; *Story on Contr.*, 6; *Rees vs. Lives*, 8 *Car. and Payne*, 126; *Selway vs. Fogg*, 5 *Mees and Welsh.*, 83.

The following are the points which were made upon the argument of the Defendant in Error in support of the judgment of the Court below.

First. There is no error in the record or proceedings of the Court below.

Second. The complaint does not set forth a *special* contract;

but only the ordinary *implied* contract of a common carrier of passengers.

Third. The evidence fully supports the complaint, and this Court will not presume the want of evidence to support any issue, when they have not the whole evidence before them.

Fourth. The answer admits that the boat was used and employed in the transportation of passengers, &c., for hire; that the Defendant in Error came a passenger upon her from Galena to Saint Paul, and paid his fare. The proof shows clearly the delivery of the baggage on board the boat at Galena, the subsequent demand and failure to deliver at Saint Paul, the articles composing the baggage and the value thereof; thus making a perfect case for the Plaintiff below.

Fifth. The violin and bow were properly held as baggage; they were articles of personal convenience to the Defendant in Error, not of merchandize, nor such as could subject the carrier to unsuual hazard.—*Pardee vs. Drew*, 25 *Wen.*, 459; *Hawkins vs. Hoffman*, 6 *Hill.*, 586; *Woods vs. Devier*, 13 *Ill.*, 746; *Jones vs. Voorhees*, 10 *Ohio*, 145.

Sixth. The rule adopted by the Court below in estimating the damages was clearly correct.—*Sedgewick on Measure of Damages*, (2 *Ed.*) *Chap.* 13.

Seventh. None of the decisions which appeared from the *finding* of his Honor, Judge Sherburne, to have been made upon the trial in the Court below, can be alleged for error in this Court. They form no part of the record proper, and could be reviewed in this Court only upon a bill of exceptions settled, &c., according to the practice of the Court, and attached to and certified with the record to this Court. The case is here as upon complaint and answer, a general verdict for the Plaintiff below, and judgment thereupon.—*Rule* 9 *of this Court*; *Rev. Stat., p.* 416; *Hill vs. Stocking*, 6 *Hill.*, 289; 2*d Burr. Pr.*, (2*d Ed.*,) 159.

Note.—Vide authorities cited upon points of Plaintiff in Error. *Van Santvoord's Pl.*, 146, 147, 151, 154, 160; 4 *How. Pr. R.*, 98; 11 *Barb., S. C. R.*, 307.

Hollinshead & Becker, Counsel for Plaintiff in Error.

Brisbin & Bigelow, Counsel for Defendant in Error.

By the Court—WELSH, C. J. This case comes before us by a Writ of Error to the District Court for the second District, County of Ramsey.

The Defendant in Error brought an action for the recovery of damages for the loss of baggage, while he was a passenger on board the steamboat War Eagle, Plaintiff in Error, from Galena to Saint Paul.

The complaint sets out that the boat was used in navigating the waters of the Territory of Minnesota, that it was used and employed in carrying passengers with their baggage, and goods, wares and merchandise upon the waters of the Fever and the Mississippi Rivers, for hire and reward, from the city of Galena, in the State of Illinois, to Saint Paul, in the Territory of Minnesota. The complaint then goes on and alleges that one D. S. Harris was Captain and Master of said boat; that he, the said Harris, in consideration that the said Nutting would take passage upon the said steamboat and become a passenger thereon to be carried and conveyed thereon with his baggage from the city of Galena to the city of Saint Paul, for a reasonable hire and reward to be paid by the said Plaintiff to the said Master, undertook and promised the Plaintiff to carry and convey him, the said Plaintiff, with his baggage, upon the said steamboat from the city of Galena to the city of Saint Paul, and to deliver to him, the said Plaintiff, his said baggage in safety and good order, at Saint Paul, upon the arrival of the said boat at Saint Paul; and that confiding in said undertaking and promise, he took passage with his baggage, which the captain failed to deliver, &c.

The answer traverses either directly or by averring want of knowledge or information sufficient to form a belief, all of the allegations of the complaint, except that said Harris was Master, that she was used in carrying passengers and goods for hire, and on the Mississippi, &c. A jury trial was waived, and the case was tried by the Court. A judgment was rendered for the Plaintiff for $170 and costs.

From the decision of the Judge who tried the case, it appears that he found the facts true as stated in the complaint. It might, perhaps, be urged that this finding was definitive of the case, and did the finding stand alone, it would be so; but

it is evident that the Judge intended to be understood that the Plaintiff had proven facts entitling him to recover, rather than that he had proved all the allegations of his complaint. The decision details the evidence given, and from this it appears by the testimony of the Plaintiff that the Plaintiff called upon the Captain of the boat at Galena and requested a ticket for a passage to Saint Paul; that the Captain directed him to the Clerk of the boat, to whom he applied and of whom he purchased the ticket, for which he paid $7 00. That he gave his trunk in charge of the porter of the boat. That the Plaintiff went on board of the boat at Galena and came on the boat to Saint Paul: that he has repeatedly demanded his trunk of the officers of said boat, and they allege, it can not be found and have not delivered it to him, and that he has not received it. The witness also testifies as to the value of the baggage lost.

Various questions were raised on the trial, but it is unnecessary to notice them, as, upon the argument it was admitted that the only question was, whether, under the pleadings the testimony warranted the judgment rendered.

The Plaintiff in Error contends that Plaintiff declares upon a special contract, and that the foregoing testimony does not support the complaint. The criticisms of counsel upon the complaint are, in the main, correct. Under our Statute, the pleadings must contain a statement of facts alone; and when the pleadings are sworn to as in this case, the impropriety, to use a mild term, of swearing to a legal fiction is manifest.

But the question is whether the Plaintiff has proved enough to warrant a recovery? He certainly has not proved all of the allegations set out in the complaint. He has, however, proved every allegation except the promise and undertaking of the Captain of the boat. He has proved enough to entitle him to recover; *Provided*, the complaint had omitted the special undertaking of the Captain. The complaint avers all that is necessary to entitle the Plaintiff to a recovery, and something more.

Now if the Plaintiff has proved all that is essential in the complaint, ought a failure to prove immaterial averments to preclude a recovery? Manifestly not. In this case all the averments in relation to the special undertaking of the master,

may be rejected as surplusage, and a failure to prove such matters should not prevent a recovery, if the facts proved sustain all the material parts of the complaint.

The judgment of the District Court is therefore affirmed.

The Bank of Hallowell, Plaintiff in Error, *vs.* Baker and Williams, Defendants in Error.

When a contract is made by which one party incurs liabilities or obligations to another, and the terms and conditions of such liabilities or obligations are reduced to writing and signed by the parties thereto, without fraud, mistake or surprise, such written contract must control and supersede all other and different terms, founded upon pre-existing or contemporaneous verbal understandings, or agreements in regard to the subject matter of the contract.

And such a contract is conclusive of what the agreement was, and of all the terms and conditions thereof.

Parol evidence of pre-existing or contemporaneous understandings and verbal agreements, tending to vary or contradict the terms of a contract which has been reduced to writing and signed by the parties thereto, is inadmissible.

But Courts of Equity will relieve where the contract has been executed through fraud, or by mistake or surprise.

This suit was brought in the District Court for Ramsey County by the President, Directors and Company of the Bank of Hallowell, against the Defendants Baker and Williams, to recover the amount of a promissory note for $5,000, dated July 20, 1854, made by the Defendant Baker, payable three months after date to the order of the Defendant Williams, and by him endorsed to Plaintiffs.

The Defendants appeared and moved to set aside the verification to the complaint, and pending this motion, the Plaintiffs entered up Judgment on default of an answer.

The Defendants were afterwards, on motion, allowed to answer, upon payment of costs.

The matters of defense set up in the answer, were substan-

tially as follows: That before the making of the note, to wit: in June, 1854, the Plaintiffs made a verbal agreement with the Defendant Baker, whereby they agreed to loan him $20,000 in the bills of the Bank of Hallowell, for the term of two years at the rate of four per cent. per annum discount, and to take as security therefor, the note of the Defendant Baker, endorsed by the Defendant Williams, for the sum of $20,000, payable in two years, secured by mortgage upon Real Estate in Saint Paul, which note and mortgage were to be executed in a manner satisfactory to C. C. Washburne, of Mineral Point, Wisconsin, and should be delivered to said Washburne, at Saint Paul, as soon as practicable after Baker's return from Maine to Saint Paul.

That said Baker agreed to circulate these Bills of the Bank of Hallowell, in the Territory of Minnesota, and give the note and mortgage soon after his return.

That afterwards, in July, 1854, the Plaintiffs agreed to give to the Defendant Baker, $5000 in the bills of said Bank, on account of the said loan of $20,000; in anticipation of the return of said Defendant Baker, to Minnesota, and of the making of said note and the execution of said mortgage, as aforesaid.

That the promissory note mentioned in the complaint was given on account of said sum of $5,000, so advanced on account of said $20,000 loan, and for no other consideration, and that it was understood between the parties at the time of the execution thereof, that the same should not be paid at maturity, but that upon the making and endorsing of the note for $20,000, and the execution and delivery of the said mortgage to secure the same, the said note for $5,000 should be returned to the Defendant; and that the same was made and endorsed by the Defendants merely as a memorandum of the receipt of said sum of $5,000 by the Defendant Baker, on account of said loan, and with no intention that the same should be paid at maturity.

That afterwards, in August, 1854, and as soon as he returned to Saint Paul, the Defendant Baker made his note for $20,000, and had the same endorsed by the Defendant Williams, and

ready to be delivered to said Washburne, who was then at Saint Paul.

That he was then and there ready and willing to give mortgages upon Real Estate in Saint Paul to secure said promissory note satisfactory to said Washburne, according to his agreement with the Plaintiff. But that said Washburne neglected and refused to attend at Saint Paul to receive the same, and had ever since neglected and refused to do so.

That after the maturity of the note, the Defendant Baker had offered and tendered the said promissory note for $20,000, drawn and endorsed as aforesaid, and offered to secure the same by mortgages on real estate in Saint Paul, in a manner satisfactory to said Washburne, if he would attend at Saint Paul for that purpose.

That the Plaintiffs had refused to accept said note for $20,000, and mortgages to secure the same, and had refused to pay to the Defendant Baker the remainder of said sum of $20,000 in the bills of the Bank of Hallowell.

And that the Defendant Baker had circulated the said sum of $5,000, in the Territory of Minnesota, as he had agreed to do.

The Plaintiffs demurred to this answer,

First, Because it does not state facts sufficient to constitute either defence or a counter claim to the said action.

Second, Because the contract alleged in the answer appears to have been a verbal contract, without consideration, and in no part performed by either party thereto, and was therefore void.

Third, The promissory note upon which the suit is brought, is no part of the contract set forth in the answer.

Fourth, Neither the said contract, nor the subsequent agreement and understanding between the Plaintiffs and Defendants, alleged in said answer, can be admitted to vary, explain or contradict the promissory note upon which this action is brought, both said contract and said agreement and understanding, being alleged to be verbal, and made, the one before and the other at the time of the making of the promissory note.

Fifth, Neither said contract nor said agreement and under-

standing appears from said answer to have been fulfilled on the part of the Defendants, or either of them; nor does the answer aver a readiness on their part, to perform the same.

This demurrer was sustained, without leave to answer except upon special application and proof of new merits.

Afterwards, the Defendants, upon affidavit of new merits, made special application to amend their answer, which application was afterwards submitted, by stipulation, to the Hon. A. J. Chatfield, Judge of the Third Judicial District.

The amendment proposed by the Defendants to their answer, was as follows:

That at the time the Plaintiffs and Defendants entered into the contract mentioned in the answer, the Plaintiffs authorized the said Washburne to act for them as their agent, in examining and approving the said note for $20,000, and the mortgages securing the same, and that the examination and approval of the said note and mortgages, and the delivery of ths same, should be made at Saint Paul, and that the said Washburne, should there attend as agent for the Plaintiffs for that purpose.

This motion to amend was denied with costs; and the following opinion was filed by the Hon. A. J. Chatfield.

By the Court—CHATFIELD, J. When this case was before me on the demurrer to the answer, I was of the opinion that the Defendants had not done enough to fix the liability of the Bank upon the contract set out in the answer, and I consequently decided that the answer did not contain any defense to the action and allowed the demurrer.

That conclusion rendered it unnecessary to consider the questions raised upon the legal validity of the contract, and upon the admissibility or competency of the evidence thereof, (the contracts being oral,) to qualify the terms of the note on which the action is brought, and change the character of its obligations. The answer had been interposed upon leave after it was due, and should have contained a full and true statement of the defense. The Court was bound to presume that it did contain all the defense that existed against the cause of action alleged in the complaint. It was for that reason that

the Court in making the order on the demurrer refused leave to amend, except upon proof showing new matter of defense.

The Defendants now ask leave to amend their answer, but do not propose to insert any new matter of defense. They only propose to amend the statement of the proceedings of Baker, under the alleged contracts so as to show more fully and definitely what was done by him to fix the liability of the Bank thereon. Strictly this is not new matter of defense. It is only a new statement of matter insufficiently stated in the former answer, and not properly within the terms of the order made on the demurrer.

Still I do not feel disposed to refuse to consider the matter thus proposed to be inserted in the answer or to exclude it because it is not strictly within the terms of the order. I choose rather to examine the legal effect of the matter proposed to be inserted, for if the matter thus proposed to be inserted, will so strengthen the answer as to constitute a good defense, the Defendants should in equity have the benefit of it; if not, then there is no legal propriety in allowing it to be inserted.

In the view which I am constrained *now* to take of this application, it will not be necessary to inquire whether the matter proposed to be inserted in the answer will have the effect to avoid the point upon which the demurrer was allowed, for if it will, then the questions upon the legal validity of the contracts set out in the answer and the competency of the evidence by which they are to be proved, will again arise, either upon a new demurrer or upon objection at the trial. They cannot be avoided. It therefore appears to me to be incumbent upon the Court *now* to consider whether the answer as proposed to be amended, would, if thus amended, constitute any defense to the action.

It will avail nothing to determine whether or not the contract set out in the answer and therein alleged to have been made between the Bank and Baker, in January, 1854, is legally valid, unless the contract alleged to have been made at the time of the execution of the note, may be proved by oral evidence to qualify the terms and change the obligations of the note; for by the alleged terms of that contract, the money

received by Baker and for which the note was made and endorsed, was to be taken by him as a part of the $20,000 mentioned in the first contract.

The terms of the alleged contract made at the time of the execution and delivery of the note are wholly inconsistent with the terms of the note; and the obligations of the note are wholly incompatible with those of the alleged contract. Both cannot stand, for both relate to the same subject matter, the same money, and the time and place of its payment. The allowance of either avoids the other.

The said contract is alleged to have been made orally. The note is made and endorsed in writing. The Defendants do not allege there was any fraud, mistake or oversight in the transaction, but it appears that the whole transaction was deliberate and well understood. Under this state of facts, it seems to me that there cannot be much doubt or question as to the rule of law governing the case. When a contract between parties is made by which one party incurs liabilities or obligations to the other and the terms and conditions of such liabilities or obligations are reduced to writing and deliberately signed by the party assuming them, and the matter is free from fraud or mistake, the writing must control and supersede all allegations of other and different terms founded upon any pre-existent or contemporaneous understanding. The writing is conclusive of what the agreement and the whole agreement was. The same rule applies in equity, for Courts of Equity will not interpose to avoid or relieve against a contract reduced to writing and signed by the party, except upon allegations of fraud or mistake. Contracts resting in bills and promissory notes stand subject to the same rule.

To illustrate—suppose a party makes a promissory note payable in ninety days; at the expiration of sixty days, the payee brings his action to recover the amount of the note and offers to prove an oral contract made at the time of the execution of the note, that it was to be due in sixty days, would it be admissible or competent? Clearly not. On the other hand, suppose the payee of such a note after maturity, brings an action upon it, and the Defendant should in defense allege or offer to prove an oral contract made at the time of the execu-

tion of the note, that it should run six months, would such defense be admissible or competent against the express written terms of the note? Certainly not.

A Court of Equity would not interfere in such a case, and it seems to me such a case is, in all its material characteristics, parallel with the one under consideration.

The rule is too clear and firmly established and too directly applicable to this case to admit of doubt. It so seems to me.

1 *Greenleaf's Ev.*, *S.* 275, *p.* 351; *Chitty on Bills*, 162; 2 *Starkie's Ev.*, 549–50; 14 *Wend. R.*, 26; 17 *Wend. R.*, 190; 1 *Hill's R.*, 116; 4 *Hill's R.*, 420; 5 *Hill's R.*, 413,–17; 6 *Hill's R.*, 219; 7 *Hill's R.*, 416.

This being my view of the case, the amendment proposed to be made to the answer, would not help it at all. The defense which it discloses is not, in my judgment, legally competent or admissible.

The motion for leave to amend must be denied with ten dollars costs of the motion.

This cause was afterwards removed to the Supreme Court by Writ of Error.

Specification of errors, points and authorities submitted by Plaintiffs in Error.

First. That the Court erred in denying the amendment to the answer offered by the Plaintiffs in Error.

Second. That the Court erred in sustaining the demurrer.

1. Because it appeared by the answer that the consideration of the said note upon which the action was brought, was the performance of a certain contract entered into by the parties therein described, and that the Plaintiffs below had not performed their contract.

2. Because it appeared by the said answer that the said contract was to be performed by the said Plaintiffs below before the maturity of said note.

3. Because the Defendants below complied with their part of the contract or tendered a compliance.

4. Because the money received by the Defendants below at the time the note was given, was received from the Plain-

tiffs below as part performance of their said contract and under the same.

5. Because by the terms of said contract, moneys to be received under the same, were not to be repaid to the Plaintiffs below until two years thereafter with interest at the rate of four per cent. per annum.

6. Because enforcing payment of the note is in fraud of the stipulations and conditions of said contract.

Third. That the Judgment is erroneous.

1. Because of the reasons above stated.

2. Because interest is therein computed and included at the rate of six per cent. per annum; whereas, by the terms of the contract admitted by the demurrer, the Defendants below were chargeable with only four per cent. per annum.

Fourth. That the Court erred in deciding the said contract set up in the answer to be insufficient, as a defense to this action, because the same was verbal.

1. Because the rule that a written agreement shall not be affected or varied by parol, applies only to the evidence and manner and conclusiveness of proof.

2. Because the rule does not apply where the fact is not denied or is admitted by the pleadings.

3 Because the said contract was not required by law to be in writing.

4 Because the said contract is not in issue.

AUTHORITIES.

As to the second alleged error assigned, and the points thereunder specified: *Miles vs. O'Hara*, 1 *S. and R.*, 32; *Snydam vs. Westfall*, 4 *Hill.*, 211; *Allen vs. Matthews*, 1 *Stewart*, 273, *cited in* 3*d Vol. U. S. Digest, Sec.* 88. *p.* 260; *Rasson vs. Smith*, 8 *Wend*, 437; *Tillotson vs. Grupes*, 4 *New Hamp.*, 444, *cited in* 3*d U. S. Digest, Sec.* 649, *p.* 282; *Sanders vs. Howe*, 1 *Chip.*, 363, *cited in* 3*d U. S. Digest, Sec.* 699, *p.* 283; *Denniston vs. T. L. Bacon*, 10 *Johns.*, 198; *Amherst Academy vs. Cowles*, 6 *Pick.*, 427, *cited in* 3*d U. S. Digest, Sec.* 698, *p.* 284; *Hill vs. Eli*, 5 *Sergeant and Rawle*, 363, *and authorities therein cited; Field vs. Biddle*, 1 *Yeates*, 171; *Woodhull*

vs. Holmes, 10 *Johns.*, 231; *Skelding vs. Haight*, 15 *Johns.*, 274, 3 *Starkie on Evidence, page* 1015, (*Metcalf*, 3*d Am. Ed.*,) *ibid.*, 1049.

As to the fourth error assigned and points thereunder specified: 3*d Starkie on Ev., page* 996, 995; 1 *Starkie on Ev., page* 388, 389, 390, 393, *&c.; Sec.* 8, *Vol.* 1, *page* 145 *to* 153, *Fonblanques Equity*, (4*th Am. Ed.*,) *ibid., note, under p.* 146; *Niven vs. Belknap*, 2 *Johns. R*, 589; *Marquis of Normandie vs. Duke of Devonshire*, 2 *Freeman*, 216; *Smith vs. Patten*, 1 *Serg. and Rowle*, 83, 84, *cited*; *Whitchurch vs. Bevis*, 2 *Brok.*, 566; *Child vs. Godolphin, Dick. Rep.*, 39; *Cooth vs. Jackson*, 6 *Ves.*, 39, *cited, and see notes to pages* 148, 149, 150, 151, 152, *Fonblanque's Equity, and Cases cited therein; Sec.* 127, *Story on Contracts, p.* 81; 1 *Whillake's Pr.*, 323; *Boyn vs. Brown*, 7 *Barb.*, 80; 2 *Story's Equity, Sec.* 755, *p.* 68; *ibid., Sec's* 755 *to* 757, *pages* 68 *to* 72.

The points and authorities of Defendants in Error, are not on file.

Hollinshead & Becker, Counsel for Plaintiffs in Error.

Geo. A. Nourse, and Brisbin & Bigelow, Counsel for Defendants in Error.

The Decision of the District Court was affirmed with costs, but no opinion was filed.

WILLIAM B. DODD, Appellant, *vs.* GEORGE F. BROTT, Respondent.

APPEAL FROM AN ORDER SETTING ASIDE AN EXECUTION.

Where a Judgment was assigned by the creditor and no notice thereof given to the judgment debtor, payments made thereon by the debtor to the creditor in good faith, will bind the assignees of such judgment, and repayment to them will not be enforced.

A garnishee is bound to disclose all his indebtedness to the Defendant named in the process, and his answers are not merely voluntary.

An Attorney has no lien upon a judgment for his costs and disbursements, without notice of his claim therefor to the judgment debtor.

An assignment of a judgment to an Attorney, by the judgment creditor, *merges* any Statute lien the Attorney might have had therein for his costs and disbursements.

The Plaintiff below, William B. Dodd, recovered a judgment against the Defendant Brott, for the sum of $166 41, in the District Court for Ramsey County, on the 22d day of October, 1853.

The Defendant was afterwards summoned as a garnishee in several suits against the Plaintiff by different creditors, in which he disclosed the indebtedness due by him to the Plaintiff by virtue of the aforesaid judgment, whereupon judgments were rendered against him in favor of the creditors of Dodd, and one of these judgments had been paid by him.

Previous to this, the Plaintiff had assigned the judgment against the Defendant, to his Attorneys, Messrs. Emmett & Moss, in consideration of certain legal services rendered by them, but no notice of this assignment was given to the Defendant; and he had no notice of such assignment at the time of his disclosures under the garnishee proceedings against him.

Afterwards the assignees of the judgment caused an execution to be issued thereon, against the Defendant, who thereupon moved to vacate the same, and for an order directing the Clerk of the District Court to enter satisfaction of such judgment upon his register and docket.

Upon the hearing of this motion, the District Court set aside

the execution and granted the order prayed for; from which order the Plaintiff appealed to this Court.

Points and authorities of Appellant.

Firstly. 1. The claim of Dodd was assignable, and carried the judgment with it.—6 *How. Rep., p.* 161; 3 *How. Rep. p.* 386.

2. The assignment carried with it all the right, title and equities of the assignor.—6 *How. Rep., p.* 161; 8 *How. Rep., p.* 319.

3. By virtue of that assignment Brott ceased being a debtor to Dodd.—3 *How. Rep., p.* 386.

4. That the judgment in garnishment against Brott cannot operate as a discharge of the original judgment thus assigned. —3 *How. Rep., p.* 386; 6 *How. Rep., p.* 161; 4 *Met. Rep., p.* 594.

5. That Brott voluntarily admitted an indebtedness to Dodd at his own risk; and in this case at a time when Dodd was not his creditor.—6 *How. Rep., p.* 161; 1 *Code Rep., N. S., p.* 311.

6. No notice to Brott was necessary to make the assignment effectual.—6 *How. Rep., p.* 161; 4 *Met. Rep., p.* 594; 5 *Shep. Rep.,* (*Me.,*) 327.

Secondly. 1. The assignees were the Attorneys of Dodd, and independent of the assignment, they had a lien on the judgment to the extent of the costs.—9 *How. Rep., p.* 16; *Rev. Stat. p.* 459.

2. That lien existed without notice to Brott, and no act of the assignor could deprive his Attorneys of said lien.—*Same as above.*

Points and authorities relied upon by the Respondent.

First. The Respondent contends that the right of the the assignee of a judgment, before notice of an assignment is given to the Defendant therein, is subject to the acts of the Defendant in paying such judgment to the Plaintiff, or satisfying the same in any manner agreeable to law.—1 *Code R.,* (*N. S.*) 314.

Second. But payment to the Plaintiffs in the garnishee proceedings was, in effect, payment to Dodd.—*R. S.,* 452, *Sec.* 13; *ib.* 453, *Sec.* 17.

Third. The payment by Respondent was not voluntary but compulsory; since the judgments on the garnishee process have the same effect and could be enforced the same as the judgment against him that had been assigned. (*R. S.*, 453, *Sec.* 17.) Wherefore a payment by Brott was in effect a payment to Dodd, which is admitted would be lawful.

Fourth. The objection that no summons was served on Brott in the case of Marshal, in no way affects the garnishee judgments, for the same reason that he might have paid the judgment to Dodd after the assignment.

Such course, too, was for the benefit of Dodd, as it saved the costs of service, &c. The presumption of law is that a summons was served.

Fifth. The assignees have not any lien for services, as it does not appear that they were rendered in that suit.

But if that appeared it was necessary to first give notice to the Defendant.—*R. S.*, 459, *Sec.* 3 *and* 4.

EMMETT & MOSS, Counsel for Appellant.

DE WITT C. COOLEY, Counsel for Respondent.

By the Court—SHERBURNE, J. This is an appeal from an order of the District Court, in the County of Ramsey, to satisfy a judgment which the Plaintiff had recovered against the Defendant. The facts are substantially as follows:

William R. Marshall and George Cady had each recovered a judgment against the Plaintiff for a sum exceeding $200.00. The Plaintiff about the same time recovered judgment against the Defendant for the sum of $222.79. On the 22d day of October, 1853, being a few days after the recovery of the judgments above mentioned, a garnishee process was served upon Brott at the suit of Cady to secure the judgment already referred to in his favor, and on the 10th of November, 1853, Brott appeared and answered, and judgment was rendered against him for the sum of $96.50. On the 6th day of February, 1854, execution was issued upon the judgment of Cady against Brott, and upon the first day of April, 1854, the execution was returned satisfied and the judgment was satisfied; the amount of the whole, with costs, being $104 80. On the 22d day of

October, 1853, affidavit was duly filed with the Clerk of the District Court for garnishee process for Marshall against Brott, on account of the indebtedness of Dodd. On the 22d day of March, 1854, Brott duly appeared and answered, and on the 27th day of April, 1854, judgment was entered against him as garnishee of Dodd for the sum of $133 31, and on the same day, as appears by the receipt of Marshall, said Brott paid to him on the judgment against said Dodd, the sum of $124 61. On the 17th day of January, 1854, execution was issued upon the judgment of Dodd against Brott. The execution was subsequently set aside and the judgment upon which it was issued satisfied by order of the Court.

From this order the Plaintiff appealed.

The objection to the order is, that prior to the time when Brott appeared and answered as garnishee in the causes above referred to, the judgment of Dodd against Brott had been duly assigned to Emmett & Moss. Of this assignment, however, Brott had no notice. The simple question arises whether a debtor who pays a debt in good faith to his creditor, can be made liable to pay it a second time to his creditor's assignee? If such a rule of law existed, I should not, for a moment, feel bound to follow it. It is repugnant to common sense and every principle of justice. But no such idea can be supported by authority. I have not looked into all the cases cited by the Plaintiff's counsel, but that upon which he seemed to rely most, in 6 *Howard's Practice Repts.*, is not in point. That was the case of a voluntary payment by a creditor, and the Court bases the decision expressly upon that ground. The payment in this cause was by a judgment of the Court. The argument of the counsel that the Defendant answered voluntarily, has no force whatever. He answered, so far as we know, as he was bound to do, in the ordinary course of judicial proceedings. It is absurd to say that he could not properly answer at that time, that he was indebted to Dodd for the reason that Dodd had assigned the judgment, because the assignees had not taken the precaution to give notice to Brott. He was called into Court to testify whether he was or was not indebted to Dodd. There was but one answer which he could make, truly, and that was that he was so indebted. Upon that an-

swer, judgment was rendered against him necessarily, and that judgment he satisfied, by which he paid the Plaintiff's debt. It is the unanimous opinion of the Court that the order of the Court below was properly granted.

It has been urged that, although the assignment may be ineffectual for want of notice to Brott, still the Attorneys for the Plaintiff had a lien upon the judgment for the amount of costs. There are two reasons fatal to this position. The first is, the Statute does not admit of this construction. The grammatical arrangement of the section and its punctuation, leave no doubt whatever that notice to the debtor in order to affect a lien upon the judgment, is necessary as well when the Attorneys claim a lien upon the costs as when they claim it upon a portion of the judgment by virtue of a stipulation or agreement. The Court are also of the opinion that even if the construction contended for by the Plaintiff's counsel was correct, still the minor lien of the Attorney was merged in the specific contract of assignment. I do not feel clear in my own mind as to the correctness of this position, and refer to it rather as the opinion of the Court than my own. The proceedings of the Court below must be affirmed.

FRANKLIN STEELE, Respondent, *vs.* ARNOLD W. TAYLOR, and others, Appellants.

A purchaser of property sold by virtue of an execution, *pendente lite* is a *voluntary* purchaser, and takes his title subject to the *lis pendens*, precisely as if by a voluntary conveyance of the property by the judgment creditor.

Such a title is not imposed upon him, by operation of law, as he acts for himself in making his bids for the property, and takes it *cum onere*.

A judgment lien attaches to only such estate in the property as the debtor has at the time when the judgment against him is perfected, or which he may subsequently acquire during the continuance of the judgment.

Voluntary incumbrancers whose liens attach *pendente lite*, need not be made parties Defendant, and they cannot compel the complainant to insert in his Bill of Complaint, the conflicting rights and equities existing between them and the Defendant, for the purpose of obtaining a decree to determine their rights and equities.

But after a decree between the original parties, voluntary incumbrancers may have their equities and rights to the property determined, and may file their bill to protect the same.

But such incumbrancers may be made Defendants in a suit, by the express consent of the Complainant, or by some act on his part recognizing them as proper Defendants.

The opinion in this cause contains a sufficient statement of its history, to enable us to perceive the application of the points and authorities cited. It was an appeal from an order of the District Court of Ramsey County, in Chancery.

The following are the points and authorities relied upon by the Appellants' Counsel:

First. The said order appealed from was improperly granted, for the reason that all the grounds on which it was asked were untrue and insufficient.

Second. The evident object for which said order was asked, and the only effect it could have, was to carry out and consummate a collusion and conspiracy between said Steele and Taylor to deprive these Appellants of their equitable rights.

Third. The said orders of the 14th, 18th and 24th days of March, 1853, were taken by default and consent, and therefore were not properly vacated without the assent of both parties.

Fourth. The Respondent herein had notice not only of the application to the Court for the said orders, but also of the particular form of the application, and having suffered the said orders to be taken by default, could not afterwards properly object to them in mere matter of form, even though the form was irregular.

Fifth. The proper form for application for the said orders was a matter resting in the sound discretion of the Court; and that discretion having been once exercised, could not properly be reviewed.

Sixth. In matter of form the said application to the Court by petition was regular, precedented and in accordance with the well settled principles of equity practice.

Seventh. The said petitioners, the Appellants in this Court, had an interest in the real property or money which was the subject of litigation in this cause.

Eighth. That interest a Court of Chancery would be bound to recognise and protect whenever it should be brought by proper application within its judicial knowledge.

Ninth. The applications to the Court below were necessary, and in matter of substance, if not in matter of form, properly made; and the said orders of Court were just and equitable to all the parties concerned, and were therefore properly made and ought not to have been vacated.

Tenth. If any order were admissible in the instance of the one appealed from, it should have been at most a modification of the former orders, and that without prejudice to the rights of the petitioners.

Eleventh. The order of Court appealed from to this Court is irregular, unprecedented, unjust and inequitable, and therefore ought to be reversed.

Twelfth. Justice under the law and rules of chancery proceedings, requires of this Court that the interests of these appellants in this cause shall be protected.

In support of which said points, the said Appellants will cite the following authorities, to wit:

3 *Paige*, 573; 4 *ibid.*, 476–8; 7 *ibid.*, 290; 3 *Johns.*, 543; 10 *ib.*, 521; 1 *Bar. Ch. Pr.*, 597; *ib.*, 595 *and* 596; 1 *Moulton's Ch. Pr.*, 32; 2 *ib.*, 77; 2 *Vesey*, 113; 13 *ib.*, 394; *Story's Eq. Pl.*, 342; *ib.*, 541; 1 *Story's Eq. Ju., Sec* 496; 2 *ib.*, 742; 16 *Serg. & Rawl.*, 237; 11 *Wend.*, 448; 4 *J. J. Marsh*, 395; *Daniel Ch. Pr.*, 1201; *Adams Eq.*, 312; *ib.*, 316; *ib.*, 713; *R. S. Min. Ter., Chap.* 94, *Sec.* 76; 1 *Bar. Ch. Pr.*, 33, 578, 633; 3 *Paige*, 123, 166, 446, 476; 4 *ib.*, 289, 378; 7 *ib.*, 288, 364, 513.

The following are the points and authorities relied upon by Counsel for Respondent:

The record of the bond from Taylor to Steele gave to Steele a title, according to the terms of the bond, and was by express Statutory provision, notice to and took precedence of any subse-

quent purchaser or purchasers and operated as a lien upon the lands described, in the instrument, according to its import and meaning.—*Sec.* 3, *R. S.*, 215.

The District Court has decided that Steele fulfilled sufficiently the terms of the bond, so far as he was concerned.

MS. opinion of Judge Fuller overruling motion to dissolve injunction in this case.

The assumption of the contracts, payment for the stove, and the payment of Bantin were to be done after Taylor had given the Deed.—*Ibid.*

To a bill for specific performance *the parties to the contract* are the only proper parties.—*Wood vs. White*, 4 *Mylne & Craig*, 460; *Taskee vs. Small*, *ibid.*, 3 *Paige* 63; *Hall vs. Deva*, 3 *Young & Collyce*, *Eq.*, *Exc.* 191; *White vs. Wood*, 4 *Mylne & Craig*, 460; *Dan. Ch. Pr.*, 247; —— *vs. Walford*, 4 *Russ.*, 372; *Melthorpe vs. Holegate*, 1 *Collyer*, 303 *and cases there cited.*

If a person *pendente lite* acquires a voluntary interest in the subject matter of the suit, he cannot, by petition, pray to be admitted to take a part as a party defendant.—*Dan. Ch. Pr.*, 328; *Story's Equity Pl.*, *S.* 342; *Note Foster*, *vs. Deacon*, 6 *Madd. R.*, 59; 2 *Mitf. Eq. Pl.*, *by Jeremy*, 68; *Sedgwick vs. Cleveland*, 7 *Paige*, 290; (*See reasoning of Ch. Walworth in this case,*) *Deas vs. Thorne*, 3 *John.*, 544; *Gaskill vs. Durdin*, 2 *Ball & Beatty*, 167; 2 *Johns. Ch.*, 455; *Murray vs. Lilburne*, *a Strong Case*; *Hoxie vs. Caw*, 1 *Sumner*, 173; 1 *Smith Ch. Pr.*, 432; (*read this,*) *Mitford's Pls.*, *note on parties*, 397, 398 *and ref*; *Bishop of Minchester vs. Bean*, 3 *Ves.* 316; *Metcalf vs. Pulvertorf*, 2 *V. & B.*, 205-7 *and ref.*

Final orders ought not to be granted upon petition.—1 *Smith's Ch. Pr.*, 70.

A party in contempt cannot be heard upon petition.—1 *Smith's Ch. Pr.*, 72.

This Court has no jurisdiction of this appeal.—*R. S.*, 471, *Sec.* 74.

North & Secomb, Counsel for Appellants.

Hollinshead & Becker, and H. J. Horn, Counsel for Respondent.

By the Court—CHATFIELD, J. The bill in this case was filed by the complainant against the Defendant Arnold W. Taylor, to enforce the specific performance of the condition of a bond executed by Taylor to the complainant; such bond being conditioned (among other things) for the conveyance to complainant by Taylor, of certain real property therein described.

The Defendant Taylor answered the bill, contesting the complainants' equitable title to the property and his right to have such specific performance.

Pending these proceedings between the complainant and Taylor, certain other parties obtained judgment against Taylor and by virtue of executions issued thereon, caused parcels of the same real property claimed by the complainant under his bill, to be sold by the proper Sheriff.

After such sales by the Sheriff, the purchasers, or those claiming under them, made their petitions and thereon asked to be admitted and made parties Defendants in the suit between the complainant any Taylor, and for relief. Notices of such applications were served on the solicitors for the complainant, but there was no appearance on the part of the complainant at the hearing of either of them. The applications were granted.

Subsequently the complainant, upon affidavit and notice, moved to vacate the orders admitting the petitioners as parties Defendants, and upon that motion an order was made vacating the orders made upon the said petitions and dismissing the petitions.

From that order the appeal in this case was taken.

The main question to be determined upon this appeal rests upon the character of the position in which the Appellants, (the petitioners,) stand relative to the complainant and Taylor. It is this: are the Appellants to be deemed *voluntary* purchasers *pendente lite* of the several parcels of the lands in question, which they respectively claim in their petitions, or are they to be considered as persons receiving the title thereto *pendente lite* by operation of law?

If they are voluntary purchasers, they may or may not be made parties at the election of the complainant. They cannot as such, be allowed to come in as parties against or without

his consent, and whether parties or not, they would be bound by the decree. If they have, under their purchases, any interests or equities requiring protection against the effect or consequences of a decree between the original parties, they must seek it, not by petition to be made parties in the pending suit without the consent of the complainant, but by an original bill in the nature of a supplemental and cross bill.—*Story's Eq. Pl., Sec.* 342; 7 *Paige Ch. Rep.*, 288.

If they are persons upon whom the title has been, by operation of law, cast *pendente lite*, they *must* be made parties, and the complaint cannot proceed until they shall have been brought in as such.

They claim title by execution. It is a kind of title unknown to the common law, and seems to be of American origin. It has grown out of the system of judgment liens adopted by many and probably by most of the American States, and out of the enforcement of the purposes of such liens, by process of execution. The lien of the judgment and process of execution, appear to have been substituted for the old common law Writ of Elegit.—4 *Kent's Com.* 423, 441, 497.

The lien is one that is forced and fixed upon the estate by operation of law, and is converted into an absolute title by virtue of the process of execution and the action of the proper officer. The title is thus transferred from the judgment debtor to the purchaser without regard to the will or desire of such debtor. So far it is a conveyance of the title by operation of law, for the proceedings and process of the law are made the instruments by which, and the conduits through which, the title is made to pass from the judgment debtor to the purchaser. The presumption is that the judgment debtor is thus *involuntarily* divested of his title.

But the purchaser takes voluntarily. His purchase is wholly an act of volition on his part, and he receives and holds in his own right and not in trust for the use of others, all the estate that he obtains by his purchase. He acts for himself wholly in making his bids and purchase and is influenced and governed by his judgment of what, under the circumstances, his own interests, and not those of others, require or render advisable. He cannot be deemed other than a *voluntary* purchaser, though

he receives his title by operation of law. The *lis pendens* is notice to him, and he takes the title *cum onere* precisely as he would by a *bona fide* voluntary conveyance from the judgment debtor, and his position with reference to both of the original parties to the suit, is the same as it would be under such voluntary conveyance. It seems to me that it would be inconsistent and incompatible with other well established principles, to allow him for the protection of his own private interests, the benefits of the rules applicable to the case of a trustee, upon whom the title had, by operation of law, been cast for the use of others; as in cases of assignees in bankruptcy or insolvency, and of receivers in chancery. He does not hold the position or rest under the responsibilities, nor is he subject to any of the duties of such trustee, who, as such, is always subject to the jurisdiction and amenable to the power of the Court of Chancery, and entitled to the benefit of its directory orders. Nor does he stand in a light like that of an heir at law, upon whom there is a descent cast by the death of the ancestor *pendente lite.* In such case the death extinguishes the party and abates the action rendering a bill of revivor indispensible.

The general doctrine applicable to forced or judgment liens is, in my view, such as to compel the conclusion above stated.

It has been held, and I think it is quite well settled that a forced lien, like that of a judgment, attaches to only such estate as is vested in the debtor at the time when the judgment against him is perfected, or at some subsequent time during the continuance of the judgment. The principle is that where there is no title or estate, there is nothing to which the lien of the judgment can attach—no tangible subject for the action of the lien. Hence a deed or mortgage made in good faith by a debtor is, though unregistered, good against the lien of a subsequent judgment against the debtor, whether the judgment creditor have notice thereof or not. The benefits of the recording act have not, in this Territory, been extended (as they have in some of the States,) to attaching and judgment creditors.

Admitting the regularity and validity of the judgments under which the appellants claim, the most that they could

derive therefrom or claim thereby, was a lien upon the estate of Taylor in the lands in question, subject to all pre-existing equities in favor of the complainant or other parties. 8 *John. R.* 385. Such lien was simply an incumbrance upon the estate of Taylor in the lands, as such estate existed at or subsequent to the time of the docketing of the judgment; and, if I mistake not, the rule is that incumbrancers who become such *pendente lite* need not be made parties. They stand in no better position or more favorable light, relative to the parties, than voluntary *bona fide* purchasers *pendente lite*, nor is it proper or reasonable that they should. They are in the same manner and to the same extent bound by the decree, and they have the same right to file their bill for the protection and enforcement of their equities under their liens.

The purchaser, under process of execution, the office of which is to convert the judgment lien or incumbrances upon lands into an absolute estate, and to foreclose the debtor's right to redeem by payment, obtains by his purchase, only the estate to which the lien was fixed by the judgment. *Cooper vs. Cory*, 8 *Johns. R.*, 385. It would be very inconsistent that he should take a greater or better estate than that held by the debtor. He takes it voluntarily and *cum onere*. He stands in relation to pre-existing equities and to those in whose favor they exist, in the same position which the judgment creditors held previous to the sale by the officer by virtue of the process; no better—no worse. It would seem to follow, that if a person becomes such purchaser *pendente lite*, he need not be made a party by the complainant, and cannot come in as such, without the consent of the complainant. While he would, in case he should remain quiet and silent, be bound by the decree, he may file his bill to protect and enforce his equities.

When the objects and purposes of the bill in this case are well and fully considered, the propriety and correctness of the conclusion before stated, are, to my mind, made much more clearly manifest. The purpose or design of the bill is to adjudicate and determine the rights and equities claimed by the complainant, in the lands as against the Defendant Taylor, and which he, by his answer, denies and resists. Facts sufficient to sustain the complainant's claims to equities as against Taylor,

would, at the same time, sustain them against the judgment creditors of Taylor and against the purchasers under the executions issued upon the judgments. It is no part of the design or proper office of the bill in this case to furnish the means of adjudicating or determining the rights of the Appellants against the original Defendant Taylor—though, perhaps it might, with the consent of the complainant, be made the instrument of such a purpose. If the complainant's claims to equities are not valid against Taylor, the Appellants have no need of the aid of a Court of Equity to protect their rights; for the law secures to them, in such case, the titles which they have acquired under the judgments and executions; provided the proceedings of the creditors and their officers have been legal and effectual. If such proceedings have not been effectually conducted, the Appellants have not thereby acquired any equities, and a Court of equity could not interpose to aid them. If the complainant's claims to equities be not valid, then the moneys paid by him into Court, belong to him and the Appellants have not a shadow of equitable claim to any part of that fund. If the complainant's claims to equities be valid against Taylor, they are equally so against the Appellants, and in such case they may have, if their judgments, executions and purchases be all legal and valid, an equitable right in the fund paid into Court by the complainant for the use of Taylor. Such right vests against Taylor and not against the complainants. The Appellants cannot, it seems to me, consistently seek to protect or enforce such right or equity by asking to be made Defendants with Taylor at the suit of the complainant. There could not, in such case, possibly be any ground of issue between them and the complainant upon their claim, to an equitable interest in the fund. Both the Complainant and Appellants assume that the money is Taylor's, and what matters it to the Complainant whether Taylor or his creditors get it. The issue in such case would be between Taylor and the Appellants, and it would be neither just or consistent for the Complainant, without his consent, to be embarrassed and delayed in the acquisition of his rights, by such a contest over the fund, between Taylor and his creditors. Indeed I cannot well see how a decree founded upon the complainant's bill could consistently

determine the conflicting rights between and distribute the fund among the Defendants; conflicts in which the complainant has no concern, or right to interfere, and which are entirely foreign to the substance and prayer of his bill.

If all persons claiming title acquired by execution *pendente lite* may become parties without the consent of the complainant, or must be made parties by him to enable him to proceed, as is insisted by the counsel for the Appellants, the object sought to be obtained by the bill, however clear, palpable and unquestionable the right might be, might, and in many like cases would, be embarrassed and delayed till the intermediate damages and expenses would inflict upon the complainant an injury greater than ultimate success could possibly compensate. Cases might easily occur in which the Complainant would find it impossible to ever reach a final hearing and decree. The original purchasers under the execution are first admitted or brought in as Defendants. The next day one or more of them sells his interest or some part of it. His grantee may be admitted or must be brought in as a Defendant, for he holds and represents a title by execution, and the principle for which the counsel for the Appellants contend, would include him. Such changes may be made daily, hourly, and without limit as to time. But it may be said that such grantees, though holding a title against the property by execution, are strictly voluntary purchasers *pendente lite* and therefore need not be made parties —cannot be without the consent of the complainant. Grant it, and only one branch of the embarrassing difficulty is removed. The title by execution in the hands of the original purchaser, is liable to attachment and judgment liens and to be sold under executions against him. The same thing is liable to occur in reference to any and every grantee of such title to any parcel of or share in such lands, be the same never so small. Forced or judgment liens upon, and titles by execution in the lands or in parcels or shares of the lands in controversy might thus multiply *ad infinitum* and keep the complainant during his life, and his heirs forever after him, busy in bringing in as Defendants, purchasers under executions, or in attending their own applications to be made such. However strong the complainant's rights and equities might be, his remedy would be

crushed beneath the accumulated and accumulating weight of parties, and postponed forever. The *lis pendens* would never cease, but with each execution sale would become more complicated and cumbersome. Time would surely bring death to some among so many parties and create titles by descent or devise in the heirs or devises of those who should die seized of the title by execution to any, even the smallest aliquot part of the smallest usable parcel of the lands in controversy. Such heirs and devises must *ex necessitate* be brought in as Defendants, and that too, by bill of revivor. I repeat, the *lis pendens* might never cease and the most palpable and pressing equity might be defeated by a rule rendering the remedy impracticable. An exhibition of possibilities and extremes like this, is always extravagant, but it frequently serves well to illustrate the propriety or impropriety of a rule of proceeding.

That rule is best which affords a full protection and remedy to each party, with the least power or opportunity of abuse and consequent danger of injustice to the other. The rule here applied to those who acquire title to or interest in real estate by a judgment and execution against a Defendant, while the same is the subject matter of a suit in equity between such Defendant and a third party, is, in my view, of that character. It leaves it in the power of the complainant to protect himself against embarrassment and delay in the litigation of his rights against the Defendant, by the interposition of those who thus acquire rights or interests in the subject matter of the suit subsequent to the commencement of the same. At the same time it places in the hands of those holding such subsequently acquired equities, full and ample means of protecting and enforcing the same by giving them the benefit of an original bill in the nature of a supplemental and cross bill. If a person holding such equity will not take the responsibility of such a bill, and thus prosecute his right affirmatively, he cannot reasonably ask to be admitted Defendant in a pending suit between other parties, and complicate and embarrass the equities of such parties respectively, for the sake of experimenting upon his own, by way of defense to those of the complainant: nor can he, if he will not take the hazard of such a bill, reasonably complain at being bound by the decree in the suit pending at the time when he acquired his equities.

The conclusion that the Appellants had not the right to be admitted as Defendants without the consent of the complainant, requires us to determine whether the record discloses any or sufficient evidence of such consent on the part of the complainant, for if he has once consented by any word or act of which the Court has competent evidence, he must stand to it, and cannot be allowed subsequently to repent and retract.

The only competent evidence upon that subject is the Complainant's default or non-appearance at the hearing of the petitions of the appellants, to be admitted as Defendants, he having notice of the time and place of such hearing—such default may imply absence of objection on the part of Complainant, but that is all, and I do not think it is enough. The right of the appellants to be admitted as Defendants, rests wholly upon the consent of the Complainant. Such consent to bind him and sustain the right of the appellants to be admitted as Defendants, should be positive and be directly and affirmatively shown by the record. It is always an act of grace or favor, on the part of the Complainant in such a case, and the appellants in this case should have sought to obtain it from him as such. They could not force it from him by a mere notice, nor can the proof of it be derived by implication from either absence or silence. Either an express consent on the record in the cause, or at least some act in the cause on the part of the Complainant recognizing the appellants as proper parties Defendants is in my judgment necessary to bind him. None such appears in the case.

The orders admitting the appellants as Defendants in the cause were therefore improperly made, because made without the indispensible pre-requisite of the Complainants consent, and after the entry of those orders, the appellants were on the record as Defendants without the right so to be there.

I think it was competent for the Complainant to clear the record of those orders, thus improperly made, by motion, and that it was not necessary to require of him a petition for that purpose. He was not asking that those orders be vacated as a matter of grace or favor, but as a matter of right, because they were made irregularly—made without his consent, which alone could give the Court competent authority to make them.

The appellants being thus on the record without the right to be there, it was the right of the Complainant to have them put off, and his motion to that purpose, was, in my judgment, proper and properly granted. The order, (from which the appeal in this case was taken,) vacating the orders admitting the appellants as Defendants, and dismissing their petitions, is in my opinion, correct. I think it was properly made and that it should be affirmed.

These views of the case as it appears upon this appeal, controlling, as they do, the result, render it unnecessary, if not improper, to consider either the subject matter or prayer of the petitions or the form or character of the orders thus vacated by the order from which the appeal in this case was taken. The appellants, not having acquired the right to come before the Court in the way and character in which they sought to come, cannot be deemed to have properly placed their equities and the facts upon which they rest in the possession and power of the Court for its consideration and action. Parties seeking the protection and aid of a Court through the exercise of its power and jurisdiction over the subject matter and over the persons of other parties, must conform to all the pre-requisites necessary to acquire the right and thus enable themselves to appear, as parties, before they can present their cases and ask for such protection and aid.

The proceedings in the case subsequent to the entry of the order from which this appeal was taken, are not before this Court on this appeal.

MERRILL, COWLES & CO., Appellants, *vs.* S. W. SHAW & BROTHER, Respondents.

This cause was commenced in the District Court of Ramsey County, to recover the amount of a promissory note made by the Defendants below, for $1296.60.

The answer of the Defendants set forth that the District Court had no jurisdiction of the persons of the Defendants, because neither the Plaintiffs or Defendants, or either of them, resided in Ramsey County at the time the suit was commenced, and had no property in that County liable to attachment, and that the summons was served upon one of the Defendants in Benton County, where he then resided.

And deny that the said note was due, because the Plaintiffs had, for a valuable consideration, extended the time for the payment thereof, of which extension, the Defendants allege, "they had the written acknowledgment of said Plaintiffs."

The latter portion of the Answer was, upon motion, stricken out.

Afterwards, the Plaintiffs demurred to that portion of the Answer which set up the want of jurisdiction of the Court, upon the following grounds:

Because it was not necessary that the Plaintiffs should reside in the County of Ramsey in order to give the Court jurisdiction over their persons.

Because the Defendants had appeared in the cause and answered the Complaint, and thereby waived any objection which might exist to the jurisdiction of the Court.

And because the summons in the action could be served upon the Defendants in any County in the Territory.

The Demurrer was overruled by the District Court, and it was there held that the appearance and answer on the part of the Defendants was *not* a waiver of the objections to the jurisdiction of the Court, and that the cause should have been

commenced in the County where the parties, or one of them, resided at the time the action was brought.

The Plaintiffs appealed to the Supreme Court from the order of the District Court overruling the Demurrer.

Specifications of Points and Authorities submitted on behalf of Appellants:

First. That the Court erred in overruling the Demurrer of the Plaintiffs to the answer of the Defendants.

Second. That the Defendants answered.

Third. That the Defendants appeared to the action.

Fourth. That the appearance of the Defendants brought them into Court and cured any defect (if any) in the issuing of summons or in the service thereof, and dispensed with any further process or notice in service thereof.

Fifth. That the summons in this action was sufficient.

Sixth. That the service thereof was sufficient.

Seventh. That the Court had jurisdiction.

Eighth. That non-residence of the Defendants in the County of Ramsey where the action was commenced, did not preclude service of the summons in any other County of this Territory, nor exclude the jurisdiction of the Court because the Plaintiffs were non-residents.

Ninth. That where there is a defect in the summons or service thereof, the remedy is by motion before appearance, and not otherwise.

Tenth. That Section 41, page 334, Revised Statutes, relates to the place of trial and not to the service of summons.

Authorities: *Sections* 44 *and* 45, *page* 334, *Revised Statutes. Section* 48 *ibid.* 335. *Section* 50 *ibid.* 335. *Section* 55 *ibid.* 336. *Sections* 39, 40, 41, 42 *and* 43, *page* 334. *Section* 26 *of amendments to the Revised Statutes. Amendments to Revised Code, page* 14. *Section* 146, *p.* 347, *R. S.* 1 *Whittaker's Practice, p.* 425. *Nones vs. Hope Mutual Life Ins. Co.* 5 *How.* 96, 3 *C. R.* 161, 18 *Barb.* 541. *Dix vs. Palmer*, 5 *How.* 233, 3 *C. R.* 214. *Flynn vs. the Hudson River R. R. Co.*, 6 *How.* 303. *Webb vs. Mott*, 6 *How.* 439. *Voorhies vs. Scofield*, 7 *How.* 51. *Hewitt vs. Howell*, 8 *How.* 346. *Beecher vs. James*, 2 *Scam.* 462. *Easten vs. Altum*, 1 *ibid.* 250. *Vance*

vs. Funk, 2 *ibid.* 263. *Wheelard vs. Bullard*, 6 *Part* 352. *Moore vs. Phillips*, 8 *ibid.* 467. *Rose vs. Ford*, 2 *Pike* 26. *Bennett vs. Stickney*, 17 *Verm.* 531. *Dunn vs. Tillotson*, 9 *Part.* 272. *Evans vs. King*, 7 *Miss.* 411 *Maine. Bank vs. Hervey*, 8 *Shep.* 38. *Griffin vs. Samuel*, 6 *Miss.* 50. *Bissell vs. Carville*, 6 *Ala.* 503. *Zion Church vs. St. Peter's Church*, 5 *Walts & Luz.* 215. 1 *Bl. Comm., p.* 60–89.

Points and Authorities submitted on behalf of Respondents:

First. The Court below *had not originally* jurisdiction of the persons of the Defendants or of the subject of the action. *R. S. Min. Ter., page* 334, *Secs.* 41, 42 *and* 43. 1 *Chitty's Pl.* 270 *and* 271.

Second. The Court *did not, subsequently to the commencement of the action, acquire* jurisdiction by the appearance or answering of Defendants. *R. S. Min. Ter. page* 337, *Secs.* 61 *and* 64; *page* 338, *Sec.* 69. 1 *Chitty's Pl.* 284. 12 *Wend.* 51 *and* 265. *Voorhies' N. Y. Code, 2nd Ed. pages* 104 *and* 105, *and cases there cited.* 10 *How. Pr. R.* 40.

Hollinshead & Becker, Counsel for Appellants.

D. A. Secomb, Counsel for Respondents.

The Supreme Court reversed the order of the District Court and remitted the cause for further proceedings, but no opinion is to be found among the files.

William B. Dodd, Plaintiff in Error, *vs.* George Cady, Defendant in Error.

A Justice of the Peace has exclusive jurisdiction, where the amount claimed does not exceed fifteen dollars.

No appeal will lie from a judgment of a Justice of the Peace, unless it exceeds fifteen dollars, exclusive of cost.

And a waiver or consent of parties will not confer jurisdiction in the District or Supreme Court.

ERROR FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The facts in the case appear in the opinion of the Court.

The Defendant (the Plaintiff in Error) will rely in argument upon the following points and authorities:

First. The District Court had no jurisdiction of the action, the judgment of the Justice of the Peace being for a sum less than fifteen dollars. *Minnesota Statutes, page* 315, *Secs.* 123, 128, 137, *page* 309, *Sec.* 87, *page* 318, *Sec.* 154.

Second. The judgment of the Justice of the Peace and the judgment of the District Court were each for a greater sum than the Plaintiff sued for.

Third. The judgment of the District Court was against the Defendant alone, whereas if judgment was rendered against him at all, it ought to have been a joint judgment against him and the surety in the recognizance for the appeal. *Minnesota Statutes, page* 316, *Sec.* 134.

Fourth. The Plaintiff in error may assign as error the want of jurisdiction in the Court, in a suit instituted by himself, and he may take advantage of such error. *Caspan vs. Noordeen*, 2 *Cranch* 126. 1 *Cond. Rep.* 370.

Points and authorities to be used by Defendant in error.

First. The Plaintiff in Error did not object to the legality of his appeal in the Court below, as he ought to have done, and as he can do now, it being a question of jurisdiction, and it was not error in the District Court not to notice the alleged illegality unless the same was brought to its attention and a decision thereupon given. *Colden vs. Knickerbocker*, 2 *Cow.* 31.

Second. The judgment of the Justice of the Peace rendered in this action on the 23d day of March, 1852, was for $16.72, and, therefore, the Defendant was entitled to an appeal. (*Sec.* 123, *R. S.*, 315.) The Statute refers to the amount of the judgment, and this Court will not go behind the judgment to ascertain from what items it was made.

Third. The Plaintiff in error having himself taken the appeal from the judgment of the Justice, cannot here complain of his own error, nor ask this Court to correct it.

Fourth. The judgment of the Justice being confessedly and clearly correct, this Court cannot legally reverse it, and even if the judgment of the District Court were erroneous, still the judgment of the Justice must stand, and a judgment, if reversed, would be improper.

Fifth. It is proper and just that the judgment of this Court, and the costs following it, should be imposed upon the Plaintiff in error, who is the party in fault, if any there be.

L. EMMETT, Counsel for Plaintiff in Error.

HOLLINSHEAD & BECKER, Counsel for the Defendant in Error.

By the Court—SHERBURNE, J. This action was brought originally before a Justice of the Peace, who gave judgment for the Plaintiff in the sum of $14.32 damages, and $2.40 costs of suit, from which an appeal was taken to the District Court, where the judgment below was affirmed; and comes before us upon writ of error.

The only error alleged which we deem material is, "that "the District Court had no jurisdiction of the action, the judg- "ment of the Justice of the Peace being for a sum less than "$15.00."

We are of the opinion that a reasonable construction of the Statute divests both this Court and the District Court of jurisdiction of the cause.

It is urged by the Defendant in Error that the Plaintiff having himself brought the action into the District Court, cannot now object that the Court below was wanting in jurisdiction of the cause. If the objection to the jurisdiction was a mere irregularity in the proceedings, it might be cured by consent of the parties. This is not, however, a mere irregularity in the proceedings, but goes to their foundation. It is not the form of the proceedings which took from the District Court jurisdiction of the cause, but it was their substance. A Justice of the Peace might as well try a question involving the title to real estate, or a crime over which he has no jurisdiction, as this Court or the District Court can try a cause over which a Justice of the Peace has exclusive jurisdiction.

It is urged that inasmuch as the damages and costs together exceeded $15.00, the case comes within the provision of the Statute, and is appealable. Such a construction, however, seems, in the opinion of the Court, to be opposed, not only to the letter of the Statute, but also to the reason of it. It could hardly have been the design of the Legislature that parties should be permitted to appeal from a Justice of the Peace to a higher Court, merely on account of a bill of costs, when the question of costs was not at issue. Good policy, perhaps, requires that the higher Courts shall not be perplexed with small and unimportant suits at law. The Legislature has thought proper to limit them to the sum of $15.00. If, however, the opposite construction is adopted, and costs are included in the term judgment, as found in the Statute, it would often be in the power of either party to appeal from a judgment for a nominal sum, and the mere incident of the costs would control the jurisdiction of the Court. With, perhaps, the exception of a single case, I have found no instance in which the mere matter of costs has been allowed to confer jurisdiction, when the costs were not in question. There can be no doubt that it is wrong in principle, and as before stated, I think such was not the intention of the Statute. The objection should have been taken in the District Court, and we are not disposed to look with favor upon a practice which leads to unnecessary costs. The decision is made, not in accordance with the wishes of the Court, under the circumstances, but in obedience to a plain Statute provision.

Proceedings dismissed without costs to either party.

THE UNITED STATES, *v.* PETER M. GIDEON.

Maliciously killing a dog is not an indictable offense under Sections 65, 66, 67, 68 and 69 of Chapter 119, Revised Statutes of Minnesota.

Under Section 39, Chapter 101, Revised Statutes of Minnesota, providing for the pun-

ishment of persons, who "shall wilfully and maliciously kill, maim or disfigure any "horses, cattle or other beasts of another person," &c.,

HELD—*First*, That the value of the animal injured or killed, should be alleged and proved.

Second, That it is not necessary to prove malice against the animal.

This cause comes to the Supreme Court, upon a report of the case made by the Judge of the Third Judicial District.

The Defendant was indicted in the District Court of Hennepin County, for maliciously killing a dog. A demurrer to the indictment was overruled by the Court, and on the trial of the cause the Court charged the jury upon certain questions of law, to which charges the Defendant excepted.

The report was made to the Supreme Court, "Because upon "the trial of the said Defendant questions of law did arise, "which were so important or doubtful as to require the decis- "ion of said Court thereon."

These issues of law as presented by the report, are fully stated in the opinion of the Court.

The following are Points and Authorities relied upon by the Defendant:

First. That the Court erred in overruling the Demurrer of the Defendant to the Indictment, because,

The said Indictment does not substantially conform to the requirements of Sections 65, 66, 67, 68 and 69, of Chapter 119 of the Revised Statutes of Minnesota.—*See R. S., Chap.* 119, *page* 542; *State vs. Wilcox*, 3 *Yerg.*, 278; *State vs. Jackson*, 12 *Iredell*, 329; 13 *Iredell*, 33.

Because, The facts stated in the Indictment do not constitute a public offense.—*R. S.*, 505, 3 *Leigh. Rep.*, 809; 4 *Leigh.*, 686; 12 *Modern. Rep.*, 336–7; 3 *McCord*, 442; 1 *Baily*, 144; *Wharton's American Criminal Law*, (1*st Ed.*,) 91, *and cases there cited*; *State vs. McLain*, 2 *Brevard*, 443; *W. Am. Cr. Law*, (1*st Ed.*,) 94, *and cases there cited.*

Because the Indictment is uncertain as it does not show whether the dog which is alleged to have been killed, *was* killed with a gun or pistol.—*R. S. page* 542 *to* 548.

Because the Indictment states no value in the dog alleged

to have been killed.—*See Wharton's Crim. Law*, (1*st Ed.*,) *p.* 90; *Archbold's Criminal Pleading*, (4*th Am. Ed.*,) 326–7.

Second. The Court erred in disallowing and overruling the challenge to the panel of Petit or trial Jurors.—*See R. S.*, 556; *Id.*, 559, *Sec.* 172, 173, 174 *and* 175; *Id.*, *pages* 535, 536.

Third. The Court erred in refusing to charge the Jury, that the facts stated in the Indictment do not constitute a public offense.—*R. S.*, 508; 3 *Leigh. R.*, 809; 4 *Leigh. R.*, 686.

Fourth. The Court erred in instructing the Jury that the killing by one person of a dog of another person, wilfully and maliciously, is a public offense indictable under and by virtue of the provisions of Section 39 of Chapter 101, of the Revised Statutes, entitled "Of Offenses against Property."—*R. S.*, *page* 505; *see authorities above cited.*

Fifth. The Court erred in refusing to charge the Jury "That before they, the Jury, could find the Defendant guilty "under the Indictment, they must have before them evidence "of express malice in the mind of the Defendant against the "claimant or owner of the dog alleged to have been killed." —*State vs. Wilcox*, 3 *Yerg*, 278, *and cases above cited*; 2 *Dev.*, 420; *Russell on Crimes*, (3*d Am. Ed.*,) 421, 425 *and* 438.

Sixth. The Court erred in instructing the Jury "That it was "not necessary to constitute the offense, or to the conviction of "the Defendant thereof, that the value of the dog should be "alleged in the Indictment or proven on the trial; and that "there is property in a dog sufficient to sustain an indictment "against a person who maliciously kills the dog of another." 12 *Modern R.*, 336, *and authorities above cited.*

The Points and Authorities of Counsel for the United States are not on file.

Wilkinson & Babcock, Counsel for Defendant.

L. Emmett, Counsel for United States.

By the Court—Sherburne, J.—This was an indictment for shooting a dog, and the charge is in the following words:

"Peter M. Gideon is accused by the Grand Jury of the Coun-
"ty of Hennepin, by this indictment of the crime of wilfully
"and maliciously killing a dog belonging to George M. Ber-
"tram, committed as follows, to wit: The said Peter M. Gid-
"eon did, on the 24th day of July, A. D. 1854, in the county
"aforesaid, wilfully and maliciously kill a dog belonging to
"George M. Bertram, by shooting said dog with a gun or pis-
"tol, to wit: in the county of Hennepin aforesaid"—dated, etc.

To this indictment a demurrer was interposed, and the following are among the causes of demurrer assigned, to wit: "The facts stated in the indictment do not constitute a public "offense," and "The indictment states no value in the dog "alleged to have been killed."

The demurrer was overruled and the cause went to trial.

The Defendant by his counsel requested the Court to charge the Jury.

First. That the facts stated in the indictment do not constitute a public offense. The Court refused so to charge, and instructed the Jury in substance, that the facts stated did constitute an indictable offense, by virtue of the provisions of Section 39, Chapter 101 of the Revised Statutes.

Second. "That before the Jury could find the Defendant "guilty under the indictment, they must have before them "evidence of express malice in the mind of the Defendant "against the claimant or owner of the dog alleged to have "been killed."

Under the second request, the Court charged the Jury, among other things, that "They must be satisfied or convinced by the "evidence in the case, that the Defendant was prompted or "induced to kill the dog by actual malice, either towards the "owner of the dog, or towards the dog itself."

Also, in substance that it was not necessary to the conviction of the Defendant that the value of the dog should be alleged in the indictment, or proved upon trial, and that there is property in a dog sufficient to sustain an indictment against the person who maliciously kills the dog of another.

To all of which charges and rulings the Defendant, by his counsel, excepted. Verdict was against the Defendant. The

case comes into this Court on the report of the presiding Judge.

Upon this statement of the case, two questions arise.

First. Is this an indictable offense?

Second. Was it necessary to allege and prove value in the dog?

Third. Was it sufficient to sustain the indictment, to prove malice against the dog only?

The indictment is founded upon section 39 of chapter 101 of the Revised Statutes. It provides that "Every person who "shall wilfully and maliciously kill, maim or disfigure any "horses, cattle or other beasts of another person," etc., "shall "be punished," etc.

It may be difficult to determine in all respects what animals the term "beasts," as used in the Statute, includes; but it may be fairly assumed, as it seems to me, that all such as have, in law, no value, were not intended to be included in that general term. Horses and cattle have an intrinsic value, which their names import, and it is but reasonable to suppose that the intention of the law was, in using the term "beasts," to include such other animals as may properly come under the name of the beasts, and as have an intrinsic value in the same sense that there is value in horses, oxen and cows. The term beasts may well be intended to include asses, mules, sheep, swine, and perhaps, some other domesticated animals, but it would be going quite too far to hold that dogs were intended. A criminal offense should not be created by an uncertain and doubtful construction of a Statute. If there be any doubt in the case, penal Statutes are to be so construed as not to multiply felonies, unless the construction be supported by express words or by a reasonable implication.—*Commonwealth vs. Macomber*, 3 *Mass.*, 254; *Myers vs. Foster*, 6 *Cow.*, 567. My opinion, therefore, is that the shooting a dog is not an indictable offense under the Statute referred to.

But if I am wrong in this opinion, there is still the fatal objection left, that no value was alleged or proved. Blackstone, in his 4 *Com.*, 236, says: "As to these animals which do not "serve for food, and which the law therefore, holds to have no "intrinsic value, as dogs of all sorts, and other creatures kept

"for whim and pleasure, though a man may have a bare prop-"erty therein, and maintain a civil action for the loss of them, "yet they are not of such estimation as that the crime of steal-"ing them amounts to a larceny." It is equally necessary to sustain this indictment, even admitting that it could be sustained in any event, that the dog killed should have been charged and proved of value.

It is true that Statutes, highly penal, have been enacted in England against persons found guilty of stealing dogs. 10 *Geo. III., Chap.* 18. But their force has not reached this country; and any criminal process here must depend upon our own Statutes. The simple word or name of dog, then, not importing value, and no value being alleged or proved, the verdict cannot be sustained.

The last objection I consider equally fatal to the verdict. The Jury must have understood the charge of the Court to be that they might find the Defendant guilty upon the question of malice, if they should find that he had malice, either against the owner of the dog or the dog itself.

It is more than probable that this question was never before raised; except under a single English Statute authorizing a conviction without proof of malice, cited in Russell on Crimes, it has always been held necessary to prove malice against the owner. I have not been able to find a single hint in the books, that malice against the animal injured was ever offered in evidence.—*See Russell on Crimes, Book* 4, *Chap.* 43.

Exceptions sustained.

HORACE B. CLAFLIN AND OTHERS, Respondents, *vs.* WILLIAM B. LAWLER AND OTHERS, Appellants.

Where an appeal is taken from a judgment rendered in the District Court, the evidence given upon the trial of the cause in that Court is no part of the record, and cannot properly be considered by this Court upon appeal.

Although the evidence in this case consisted of Depositions read in the Court below,

there is no more propriety in sending up written than oral testimony; we have no right to look beyond the records in the cause.

The record consists only of the pleadings, the decision of the Judge, and the judgment.

Upon an appeal, this Court will not undertake to revise the judgment below or give judgment upon the evidence; but will only consider the facts as they are exhibited by the record.

Under the Statute of this Territory, a party to a suit is a competent witness, and his testimony may properly be taken out of the Territory under a commission and used upon the trial in the same manner as the testimony of other witnesses.

AMES & VAN ETTEN, Counsel for Appellants.

HOLLINSHEAD & BECKER, AND D. COOPER, Counsel for Respondents.

By the Court—WELCH, Ch. J. This is an appeal from a judgment of the District Court of the Second Judicial District, county of Ramsey.

The Plaintiffs, Claflin, Mellen & Co., brought a complaint against William B. Lawler and others, for the purpose of foreclosing a certain mortgage executed on the first day of October, 1852, by the Defendant, Lawler, (by his Attorney in fact, Anne Curran.)

The Complaint avers, that the mortgage was given and conditioned to secure the payment of a certain promissory note for $4000, made by the Defendant, Lawler, bearing even date with the mortgage, and payable one year from date to the order of the Plaintiffs. That the other Defendants claim title to, and interest in, the mortgaged premises, as judgment creditors, and as mortgagees and assignees of mortgagees of the Defendant, Lawler, subsequent to the execution and recording of the said mortgage.

The answer of the Defendant, Lawler, admits the execution and delivery of the note and mortgage, and alleges that at the time of the making and delivery of the said note and mortgage, the Defendant and one James Curran were co-partners in trade, engaged in the general mercantile business at Saint Paul in the Territory of Minnesota, under the name, style and firm of Curran & Lawler, and were then indebted to the Plaintiffs in the sum of $2126 8-100, balance due upon account of previous purchases of goods by the said firm of Curran & Lawler. That

the note and mortgage in question were made by the Attorney in fact, of the Defendant, Lawler, at the instance and solicitation of James Curran, and delivered to James Curran at the time they were executed, for the purpose of being delivered (by him) to the Plaintiffs in New York, as collateral security for the payment of said indebtedness to the Plaintiffs.

That it was then expressly understood and agreed by the said Curran and the Attorney in fact, of the Defendant, Lawler, that when the aforesaid balance of indebtedness should be afterwards paid, the mortgage and note should be delivered up to the Defendant, Lawler, satisfied.

That afterwards, Curran & Lawler did fully pay said indebtedness to the Plaintiffs, and that the Plaintiffs now hold the said note and mortgage without consideration therefor, in fraud of the rights of the Defendants.

The Plaintiffs in reply deny the new matter set up in the answer, and aver that the note and mortgage were given to secure the payment of any indebtedness of Curran & Lawler then existing, or that might afterwards be contracted, and that the amount of the indebtedness of Curran & Lawler to the Plaintiffs existing at the time of the maturity of the note secured by the said mortgage and at the commencement of the suit, was upwards of $5000.

A jury trial was waived, and the case was tried by the Court.

The Court rendered a judgment of foreclosure in favor of the Plaintiffs and made the usual order directing a sale of the mortgaged premises.

From the judgment an appeal has been taken to this Court.

The paper books furnished the Court contain not only the judgment roll, including properly, the decision of the Court below, but also the evidence in the case. The cause has been argued as though the evidence was properly before this Court; but this is a mistake.

In this case it is true that the evidence consisted wholly, or nearly so, of Depositions, but there is no more propriety in sending up written than oral testimony, and we have no right to look beyond the record in the case.

The record consists of the pleadings, the decision of the

Judge, and the judgment. The question then is, does the record show any error of law.

No error has been assigned, and none appears in the record, unless it appears in the decision of the Court below.

The decision is something more than a general verdict. Perhaps any error disclosed by the decision, although such decision may contain more matter than is required by the Statute, may be noticed. The true course, I apprehend, however, is for the party to take his exceptions to every ruling, in the same manner as in a jury trial, unless such ruling will form a legitimate part of the decision, or the error, if any exists, will appear in the pleadings.

This Court will not undertake to revise or give judgment as to facts, but will take them as they are exhibited by the record. What then does the decision disclose? A number of objections were made upon the trial, which are noticed in the decision. Those questions have not been raised upon the argument, and any argument was unnecessary, as they were settled by the pleadings.

The first objection necessary to be noticed is, that the testimony of a party to a suit cannot be taken by commission. This objection was overruled. This ruling we think clearly correct; a party to a suit is a competent witness, and by Statute the testimony of a witness may be taken under a commission. The next objection is, that the statements of James Curran were received in evidence. Now the Court have no legitimate means of knowing whether these items of testimony thus objected to were properly received or not. Nothing is before us but the record, and we cannot travel out of the case to learn what transpired on the trial. The Judge has decided the issues presented by the pleadings in favor of the Plaintiffs, and judgment was accordingly rendered for the Plaintiffs.

The judgment from the record appears to be correct, and is affirmed.

In this case, as Counsel have argued the questions as though the whole case was properly before the Court, we should be disposed to remand the case for further proceedings in the District Court, if we supposed that any right might be sacrificed by any misunderstanding of the law; but we are satisfied

from the arguments of counsel, and an examination of the papers submitted to us, that the judgment of the District Court was correct.

HERBERT DUFOLT, Appellant, *v.* WILLIS A. GORMAN, Respondent.

An order of the District Court granting a new trial, is not subject to review in the Supreme Court.

Objections to the admission of testimony should be made at the trial in the District Court, and if not objected to at that time, it is too late to take exceptions thereto in the Supreme Court.

A common carrier can acquire no lien upon goods or property belonging to the United States Government, for services rendered, in transporting such goods.

A verbal promise to pay the debt of another upon certain conditions, is not an original undertaking, and is within the Statute of Frauds.

The Plaintiff below sued the Defendant before a Justice of the Peace for Ramsey County, and recovered Judgment for the sum of $55 and costs, from which Judgment the Defendant appealed to the District Court.

The Complaint set forth that the Plaintiff on the 4th of February, 1854, had arrived at Saint Paul with 1650 pounds of goods and merchandize, which he had hauled from Watab, in Benton County, at the request of one Fairbanks, who requested him to deliver the same to one Fuller, at Saint Paul, on payment by said Fuller of the Plaintiff's reasonable charges, which amounted to $55, and for the payment of which the Plaintiff had a lien upon the goods.

That he offered the goods to Fuller, who refused to pay his charges thereon, and that thereupon the Defendant undertook and promised that if he, the Plaintiff, would deliver the goods to said Fuller, he, the Defendant, would pay the Plaintiff's

charges for hauling the same, as aforesaid, whereupon he delivered the goods to said Fuller.

The answer of the Defendant admits the hauling of the goods for Fairbanks, and that Fairbanks requested the Plaintiff to deliver them to the said Fuller, but that said delivery was to be unconditional, and avers that the said transportation was contracted for and procured by said Fairbanks, and that Fuller employed and paid Fairbanks for transporting said goods from Watab to Saint Paul.

The Defendant further denied that such hauling was worth the sum charged therefor, and expressly denied that he ever promised to pay the Plaintiff's charges, and denied that the Plaintiff had a lien on the goods for the payment thereof.

The reply to the answer denies that the goods were to be delivered to Fuller unconditionally, and denies that Fuller paid Fairbanks for the transportation thereof.

A jury trial was had, and a verdict was rendered against the Defendant for the sum of $55 and interest.

The Defendant moved to set aside the verdict and for a new trial, which motion was sustained and a new trial granted.

Afterwards, the parties waived a jury trial, and the cause was submitted to the Court upon the pleadings and evidence, who found as follows:

That in the month of February, 1854, a quantity of goods belonging to the Government of the United States, and destined to be distributed to the Chippewa tribes of Indians as annuities, were stored or lying at a place called Watab, in the County of Benton, in this Territory. That in obedience to an order of Government, some agent or officer of Government had contracted with one David L. Fuller, to transport said goods from said Watab to the city of Saint Paul. That said Fuller engaged one Fairbanks to procure the hauling of said goods, and that they were hauled by Plaintiff to Saint Paul at the request of, and procurement of said Fairbanks, but upon what terms or conditions does not appear in evidence. That the Plaintiff hauled the goods aforesaid to the place of destination (the store of said D. L. Fuller,) in Saint Paul, and that said Fuller refused to pay for the transportation of the same, and that the Plaintiff refused to deliver the goods without such

payment. That the Plaintiff called upon the defendant, who was and is the Governor and Superintendent of Indian affairs of this Territory, and that after two or three interviews, the Governor (the Defendant,) told him verbally to deliver the goods to said David L. Fuller, and if he, Fuller, did not pay the transportation, he, the Defendant, would, and that thereupon said goods were delivered by said Plaintiff to said Fuller.

The counsel for the Plaintiff insist that he, the Plaintiff, had a lien on the goods for the service in transporting the same, and that the discharge of said lien was a good and valid consideration for the promise of the Defendant. I determine and adjudge otherwise, and that the Plaintiff obtained no lien upon the property belonging to the government of the United States, by any transportation of the same. I also adjudge and determine that the Plaintiff's legal claim for his services in the transportation of said goods, being on said Fuller, said Fairbanks, the promise of the Defendant, if made at all, was not binding upon him in law, it not being in writing. I also further adjudge and determine that for the last two reasons or either of them, the Plaintiff has failed to maintain his action, and that judgment must be rendered for the Defendant.

From this judgment the Plaintiff appeals to the Supreme Court.

Points and authorities relied on by the said Appellant:

First. That the Court erred in setting aside the verdict rendered in favor of the Plaintiff, September 25, 1854, and in granting a new trial to the Defendant.

Second. That the grounds upon which the Court set aside the said verdict and granted the new trial were insufficient.

Third. That the question, as to whether the said goods hauled by the Plaintiff, belonged to the United States or not, was a question of fact for the jury, and the evidence thereon did not justify the setting aside the verdict.

Fourth. That it was immaterial whether the said goods belonged to the Government of the United States or not.

Fifth. That the same was not an issue in the cause.

Sixth. That the material issue in the case was the promise

and contract of the Defendant to pay the Plaintiff for the hauling of said goods which was alleged by the Plaintiff and denied by the Defendant.

Seventh. That the said contract was clearly proved.

Eighth. That the delivery of the goods to Fuller, at the request of the Defendant was a sufficient consideration for the contract.

Ninth. That the Plaintiff had a right to hold the possession of the goods until he was paid as against the said Fuller or any party except the Government of the United States.

Tenth. That by the delivery of the goods to the said Fuller, at the request of the Defendant, the Plaintiff parted with the possession of the goods, when he might otherwise have held against the said Fuller, or any other party, but the Government of the United States, until he was paid.

Eleventh. That the presumption of law is that if the goods belonged to the United States, that the Plaintiff would not have been required to deliver the goods to the Government of the United States before he was paid.

Twelfth. That the contract was not within the Statute of Frauds, being an original contract and not a collateral undertaking to answer for the debt, default or miscarriage of another.

Thirteenth. That the Court erred in finding and directing judgment for the Defendant, October 23d, 1855, upon the trial before the Court.

Fourteenth. That the facts found by the Court upon said trial, would entitle the Plaintiff to a verdict and judgment in his favor.

Fifteenth. That the Court erred in finding that the goods hauled by the Plaintiff were goods belonging to the United States; there being no issue in the case as to the title of the goods, or as to whether they belonged to the United States.

Sixteenth. That the Court erred in finding that the Defendant was and is the Governor and Superintendent of Indian affairs; the same not being in issue, and it did not appear, nor was it averred that the Defendant acted in an official capacity, or as the agent of the United States in making the contract.

Seventeenth. That the Court erred in deciding that the Plaintiff had no lien for his services.

Eighteenth. That the Court erred in deciding that the contract was not binding on the Defendant, because the same was not in writing.

Nineteenth. That the Court erred in deciding that for the last two reasons or either of them, the Plaintiff had failed to maintain his action.

AUTHORITIES.

As to setting aside verdicts and granting new trials—*Sec.* 58, 59, *R. S.*, 359; *Smith vs. Hecks*, 5 *Wend.*, 48; *Jackson vs. Loomis*, 12 *Wend.*, 27; *Sec.* 11 *R. S.*, 414.

As to consideration of the contract, it is sufficient that something valuable flows from the person to whom it is made, although the promissor receives no benefit.— *Violett vs. Patten*, 5 *Cranch. R.*, 142; *Hinman vs. Moulton*, 14 *Johns. R.*, 446; *Stewart vs. McGuin*, 1 *Cow.*, 99; *Richardson vs. Brown*, 1 *Cow.* 255; *Lockwood vs. Bull*, 1 *Cow.* 322; *Smith vs. Weed*, 20 *Wend.* 184; 7 *J. R.* 463; 8 *J. R.* 376; 8 *J. R.* 30; 10 *J. R.* 412; 18 *J. R.* 412; 13 *Wend.* 144; 10 *Wend.* 461; 4 *Cow.* 439; 15 *Pick.* 166; *U. S. Digest*, 1 *Vol.*, *Sec.* 40, *page* 99, *and cases cited; Chitty on Con.* 29, 31; 5 *Pick.* 384; 2 *How'ds*, 426.

As to the right of the Plaintiffs to hold possession of the goods until he was paid:

Sec. 10 *R. S.* 489; *United States vs. Barney*, 2 *Hall's Law Journal*, 128; *Digest of Cases in the Federal Courts*, 2 *Vol. p.* 200, *Sec.* 29. *Ditto p.* 213, 8 *Sum. C. C. R.* 308, *in case of U. S. vs. Wild;* 4 *Pick.* 466.

As to the application of the Statute of frauds:

Sec. 2, *Chap.* 63, *R. S.* 268; *Watson vs. Randall*, 20 *Wend.* 201; *Larson vs. Wyman*, 14 *Wend.* 246; *Farley vs. Cleveland*, 4 *Cow.* 432; *Leonard vs. Vredenberg*, 8 *J. R.* 29; *Leonard vs. Vredenberg*, 8 *J. R.* 376; *Rogers vs. Kneeland*, 13 *Wend.* 114; *Gold vs. Phillips*, 10 *J. R.* 412; 17 *J. R.* 113; *Chapin vs. Merrill*, 4 *Wend.* 657; 7 *Wend.* 315; 5 *Wend.* 25.

As to contracts made by public officers, but acting in their individual capacity, and presumptions in reference thereto.

Swift vs. Hopkins, 13 *Johns.* 313; *Olney vs. Weekes*, 18

Johns. 122; *Sheffield vs. Watson*, 3 *Caines* 69; *Gill vs. Brown*, 12 *Johns.* 385.

The following are the points relied upon and authorities cited by the Respondent in the above entitled action:

First. That the complaint of the Plaintiff in the above action, does not contain facts sufficient to constitute a cause of action, and does not state or show any legal grounds to sustain the action.

Second. That the goods mentioned in the complaint were the goods and property of the United States of America, and in the possession of the officers and employees of the said U. S. Government, and that the hauling and transportation of the same by the Plaintiff was done at the request and by the procurement of David L. Fuller, who has contracted with the Government therefor, and not at the request or instance of the Defendant.

Third. That the Plaintiff could not acquire a lien upon the goods and property of the U. S. Government, and had not any subsisting lien upon said goods for the hauling and transportation of the same or otherwise.

Fourth. That the Plaintiff's claim for compensation for his services in the hauling and transportation of said goods, if any accrued or existed against the said Fuller, and was the debt of the said Fuller, not of the Defendant, and the Defendant was not liable for the same.

Fifth. That the supposed promise of the Defendant, as alleged in the complaint and as appears from the evidence in the cause, if made at all, was a promise to pay the previous existing debt of David L. Fuller, upon the condition that Fuller did not pay it, and was and is void in law, because the same was made, if made at all, without consideration, and because the same was not made in writing and signed by the Defendant, who is the party sought to be charged.

Sixth. That the evidence given upon the trial of the cause fully justifies and sustains the decision and judgment of the District Court thereon.

Seventh. That the decision and order of the District Court, setting aside the verdict of the Jury rendered upon the first

trial of the cause, and granting a new trial thereon, was legal, just and proper, and justified by the law and facts of the case.

Eighth. That the final decision and judgment of the Court in favor of the Defendant and against the Plaintiff below, is fully justified and supported by the evidence and according to the law of the case.

Authorities cited in support of the above points:

See Rev. Stat. of Minn., page 268, *Chap.* 63, *Sec.* 2; 3 *Metcalf's Rep., page* 396 *Nelson vs. Boynton;* 18 *Pick. Rep., page* 369, *Cahill vs. Bigelow & Trustee;* 18 *Pick. Rep., page* 467, *Stone vs. Simms;* 15 *Pick. Rep., page* 159, *Loomis vs. Newhall;* 6 *Pick. Rep., page* 509, *Tilletsons vs. Nettleton;* 3 *Pick. Rep., page* 83, *Cabot vs. Haskins;* 20 *Wend. Rep., page* 201; 15 *Wend. Rep., page* 343, *Parker vs. Wilson;* 15 *Wend. Rep., page* 182, *Smith vs. Ives;* 14 *Wend. Rep., page* 246, *Tarson vs. Welfman;* 7 *Cowen Rep., page* 358, *Chaffer, vs. Thomas;* 4 *Johns. Rep., page* 422, *Simpson vs. Patten;* 12 *Johns. Rep., page* 291, *Jackson, vs. Reyner;* 7 *Term. Rep., page* 201; 9 *Johns. Rep., page* 337; 1 *Pennington Rep., page* 5, *Smith vs. Toomey;* 1 *Pennington Rep., page* 98, *Ayres vs. Herbert;* 2 *Pennington Rep., page* 662; 1 *Bailey Rep., page* 14; 2 *Souths. Rep., page* 370, *Ashcraft vs. Clark;* 2 *Souths. Rep., page* 577, 681; 1 *Peter's Rep., page* 476, *De Wolf vs. Reyband;* 1 *Breese Rep., page* 49, *Everett vs. Morrison;* 2 *Verm't Rep., page* 453, *Skinner vs. Conant;* 1 *Bebb. Rep., page* 488, *Smith vs. Coleman;* 5 *East. Rep., page* 16, *Waine vs. Walters;* 5 *Cranch. Rep., page* 142; 6 *Conn. Rep., page* 81, *Sage vs. Wilcot;* 2 *Comstock Rep., page* 563; 3 *Comstock Rep., page* 345; 1 *Comstock Rep., page* 535, 610.

Hollinshead & Becker, Counsel for Appellant.

Ames & Van Etten, Counsel for Respondent.

By the Court—Sherburne, J. This action was brought by the Plaintiff to recover a sum of money which he alleged to be due to him for hauling a quantity of goods from Watab in this Territory to the city of St. Paul. The action was tried before a jury and verdict rendered for the Plaintiff. The verdict was

set aside by the presiding judge and a new trial granted. The cause was again tried by the Court, by consent of parties, and a verdict rendered for the Defendant. It now comes before this Court by appeal from the District Court.

Among a great number of causes stated by the Plaintiff's counsel why the judgment below should be reversed, the first twelve go to alleged errors of the District Court in granting a new trial. This has always been held a matter of discretion, and the order of the Court below not subject to review. It has been so held by this Court in a case not now reported.

The remaining points from thirteen to nineteen inclusive, go to the finding of the District Court at the last trial. The first objection which it is necessary to notice is, that the Court erred in finding that the goods transported by the Plaintiff were of the property of the United States, because that question was not put in issue by the pleadings. This cause was twice tried in the District Court, and in both instances the question of property in the goods was made and testimony introduced relating to it without objection. This appears presumptively from the record. The objection appears for the first time in this Court. The objection comes too late. *See Northrup & Huntley vs. Jackson*, 13 *Wend. R.* 175; *Whiting vs. Cochran*, 9 *Mass. R.*, 532; *Johnson vs. Shea*, 21 *Pick. R.*, 225. The testimony went to show a want of consideration for the promise, and it is unnecessary now to inquire whether it should have been excluded if objected to, or not, for, having been introduced by tacit consent of the Plaintiff, he has waived the error, if error it was.

The fact having been found that the goods transported by the Plaintiff belonged to the United States, a question can hardly arise as to whether the Plaintiff acquired a lien upon them to the amount of his services in transporting them. Individuals obtain no lien upon property of the government as security for their services. Such a power might often subject the operations of the government to the wishes and caprice of common carriers. The authorities cited do not support the position, and it requires no argument to prove that it cannot be supported.

The Plaintiff having no lien upon the property, then, there

was no consideration for the promise, and it was therefore void. But a question arises as to whether the promise was not void, admitting that there was a good consideration. The Defendant had a legal claim for his services, either against Fuller or Fairbanks. The Defendant directed the Plaintiff verbally to deliver the goods to Fuller, and if he did not pay for the transportation, the Defendant would. The Plaintiff contends that this contract or promise does not, upon the facts stated, come within the Statute of Frauds; and whether it does or does not is the question to be considered. It was a promise to pay the debt of Fairbanks or Fuller, if Fuller did not pay it. The original debt was not discharged, and even now remains in force unless it has been paid. The promise was not absolute but conditional. It was not an original undertaking, but a collateral one. It was made to pay a subsisting debt due from a third party to the Plaintiff. Such a promise is void, unless in writing, stating both the promise and consideration. I have examined the cases cited by the counsel for the Plaintiff, but they fail to sustain his position.

It is difficult to reconcile all the decisions upon the question, and quite as much so to establish any uniform rule by which all cases may be governed hereafter; but no instance has been shown where a mere verbal, collateral promise to pay the debt of another was held binding, except where the original debt was discharged, or the amount was placed in the hands of the promisor by which it might be discharged. Such cases have been held to be original undertakings, upon a new consideration and therefore not within the Statute. *See Farley vs. Cleaveland*, 4 *Cow.* 432, *and cases cited.* But in the case before us it cannot be contended that the Defendant received any benefit from a discharge of the lien, if the Plaintiff had any to discharge. The most which can be said is that the Plaintiff parted with a right which was of some value to him, although the Defendant was not benefitted. Such a consideration may be good if expressed in writing but not otherwise.

The case of *Nelson vs. Boynton*, 3 *Met. R.* 396, *is in point.* The Plaintiff had secured a demand which he held against a third person, by an attachment of his property. The Defendant made an absolute promise to the Plaintiff to pay the debt

in consideration that the Plaintiff would release the property from attachment. This was done, but the Court held in an action upon the promise, that it was within the Statute and void.

See also Jones vs. Cooper, 2 *Cowp.* 227; *Jackson vs. Rayner*, 12, *John*, 291; *Simpson vs. Patten*, 4 *John*, 222, for a very clear and elaborate view of the subject. See also *Farley vs. Cleaveland* before cited.

Judgment below affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

IN JULY SPECIAL TERM, 1856.

GEO. L. BECKER, Plaintiff in Error, *vs.* THE SANDUSKY CITY BANK, Defendant in Error.

Where a demurrer to an answer was sustained, and the Defendant filed an amended answer, he cannot, upon Writ of Error, re-examine the original demurrer, as he waives all objections to the order sustaining the same by answering over.

Equities existing between the original parties to a note, which originated subsequent to the endorsement thereof to the holder, cannot be set up as a defense by the maker against the holder.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The Plaintiffs, the Sandusky City Bank, brought their action to recover the amount of two promissory notes made by the Defendant, George L. Becker, payable to the Columbus Insurance Company, and by them endorsed to the Plaintiffs. The notes were dated the 6th of September, 1851, each for the sum of $327, and interest, and payable in three and four months, respectively.

The answer of the Defendant set forth that the Columbus Insurance Company, the payee of the note, was an incorporated Company, doing business in the State of Ohio, and that by virtue of their Charter, they had power to insure property against loss or damage by fire, &c., and that the powers and duties of said Corporation were expressly limited to that busi-

ness. That it was a part of their Charter that they should not employ any part of their capital stock in the trade or business of Exchange Brokers, nor emit bills of credit, &c., and that they had no power or authority to sign, endorse, deliver or otherwise circulate or transfer the notes mentioned in the Complaint.

A demurrer to this answer was interposed by the Plaintiffs, which was sustained, with leave to answer over.

The amended answer of the Defendant set forth that at the time of the endorsement and delivery of the notes, the Columbus Insurance Company was indebted to the Plaintiff in an amount greater than the amount of the notes, and that they were indorsed and delivered as collateral security for the amount then due from the Columbus Insurance Company to the Plaintiff, and further, that the notes were given by the Defendant to the Insurance Company for premiums upon policies of Insurance issued by the Defendant as the agent of the said Columbus Insurance Company at Saint Paul, and such premiums were the sole consideration of the said notes. That the policies of insurance for premiums upon which the said notes were given, were at the time when the notes were given, outstanding and unexpired. That soon after the said policies of insurance were issued, and about the 3d day of October 1851, the said Columbus Insurance Co., failed and became entirely insolvent, and the said policies of insurance became entirely worthless. That after such failure, and on the 21st October 1851, the Insurance Co., instructed the Defendant by letter of that date, to return the premiums for the unexpired term of any policies issued by the Defendant, to the holders of such policies.

That such premiums amount to $467,07, with interest from October 21, 1857, which sum the Defendant agreed to become liable to pay to the holders of said policies pursuant to said instructions, and would have paid to them but for this suit.

The Plaintiff demurred to the amended answer, for causes which will appear in the points presented by the Plaintiff in error, and from the opinion of the Court. The demurred to the amended answer was sustained and the Defendant sued out his writ of error.

The following are the points and authorities relied upon by the Plaintiff in error:

First. That the Court erred in sustaining the demurrer to the original answer of the Defendant and in the order thereon made January 30th, 1855:

1st. Because it did not appear that there had been a valid transfer of said notes by the Columbus Insurance Co., to the Plaintiff.

2d. Because under the charter of the said Columbus Insurance Company; it appeared that it was not authorized to endorse, transfer, or negotiate the said notes.

Second. That the Court erred in sustaining the demurrer to the amended answer of the Defendant and in the order made on September 5, 1855:

1st. Because it does not appear that the Columbus Insurance Company transferred the said notes to the Plaintiff.

2d. Because it appears that the said notes were not transferred in the usual course of business.

3d. Because it does not appear nor is there any presumption that the Plaintiff was a holder of said notes for value.

4th. Because it appears that the said D. Adams endorsed and delivered said notes as collateral security for a precedent debt due by the Columbus Insurance Company to the Plaintiff and that the Plaintiff has no claim to said notes except as such collateral security.

5th. Because the consideration of said notes were premiums for insurance effected in said Company, and the policies issued thereon became valueless by reason of the failure of the Company, which happened before the maturity of the notes—and the Defendant was liable to the policy holders for the amounts paid by them to him for the unexpired insurance in the amount stated in his answer—whereby the consideration of said notes had failed, *pro tanto*, and the Defendant had a just defence.

6th. Because no notice of said defence was necessary.

7th. Because the time of transfer of the notes did not prejudice said defence.

Third. The Court erred in deciding the allegation in the Defendant's amended answer, to wit: "And if the said notes were endorsed and delivered by the payee thereof to the Plaintiff," &c., as hypothetical and objectionable on demurrer.

1st. Because the same was not inconsistent with any part of the defence.

2d. Because the expression "if," &c., aforesaid was merely cautionary and introduced to exclude a waiver of the Defendant's traverse (through want of knowledge or information sufficient to form a belief) in his original answer—of the authority of D. Adams to transfer or endorse said notes and the validity of any transfer by the Insurance Co.

Fourth. The Court erred in directing judgment, because the question of D. Adams' authority to transfer said notes was an issue of fact as well as of law undetermined in the cause, and the amended answer did not waive the issue of fact, but was only an amendment to the new matter demurred to.

AUTHORITIES:

As to the 1st error assigned and the points thereunder specified:

Kent's Commentaries, 2 *Vol.*, 298, (*2nd ed.*); *ibid* 1 *Vol.*, 407–8; *People vs. Utica Ins. Co.*, 15 *Johns. R.*, 358; *N. Y. Fire Ins. Co., vs. Sturges*, 2 *Cowan*, 644; *N. Y. Fire Ins. Co., vs. Ely*, 2 *Cowan*, 678; 5 *Conn.*, 560; *North River Ins. Co. vs. Lawrence*, 3 *Wend.*, 484; *Sec.* 8 *of Act incorporating the Columbus Ins. Co., recited in the answer, and the Charter of the said Company therein referred to. Chitty on Bills, p.* 252, *Ed.* 1836; *Savage vs. King*, 5 *Shep.*, 301, *2nd Vol.; Supplement U. S. Digest* § 225, *p.* 612; *Peaslee vs. Robbins*, 3 *Met.*, 164; *ibid. Sec* 232, *p.* 612; *Taft vs. Brewster*, 9 *Johns.* 334; *Angel & Ames on Corp'n, p.* 140, (*Ed.* 1832.)

As to the 2nd error assigned and the points thereunder specified:

Story on Bills, Sec. 419; *Chitty on Bills, Chap.* 9, *page* 433, (*8th Ed.* 1833;) *Peters vs. Beverly*, 10 *Peters*, 567; *Sheehy vs. Manderville*, 6 *Cranch*, 253; *Wallace vs. Agy*, 4 *Mason*, 142; *Van Ostrand vs. Rud*, 1 *Wend.*, 424; *Burdick vs. Green*, 15 *Johns.*, 247; *Coddington vs. Bay*, 20 *Johns.* 637; *Jones vs. Swan*, 6 *Wend.*, 589; *Wardell vs. Howell*, 9 *Wend.*, 170; *Stalsler vs. McDonald*, 6 *Hill*, 93, 95; *Tappen vs. Van Wagenen*, 3 *Johns.* 465.

As to the 3rd error assigned and the points thereunder specified:

Revised Statutes, p. 337, 338, *Secs.* 66, 69; *Revised Statutes, Sec.* 76 *of Amendments; Appendix, p.* 9; *Whittaker's Pr., Vol.* 1, 324, *and authorities cited; Porter vs. McCreedy,* 1 *Code R. U. S.,* 88; *Ostrom vs. Bixly,* 9 *Howard Pr. R.,* 57, 59; *Howell vs. Frazier,* 1 *Code R. N. S.,* 270; *Burnap vs. Halloran,* 1 *Code R.,* 51; *Clark vs. Harwood,* 8 *How. Pr. R.* 471; *Smythe vs. White,* 6 *How. Pr. R.* 324; *Sayles vs. Wooden,* 6 *How.,* 391; *Boyce vs. Brown,* 3 *How.,* 391; *McMurray vs. Thomas,* 5 *Cow.,* 14.

As to the 4th error assigned and the points thereunder specified:

Sec. 90 *Revised Stat.,* 340; *Snyder vs. White,* 6 *How. Pr. R.,* 321; 1 *Daniel's Chancery Pr., Sec.* 8, *p.* 508–9; 1 *Ame. Ed., p.* 300; *Snyder vs. White,* 6 *How. Pr. R.* 321.

The following are the points and authorities relied upon by the Defendant in Error:

First. The Defendant below having availed himself of the right to serve an amended answer, cannot question the propriety of the Court below in sustaining the demurrer to the original answer. *Rev. Stat., p.* 340, *Sec.* 89; 14 *Ohio Rep., p.* 204; 2 *Wend., p.* 137; *Coit vs. Waples & Zerkle, Ante,* 134.

Second. Corporations can transfer and negotiate bills of exchange and promissory notes. 1 *Denio Rep., p.* 608; *Bayles on Bills,* 67, 68; *Chitty on Bills,* 15, 16, *and notes,* 10 *Am. Ed.;* 1 *Kernan Rep., p.* 200, *Babcock vs. Beman;* 1 *Cow. Rep., p.* 513, *Mott vs. Hecks.*

Third. It is unnecessary to give a corporation express authority to negotiate notes; they have that authority unless it was expressly prohibited. (See authorities above cited.) 3 *Wend. Rep., p.* 94, *Barker vs. Mec. Ins. Co.;* 10 *Wend. Rep., p.* 341, *Welmarth vs. Crawford;* 15 *John. Rep.,* 44, *Mann vs. Commission Co.*

Fourth. The possession of a note by an endorsee is evidence *prima facie* that he is a holder for value. *Chitty on Bills, p.* 424, *and notes,* 10 *Am. Ed.; Pratt vs. Adams,* 7 *Paige Rep., p.* 616; *Lord vs. Appleton,* 15 *Maine Rep., p.* 270; *Rev Stat., p.* 483, *Sec.* 85.

Fifth. A note transferred before maturity as a collateral security, is good in the hands of an innocent holder, against the maker, and the maker is not entitled to the benefit of any equities arising in the inception of the instrument, except in cases of fraud. 16 *Peters' Rep., p.* 1; 2 *Hill, p.* 140; *Chitty on Bills, p.* 74, 10 *Am. Ed.;* 4 *Bing.*, 496; 6 *Wend.*, 615.

Sixth. If, under any circumstances, the maker would be entitled to equities, where the *note was held as a collateral security*, those equities must have existed at the execution of the note, and in the subject matter for which the note was given. Furthermore, the equities must have arisen between the parties before and prior to the transfer of the note. 2 *Hill Rep., p.* 140, *Manhattan Co., vs. Reynolds;* 1 *Sand. Sup. Ct. Rep., p.* 53, *Farniss vs. Gilchrist.*

Seventh. The amended answer is hypothetical and therefore bad on demurrer. 5 *How. Pr. R., p.* 111; 6 *How. Pr. R., p.* 59, 65–6; 6 *How. Pr. R., p.* 84; *Whit. Pr., p.* 164, (1*st Ed.*); *Van Sand. Pl., p.* 201, *Chap.* 4, *Sec.* 2; *Stephen Pl., p.* 387; 1 *Chit. Pl., p.* 236–7.

Hollinshead & Becker, Counsel for Plaintiff in Error.

Emmett & Moss, Counsel for Defendant in Error.

By the Court—Sherburne, J. This is a demurrer to the Defendant's amended answer. The first point made by the Plaintiff in Error, (the original Defendant,) is, that the Court erred in sustaining the demurrer to the original answer. It is too late to make this point. It was waived by answering over. This question was made in this Court in the case of Coit against Waples and Zirkle, (*Ante, p.* 134,) in which it was held that a party so situated cannot re-examine, in this Court, the original demurrer.

It is said in argument that that portion of the original answer which was not demurred to, is still before the Court, and is to be taken in connection with the amended answer now demurred to. But I think otherwise. The Defendant must be confined to his amended answer. Such is the practice

which has been pursued heretofore, and any other would lead to uncertainty and confusion. Such was, undoubtedly, the design of the pleader who drew the amended answer; for he calls it "The amended answer of George L. Becker, Defendant in the above entitled action, to the complaint of the Plaintiff therein." This language necessarily excludes the idea that the pleader intended to rely upon any portion of the former answer. I do not mean to decide that the Defendant could not have filed an amendment to the original answer, and have saved that portion of it which was not demurred to; but whether he could or could not, is immaterial, for in this case it was not attempted.

This action is founded upon two promissory notes alleged to have been given by the Defendant to the Columbus Insurance Company, on the 6th day of September, 1851, and at the same time endorsed by that Company to the Plaintiff. The amended answer avers, in substance, that at the time of the alleged indorsement of the notes aforesaid to the Plaintiff, the Columbus Insurance Company was indebted to the Plaintiff in a sum greater than the amount of the notes, and that if the notes were so endorsed, they were endorsed as collateral security for the payment of the indebtedness of the Columbus Insurance Company to the Plaintiff; that the notes were given by the Defendant to said Company on account of premiums upon policies that the Defendant had issued as the agent of said Company; that on or about the 3rd day of October, 1851, said Insurance Company failed, and said policies of insurance became worthless; that on the 21st day of said October, said Company instructed the Defendant to return the premiums to the policy holders for the unexpired term of the policies, amounting to $467,07, "which sum the Defendant agreed and became liable to pay to the said holders of said policies," and holds said sum subject to the determination of this action.

Waiving the objection as to the form of the answer, and admitting that the defence would be good as between the Insurance Company and the Defendant, is it good as against the present plaintiff?

The question principally discussed by counsel as to whether

a negotiable note endorsed to a third party as collateral security for the payment of a pre-existing debt, is subject to the equities between the original parties, at the time of the endorsement is not presented by these pleadings. If the pleadings show anything as to time, they show that the endorsement and delivery of the notes to the Plaintiff were made prior to the failure of the Insurance Company. The Complaint alleges the endorsement and delivery of the note to have been made at the time the note was executed. This allegation is ordinarily in the old practice a mere matter of form, and it may have been so considered by the counsel who drew the complaint. But, however this may be, I cannot presume that it is false, and that the endorsement was made subsequent to the failure of the Company, while the complaint and answer show the contrary, although in language which may be considered matter of form; especially when it is considered that under our present practice, matters of form are excluded and the pleader is bound to state only facts.

But even if the pleadings fail to define the time of these transactions, the defence is left in no better condition; because if the Defendant would avail himself of the fact that the Columbus Insurance Company had failed prior to the endorsement of the notes, his answer must set up that fact affirmatively or it must appear distinctly from all the pleadings together.

The question for consideration then is, can a defence be set up in this action originating between the original parties to the note, subsequent to the endorsement thereof to the Plaintiff?

I do not find that such a defence has ever been sustained in a single instance, but the contrary doctrine has often been held. 1 *Sanford's Reps.*, 56, *Farniss vs. Gilchrist.*

So far as appears from the pleadings, neither the Defendant nor the policy holders, at the time of the endorsement, had any defence to an action upon these notes, if they had been then due, either equitable or otherwise. The Plaintiffs, if the notes had been due, could have brought their action and the facts which are now set up in the defence could not have been interposed, because at that time they did not exist. If acts arising subsequently can be set up in defence, then the endorsee takes

the negotiable paper subject to any future discharge of the maker by the endorser. The endorser will then have it in his power, at any time, at least before the note matures, and notice to the maker, to make it valueless in the hands of his own endorsee, by his own act subsequent to the endorsement. Such a doctrine cannot be sustained upon authority or reason.

I commenced an examination of this case under a full conviction that the answer would also be bad as to any equities between the original parties prior to the endorsement; that the law was as laid down by Judge Story in *Swift against Tyson*, 16 *Peters' Reps.*, 1. But a careful examination of the authorities leads me to doubt the correctness of that opinion upon this point. The authorities cited by Judge Story to sustain his view upon this point in that case will be found, with a very few exceptions, based upon an endorsement of negotiable paper, as *payment* of an antecedent debt, and not as *collateral security* for the payment. It should be recollected that in the case of *Swift vs. Tyson*, the bill of exchange was endorsed in *payment* of an antecedent debt, and not as collateral security; and that so far as the opinion relates to an assignment as collateral security, it is foreign to the question which was before the Court, and "its weight of reaon must depend upon what it contains." *See Carroll vs. Lessee of Carroll et al*, 16 *How. U. S. Rep.*, 287. But even as the mere *dictum* of Judge Story, I would not presume to dissent from it without very strong reasons or the support of high authority.

The opinion, however, has been reviewed by Chancellor Walworth in the case of *Stalker vs. McDonald*, 6 *Hill Rep.*, 93, in which it seems to me to be clearly shown that the *dictum* of Judge Story cannot be supported as sound law.

If the allegation in the answer, that the Defendant had promised to pay the policy holders the amount in dispute, is necessary to enable him to support his defence, it is also necessary that the promise should appear to have been made prior to the commencement of this action.

It is unnecessary to notice the other points made, as the judgment below must be affirmed.

NATHAN MYRICK, Appellant, *vs.* CHARLES E. DOLE, ET. AL. Respondents.

This was an appeal from a judgment against the Appellant, in favor of the Respondents, in the District Court for Ramsey County.

The Plaintiffs below, Charles E. Dole and others, were the proprietors of the steamboat "Governor Ramsey," and brought their suit to recover $156 17—balance due for freight on goods conveyed on said boat from St. Anthony to Sauk Rapids, for the Defendant, at different times between the 1st of May and the 25th of October, 1851.

The Defendant, in his answer, set forth: that said freight was received by Plaintiffs at St. Anthony, and that they had agreed to convey and deliver the same, for forty-five cents per hundred weight, to Sauk Rapids, in Benton County; that the Plaintiffs only conveyed one-fourth of the freight to Sauk Rapids, having left the balance at Baptist's Landing, four miles below Sauk Rapids, by reason whereof the Defendant was subjected to great inconvenience and injury, for want of a suitable warehouse at that place in which to store the same from the weather, &c.

For a further defence, the Defendant set forth that the Plaintiffs had received fourteen sacks of corn and two sacks of peas, worth $40, and five barrels of flour, worth $35, belonging to said Defendant, which they had agreed to deliver at Sauk Rapids, but that the same had never been delivered there or elsewhere; and demands judgment against the Plaintiffs for the sum of seventy-five dollars, the alleged value of the corn, peas and flour.

The Reply of the Plaintiffs states that the Defendant knew that there were two landings at Sauk Rapids—the lower one called "Baptist's Landing"—and that it was the custom of said boat to leave goods at either landing, at the discretion of the master;

That the Defendant well knew that the boat could not land and discharge freight above Baptist's Landing, except at high water, and that when this contract of affreightment was made it was understood and considered that a delivery at Baptist's Landing was a full execution of said contract; that they had, in fact, delivered more than one-half of said freight at the upper landing, but that, in consequence of low water, the balance of said freight was delivered at Baptist's Landing, and that the Defendant received the same and assented to the delivery there, as a full execution of said contract;

That the Defendant was not subjected to damage or inconvenience thereby, as the goods had been stored in good order and condition in Baptist's warehouse, where the Defendant received the same;

And allege, that they delivered all goods and freight to the Defendant which they had received from him, and transported the same to Sauk Rapids as aforesaid, except as otherwise expressly ordered by the Defendant, and further excepting one barrel of flour, two bags of peas, and one bed-cord, which the Plaintiffs bought of the Defendant, and for which he had been credited in his bill.

At the October Term, 1853, of the District Court, the cause was referred to James K. Humphrey, Esq. to hear and decide the whole issue between the said parties.

On the 23d December, 1853, the Referee made a report to the Court, that he had found that there was due from the Defendant to the Plaintiffs the sum of one hundred and three dollars and seventy-nine cents.

Upon motion of Defendant's Counsel, it was ordered that the Referee report the facts by him found in said action, from the proofs and allegations of the parties.

Pursuant to this order, the Referee reported the following facts as proved:

That, in the spring of the year 1851, the Plaintiffs agreed to carry freight for the Defendant from St. Anthony to Sauk Rapids, for the sum of forty-five cents per hundred weight; that under this agreement the Defendant shipped and the Plain-

tiffs carried a certain amount of freight from and to the places, and at the times stated in the Schedule annexed to the report.

That whenever freight was left at Baptist's, or Sauk Rapids lower landing, it was left there because the boat could not get any higher up the Rapids on account of low water, and that when goods were so left the Defendant had reasonable notice; that whenever freight shipped under this contract was put off at any point below the lower landing, it was at the request of Defendant.

That the slight variance between the time stated in the Bill of Particulars and the time proved did not mislead the Defendant at all, and is therefore immaterial.

That the Plaintiffs left 55,448 pounds of freight at the lower landing in good condition and safely stored, which it was worth ten cents per hundred weight to haul to the upper landing, and upon which, therefore, a deduction of ten cents per hundred weight has been made.

That the Defendant sustained much damage through the negligence of warehousemen.

That, although the charge of two dollars for carrying freight from Baptist's to Big Bend is not covered by the complaint, yet it is charged in the Bill of Particulars and denied by the Defendant's answer. Now, if the Bill of Particulars is good to exclude proof of items covered by the complaint, because they are not charged in the Bill, it is also good to include proof of items charged in the Bill though not covered by the complaint,—especially if the charge is answered and denied by the Defendant: for he has his election to strike out that which was a departure from the original complaint, or aid the pleading of the Plaintiffs by answering the defective part.

[As the Bill of Particulars referred to in the Report of the Referee is not among the files, it is deemed unnecessary to give the Schedule annexed to the Report.]

Judgment was rendered in favor of the Plaintiffs according to the report of the Referee: from which judgment the Defendant appealed.

Specification of points and authorities submitted on behalf of said Appellant:

First. That from the facts reported by the Referee, upon which the judgment in this case was entered, it appears that the Plaintiffs did not establish their case.

Second. That the Referee erred in allowing the Plaintiffs and charging the Defendant with the following items set forth in Schedule A. appended to his report, to wit:

Date.	Amount of Freight.	Where Left.	Amount.	
1851, May 1.	18,868	Baptist's Landing,	$60 15	
Aug. 7.	12,713	" "	57 20	
	Grave-Stones,	" "	1 00	
	Shingles,	" "	4 00	
Aug. 10.	19,137	" "	87 16	
14.	2,611	" "	11 74	
25.	6,696	" "	30 13	
Oct. 8.	700	" "	3 15	
10.	5 bbls. 1 box,	" "	2 75	
				$257 28
May 1.	1,748	Elk River,	7 86	
	One Harrow,	" "	1 00	
				8 86
July 12.	2 boxes Mdse.	Big Bend,	1 00	
Aug. 14.	825	" "	3 71	
25.	4,840	" "	21 78	
27.	Carrying freight from Baptist's to Big Bend,		2 00	
				38 49
				$330 93

Third. That the said items do not form part of the cause of action of the Plaintiffs.

Fourth. That as to the said items, there is a variance between the allegations in the complaint and the proof, and that proof of the same was not admissible under the pleadings.

Fifth. That the Plaintiffs did not comply with their contract, which was to carry the goods to Sauk Rapids.

Sixth. That they were not entitled to charge for freight until they had carried it to Sauk Rapids.

Seventh. That the Plaintiffs were answerable for any damages sustained by the Defendant while the goods were stored at Baptist's Landing.

Eighth. That the amount of such damage should have been ascertained by the Referee, and was *pro tanto* a good defence to this action.

Ninth. That the Referee has not reported on the Defendant's claim for the non-delivery and loss of fourteen sacks of corn and two sacks of peas of the Defendant, worth $40, and five barrels of flour of the Defendant, worth $35.

Tenth. That the Referee should have allowed the last-mentioned claim.

Eleventh. That the report of the said Referee was contrary to the evidence and law of the case.

Authorities: *Crawford vs. Morrell*, 8 *Johns.* 253; *Phillips vs. Rose*, 8 *Johns.* 392; *Robertson vs. Lynch*, 18 *Johns.* 451; *Lower vs. Winters*, 7 *Cow.* 263; 1 *Chitty's Pleadings*, 309, 618; *McArthur vs. Sears*, 21 *Wend.* 190; *De Mott vs. Laraway*, 14 *Wend.* 225; *St. John vs. Van Santvoord*, 25 *Wend.* 660; *Ostrander vs. Brown*, 15 *J. R.* 39; *Schureman vs. Withers*, *Ansh. N. P.* 166; 1 *Dig. N. Y. Rep.* 350; 3 *Kent's Comm.* 219; *Case of Ship "Hooper"*, 3 *Sumner*, 542; *Frish vs. Barker*, 2 *J. R.* 327; *Jenks vs. Hallet*, 1 *Caine's R.* 60; *Butler vs. Hopper*, 1 *W. C. C.* 449, *cited in U. S. Dig.* 3*d vol. sec.* 191, *page* 634; *Lawrence vs. Beabieu*, 2 *Bailey*, 623; *ibid*, *sec.* 187, *p.* 634; *Peterson vs. U. S.* 2 *W. C. C.* 36; *McCarty vs. Allison*, 24 *Wend.* 291.

Points and authorities submitted on part of the Appellees:

First. The amended Report of the Referee having been made subsequently to the rendering of the judgment, which is appealed from, cannot properly be considered on this appeal. *Wend.* 2, 52; *R. S. p.* 414, *sec.* 7.

Second. The facts reported in the said amended Report do sustain the finding of the Referee.

Hollinshead & Becker, Counsel for Appellant.

D. A. Secomb, Counsel for Respondents.

The judgment of the Court below was affirmed with costs [No opinion filed.]

JAMES STINSON, Plaintiff in Error, *vs.* H. L. DOUSEMAN, Defendant in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The complaint of the Plaintiff below set forth that on the 7th day of February, 1854, the said Plaintiff entered into a written agreement with the Defendant, James Stinson, to convey to him, by warranty deed, Lot 1 in Block 18, in Rice & Irvine's addition to St. Paul, upon the performance of certain conditions by the said Defendant, to wit: To pay to the Plaintiff the sum of eight thousand dollars, as follows: $2,000 on the first day of September, 1854, with interest from date at ten per cent. per annum; $2,000 on the 7th day of February, 1856, and $4,000 on the 7th day of February, 1858, with interest at ten per cent. per annum from date of agreement, payable annually; aud also, to keep the buildings on said lot insured for $1500, in some good insurance company, and to have the policy of insurance made payable, in case of loss, to said Douseman; and to pay all taxes that should be assessed on said premises, from May 1st, 1853. It was further provided, that in case of failure in the performance of either of the covenants of the said Stinson, the said Douseman should have the right to declare the contract void, and to recover all the interest which should have accrued upon the contract up to the time he should so declare it void, as rent, for the use and occupation of the premises; to take immediate possession thereof, and to regard the persons in possession, as tenants holding without permission.

The complaint then states that the Defendant did not, on the 1st September, 1854, or at any time previous, pay the Plaintiff $2,000 with interest, according to the contract, or any part thereof; that he did not have the buildings on the lot insured for $1500, in a good insurance company, and the policy made payable, in case of loss, to the Plaintiff; that he did not pay all the taxes assessed on said premises, from the first of May,

1853; and that he had entirely failed to perform any of the covenants and agreements on his part to be performed according to said contract.

That the Plaintiff, on the 14th of September, 1854, had declared the said contract void, by notice in writing: which notice set forth the reasons why the same was so declared void, to wit: on account of the non-performance of the covenants on his (Defendant's) part to be performed, as above mentioned; that said notice was duly served upon the Defendant by mail; and that the Defendant was indebted to the Plaintiff for all the interest which had accrued on said contract, from the date thereof until the 14th September, 1854, to wit: in the sum of $481 16,—for which sum the Plaintiff demands judgment.

The Defendant's answer admits the execution and delivery of the contract, and, in answer to the allegation in the complaint, to the effect that he had not paid the sum of $2,000 and interest on the 1st day of September, 1854, he says:

First. That on the 7th day of February, 1854, at Prairie du Chien, in Wisconsin, he (Defendant), at the request of the Plaintiff, for the payment of said sum and interest, executed and delivered to Plaintiff his (Defendant's) negotiable note, dated on that day, whereby he promised to pay the Plaintiff or order $2,000, on the 1st day of September 1854, with interest, at the rate of ten per cent. per annum from date, and which note was then and there accepted by Plaintiff, for the payment aforesaid, due September 1st, 1854.

Second. That, before the maturity of this note, the Plaintiff appointed N. Corwith & Co. of Galena his agents to receive payment thereof when due, and sent said note to them for collection; that, by an arrangement with the Plaintiff, said note was to be paid to said Corwith & Co. by a draft of Thomas Stinson, of Hamilton, Canada, the father and agent of Defendant, payable to order of said Corwith & Co.; that said Thomas Stinson, on behalf of Defendant, on the 21st day of August, 1854, drew his draft on R. K. Swift, at Chicago, for the sum of $2,138 75, and, at the request of Plaintiff, forwarded the same by mail to said Corwith & Co. having first made arrangements for the acceptance and payment thereof, and having reason to

believe that he had funds in the hands of said R. K. Swift to meet the same; that said draft was duly received by said Corwith & Co. at Galena, as agents of the Plaintiff, on the 25th day of August, 1854, and by them, with the consent of said Plaintiff, used and appropriated in their individual business as bankers; that on the 28th of August, the draft was presented at said Swift's office for payment, but owing to the absence of said Swift and his principal clerk, payment was refused by mistake, and on the same day the draft was protested for non-payment; that, on the 1st day of September, 1854, said Corwith & Co. returned said note to Plaintiff, although the same had not matured, nor had said note been dishonored; that Thomas Stinson was not notified of such protest until the 7th day of September, whereupon he forwarded to the Plaintiff at Prairie du Chien, for the payment of said note, another draft, upon Messrs. Ward & Co. New-York, for the sum of £530, 2*s*. 4*d*. currency; that the same reached Prairie du Chien on the 11th of September, before the commencement of this action and prior to the date of the notice set forth in said complaint; that said last named draft was returned to said Thomas Stinson on or about the 25th day of September, but without objection as to the character, amount or value thereof.

Third. The Defendant further states that he was always ready to pay said note, from the maturity thereof, and still is; and that he tendered the full amount thereof to the Plaintiff on the 12th day of October, 1854, before the commencement of this action; and that he brings the money into court, &c. and that said note is still outstanding against him.

Fourth. The Defendant further states that he caused the buildings on said lot to be insured on the 21st day of February, 1854, by a good insurance company, and has kept the same insured ever since, for the sum of $1500; that on the 9th of October, 1854, he obtained the consent of said insurance company to transfer his (Defendant's) interest in said policy to Plaintiff, and on said day transferred said interest therein to said Plaintiff, and tendered the same to him, which he refused, and brings the same into court, &c. And avers, that said buildings had not sustained any loss or damage by fire, nor had the Plaintiff been damaged thereby in the premises.

Fifth. That it was the understanding and agreement of the parties to said contract, at the time of the execution thereof, that the amount thereafter to be paid by any insurance company for loss or damage by fire to said premises was to be applied by the Plaintiff as a payment *pro tanto* on the whole purchase-money, but that such stipulation had been inadvertantly omitted in said contract; and that Defendant had delayed making an assignment of said policy, for the purpose of seeing the Plaintiff to have such omission rectified.

Sixth. As to the allegation in the complaint concerning the non-payment of taxes, the Defendant answers: That, on the 30th day of July, 1854, he paid the district school-tax assessed on said premises; that, on the 10th of October, he called upon the tax-collector to pay taxes for 1853, and found they had been paid by the Plaintiff on the 12th of September, 1854; that, on the 11th day of October, and before the commencement of this action, he had paid all taxes assessed on said premises for 1854; and that, on the 12th day of October aforesaid, and before the commencement of said action, he had tendered to the Plaintiff the sum of $40, for the taxes of 1853,—being full amount thereof, with interest; that Plaintiff had refused to receive the same, and Defendant now brings the same into court, &c.; that, on the 26th day of October aforesaid, Plaintiff had called upon Geo. L. Becker to pay certain taxes assessed upon said property by the City of St. Paul—said Becker then being the authorized agent to receive the same—and tendered to him the amount so assessed: which he (the said Becker), being also one of the attorneys for the Plaintiff in this action, then refused to accept, or give Defendant any satisfaction in the premises. And brings such assessments into court, &c. and says that he has paid and offered to pay all taxes assessed upon said premises since the 1st day of May, 1853, and that no loss or damage has been sustained by said premises by reason of any delay in the payment thereof; and that he has done and performed all of the covenants and agreements by him to be kept and performed in said contract set forth.

Seventh. As to the allegation of the non-payment of interest, the Defendant answers that he has paid all the interest due the Plaintiff by the terms of said contract, and is ready

and willing to pay to the Plaintiff according to the terms of said contract all the interest accruing thereon; and denies that the whole or any part of the interest accruing upon said contract remains due or owing from him to Plaintiff.

The Plaintiff demurred to the several parts of the Defendant's answer as follows:

To the first subdivision thereof,—Because no fact is stated showing that the Plaintiff agreed to receive said note in payment of the sum due upon the contract, or that he did accept and receive said note in payment of said sum, or that the Plaintiff ever agreed to relinquish or did relinquish any rights under the said contract; and because it appears that said note remained in the possession of and belonged to the Plaintiff until the same was due—that it had not been paid, and that the revocation of said contract by Plaintiff would be a bar to any action on the note.

To the second subdivision of said answer,—Because it does not relate to any allegations in the Plaintiff's complaint in any manner, but refers to matters wholly foreign to the subject-matter of the action, and amounts to nothing more than an averment that the Defendant did not pay the sum due the Plaintiff *because he had n't the money.*

To the third subdivision of said answer,—Because the action is upon a special contract to pay the Plaintiff $2,000 on the 1st day of September, 1854, and not that he would pay or tender $2,140 on the 12th day of October, 1854, after said contract had been declared void; and because the averment that the Defendant tendered the sum of $2,140, or any other sum, on the 12th October, 1854, is not an answer to the complaint for the breach of contract upon which the action is founded.

To the fourth subdivision of said answer,—Because the same is not responsive to any allegation in the complaint, and is an allegation to the effect that on the 14th day of September, 1854, and when the contract was declared void, the Defendant had utterly violated the provision therein in reference to insurance; and because this action is not for damages occasioned by fire, but for interest, as rent for use and occupation.

To the fifth subdivision of said answer,—Because it is an

attempt to set up an alleged verbal "understanding"—to add to, vary, and contradict the express terms of a written contract; and because the reasons set forth are insufficient to justify or excuse the violation of the contract, as any amount paid by an insurance company in case of loss would have been applied by operation of law, upon the purchase-money for the property specified in the contract.

To the sixth subdivision of said answer,—Because the contract was declared void by the Plaintiff on the 14th day of September, 1854; and no act done or attempted to be done thereafter by the Defendant, under or pursuant to the contract, in the exercise of his rights derived therefrom, is any legal defence to the Plaintiff's claim in this action.

And to the seventh subdivision of said answer,—Because the same is contradictory of itself and of the other portions of said answer.

The demurrer to the answer was sustained in the District Court with leave to answer over. Afterwards, the Plaintiff entered his judgment for want of an answer, and the Defendant obtained his writ of Error to review the proceedings of the District Court.

The following is the assignment of errors on behalf of the Plaintiff in Error:

That the Defendant may interpose, by way of answer, the equities arising in this case, and is not driven to his action for specific performance. *Laws of Min. of* 1853, *p.* 3, *et seq.*; 4 *Howard's Pr. R.* 350, *Dedrich vs. Hagsdadt*; 8 *Howard's Pr. R.* 416, *Hunt vs. Rodgers.*

That the acceptance by the Plaintiff of the Defendant's negotiable promissory note for the first $2,000 specified in the contract, was a satisfaction of the contract to that amount. *Chitty on Contracts, pp.* 769, 770, *6th Amer. Ed.*

That the acceptance and conversion of the first draft drawn by Thomas Stinson—a third party—under the agreement averred in the answer, was a payment of said note, and the Plaintiff's remedy was on the draft. *Chitty on Contracts, pp.* 767—770, and cases cited.

That, from the time of making the contract and taking possession under it, the equitable title to the premises was in the Defendant, and could not be divested at the will of the Plaintiff, for the causes stated in the complaint. 2 *Lead. Cases in Eq.* 26, *et seq.*; *Story's Eq. Juris. secs.* 115—628.

Time is not of the essence of this contract: the principal object of the Plaintiff being to sell the property for a given sum. 2 *Lead. Cases in Eq.* 19, 29; 1 *McLean*, 375, *Longworth vs. Taylor*; 3 *McLean*, 148; 14 *Peters*, 372; 2 *Hill's Ch. R.* 121; 13 *U. S. Dig. p.* 235, *Nos.* 203, 206; 13 *Eng. L. and Eq.* 416, *Parkin vs. Thorwald*; 6 *Wheaton*, 528, *Brasier vs. Gratz*; *Story's Eq. Juris. sec.* 1316; 5 *Condensed R.* 160, 164, 169; 3 *idem*, 522 *and notes*; 4 *Peters*, 449; 5 *idem*, 264; 6 *idem*, 389; 4 *Dallas*, 345; 5 *Cranch*, 262.

That even if time was of the essence of the contract, and the acceptance of the Defendant's note was not a payment of the first $2,000 specified in the agreement, the Defendant has shown sufficient excuse for non-performance at the day, and equity will relieve him against the accident which occasioned it. *Story's Eq. Juris. pp.* 747, 748, 771, 775—777.

That the proviso to the contract, except the finding the rule of damages, states a mere conclusion of law, and might have been omitted without changing the nature of the instrument or effecting the rights of either party under it. 2 *Lead. Cases in Equity*, *p.* 19, *Grayson vs. Riddle.*

If the proviso authorizes the Plaintiff to declare the contract void, and to oust the Defendant of his possession of the premises, then the omission to insure for a single day, or permitting a single dollar of the tax to remain unpaid for a single day after it was assessed, would have the same effect: and proves it clearly to be in the nature of a penalty or forfeiture, which a court of equity will not enforce. *Story's Eq. Juris.* 1315—1319; *Chitty on Contracts*, 863—865.

That, under the proviso, non-performance, at most, only renders the contract voidable, and not *ipse facto* void. [See contract.]

That if Douseman intended to declare the contract void upon Stinson's failure to perform at the day, he was bound to do so at the day; and his omission so to do was an acquiescence in

the delay, and a waiver of his right to declare it void after the Defendant had offered to pay. 2 *Lead. Cases in Eq.* 30; 5 *Paige*, 225; 6 *idem*, 407; 7 *idem*, 37.

The Defendant, in any event, was entitled to reasonable notice of Plaintiff's intention to insist upon payment at the precise day. 2 *Lead. Cases in Eq.* 33, and cases there cited; 3 *Phil. Ev.* 343, 345; *Chitty on Contracts*, 771, *et seq.*

That the acceptance by the Plaintiff of Defendant's note,—which would not mature until after the day named in the contract for the payment of the first $2000,—even if it was not a satisfaction *pro tanto* of the contract, and Plaintiff's conduct respecting the first draft, had a tendency to induce the Defendant to believe that the precise day was not essential and would not be insisted on. 2 *Lead. Cases in Eq.* 19, and cases there cited; 8 *Paige* 423—600.

Where there has been a part performance, as a part payment of the purchase-money—payment of taxes, &c. and a delivery of possession to the Defendant,—mere lapse of time, unless the delay was very great, would form no excuse to convey by the Plaintiff. 3 *Phil. Ev.* 344, and cases cited; 3 *Monroe*, 313, 318, 322; 4 *idem*, 500, 501; 6 *Monroe*, 362, 365, 368; 4 *Bibb*, 453, 536; 4 *J. J. Marshall*, 157; 1 *Howard*, 358.

In all cases where time is an essential part of the contract, and where there has been a part performance, courts of equity will enforce the contract, unless there is some evidence of either actual or presumptive abandonment. 2 *Lead. Cases in Eq.* 29, 30; 3 *John. Cases*, 60, *Ballard vs. Walker;* 2 *Devereaux Eq.* 224; 4 *Munf.* 332, 333.

The failure of the Defendant to perform at the day was the result of accident or mistake, against which equity will never refuse to relieve. [See authorities on subject of specific performance.]

The Plaintiff cannot maintain this action without showing that he has sustained injury, and not then if such injury will admit of compensation. 2 *Lead. Cases in Eq.* 3 *et. seq. Seaton vs. Slade;* 3 *Phil. Ev.* 344, 345, and cases there cited.

The mere non-payment of money at a specified day is no excuse for refusing to convey, because if an injury result from it it may be compensated by money, and a court of equity will

decree a performance. 2 *Lead. Cases in Eq.* 17, and cases there cited.

That if the contract could be declared void, the Defendant would suffer a positive injury, which cannot be compensated by any known rule of damages, and therefore it would be inequitable to allow the Plaintiff to recover in this action. 2 *Lead. Cases in Eq.* 26, 31.

That the Defendant had both the ability and intention to perform his part of the contract, and was only prevented from performing by accident or mistake; and where the ability and intention both exist, equity will compel the Plaintiff to perform, unless the Defendant has been guilty of gross negligence.

That had the parties intended to have made time of the essence of the contract, they would have so declared it in the proviso; and naming a day for payment is merely formal, and means nothing more than that the payment shall be made in a reasonable time. 2 *Lead. Cases in Eq.* 18; *Story's Eq. Juris.* 1360.

[The points and authorities on behalf of the Defendant in Error are not on file.]

EMMETT & MOSS, and D. COOPER, Counsel for Plaintiff in Error.

RICE, HOLLINSHEAD & BECKER, Counsel for Defendant in Error.

The Judgment of the Court below was affirmed.

[No opinion on file.]

WILLIAM HOLCOMBE, Plaintiff in Error, *vs.* JOHN MCKUSICK, ET. AL. Defendants in Error.

ERROR FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

The Plaintiff below brought suit to recover damages for injuries to his dwelling and the furniture therein, by reason of the wrongful and unlawful acts of the Defendants in removing said dwelling, situated upon a certain lot in the city of Stillwater in the county of Washington, the property of the Plaintiff. Damages claimed, five thousand dollars.

The Defendants, in their answer, set forth in full the act of the Legislature of the Territory of Minnesota, entitled "An Act to incorporate the City of Stillwater in the County of Washington," approved March 4, 1854. [See Session Laws 1854, page 171.]

The answer then sets forth the organization of the city government by virtue of said act, and recites the ordinance of the City Council creating the office of Marshal of said city, regulating his duties, &c.; also, the ordinance of said City Council concerning nuisances, &c. — providing, among other things that if any person "shall place, or cause to be erected or placed "any buildings, lumber or other obstruction whatsoever, in or "upon any of the streets or landings of said city, or shall "occupy, maintain or keep, or cause to be maintained, occu- "pied or kept, any such building, lumber or other obstruction "now erected or placed in or upon any of the streets or land- "ings of said city, it shall be the duty of the Marshal to give "notice to such person or persons to remove such nuisance "forthwith"; and further providing, that if such person or persons shall permit any such nuisance to remain, after twenty-four hours notice to remove the same, and if such "nuisance shall be manifestly dangerous or improper, or "shall interfere with the use and enjoyment of the streets and "landings "of said city, it shall be lawful for the Marshal to remove "and abate such nuisance, either by removing the building"

or other obstruction erected, placed or maintained in or upon said streets or landings, &c.; and providing further for an assessment of the damages sustained by reason of such removal, &c. and giving the Marshal full power to call to his assistance in the execution of said ordinance any male inhabitant of said city, &c.

The answer further states, that the building mentioned in the complaint was in and upon Main-street in said city, according to the plot thereof recorded on the 12th day of September 1848, and that said building obstructed the free use of said Main-street, and that the same was a public nuisance; that, on the 30th day of October 1854, the Marshal of said city, in pursuance of said ordinance had served a notice upon the Plaintiff, requiring him to remove the said building from said Main-street, which the said Plaintiff had failed and refused to do; and that, on the 4th day of November thereafter, the said Defendant, Jonathan McKusick, the then Marshal of said city, did remove said building, and had called to his assistance the other of the Defendants.

The answer further denies all the allegations of said complaint, charging the Defendants with damages for injuries to said building, and denies that the same was injured in a greater amount than two hundred dollars, which was unavoidable and necessary in removing the same as aforesaid.

The reply of the Plaintiff denies, upon information and belief, the passage of the Act to incorporate the City of Stillwater recited in the answer, and alleges that no such act had ever been *published* pursuant to the provisions of Sections 2, 3 and 4, Chapter II. of the Revised Statutes of the Territory.

But "alleges that an act of said Legislative Assembly was "published pursuant to the provisions and requirements of "said section;" and quotes in full an act incorporating said City of Stillwater, without stating when the same was passed or approved, or when or where it was published.

The reply further denies, upon information or belief, all the allegations in the complaint respecting the organization of said city under the act recited in the answer, the ordinances of said city creating the office of Marshal and defining his duties, and

the ordinance concerning nuisances, recited in said answer; and denies that said building was in or upon Main-street in said city, according to the recorded plot thereof, dated September 12, 1848.

Second. The reply states that the said building was erected prior to the 12th day of September, 1848, and denies that the plot of the City of Stillwater in the answer mentioned was ever certified by the Surveyor thereof, or that it was ever duly acknowledged or recorded in the office of the Register of Deeds in the proper county.

Third. The reply further states that a plot of the Town of Stillwater in St. Croix County, Wisconsin Territory, was acknowledged by one John McKusick; that the said John McKusick was not a County Commissioner of the County of St. Croix in the Territory of Wisconsin, or the sole owner or proprietor of said Town of Stillwater at the time said plot was acknowledged; that he acknowledged the same in his own name, and not as the agent of the proprietors of said town; that on the first day of July, 1848, and when the title to the land included in the alleged plot of the City of Stillwater was in the United States, the Plaintiff, with other persons, was settled and resided upon lands included in said alleged plot—the Plaintiff occupying and possessing the premises mentioned in the complaint and the buildings therein mentioned.

The reply then sets out in full the formation of a "Claim Association," similar in all respects to the one set forth in the case of *Brisbois vs. Sibley, et. al.* [see *ante*, page 230], which Association was formed for the purpose of securing to the people of Stillwater the legal title to the lots which they respectively occupied. A person was appointed to bid off the lands, which were to be by him deeded to the respective owners thereof. A committee was appointed to adjust conflicting claims, &c. and it was made a part of their duty to have a survey made of the Town of Stillwater, so as to conform to the present surveys, fixing the bounds of the lots and blocks and numbering the same. John McKusick was appointed to bid off the lands at the land sales.

That before the 11th day of September, 1848, one Harvey Wilson made a survey of the Town of Stillwater, which plot is the same referred to in the Defendants' answer.

That such survey was afterwards accepted by said committee, and that the claim of this Plaintiff was settled by them, as follows: "That the said Plaintiff should be entitled to re- "ceive a deed of his lot on which he then resided, according "to the town plot of Stillwater, as surveyed and plotted by H. "Wilson, August 28, 1848; and the said committee, on said "day, further resolved that inasmuch as the house in which "said Plaintiff resides is in the street, that the same remain "where it now stands until it is removed at the public ex- "pense."

The Defendant demurred to the first subdivision of the Plaintiff's reply,—Because the Act of Incorporation of the "City of Stillwater" set forth in the answer, is not a "general law" within the legal meaning of the sections of the Revised Statutes specified in that portion of said reply, and it was not necessary that it should be published as in said sections directed, but that the same took effect from and after its passage, according to its terms; and because, a failure on the part of the Secretary of the Territory to comply with the provisions of Section 4 Revised Statutes, referred to in said reply, will not invalidate an act of the Legislature; and because it is impossible to know what is intended in the said portion of said reply, as the publication of such a document in a newspaper can have no effect upon the issues of this action, nor is such publication in any manner responsive to any portion of the answer: it is not pretended that the act specified in the answer is not the act passed by the Legislature, nor is it alleged that the act quoted in the reply was ever so passed and enacted.

To the second subdivision of said reply,—Because it is impossible to understand or know what is intended by that portion of said reply,—no reason being given, or apparent, for inserting it: the question in the cause being, *where* the building was when it was removed, and not *when* it was erected or placed there.

To the third subdivision of said reply,—Because the same is matter of evidence and is improperly inserted in a pleading; and because the same only amounts to an admission of the truth of the facts alleged in the answer, to wit: that the town

plot was surveyed, acknowledged and recorded, and that the building referred to was in the street and continued there until removed; and because the same is contradictory.

A motion was made at the same time, on behalf of the Defendants, to strike out certain portions of the Plaintiff's reply.

The District Court sustained the demurrer, and allowed the motion, with leave to amend; and afterwards, judgment was rendered against the Plaintiff for costs.

Points and authorities relied upon by the Plaintiff in Error:

First. The demurrer cannot be sustained, because there are incurable defects of substance in the answer. 1 *Code Rep. N. S.* 238; 1 *Code Rep.* 342; *Van Santvoord's Pl. p.* 367; 3 *Cowen*, 96; *Newell's Pr. vol.* 1, *p.* 539, 40 *et pariem.* The answer is bad in the following particulars:

1. The Act of Incorporation of the City of Stillwater is a general law, requiring, under the Revised Statutes, to be published before it can become operative, which publication should have been averred. *Vide Rev. Stat. sec.* 2, *Chap.* 2, *pp.* 33, 34; 1 *Kent's Com. vol.* 1, *p.* 506; *Buvier's Law. Dic. vol.* 1, *p.* 347; *Civil Code Laws, art.* 420; *Pierce vs. Kemball*, 9 *Greenl.* 54; *Bac. Abr. vol.* 9, *p.* 231; 7 *Mass.* 9; 5 *Mass.* 266; *ib.* 329; 8 *Shep. Me. Rep.* 58.

The provision of the Revised Statute referred to is not repealed by the words of the Act. *Bac. Abr. vol.* 9, *p.* 228; *Rex vs. Idle*, 2 *Barn. & Co.* 149; *Golden vs. Buck*, 15 *East.*; *Bac. Abr. vol.* 9, *p.* 257; 15 *East.* 322.

Second. The Defendants' justifying the commission of the acts complained of under and by virtue of a special and limited jurisdiction must aver that every requirement of the Act of Incorporation has been complied with, which they have not done in their answer. *Thayer vs. Stearns*, 1 *Pick.* 112; *Weller vs. Ballette*, 11 *Mass.* 480; *Saxton vs. Nimms*, 14 *Mass.* 320; *Ayre vs. Young et. al.* 13 *Mass.* 320; 4 *ib.* 232; 5 *Wend.* 170; *Cable vs. Cooper*, 15 *J. R.* 122, *Opinion.*

Third. The Act being a general law, the allegation that it has never been published raises a material issue. [*Vide* Revised Statute before cited.]

Fourth. The Act of Incorporation being a private act as the Defendants insist, then the matter covered by the demurrer is irrelevant and redundant and can only be reached by motion. *Smith vs. Greenin*, 2 *Sandf. S. C. R.* 702; 3 *Sanford*, 743; 3 *Code Rep.* 206; 6 *H. P. R.* 475; 4 *H. P. R.* 68; *ib.* 24; *V. Santvoord Pl.* 284, 426, 371, 400, 408; 4 *Sandf. S. C. R.* 660.

Fifth. The matter embraced by the second count of the demurrer is irrelevant and redundant, and the authorities just cited indicate that such matter can only be reached by motion.

Sixth. The third count of the demurrer cannot be sustained, because, admitting it to be matter of evidence, it is not demurrable. *I Code Rep. N. S. p.* 270.

2. It is to a fragment of an integral defence. *V. S. Pl. pp.* 369, 370, 353, 439; *Cobb vs. Frazer*, 4 *H. P. R.* 413; *ib.* 373; 5 *H. P. R. p.* 5; *ib.* 206.

3. Allegations contradictory can only be reached by motion under authorities cited; no contradiction is apparent upon the face of the matter demurred to; and

The matter embraced in the last count of the demurrer contains a valid and sufficient defence to the new matter of the answer.

Seventh. Either count of the demurrer being disallowed the whole must fail. *Authorities above cited;* 1 *C. R. N. S.* 397; *V. S. Pl.* 367, 353, *&c.*

[The points and authorities of Defendants in Error are not on file.]

S. J. R. McMillan and Wilkinson, Babcock & Brisbin, Counsel for Plaintiff in Error.

Thompson & Parker, Counsel for Defendant in Error.

The judgment of the District Court was affirmed with costs.

The Pleadings in this cause would of themselves make a respectable book *in size*, but as there is no Opinion on file, and the record very imperfect, I have stated the issues in as few words as possible.—Reporter.

JOHN R. IRVINE, Appellant, *vs.* MARSHALL & BARTON, Respondents.

This was an appeal from a judgment of the District Court of Ramsey County.

[There are no papers on file from which a report of the case can be prepared. The minutes of the Court show that the judgment of the District Court was affirmed.]

THE BANK OF COMMERCE, Plaintiff in Error, *vs.* SELDEN, WITHERS & Co., Defendants in Error.

Evidence not tending to support the issues tendered by the party offering it, is incompetent.

Generally, a witness must testify of his own *knowledge*, and from his recollection of *facts* within his own knowledge; and not to his *belief* or opinion.

But questions of *identity* and personal skill, are exceptions to this rule; in such cases a witness may testify to a belief.

The impressions of a witness derived from a recollection of facts, are admissible; but otherwise, when such impressions are derived from the information of others, or some unwarrantable deduction of the mind.

It is the province of the Jury to draw conclusions from the facts stated by the witness.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The opinion in this cause contains a full statement of its history, and fully explains the issues decided.

Specifications of Errors, Points and authorities submitted by Plaintiffs in Error:

First. That the Court erred in admitting that part of the answer of Robert W. Latham, a witness for the Plaintiffs examined under the commission of Plaintiffs, to the 5th cross interrogatory, wherein the said witness stated his impressions, to wit:

"My impression was that he (Mr. Rittenhouse) knew it (the "check) was for my use."

1st. Because the witness did not testify to any fact within his own knowledge.

2d. Because the said testimony was not based upon any statement of facts testified to by the witness.

3d. Because the said testimony is a mere matter of opinion or inference.

4th. Because the said testimony was too uncertain.

5th. Because the said testimony was insufficient.

Second. That the Court erred in admitting that part of the answer of the said Robert W. Latham to the 9th cross interrogatory, wherein he stated his impressions, to wit: "I cannot state positively, but am under the impression that they (the Plaintiffs) did" (know that the collateral securities were the property of the witness.)

1st. Because the witness did not testify to any fact within his own knowledge.

2d. Because the testimony was not based upon any statement of facts testified to by the witness.

3d. Because it appears the witness had no knowledge upon the subject.

4th. Because the said testimony was mere matter of inference or opinion.

5th. Because the said testimony was too uncertain.

6th. Because the said testimony was insufficient.

AUTHORITIES.

As to the 1st and 2d alleged errors and the points thereunder specified:

3d Am. Ed., 4 *Cowen & Hill's notes on Phillips on Evidence, p.* 725–6; *The case of the Nereide*, 9 *Cranch*, 416; *Cutler vs. Carpenter*, 1 *Cow.*, 81, 83; *Clark vs. Bigelow*, 4 *Shep.*, 246, 1 *vol.; Supplement to U. S. Digest, Sec.* 1405; *Jones vs. Childs*, 2 *Dana*, 25, 2 *vol.; U. S. Digest, Sec.* 1974, *p.* 290; *Carter vs. Connell*, 1 *Wharton*, 392; *Connalt vs. Post*, 8 *Watts*, 406, 408, 411; *2nd Saunders on Pleading and Evidence*, 493, *2nd Am. Ed.*

Points and authorities of Defendants in Error:

There was no error in the admission of the answer of Robert W. Latham to the cross interrogatory of Defendants, in which he said: "Mr. Rittenhouse, I suppose, knew, there is "no doubt about it, that the check was in my handwriting, and "that the words "Good, Selden, Withers & Co., were in my "handwriting; I cannot state positively whether it was or was "not known to him. *My impression was that he knew it was "for my use."*—2 *Vol. Phil. Ev., p.* 749, *note* 526; 1 *John R.*, 99 *and* 103; 6 *Curtis decis. Sup. Ct. U. S.*, 145, *Riggs vs. Fulve;* 5 *Ibid.*, 396 *or* 9 *Cranch*, 416, *Nereide;* 7 *East* 66, *Rex vs. Johnson*, 5 *Conn. R.*, 111; 1 *Phil. Ev.*, 454; 3 *Phil. Ev.*, 1222, *note* 866; 12 *Gill vs. John.*, 244; 2 *Vol. U. S. Dig., p.* 297, *Sec.* 2158; 5 *Shep.* 260, *Lewis vs. Freeman*; 4 *Ibid.*, 727, *Sec.* 1603; 14 *Idem.*, 280, *Sec.* 268; 12 *Geo.*, 257; 8 *Watts*, 406, *Connalt vs. Post*, 4 *Wharton*, 334; 13 *Ohio*, 513; 5 *Pick.* 246; *Greene Ev., Vol.* 1, *p.* 571.

The Plaintiff having constructive notice that the check was for the individual use of R. W. Latham, in that it was drawn in his individual name, could not be damnified by the admission of any testimony tending to prove notice; therefore, even had the admission of Latham's answer been improper, if the law had not presumed such notice, under the circumstances in this case, the testimony was wholly immaterial and innocuous, and consequently no grounds for revisal. 4 *John. R.*, 260, 271, 273; 16 *John.*, 386, *ante;* 2 *Cowan*, 251; 2 *Scam.*, 9.

The fact that the check was drawn by R. W. Latham was constructive notice to the Plaintiffs that it was for his individual use. 4 *John.*, 260, 271, 273; 16 *John.*, 38, *ante;* 19 *John.*, 157; *Story & Partner*, 102 *note*, 132 *note*, *page* 202 *note*, 216, 217, 218, 219, 223 *notes.*

The check, when offered in evidence, not being accompanied by the $5000 ch. & Ohio cord B'ds, the Plaintiffs were not entitled to recover, even had they been able to show that the check was for Defendants' use, and endorsed "Good" with their consent. The Bonds were a part of the instrument and inseparable from it.

An erroneous admission of evidence is no ground for reversing a judgment, if the verdict must have been the same with-

out such evidence. 4 *Vol. U. S. Dig.*, 724, *Sec.* 1532; 1 *Cowan*, 257, *Trowbridge vs. Baker;* 2 *Scam.*, 9, *Forsythe vs. Banter.*

It was entirely competent for the Defendants to show the fact that the check was not negotiated for the use of the firm or with the knowledge or consent of Selden, Withers & Co., Defendants.

There was no error in the admission of any of the testimony for which error is assigned by the Plaintiffs in error.

HOLLINSHEAD & BECKER, Counsel for Plaintiffs in Error.

D. COOPER, Counsel for Defendants in Error.

By the Court—WELCH, J. This was an action brought by the Plaintiffs in Error against the Defendants in Error upon a check drawn by R. W. Latham, one of the Defendants, upon the Defendants, and accepted in the firm name of Selden, Withers & Co., the Defendants.

The complaint sets out the drawing of the check—the check, and the acceptance of the Defendants in their firm name.

The answer simply traverses the allegations of the complaint by averring want of knowledge or information sufficient to form a belief.

Upon the trial the Defendants offered in evidence certain depositions taken under a commission; among the number was the deposition of R. W. Latham, one of the Defendants. To portions of said Latham's answers, objections were made upon the trial, which were overruled by the Court.

The Jury returned a verdict in favor of the Defendants, upon which verdict judgment was rendered for costs.

To the ruling of the Court exceptions were taken. One objection overruled by the Court was to a portion of the witness', (Latham's) answer to the fifth interrogatory in said commission. The interrogatory is in these words: "Did not the "Plaintiffs, or some one or more of them, know at the time you "negotiated that check, that you wrote the words 'Good: Sel- "den, Withers & Co.,' on said check for your own individual "use and benefit, and not for the use and benefit of the "house of Selden, Withers & Co., the Defendants?" To this

interrogatory the following answer was given, viz: "Mr. Rit-"tenhouse, I suppose, knew, there is no doubt about it, that "the check was in my handwriting, and that the words 'Good: "Selden, Withers & Co.,' were in my handwriting. I cannot "state positively whether it was or was not known to him. "*My impression was that he knew it was for my use.*"

To the latter part of this answer, stating the impression of the witness, objection was made, which was overruled by the Court. To this ruling an exception was taken, which has been incorporated into a bill of exceptions, and thus is brought up by writ of error as a part of the record in this case.

In examining the record in the case, it seems that a different case has been presented upon the argument, from the one presented by the record. The complaint sets out the drawing of a check and its acceptance by the Defendants. The Defendants are sued as acceptors of the check. The answer traverses the making of the check and its acceptance. The only issues presented by the pleadings were as to the drawing of the check and its acceptance by the Defendants. It follows, therefore, that all evidence on the part of the Defendants not tending to support the issues tendered by them, was incompetent. It was the duty of the Defendants to deny the allegations of the complaint, or to confess and avoid such allegations. They have seen fit to deny the allegations. No question, therefore, could arise as to whether this check was for the individual benefit of Latham, or whether the Plaintiff had notice that he, (Latham,) applied the money procured upon the negotiation of the check, to his own use. If the Defendants wished to raise these questions, they should have set out the facts as they were, or as they claimed they were. This would have allowed the Defendants to introduce any competent testimony bearing upon the issues thus presented. It appears to me, therefore, that not only the answer of the witness to the fifth interrogatory was incompetent, but that nearly all the testimony offered was alike objectionable.

The case, however, seems to have been tried and argued in good faith, and I am inclined to examine, so far as is proper, the questions of law presented upon the argument.

The first question presented is as to the answer before allu d-

ed to. The rule is as well settled as any other rule of evidence, that a witness must testify of his *own knowledge*, and from his recollection of *facts* within his *own knowledge*, and not to his *belief* or *opinion*.

As to actual knowledge, a witness stating facts can only state those of which he has a *personal knowledge*, and cannot be examined as to his *belief* or *persuasion*. 2 *Saund. Pl. and Ev.*, 491. To this rule there are exceptions. In questions of identity and personal skill, a witness may testify to a belief, (not founded in knowledge;) but in respect to facts which are supposed to lie within the compass of his memory, the rule is otherwise. *Starkie*, 153. If the *fact* is impressed upon the memory, but the recollection does not rise to positive assurance, then such impression is admissable; but if such impression is not derived from a *recollection* of the *facts*, and are so slight that it may have been derived from the information of others, or some unwarrantable deduction of the mind, they are not admissable.

Now let us apply the above tests to the question before us. The question propounded is as to the knowledge of the Plaintiffs, or some one of them, of a certain fact—*i. e.*, whether the witness accepted the check in the firm name for his own individual use and benefit.

The nature of the question is such that the witness, perhaps, could not answer directly of his own knowledge; he could not know of his own knowledge what another *knew*. He might have a knowledge of facts which would render an opinion as conclusive as in a case where a witness has personal knowledge. The Plaintiffs might have told him, or he might have told the Plaintiffs as to his object; in such case the opinion of the witness would be conclusive for his own satisfaction, and if he gave the facts upon which the opinion was founded, it would probably be satisfactory to others. In such a case, however, the true rule would be for the witness to state the facts upon which his opinion was founded. If the facts were as in the case supposed, others would draw the same conclusion as the witness; and in such a case, although the impression or opinion was given before the reasons for such opinion, probably no one would think of objecting to the opinion itself.

The facts, however, should be stated, and not the opinion of witnesses, and conclusions from the facts must be drawn by the Jury.

In this case, the witness merely states a naked impression: he may have known facts which would have warranted a Jury in forming an opinion similar to his own, but he certainly does not state them.

The answer of the witness contains no reasons to warrant the finding of the Jury; and the addition of the witness' opinion can give no legitimate weight or effect to the other parts of the answer.

The witness gives a mere opinion, an impression as he calls it, literally. He could not, in the nature of things, give anything but an opinion when he undertook to testify of anything except *facts*.

The judgment of the District Court is reversed and the cause remanded, with directions to issue a *venire facias de novo*.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

IN JANUARY TERM, 1857.

FRANKLIN STEELE, Plaintiff in Error, *vs.* PATRICK MALONY, Defendant in Error.

Technical objections to the array or to a single Juror must be made before verdict is rendered, unless there was fraud or collusion used in the selection of the Jury and it is shown that the party objecting has been prejudiced thereby.

Where the Jurors named in the original venire had all been discharged, and the Court ordered a special venire,—HELD, That the Jurors so summoned were competent to try a cause, under Sec. 32, page 289, Rev. Stat. Minnesota.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The Opinion of the Court contains sufficient reference to the history of the cause to enable us to understand the issues in the Supreme Court.

Points and authorities of Plaintiff in Error:

First. The case was not tried by a jury in contemplation of law.

Second. The jury which tried the case was not chosen or selected or drawn or summoned according to law.

Third. There was no jury returned at the opening of the Court, as required by law, or drawn for the term.

Fourth. The jurors who tried the case were not selected by the officers appointed by law to select the same.

Fifth. There were only twelve jurors returned at the opening of Court, and for the term upon the original venire.

Sixth. All the jurors who had been returned on the original venire had been discharged at the time the said cause was tried.

Seventh. Joseph Lindsley, one of the jurors who tried the cause, was unqualified to act as a juror—the said Lindsley not having resided six months within the Territory.

Eighth. The verdict and the judgment thereon, upon the grounds aforesaid, were irregular and void.

Ninth. The proceedings were irregular, as also the orders for special venires of jurors.

Authorities: *Secs.* 146—151, *chap.* 126, *R. S. p.* 556; *Secs.* 160, 161, *chap.* 126, *R. S.* 557; *Secs.* 2, 6, *and* 7, *chap.* 115, *R. S.* 534; *Sec.* 14, *chap.* 71, *p.* 353, *R. S.; Morgan vs. Nye, Cro. Eliz.* 574; *Bacon's Abr. Am. Ed.* 1844, 5*th vol. B. pp.* 318, 379, 381; *McMasters vs. Caruthers*, 1 *Burr*, 324; *Cooper vs. Bissell*, 16 *Johns.* 146; *Morrell vs. Newton*, 1 *Browne*, 205; *Shaffer vs. State*, 1 *How. Miss.* 238; *Drumgoold vs. Horne*, 1 *Hud. & Brooks*, 412; *McKinney vs. Smith, Hardin, Ky.* 167; *Cain vs. Cain*, 1 *B. Monroe*, 213.

Points and authorities relied upon by Defendant in Error:

First. The Defendant in Error objects to the third and fourth grounds stated for a new trial in Plaintiff in Error's motion papers, because the Judge's minutes are not set forth in the motion. The minutes of the Court are no part of the record, and should be served in the notice.

Second. There is no affidavit showing that there was any collusion of the officers impannelling the jury, or fraud, or that injustice has been done by the verdict on account of the alleged irregularity in impannelling the jury: and therefore the party cannot have a new trial for that cause. *Vide R. S.* 289, *sec.* 32; 2 *Graham & Waterman on New Trials*, 159, 160; *Commonwealth vs. Roly*, 12 *Pick.* 496; *The People vs. Vermilyea*, 7 *Cow.* 382; *The United States vs. Gilbert*, 2 *Sumner's R.* 19; *The King vs. Hart*, 4 *Barn. & Ald.* 430; *Hill vs. Yates*, 12 *East.* 229; *Cole vs. Perry*, 6 *Cow.* 584; *The People vs. Ranson*, 7 *Wend.* 417; *Amherst vs.*

Haldley, 1 *Pick.* 38; *Howland vs. Gifford*, 1 *Pickering*, 43; *The State vs. Harscill*, 4 *N. Hamp. R.* 352; *The King vs. Sutton*, 8 *Barn. & Cress.* 417; *Commonwealth vs. Norfolk*, 5 *Mass.* 435; *Enoss vs. Dayharsh*, 1 *Selden's R.* 531; *The State vs. Underwood*, 4 *Jredell*, 96; *The People vs. Griffin*, 2 *Barb. Sup. Court Rep.* 427; *Fenalty vs. The State*, 7 *Engl. Rep.* 630; *Page vs. The Inhab. of Danvers*, 7 *Mass. R.* 326.

If the objection does not go to the moral capacity and impartiality of the juror, nor to the fairness of the verdict, if the objection is not taken at the trial it will be deemed to have been waived. The Statute provides when the challenge must be taken (*R. S.* 559, *sec.* 174); and the venire must be returned into the Court, so that the party can know who are to form the panel (*R. S.* 536, *sec.* 8.) Not having challenged, nor shown collusion nor fraud, nor that any injustice has been done, nor that he was ignorant of the improper manner of impanelling the jury, the objection must be deemed to have been waived. *The State vs. Hascell*, 4 *N. Hamp.* 352; *Commonwealth vs. Norfolk*, 5 *Mass.* 435; *The State vs. Underwood*, 4 *Jredell*, 96; *Enos vs. Dayharsh*, 1 *Selden's R.* 531; *vide* 10 *John.* 107; 2 *ib.* 375; 9 *ib.* 352; 11 *ib.* 134; 9 *Bing.* 13; 6 *Taunt.* 460; 4 *Bar. & Ald.* 430; 2 *T. R.* 385.

Third. The objection that the juror Lindsley was not a qualified voter is not tenable. An affidavit of ignorance of the disqualification, if available in any case, cannot be so unless it is made by the party moving for a new trial.

But no affidavit would have been available in this case, since the party had the opportunity of knowing the matters objected to; and also, because a distinction is made in the cases as to the ground of objection, for the purpose of ascertaining whether a new trial will be granted on such affidavit of ignorance or not.

If the objection goes to the moral capacity or impartiality of the juror, or any matter which goes to the fairness or impartiality of the verdict, a new trial will be granted; but if the objection rests upon grounds purely technical, as the want of property, alienage, or the like—not at all affecting the moral capacity or impartiality of the juror, or of the justice of the verdict,—the rule does not apply. *The King vs. Sutton*, 8

Barn. & Cress. 417; *S. C.* 15; *Eng. Com. L. R.* 208; *Hollingsworth vs. Duain*, 4 *Dall.* 353; *Grenup vs. Stoker*, 3 *Gilman*, 202; *The People vs. Jewett*, 5 *Wend*, 386; *Presbury vs. Commonwealth*, 9 *Dona.* 203; *Queen vs. Hepburn*, 7 *Cranch*, 297.

HOLLINSHEAD & BECKER, and H. J. HORN, Counsel for Plaintiff in Error.

DE WITT C. COOLEY, Counsel for Defendant in Error.

By the Court—SHERBURNE, J. This action was brought by the Defendant in Error to recover the amount due upon a promissory note. The cause was tried before a jury of twelve men, and a verdict returned for the Defendant in Error. The errors alleged are in regard to the jury that tried the cause, —first, to the array: and second, to an individual juror. The objections were not made until after the jury had returned a verdict. The substance of the first objection is, that there were only twelve jurors returned at the opening of the Court, for the term, on the original venire, and that they had been discharged at the time this cause was tried.

The jurors who tried this cause were returned upon a special venire, which was issued by order of the Court. The following provision of statute would seem to furnish sufficient authority for issuing a special venire: "It shall be lawful for "the Judge of the District Court of either of the counties of "this Territory, when there shall happen to be a deficiency of "jurors *for any cause whatever*, to rule a special venire, through "the term or any days of the term, to the sheriff of the proper "county to summon a number of jurors sufficient to complete "the number of the original panel." *Rev. Stat. sec.* 32, *p.* 289.

It is contended that inasmuch as none of the original panel remained, this section of the Revised Statutes does not apply to this case; but I think the power exists, although, for obvious reasons, it should be exercised with great caution. Parties should, if possible, whenever they require it, be tried by a jury selected in the manner pointed out by the law for the selection of the original panel. But it often happens,—and

especially in a new country, inhabited by a mixed and constantly changing population,—that the original panel falls far short of the requisite number. To remedy this deficiency, the Legislature gave to Courts the authority found in the section above quoted.

It is, however, unnecessary to inquire how far the authority of the Court extends in such cases when objection is seasonably made, because in the one before us none was made till after the return of the verdict of the jury. This was too late. In the absence of fraud or collusion in the selection of a jury, an objection to the array, or to a single juror, is too late after the verdict: unless it is shown that the party objecting was prejudiced by the irregularity. In other words, an objection which is merely technical in its character must be taken before the coming in of the verdict of the jury. *Walker vs. Green*, 3 *Green. R.* 215; *Fellows' Case*, 5*th Green. R.* 333; *Amherst vs. Hadley*, 1 *Pick. R.* 38; *Howland vs. Gifford*, 1 *Pick. R.* 43; 6 *Cowen*, 584; 6 *Wendell R.* 389.

The objection to one of the jurors that tried the cause (Joseph Lindsley) was good if it had been made in season. He had not resided in the Territory six months. But no suggestion is made that his selection grew out of any wrong intention, or that the Plaintiff in Error is injured by it. He must, therefore, abide by the result. To adopt a different rule would place verdicts upon a foundation so precarious that parties would never know when they were to approach the end of a lawsuit. It would always give the defeated party additional trials, so long as he could find technical defects in the drawing, summoning or qualifications of jurors. This cannot be supported by sound reasoning, and is opposed to the interests of the people and the policy of the law.

Judgment below affirmed.

WILLIAM BREWSTER, ET. AL. Plaintiffs in Error *vs.* WILLIAM WAKEFIELD, Defendant in Error.

A Promissory Note bearing interest at a specified rate "from the date thereof," bears such specified rate *after* maturity and until paid.

Legal Interest is to be applied only when no rate is agreed upon or specified in the contract.

The intention of a party to a Contract should control its legal effect, when such intention is clearly manifest from the face of the contract; but when the intention is not clear, the contract is to be construed most strongly against the promissor.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The following are the points and authorities upon which the Plaintiff in Error relies in the above-entitled cause:

First. The Court below erred in decreeing the payment of interest upon the promissory notes mentioned in the decree at a greater rate than seven per cent. per annum from the maturity of the said notes respectively, by the Defendant Brewster.

Second. The Court below erred in decreeing the payment out of the proceeds of the sale ordered in the decree, of interest upon the said promissory notes at any greater rate than seven per cent. per annum from and after the maturity of the said notes.

Third. The said notes contain no express contract to pay interest after their maturity. The rate of interest specified in them respectively, refers to and is limited and controlled by the time specified for its payment. No interest can therefore be recovered upon them from and after the time of their maturity, except as damages for the non-payment of principal when due, and, as such, only at the rate fixed by statute in the absence of an express contract, viz: seven per cent. per annum.

Authorities: *Rev. Stat. p.* 155, *chap.* 35; *Bander vs. Bander*, 7 *Barb. S. C. Rep.* 560; *Macumber vs. Dunham*, 8 *Wend.* 553; *U. S. Bank, vs. Chapin*, 9 *Wend.* 471; *Ludwick vs. Huntzinger*, 5 *Watts & Serg.* 51, 60—*also cited in note to Chitty on Bills*, (11*th Am. from* 9*th Lond. Ed.*) 682 *marginal paging. Clay vs. Drake, Minor*, 164; *Henry vs. Thompson*,

Minor, 209—*to be found also in 2d U. S. Dig. p.* 624, *secs.* 243, 244.

The following are the points and authorities relied upon by the Defendant in Error:

First. The rates of interest are clearly expressed in the terms of the promissory notes, and fixed by the contract of the parties, which the parties were competent to do, and the rates agreed upon are legal and valid by the provisions of our Statute. *See R. S. p.* 155, *chap.* 35.

Second. It is the duty of the Court to construe the contract and give it effect according to the intention of the parties at the time of making it as gathered from the face of the instruments. *Story on Contracts, p.* 556, *secs.* 633, 634; 7 *Barbour's S. C. Rep.* 560—*cited by Plaintiff in Error; Chitty on Contracts, p.* 74, (7*th Am. Ed.*)

Third. If the terms of the notes are ambiguous, or the intention of the parties appear from the face of the notes doubtful, they are to be taken and construed by their terms most strongly against the maker. See (9*th and* 12*th edition*) *Chitty on Bills, p.* 682—*Note; Chitty on Contracts, p.* 95, *and notes.*

Fourth. The terms of the notes and the manifest intention of the parties were a contract on the part of the maker to pay the respective rates of interest mentioned in the notes, as well after maturity as before, until the principal sum should be paid. 15 *Wendell's Rep. p.* 76, *Fake vs. Eddy's Exec'rs.*

Fifth. That the judgment and decree of the Court below was correct and well supported by the evidence appearing from the notes and mortgage.

Brisbin & Bigelow, Attorneys for Plaintiffs in Frror.

Ames & Van Etten, Attorneys for Defendant in Error.

By the Court.—Chatfield, J. Wakefield, the Defendant in Error, brought his action and obtained judgment in the District Court against Brewster and others, the Plaintiffs in Error, for the foreclosure of a mortgage and sale of the mortgaged premises. The mortgage was given to secure the payment of two promissory notes, bearing date July 11th, 1854, and pay-

able twelve months after date. One of the notes was for the sum of $5,583 75, with interest at the rate of twenty per centum per annum; the other note was for the sum of $2,000, with interest at the rate of two per centum per month. Upon the assessment of the amount due upon the notes, the Plaintiff below claimed to be entitled to interest on the notes at the rates specified in them, respectively, from their date to the time of judgment. To the allowance of such interest, Brewster—who was the mortgager—objected, and insisted that interest on each of the notes should be computed at the rate specified in it from the date of the notes to maturity, and that after maturity interest should be computed at the general legal rate of seven per centum per annum. The District Court overruled the objection, and allowed to the Plaintiff below interest on each of the notes at the rate specified in it from the date thereof to the time of judgment. Brewster excepted, and removed the case to this Court by writ of Error. The exception stated presents the only question to be determined by this Court in the case, and is simply this: Does the rate of interest specified in a promissory note cease at the maturity of the note?

The question must be solved by the application of the provisions of the statute "of the interest of money" to the terms of the contracts contained in the notes. That statute contains only two short sections, in these words:

"SECTION 1. Any rate of interest agreed upon by the parties "in contract specifying the same in writing shall be legal and "valid.

"SEC. 2. When no rate of interest is agreed upon or speci- "fied in a note or other contract, seven per centum per annum "shall be the legal rate."

The two prominent ideas that strike one in analyzing this Statute are these: That the legal or general rate of interest —seven per centum per annum—is to be applied only "when no rate of interest is agreed upon or specified in a note or contract;" and if any rate is specified in the contract or note—it matters not what it may be—it is valid, and consequently to be applied to the demand. The Statute contains no limit as to the time during which the rate agreed upon in the contract shall run. Consequently, if there is any such limit it must result from

the operation of some controlling legal principle. Is there any such principle properly applicable under the provisions of our Statute?

Interest is but an incident to the debt that bears it—a rent that the debtor pays for the use of his creditor's money. The power and influence which money confers upon its owner has hitherto induced restrictions upon the rates of use, and even absolute prohibitions beyond certain rates, under severe penalties and forfeitures, by legislative enactment. It seems to have been the purpose and design of our Statute to sweep away all such obstacles in the way of contracts for interest, and to leave parties making them free from all legislative guardianship. It is based upon the principle that if a person is competent to contract at all, he is as competent to contract for the rate of interest as for the use of a horse or for rent of land or any other matter within the scope of legal and moral contracts between one person and another. In my view of the design and effect of our Statute, contracts in writing, by which one person agrees to pay a specified rate of interest on a debt due or to become due to another, should be construed by the same rules of legal construction which are applied to every other contract in writing between parties. The intention of the parties should, when clearly manifest upon the face of the contract, control its legal effect and the rights of the parties under it; but when the intention is not clear, the contract is to be construed most strongly against the promissor, and especially so if a different construction results in allowing a person to derive a benefit from his own breach of faith and moral delinquency.

What was the intention of the parties to the notes in this case in regard to the time when the rate of interest specified in them should cease? Did the maker of the notes intend or expect that the rates of interest mentioned in the notes should cease at their maturity? I cannot think so. But suppose *he* did. How was it with the other party—the payee? Is there anything in the contract to show that he designed or anticipated that his rate of interest on the debt was to be reduced to a lower rate after maturity than it bore before it was due? Such an idea is hardly supposable. If any such conclusion is to be drawn from the contract, it must be by implication: for certainly it

is not so expressed; and the implications to be drawn from construction must be against, not the promissee, but the promissor: and the implication to be made against him in solution of any doubt arising out of the terms of the contract, is that the parties intended that the rates of interest specified in the contract should run upon the debt until it should be paid. Such construction is not at all inconsistent with our Statute, but, in my view, strictly conformable to it. It is the rate agreed upon by the parties—the stipulated value of the use of the money—the specified rate of interest in the notes, which excludes the application of the general legal rate.

The rate of interest on money is a proper and lawful subject of contract. It always has been so, but generally under more or less statutory restrictions. Now, here it is as free from such restrictions as is the price or use of property of any kind. In this state of the subject of interest, a written promise to pay a given sum of money, with a specified rate of interest, on some future day, certainly seems to bear a two-fold aspect:—first, that the debt—the incident as well as the principal, shall be paid by the day; second, that the debt shall bear a specified rate of interest as its incident. The debt and its incident are co-existent. No change is to be presumed. In the absence of any action of the parties, no rule of law should—nor do I think any does—intervene to sever one from the other. The agreement fixing the rate of interest on the debt overrides and supersedes the application of general statutory rate, so long as the debt to which the agreed rate is fixed, or any part of it exists: for the Statute is, by its terms, subservient to and must be controlled by the agreement of the parties.

This construction is directly supported by the rule for computing interest upon contracts for the payment of money bearing interest at a maximum rate allowed by statute. In computing interest on such demands, no rest is made at their maturity. If the contract to pay interest ceases at the maturity of the debt, and the subsequent interest is allowed only in virtue of the statute, then a rest should be made at such maturity and the whole amount of the debt and interest then due should bear interest from the time at the statutory rate. Such has never, to my knowledge, been the rule of computation of in-

terest on such demand; but the rule has been, to compute the interest on the principal debt from its date to the time of payment or judgment—a rule founded upon the contract, and not on the statute allowing interest.

As well might it be said that a tenant holding over after the expiration of his term should not pay rent at the rate reserved in the lease under which he entered, and should be liable to pay only the reasonable value of the use, as that the maker of the note under our Statute be liable to pay the rate of interest on his debt over-due which he by his written promise agreed it should bear before maturity. They both stand upon the same principle. The tenant refuses to surrender at the expiration of his term, and for that reason he will not pay the rate of rent agreed upon in the lease, and insists upon a right to be discharged by payment of a less rate upon a mere legally implied promise to pay the value of the use and occupation; the maker of a note refuses to pay it at maturity, and for that reason insists that he is discharged from his agreement to pay interest, and the payee entitled only to the legal and less rate. Such a principle and rule has never been tolerated between landlord and tenant, and never should be allowed to prevail between the promissor and promissee in a contract for the payment of interest for the use of money.

The moral influences and effects of such a rule if allowed to prevail are in all respects deleterious and reprehensible. The rule, if applied to contracts made in view of our Statute, offers a premium upon bad faith and allows persons to reap rich harvests of wealth out of their own violated promises and forfeited pledges; it allows them to avail themselves of benefits derived from their own wrongs, and to enjoy them. To such a doctrine I cannot assent, in whatever form it may arise.

The cases cited by the Plaintiff in Error upon the argument seem to have arisen under the influence of statutory limitations and restrictions upon contracts for the interest of money—an influence the like of which does not prevail here. There it would seem that the statutes control the contract beyond the specified limit of interest: here the statute has no application to or effect upon the agreement to pay interest, for it is only in the absence of any agreement that the statute has any ope-

ration. I am constrained to think that agreements made in view of our statute of interest stand upon another and different principle from the cases cited and which arise under statutory restrictions. There the statutes controlled the agreement: here the agreement prevails over the statute.

The only case cited that bears any close analogy to this is that of *Ludwick vs. Huntzinger*, 5 *Watts & Seargent's Rep.* 51. That case would seem to be within the principle contended for by the Plaintiff in Error. While I hesitate and regret to differ with the eminent Court who pronounced that decision, I am constrained to question the correctness and propriety of the principle upon which it rests—a principle that changes the terms of a lawful contract between parties; and I seriously doubt whether that Court would have applied the doctrine and rule of that case to one like this—to a case in which the effect would be to diminish the liability of the promissor and give him a direct and material benefit as the result of a violation of his promise. If that case is to be considered as founded upon an established doctrine fixing an inflexible rule applicable to all cases, whatever the consequences may be, and upon whomsoever they may fall—overriding the old sacred and salutary maxim that no man shall be allowed by the law to derive a benefit by the commission of a wrong or neglect of a duty,—then I cannot consent to adopt or follow it as a precedent, or sanction its moral or strengthen its force.

In my opinion, the judgment of the District Court should be affirmed.

THE MINNESOTA AND NORTH WESTERN RAIL ROAD COMPANY, Appellants, *vs.* EDMUND RICE, Respondent.

APPEAL FROM THE DISTRICT COURT OF DAKOTA COUNTY.

Edmund Rice, the Plaintiff in the Court below, brought sui

in the District Court of Dakota County, against the Defendants, "The Minnesota and North Western Rail Road Com-"pany," for trespass upon certain lands in said County belonging to the Plaintiff, and for cutting down and carrying away certain trees from off said lands, for which he claims damages in the sum of twenty-two hundred dollars.

The Defendants, in their answer, set forth the act of the Legislature of the Territory of Minnesota, entitled "An Act to "incorporate the Minnesota and North Western Railroad "Company," approved March 4, 1854, and state that at the time of the alleged trespasses, said act was in full force, and that the said Company had duly accepted the said Charter and given notice thereof to the Governor of the Territory; that they had opened books and received subscriptions to the capital stock of said Company, of which ten per cent. had been paid.

The Defendants further set forth in full the act of Congress, entitled "An Act to aid the Territory of Minnesota in the con-"struction of a Rail Road therein," approved June 29th, 1854.

That afterwards, the said Defendants had fully organized by the election of Directors, &c., as required by the said Charter.

They further set forth in their answer, "An Act to amend "an act entitled an act to incorporate the Minnesota and North "Western Rail Road Company," which act was passed by a two-thirds vote in both branches of the Territorial Legislature, February 17, 1855.

Also, "An Act granting an extension of time to the Minne-"sota and North Western Rail Road Company, and for other "purposes," approved March 1, 1856.

The Defendants further state that this last act was duly accepted by said Company, and notice of such acceptance given to the Governor, and that on the 20th day of October, 1855, and while the parcels of land upon which the trespasses mentioned in the complaint are therein alleged to have been committed, were the property of the Government of the United States, the said Defendants had caused a survey of the route of said Rail Road to be made, within the limits of the route contemplated by said act of Congress and of the Territorial

Legislature, and had located said route between Saint Paul and the Southern line of said Territory; and that the same passed over and across the property upon which the said trespasses are alleged to have been committed. That the said parcels of land being parts of sections designated by an odd number, upon the line of said road, were, at the time of said survey and location, portions of sections granted to said Territory by said act of Congress. That the Plaintiff had purchased and entered said lands of the United States Government on the 1st day of January, 1856, and long after such location and survey.

And the Defendants justify the alleged trespasses mentioned in the complaint, as being incident and necessary to the construction and location of said Rail Road, and aver that they had the lawful right to enter said lands, and to cut down and carry away the trees from the track of said road.

The Plaintiffs, in their Reply, allege that after the officers and directors of said Company were elected and had entered upon the discharge of their duties, but *before* the said trespass was committed—to wit: on the fourth day of August, 1854, the said act of Congress referred to in the answer, was repealed by an act of Congress entitled "An Act for the relief of "Thomas Bronaugh, and for the repeal of the act to aid the Ter- "ritory of Minnesota in the construction of a Rail Road "therein."

The Defendants demurred to this Reply, because the act of Congress therein set forth is void and of no effect so far as it relates to the repeal of the act approved June 29, 1854, set forth in the answer.

The District Court (Judge Chatfield) overruled the demurrer, and judgment was afterwards entered in favor of the Plaintiff, the damages to be assessed by a writ of inquiry.

The Defendants appealed to the Supreme Court.

Points and authorities relied upon by the Appellants:

First. By the act of Congress approved June 29, 1854, granting certain lands to the Territory of Minnesota to aid in said Territory in constructing a Rail Road, the Territory, "*eo instanti*," upon the passage of the act, acquired an interest

and property in the lands granted, which the Territory could grant and convey.

Second. By the act of the Legislature of Minnesota, approved March 4, 1854, incorporating the Minnesota and North Western Rail Road Company, the said Company acquired an interest and property in all the land subsequently granted by Congress to the Territory for the purposes of the Road; which interest became vested in said Company immediately upon the passage of the act of Congress and the organization of the Company.

Third. The second section of the act of Congress, passed August 4, 1854, repealing the first mentioned act of Congress, is repugnant to the Constitution of the United States, and also to great and fundamental principles which have been recognized as binding from time immemorial, wherever the Common Law prevails.

Points and authorities relied upon by the Respondents:

First. No title to the lands granted by Congress by the act of June 29, 1854, vested in the Territory of Minnesota, or could vest.

Second. The Defendants acquired no rights under the act of incorporation and the act of Congress.

Third No rights having vested, Congress could resume the grant, and the repealing act was valid and effectual.

Geo. L. Otis, Counsel for Appellants.

I. V. D. Heard, Counsel for Respondent.

The judgment of the District Court was reversed.

[No opinion on file.]

JAMES M. WINSLOW, Plaintiff in Error, *vs.* WILKINSON & BABCOCK, Defendants in Error.

ERROR FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The Defendants in Error brought their suit in the Court below, to recover from James M. Winslow the sum of three hundred and fifty dollars, a balance alleged to be due them for professional services rendered as the Attorneys and Counsel of the said Winslow.

The Complaint set forth that the account originally accrued with the firm of Wilkinson, Babcock & Brisbin, who were co-partners from December 13, 1853, until May 1, 1855, when said firm was dissolved, except so far as relates to the unfinished business which said firm had on hand at the date of its dissolution.

That said Wilkinson & Babcock had been engaged in business as co-partners since the dissolution of the old firm, and that said account had been duly assigned by the old firm to the new, of which assignment the Defendant had notice, and that they were now the lawful owners and holders of said account.

Judgment was rendered against the Defendant by default.

Points and authorities relied upon by Plaintiff in Error:

First. The Complaint of the Defendants in error does not show that the firm of Wilkinson, Babcock & Brisbin and the firm of Wilkinson & Babcock were both in existence at the time of the supposed assignment, so that there was one party to transfer and the other to receive. *Vide Chitty on Contracts*, 107.

Second. The Complaint must show the right and title of the Plaintiff in the thing sued for, and for that purpose, as that right is derived through the medium of assignment, the Complaint must show that there were competent parties in existence to make such assignment.

Third. But if it was admitted that the two firms existed at

the time of the assignment, still as the two firms were composed of some of the same parties, they could not make the assignment, because there would be only in effect an assignment of one to himself, and, therefore, bad because no action could be brought by one firm against the other, as it would be but an action by one against himself, which cannot be done. *Vide Niven vs. Spickerman*, 12 *Johns. R.*, 401.

Fourth. The Complaint does not state that the assignment is by deed or on any consideration, and, therefore, is bad because the subject matter of the assignment is a *chose in action*, and can only be assigned by deed or upon consideration, it not being susceptible of delivery. 2 *Bl. C.* 441, 442, 449, (*n.* 18,) 2 *B. and Ald.*, 551; 1 *Madd. Ch. Pr.*, 434; 2 *Kent's Com.*, 439; 2 *Johns. Rep.*, 52; *American Eqt. Digest*, 965; 2 *L. C. in Eqt.*, 2 *Pt.*, 233–4. *See, also, Gould's Pl. Ch.* 4, *Sec.* 27; 6 *East.*, 567; 8 *Ib.*, 7. The allegation that the account was duly assigned has no legal force, as the word duly has no legal effect, it but affirming matter of law instead of fact, and, therefore, not traversable. *Gould's Pl., Ch.* 4, *Sec.* 29; 9 *Co.* 250, *A.* The Complaint should have alleged that the assignment was upon consideration or by deed.

Fifth. No defect in substance is waived by letting judgment pass by default. 1 *Chit. Pl.* 674, (*old paging*;) *R. S.* 337, *Sec.* 65.

Sixth. A writ of error lies from a judgment by default. 1 *Chit. Pl.*, 674; 9 *Wend. R.*, 149; *Organic Act M. T.*, *Sec.* 9; *R. S.* 285–6, *Sec.* 4, 5, 6; *Amend.*, *p.* 5, *Sec.* 3, *p.* 13, *Sec.* 51.

Points and authorities relied upon by Defendants in Error:

First. Every action under the code must be brought and prosecuted in the name of the real party in interest, except as otherwise especially provided. *Stat. Minn.*, 333, *Secs.* 27, 28, *and Willard's Eq.*, 460.

Second. Where the contract or *chose in action* upon which suit is brought has been assigned to the Plaintiff, the only facts necessary to be stated in the Complaint with regard to the assignment are those which show that there has been a change of interest, and that the Plaintiff is the real party in interest; and it is not necessary to state compliance with every partic-

ular requisite to render that change effectual. *Hall vs. Southmayd*, 15 *Barb.*, (*Sup. Ct. N. Y.*,) 473; *De Forest vs. Fray*, 6 *Cowen* 151, (*A. D.* 1821;) *Perkins vs. Parker*, 1 *Mass.* 117, (*A. D.* 1804; *Prescott vs. Hall*, 17 *Johns.* 285, (*A. D.* 1820;) *Bailey vs. Johnson*, 9 *Cowen*, 115, (*A. D.* 1826;) *Voorhies' Code* (1855) *p.* 97, *a. b. c.* 167, *d. e. f.*; *Martin vs. Karouse*, 2 *Abbott Pr. Rep.* (*N. Y.*) 330, 333, (1855;) *James vs. Chalmers*, 5 *Sandford* 52, (*N. Y.*;) *Clark vs. Downing*, 1 *Smith* (*N. Y.*) 506; *Woodbury vs. Sackrider*, 2 *Abbott Pr. Rep.* (*Jan.* 1856) 403, 405; *Littlefield vs. Stoney*, 3 *Johns.* 425.

Third. An assignment, by the very definition of the word, is a transfer or making over to another of one's whole entire interest, whatever that interest may be; the assignor parting with his whole entire interest, the assignee assuming his place. 1 *Pars. Cont.* 199, *n. q.*; 1 *Stephen Com.* 485; 1 *Bouviers' Dict.* 133–4.

Fourth. The mere delivery of the written evidence of a debt with an intent to transfer the debt itself is sufficient to prove and constitute an assignment; and any transaction which indicates the intention of parties to pass the beneficial interest in the instrument, *chose in action*, or indebtedness from one to another, is sufficient to transfer that interest. *Vol.* 2 *Leading Cases in Equity* (*How. & Wallace's notes*) *part* 2*d*, *p.* 232; 24 *Pick.* 27, 10 *Met.* 180; 5 *Greenlf* 349; 5 *Shepley*, 327; 1 *Story's Eq. Jurisp.*, *Sec.* 353; 2 *Story's Eq. Jurisp.*, *Sec.* 1040, 1047; *Willard's Eq.*, 460, 462; 4 *Blckfrd*, 380; 3 *Smede & Marsh*, 647; 1 *Smith* (*N. Y.*) 273.

Fifth. An allegation or proof of valuable consideration for an assignment is necessary to be made only when a defence is set up, which, unless the Plaintiff were a holder *bona fide*, and for value would conclude him. *Voorhies' Code* (1855) 97 *C. Burnett vs Lynne*, 2 *Abbott*, 79; *James vs. Chalmers*, 5 *Sandford*, (*N. Y.*) 52.

Sixth. A present indebtedness can be assigned whether the proof of that indebtedness rests in a book account, bill, note, or otherwise in parol; and no special forms or mode are prescribed by which that transfer is to be made. *Jones vs. Witter*, 13 *Mass.*, 304; 1 *Pars. Cont.*, 197 *and note e.*; *Chitty Cont.*, (*9th Am. Ed.*,) 628, (537) *n.*; *Owings vs. Owings*, 1

Har. & Gill., 484; *Curtis vs. Norris*, 8 *Pick.* 280; 2 *Story Eq.*, *Sec.* 1046, 1040 *a. and note* 5; *Hoyt vs. Thompson, et. als.* 1 *Selden*, 347, (*A. D.* 1851.)

Seventh. The Complaint states facts sufficient to constitute a cause of action; and although it shows that the assignment was between firms which had some partners in common that assignment would be valid in equity as between the firms, and is valid as law at to third persons. 10 *Humph.* 412, *Burnham vs. Whittier*, 5 *N. H.*, 334; *Stat. Minn.*, *p.* 339, *Sec.* 75, *Collyer Partnership*, *Sec.* 644; 1 *Parsons Cont.*, 139, *Z. A.* 140, 141, *a.*; 12 *Ohio*, 300; *Englis vs. Farniss*, 2 *Abbott*, 333; *Story Partnership*, *Sec.* 222; *Stat. Minn.*, 341, *Sec.* 92.

De Witt C. Cooley, Counsel for Plaintiff in Error.

Charles T. Cotton, Counsel for Defendants in Error.

[The judgment of the Court below was affirmed with costs, but no opinion is to be found on file.]

Oliver Ames *vs.* William Boland, et. al.

There are but two modes by which a cause can be removed from a District Court to the Supreme Court, to wit: by Appeal and by Writ of Error.

In case of final judgment in the District Court, a party may elect which of the two modes he will pursue. If the grievance rests in an appealable order, the only remedy is by appeal.

The jurisdiction of the Supreme Court of this Territory is appellate only, except as provided by law.

There must be some decision, judgment, decree, or appealable order, in the Court below, before the Supreme Court can acquire any jurisdiction of a cause.

A reserved case brought to the Supreme Court by agreement of Counsel, upon which no judgment was rendered in the District Court, cannot be examined in the Supreme Court. Their judgment must be one of affirmance, or reversal, of the judgment below or a modification of a judgment.

A consent, stipulation or agreement of parties may waive error, but will not confer jurisdiction.

Ames v. Boland. et. al.

This cause came to the Supreme Court upon a statement of an agreed case, from the District Court of Ramsey County. It seems that Oliver Ames, the Plaintiff below, brought his action against the Defendants, to recover certain pine logs which, he alleged, were wrongfully detained by the Defendants.

The Answer denies the wrongful detention, but alleges that they had a lien upon the logs for services performed by them in cutting and rafting the same for one Jesse M. Ayers, a former owner of the raft. The Plaintiffs in their Reply put all the matters of defence in issue.

It appears further that the parties went to trial, and all the evidence offered at the trial is presented in the papers in the Supreme Court.

After the close of the evidence in the District Court, it was agreed by the Counsel for the parties respectively, that the Jury should, as a matter of form, return the verdict for the Plaintiff, "and if, upon the whole case, the Supreme Court "shall be of the opinion that the Plaintiff was entitled to the "verdict, judgment should be entered therein, in his favor. "If otherwise, such judgment or judgments shall be entered "for the Defendants, if any, as may in the opinion of the Court "be authorized by the law and facts of the case."

This agreement was signed by the Attorneys for the respective parties, and certified by the Judge as "a true statement "of the above case as reserved by me."

The Clerk of the District Court sends up the pleadings, evidence and this certified statement, and the same compose the record in the Supreme Court.

On motion, the cause was stricken from the Calender, upon the grounds stated in the opinion of the Court.

Brisbin & Bigelow, Counsel for Oliver Ames.

Sanborn & French, Counsel for Boland, et. al.

By the Court—Chatfield, J. The record in this case shows that there is not in the case either an Appeal or Writ of Error.

Can this Court take cognizance of the case? Is it within the Jurisdiction of this Court?

Chapter 81 of the Revised Statutes provides for the removal of actions from the District Courts to the Supreme Court by a party aggrieved. One mode is by Appeal. Another mode is by Writ of Error. In case of final judgment in the District Court, the aggrieved party may elect which of the two modes he will pursue. In case the grievance rests in an appealable order, and not in a final judgment, the remedy of the party is by appeal only.

Art. 1 of Chap. 69 of the Revised Statutes, defines and limits the jurisdiction of this Court, and declares it to be appellate only, (except as otherwise provided by law,) and extends it "to all matters of appeal, error or complaint from the decisions, judgments or decrees in all matters of law or equity, and may also extend to all questions of law arising in any of the "District Courts," in the cases prescribed in the three subdivisions of Sec. 4 of said article. The only cases within the exception contained in the said Section, and in which this Court can take or exercise any original jurisdiction, would seem to be the issuance of and proceedings upon writs of mandamus and prohibition.

There is not in this case any "decision, judgment or decree" upon which any "matter of appeal, error or complaint" can be alleged. There has not been passed in the District Court any decision or judgment at all, nor is it so pretended by either party, nor has either party brought any Appeal or Writ of Error in the case. Neither party knows what the ruling or decision of the District Court in the case would be, or whether or not he would be aggrieved by such ruling or decision. For aught he knows it would be for and not against him. The District Court not having made any decision, order or judgment in the case, there is no predicate for either an Appeal or Writ of Error. There being no predicate for either, neither has been taken, and it follows as an inevitable consequence that there is here no *lis pendens*—nothing of which this Court can take cognizance, or upon which it can adjudicate.

This will appear the more palpable by reference to the Statute prescribing the judgments to be rendered in this Court upon appeals. (*Sec.* 8 *of Chap.* 81 *of Rev. Stat., p.* 414.) The Supreme Court may, upon appeal, "reverse, affirm or modify

"the judgment or order appealed from in the respect men-"tioned in the notice of appeal." This Court cannot reverse, affirm or modify a judgment or order, unless there be one.

The only judgment that can be rendered in this Court upon Writ of Error is that of affirmance or reversal of a final judgment in the District Court. In the absence of such judgment in the District Court, there cannot be any Writ of Error, or any *lis pendens* in this Court upon a Writ of Error.

There being nothing in this case to which this Court can apply its appellate jurisdiction, no judgment can be rendered here in the case. Should this Court assume to render any judgment in this case, it must first arrogate to itself an original jurisdiction which it does not possess. The question which the case presents is simply this: Is the Plaintiff, upon the statement of facts contained in the case, entitled to judgment upon the verdict in his favor?—a verdict and statement upon which no determination has been had or judgment rendered. Such judgment, whichever way it may be, must be an original judgment—a judgment in the original action and to be rendered by the exercise and application of an original jurisdiction; such a jurisdiction as this Court does not possess. Such judgment cannot be rendered in this Court, nor can this Court render any such judgment in and for the District Court.

It is contended by the Defendants that Sec. 39 of Chap. 71, Rev. Stat., as amended, is sufficient in its terms to give this Court jurisdiction of this case, and confers upon this Court authority to determine the questions of law arising on the agreed state of facts and to render judgment accordingly. It is very clear to my mind that no such jurisdiction or authority is contained in, or to be derived from, that Section of the Statutes. That Section applies only to the District Courts, and is designed for the protection of parties litigant in those Courts, and for a proper hearing of and advisement upon the matters specified in the Section, in those Courts, and not elsewhere.

It is also contended that the stipulation contained in the statement of the case and signed by the Attorneys for the respective parties, by which it is agreed, in substance, that the Supreme Court shall determine what judgment shall be

rendered in the case, is sufficient to confer upon this Court jurisdiction and authority to determine the rights of the parties and render judgment. I do not think so. It is a familiar proposition that though the consent or agreement of parties litigant may waive error, it cannot confer jurisdiction. If the subject matter of the controversy be not within the jurisdiction of the Court, no agreement of the parties can bring it there. In this case the subject matter is still undetermined in the Court of original jurisdiction, and subject to the further necessary action of that Court to determine it, and so long as it thus remains, it is absolutely excluded from the jurisdiction of this Court.

Should this Court, or rather the members thereof, assume to pass upon the question raised and still pending in the case in the District Court, their action could only be advisory. While they might conclude what, in their judgment, ought to be done in the case, they would not possess any power to enforce their conclusion as judgment. In the absence of such power, this Court cannot consistently with duty or propriety take any action upon the matters on which the rights of the respective parties in the case rest.

This case must be stricken from the Calendar of this Court.

ALLEN PIERSE, Plaintiff in Error, *vs.* IRVINE, STONE & McCORMICK, Defendants in Error.

Parol Evidence is admissable to prove in what capacity a party writes his name on the back of a note—whether as endorser, guarantor or surety, when the controversy is between the original parties, or to determine the mutual liability of the endorser, when there are several.

And the admission of Extrinsic Evidence, to show the real intention of the parties and to explain the real nature of the contract, is no infringement of the Statute of Frauds: although such evidence alters the *prima facie* character of the instrument.

A party who writes his name upon the back of a Note at its inception (*i. e.* before it is delivered to the payees), for the purpose of inducing the payees to take the same, or "for the purpose of guaranteeing the payment" thereof, or becoming security to

the payees for the amount thereof, is liable as an original maker. The *facts* create the liability.

If the facts stated in a Complaint make the Defendant liable, it is unnecessary to inquire in what character his liability originated.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

A. Davis made his promissory note in writing, payable to the order of Irvine, Stone & McCormick, and delivered the note to Allen Pierse, who endorsed it and re-delivered it so endorsed to Davis, who, afterwards, and before maturity, delivered it to the payees.

They bring suit upon the note against Pierse, and allege in their complaint that he endorsed the note for the purpose of "guaranteeing the payment of the same, and becoming secu-"rity to the Plaintiffs for the amount thereof: and the Plain-"tiffs, relying upon such endorsement and guaranty by the "Defendant, paid the consideration for the same to Davis."

They also allege demand, protest for non-payment, and notice of protest given to Pierse.

The Defendant Demurred to the complaint,—

Because, The Plaintiffs are the payees of the note sued upon, and the title to the note cannot be transferred to the Defendant so as to make his endorsement effectual, except by the precedent endorsement of the Plaintiffs: in which event, the Defendant is the endorsee of the Plaintiffs, and no recovery can be had against him in their favor.

And because, The Defendant cannot be regarded as a guarantor of the note. When a party writes his name in blank upon a promissory note, he only agrees that he will pay the note to the holder on receiving due notice that the maker, upon proper demand, has neglected to pay it. The contract of the Defendant is that of an endorser, and a contract of a different kind cannot arise and will not be implied in conflict with the written agreement.

And because, The complaint, charging the Defendant as a guarantor and an endorser, improperly unites several causes of action.

The demurrer was overruled, and judgment ordered in favor of the Plaintiffs.

The following are the points and authorities relied upon by the Plaintiff in Error:

First. The contract of the Defendant is that of an endorser: and a contract of a different character will not arise and cannot be implied in conflict with the written agreement. *Seabury vs. Hungerford*, 2 *Hill*, 80; *Hall vs. Newcombe*, 3 *Hill*, 233; *Same vs. Same*, 7 *Hill*, 416; *Spies vs. Gillmore*, 1 *Comstock*, 321; *Ellis vs. Brown*, 6 *Barb.* 282; *Hall vs. Larme, et. al.* 5 *Denio*, 484; *Same vs. Same*, 2 *Comstock*, 553; *Brewster vs. Silence*, 4 *Selden*, 207; *Jackson vs. Sill*, 11 *J. R.* 201; *Nebb vs. Rice*, 6 *Hill*, 219; *Stevens vs. Cooper*, 1 *J. Ch.* 429. 1 *Spencer, N.-J. R.* 256; *Frea vs. Dunlap*, 1 *Greene*, 331; *Jennings vs. Thomas*, 13 *Smeade & Marshall*, 617; *Taylor vs. McCune*, 1 *Jones' Penn. R.* 460. [The last four cases are also cited in *Story on Promissory Notes*, 3d edition, section 134, and *note.*]

Second. The contract of the Defendant being that of an endorser, he is the endorsee of the Plaintiffs, and not liable to them. *Herrick vs. Carmer*, 12 *J. R.* 160; *Tillman vs. Wheeler*, 17 *J. R.* 326; *Ellis vs. Brown*, 6 *Barb.* 282.

Third. Conceding that the debt may be made liable in any event, he is charged in the complaint as a guarantor; and the complaint, showing his engagement—whatever it may have been—to have been contemporaneous with the inception of the note, he is liable as an original promissor, and not guarantor.

Fourth. Conceding the Defendant's liability under any state of facts, the complaint does not aver facts sufficient to charge him.

Fifth. Distinct causes of action are improperly united in the same count. *Rev. Stat. p.* 340, *sec.* 7; 2 *Code Rep.* 145; 4 *H. P. R.* 226; 5 *ib.* 172; 7 *Barb.* 80.

The points and authorities relied upon by the Defendants in Error are as follows:

The Defendant is not an endorser of the note on which the action is brought, in the legal acceptation of the term, but is a guarantor.

Such an endorsement as that made by the Defendant is a guaranty. *Campbell vs. Butler*, 14 *Johns. R. p.* 35; *Labron & Ives vs. Woram*, 1 *Hill's Rep.* 91; *Herrick vs. Carmer*, 12

Johns. 159; *Nelson vs. Dubois*, 13 *Johns. R.* 175; *Hall vs. Newcombe*, 3 *Hill*, 333—(*Opinion of* NELSON, *Ch. J.*)

The note is not, properly speaking, negotiable, and therefore the Defendant *cannot* be made an *endorser*, according to mercantile usage. *Dean vs. Hall*, 17 *Wendell*, 214.

If the Defendant is a guarantor he cannot object to the complaint, for the reason that demand and notice is not sufficiently alleged. *Brown vs. Curtis*, 2 *Comst.* 225; *Allen vs. Rightenmere*, 20 *Johns.* 365.

But even if the Defendant were an ordinary endorser the third ground of demurrer would not be tenable. The absconding of the *maker* and the use of due diligence are sufficient to excuse a demand. *Stewart vs. Eden*, 2 *Caines*, 121; *Galpin vs. Hard*, 3 *McCord*, 374; *Union Bank vs. Magruder*, 7 *Peters*, 287.

Several causes of action have been improperly united. *R. S. sec.* 61, *chap*, 70; *ibid*, *sec.* 83, *chap.* 70.

If any portion of the complaint is not in comformity with the Statute, because double, indefinite or uncertain, the remedy of the party defendant was by motion to strike out and not by demurrer. *Amendm'ts Rev. Stat's. p.* 9; *Weller's Exe'rs vs. Webster*, 9 *How.* 251.

Duplicity cannot be taken advantage of on demurrer. *Benedict vs. Seymour*, 6 *How.* 298; *Rev. Stat's. Minnesota, p.* 341; *Howell vs. Frazer*, *Code Rep.* (*N. S.*) *vol.* 1, *p.* 271; *Van Sant. Pl.* 175, 176, 181, *and cases there cited;* 9 *Howard*, 251.

WILKINSON, BABCOCK & BRISBIN, Counsel for Plaintiff in Error.

HOLLINSHEAD & BECKER, Counsel for Defendants in Error.

By the Court.—SHERBURNE, J. Demurrer to the complaint. On the 29th day of December, 1854, one A. Davis made his promissory note for the sum of four hundred dollars, payable to the Defendants in Error in ten days. This note, on the same day, and before delivery of the same to the Defendants, was endorsed by the Plaintiff in Error, by writing his name on the back thereof. And the complaint alleges "that he so endorsed

"said note for the purpose of guaranteeing the payment of the "same, and becoming security to the Plaintiffs (Defendants in "Error) for the amount thereof; and the Plaintiffs, relying "upon such endorsement and guaranty by the Defendant, paid "the consideration for said note to the said A. Davis." The complaint also alleges that, on the day on which the note matured, the Defendant (said Pierse), in writing on the back of said note, waived a demand on the maker and notice to him.

Is the endorser liable to the payees? The first question which I shall consider is: Whether it is competent to prove the purpose and intention of Pierse in endorsing the note, as understood by himself and the maker and payees. If it is competent to prove it, the fact is admitted by the demurrer: but if it is not competent, then the object and intention of the endorsing is not well pleaded, and therefore not admitted.

Ordinary commercial paper, in the hands of innocent endorsees, must be controlled as between the endorsees and original parties, by what is written; but to determine the mutual liability of the endorsers where there are several, it becomes often necessary to resort to extrinsic evidence—especially as to the priority of the endorsements. So, between the original parties, it is every-day's practice to prove facts effecting their rights; and this is done upon the question of consideration, though the evidence contradicts the tenor of the note. Take for example the various positions in which the parties might be placed in a case like this. Pierse signed his name, as he admits, to enable Davis to raise money from Irvine and others. They advanced their money upon the credit of his name. As to the equitable rights and obligations of the parties, then, there can be no question. Suppose the payees had afterwards endorsed the note, and their endorsee had collected it of Pierse, how would the case stand in an action by Pierse against the payees, to recover back the money paid? This is reversing the parties, but not the facts or principle involved; and yet to permit him to sustain his action upon such a statement would result in the violation of the original agreement and in reversing the real rights and obligations of the parties.

Suppose, again, that the name of Pierse had been written upon the note, at the request of the payees, after the same had

passed into their hands, for the purpose of giving them credit in the market, and they had brought this action without endorsing it. If he could not prove these facts, he would, according to the majority of the decisions, be subject to a gross fraud, and without any possible remedy: for, the better opinion seems to be, as will be seen hereafter, that, although a transaction like the one under consideration is always open to explanation, yet *prima facie*, the blank endorser is an original maker.

Suppose, again, that the entire transaction was for the benefit of Pierse, and that he received the whole amount of the note: —Can this fact be proved, or must he still be treated as second endorser, as he now contends? The statement of the question demonstrates its absurdity.

If this were the first time a court had been called upon to settle the questions involved in this controversy, my impression is that there would be so much doubt as to the intention of the parties that a court could not hesitate a moment in admitting testimony to explain it. It would presume that the name on the back of the note created a liability on the part of him whose name is there written, in a case like this: but to whom and for whom, in the absence of judicial decision, might well be a subject of doubt, and, at most, the name could only furnish *prima facie* evidence. The circumstances, therefore, under which it was written—the time when, at whose request, and for whose benefit—become material in arriving at the real intention of the parties and nature of the contract.

The Statute of Frauds does not affect a question of this character. The Chancellor, in the case of *Hall vs. Newcombe*, 7 *Hill's Reports*, 418, says: "The Courts have gone far enough "in repealing the statute to prevent frauds and perjuries, by in- "troducing parol evidence to charge a mere surety for the prin- "cipal debtor by showing that his written agreement means "something else than what upon the face it purports to mean." In this case, because "courts have gone far enough," the Chancellor goes back over a well-beaten track, and reverses all they have done. It is also assumed that the contract, as shown by the note, is that of a second endorser. No force of reasoning can prove this to be true. There is nothing in the case to show that the contract was not completed without the endorsement

of the payees. But it will be seen hereafter that in this very case the Chancellor impliedly admits that, in another way, the intention may be shown by extrinsic evidence.

But the subject has been too often adjudicated to be called in question at this late day. It would seem that if a uniformity of judicial decisions both in this country and in England, during the last forty years, has not quieted this question, there can be no hope of ever accomplishing such an end. In the following cases it was held, either directly or by necessary implication, that parol evidence could be introduced to explain the nature of a contract like the one under consideration:— *Moies vs. Bird*, 11 *Mass. R.* 436; *Sumner vs. Gay*, 4 *Pick. R.* 311; *Baker vs. Briggs*, 8 *id.* 122; *Chaffee vs. Jones et. al.* 19 *id.* 260; *Austin vs. Boyd*, 24 *id.* 64; *Josselyn vs. Ames*, 3 *Mass. R.* 274; *Sampson vs. Thornton*, 3 *Met. R.* 275; *Hunt vs. Adams*, 5 *Mass. R.* 362; *Powell vs. Thomas*, 7 *Mo. R.* 440; *Lewis et. al. vs. Harvey et. al.* 18 *Mo. R.* 14; *Colburn vs. Averill*, 30 *Maine R.* 317; *Irish vs. Cutter*, 31 *id.* 536; *Adams vs. Hardy*, 32 *id.* 339; *Beekwith vs. Angell*, 6 *Conn. R.* 315; *Laflin vs. Pomroy*, 11 *id.* 444; *Flint vs. Day*, 9 *Verm. R.* 345; *Nash vs. Skinner*, 12 *id.* 219; *Story vs. Pike*, 16 *id.* 554; *Sampson vs. Norton*, 17 *id.* 285; *Milton vs. De-Yampert*, 3 *Ala. R.* 648; *Jordan vs. Garnett*, *id.* 610; *Champion vs. Griffith*, 13 *Ohio R.* 225; 9 *id.* 39; 4 *Watts*, 448; *Story vs. Bearbane*, 2 *McMullin's R.* 313; 1 *Nott & McCord's R.* 129; 2 *McCord's R.* 338; 13 *Ill. R.* 682; *Martin vs. Boyd*, 11 *N.-H. R.* 385; 2 *La. R.* 248; 2 *Mich. R.* 555; *Crozier vs. Chambers*, 1 *Spencer*, 256; *Violett vs. Potton*, 5 *Cranch*, 142.

The earlier decisions of New-York were to the same effect. See *Herrick vs. Carmer*, 12 *John. Rep.* 159; *Nelson vs. Dubois*, 13 *id.* 175; *Campbell vs. Butler*, 14 *id.* 349; *Tillman vs. Wheeler*, 17 *id.* 326; *Prosser vs. Lugneer*, 4 *Hill*, 420; *Hoag vs. Strong*, 5 *Wendell*, 601.

Latterly, however, the Courts of that State have inclined to hold a party in the situation of the Plaintiff in Error as endorser only, and not as original maker or guarantor. See *Hall vs. Newcombe*, 7 *Hill's R.* 418; *Ellis vs. Brown*, 6 *Barb. R.* 282. But even in these cases it is difficult to see

how the reasoning of the Court can be consistent with itself upon any other principle than that of permitting the introduction of testimony to explain the transaction. The Courts, in commenting upon these cases, say, in substance, that if the original payees of the note had endorsed it to a third party, without recourse to them, it would have been available to them, because the endorsee might have recovered it of the party who put his name upon the back of the note at the time it was made. But the argument is, that he stands in the place of a second endorser, and is liable only as such. If this be so, then, immediately upon his paying the amount of the note to his endorsee, he would have a legal demand for the same upon the payees. What would be their defence? If there could be any defence under the decisions above cited, it would be, of course, that they had endorsed "without recourse." But the Plaintiff in Error being, as it is said, only second endorser, and only liable as such, the payees had no right to make a restricted endorsement, and he may prove that none such was made when he wrote his own name. The restricted endorsement would be a fraud upon him, if there were no other facts in the case: and that he might prove such fraud is too evident to admit of a doubt. There must be one step more taken upon the trial. The payees must prove that when the endorser put his name upon the note it had not come into their hands, but he put it there as surety for the maker, and that they took it with that understanding. If I understand the last two cases cited, the original intention of the parties may be carried out by following this circuitous path, but cannot in a plain, simple, direct action between the original parties. They do, however, sustain the uniform doctrine that, in some form, extrinsic evidence may be admitted to enable the Court to adjust the rights of the parties according to their original intention.

It seems to me, therefore, to be as well settled as any principle of law can be, that it would be competent for the original Plaintiffs to prove all they have alleged in their complaint. It is therefore admitted by the demurrer.

One great cause of the numerous litigated suits which have grown out of this subject has been—not that the endorser was not holden at all, but the diversity of opinion among the courts

as to the character in which he was holden. The prevailing doctrine is, that he is holden as original maker and surety for the promissor in the note, and therefore not entitled to the notice of a commercial endorser. See *Austin vs. Boyd*, and *Lewis vs. Harvey*, above cited.

In the earlier decisions of New-York, he was held as guarantor. See *Campbell vs. Butler*, 14 *John. Rep.* 349; *Nelson vs. Dubois*, *id.* 75. A few similar decisions are found in other States.

Others hold that he is only an endorser, and as such is entitled to be thus treated, but, upon the usual demand and notice, is liable directly to the payee of the note. *Spies vs. Gilmore*, 1 *Conn.* 321; *Seabury vs. Hungerford*, 2 *Hill's Rep.* 80. But in this case the note was made payable to the plaintiff or bearer, which may have been supposed to distinguish it from others. The distinction, however, if there is any, lies more in form than in substance.

But under our form of pleading it is unimportant in what character the plaintiff may be liable, if he is liable at all. The old forms and distinctions are abolished, and the plaintiff is required to allege in his complaint "a statement of the facts "constituting the cause of action, in ordinary and concise lan- "guage, without repetition, and in such a manner as to enable "a person of common understanding to know what is intended;" also, "a demand of the relief to which the plaintiff supposes himself entitled." (See *Revised Statutes*, section 60, page 337.) If the facts, then, which are stated in the complaint and admitted by the demurrer make the Plaintiff in Error liable to the Defendants, it is unnecessary to inquire in what character his liability originated. It would seem, however, that the reason of the case makes him liable as original promissor. His name is written at the inception of the note and before delivery. The object and purpose is to give the maker or principal credit with the promissees or payees. He writes his name at the same time and for the same purpose that he would have written it upon the face of the note as surety. Why should he be not so held? If his name had not been written until after the delivery of the note to the payees, and they had parted with their money, the act would have been void by the

Statute of Frauds. If, at that time, the promise and consideration had been in writing, it would have been a guaranty. But he now stands in no relation of guarantor. He is privy to the original consideration, and may for that reason be held as surety without resort to any ingenious and artificial expedients, if he is liable at all. See *Sampson vs. Thornton*, 3 *Met. Rep.* 279; *Irish vs. Cutter*, 31 *Red. Rep.* 536; *Colburn vs. Averill*, 30 *Maine Rep.* 317. There is not one fact in the case making him technically a commercial endorser, and it is unnecessary to speak of him as presenting that character. It is sufficient to say that the general tenor of the authorities of this country holding him liable in any event maintain that he is an original party to the note and liable as maker. This seems to me to be the correct doctrine. It can only be material when there is a want of demand and notice, which in this case are waived.

But there have been two or three late decisions in New-York which seem to sustain the view of the Plaintiff in Error, and to hold that in no event can he be liable in an action by the payees—*Ellis vs. Brown*, and *Hall vs. Newcomb*, *supra*.

The reasoning of the Courts in these cases proceeds upon the ground that the note itself shows *prima facie* that the original Defendant is a second endorser, and that to hold him as maker is to change the contract made by the parties into one made by the Court. But upon what ground can it be said that Pierse appears upon the note as second endorser? The presumption of law is that his name was written there at the inception of the note. (See 30 *Maine Rep. supra*, and cases there cited.) In this form it goes into the hands of the payees for a full consideration; they hold it till maturity and bring their action. It is certainly not very apparent how, under such facts, the payees can be made to stand in the place of the first endorsers. The note contradicts it, because they have not endorsed it—it contradicts it because they still hold it, and also because the name of Pierse was written at the inception. If it was not then written that fact may be denied, but in this case it is admitted.

The admission of parol evidence is not to enable the Court to make a contract different from that made by the parties,

but to explain to the Court the nature of the contract which the parties really did make. Pierse admits that he endorsed the note for the purpose of being surety for its payment to the payees: and yet the ruling in the case of *Ellis vs. Brown* will change that contract, admitted upon the record, and make Pierse liable only for the responsibility of the payees. This is making "judicial contracts" with a vengeance. This kind of paper is not new, and, judging from the reported cases, it must be in very common use. Two other causes are disposed of with this, involving a large amount.* The intention of the parties is in each case admitted by the pleadings. It is apparent and beyond all question that in each case the endorser considered his name as good to the promissee. But the late decisions of New-York which are referred to are invoked to relieve them of the responsibility which they assumed with a full knowledge of its extent, and to take from the payees, probably, the only names on which they had in good faith advanced their money. And yet one ground of these decisions, as before stated, is that Courts should not make contracts for the parties, but leave them as the parties intended. The principle is good, but the application destroys it. The one is inconsistent with the other. It has already been seen that even in these cases the courts do not hold the contract and intention of the parties as entirely void, but admit that the note may be made available by the payees if they will but endorse it without recourse. This admission undermines the entire foundation upon which the decisions rest. The decisions are based principally, as already stated, upon the assumed position that by the terms of the note the original Defendant (applying the decisions to this case) was holden only as second endorser, and the Court would not make a "judicial contract." And yet the Court suggests the above roundabout process of endorsing without recourse by which the endorser may be compelled to carry out the original understanding of the parties.

Whether these cases are supported by sound reasoning or not, they are insufficient to overturn the common-law of the land. Immense interests are involved in the question, and no

* William R. Marshall, et. al. Plaintiffs in Error, *vs.* James W. Simpson. James M. Winslow, Plaintiff in Error, *vs.* Boyden & Willard.

change should be made which will impair them. It is the duty of courts to determine what the law is, and not what they may please to have it. A legislature could change it, and make it prospective only; a court has no such power, and should never reverse a well-settled principle of law in which the interests of the people may be largely involved. As it now stands, the intention of the parties will prevail.

Judgment below affirmed.

ALEXANDER REY, AND MARSHALL & Co., Plaintiffs in Error, *vs.* JAMES W. SIMPSON, Defendant in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The questions arising in this case are similar in all respects to those in the case of Allen Pierse against Irvine, Stone & McCormick, *supra*. Rey made his note and delivered it to Marshall & Co., who endorsed it for the purpose of guaranteeing its payment, and immediately re-delivered it to Rey, who delivered it before maturity to Simpson, the payee—Simpson relying only upon Marshall & Co.'s guaranty.

The Defendants, Marshall & Co., moved to strike out those portions of the Complaint charging them as guarantors, which motion was denied, and judgment was subsequently entered in favor of the Plaintiff for want of an Answer.

Points and authorities for Plaintiffs in Error:

First. The contract of the Defendants (Plaintiffs in Error) was that of endorser, and a contract of a different character cannot arise, and will not be implied in conflict with the written agreement. The Defendants being endorsers, they are endorsees of the Plaintiff, and not liable to him. 17 *Johns.*,

376; 1 *Jones' Penn.*, 46; 17 *Wend.*, 214; *Story on Promissory Notes, Sec.* 134, *notes;* 2 *Hill*, 80; *Story on Bills, Sec.* 215; 3 *Hill*, 233; 11 *Johns.*, 201; 7 *Hill*, 416; 1 *Phillips' Ev.*, 547; 19 *Wend.*, 202; 6 *Hill*, 219; 6 *Barbour*, 282; 1 *Johns. Ch. R.*, 429; 1 *Comstock*, 321; 4 *Selden*, 207; 1 *Spencer, N. J.*, 256; 2 *Comstock*, 553; 1 *Green.*, 331; 5 *Denio*, 484; 13 *Sm. & Mar.*, 617; *Rev. Stat., p.* 268.

Second. The Complaint charges the Defendants as guarantors, and shows that the contract was contemporaneous with the inception of the note, and no construction of the authorities will charge them upon such fact otherwise than as original maker.

Third. In no view can the Defendants upon this Complaint be regarded except as endorsers, because, conceding that the written contract of the parties may be waived by a cotemporaneous parol agreement, facts are not stated in the pleadings from which the Court can infer the nature of the contract.

Fourth. The Complaint is double. If any contract besides that of endorsers is stated, it contains in the same count a contract of endorsement and of guaranty. They are distinct causes of action and should be separately stated. *Vide Rev. Stat., p.* 340, *Sec.* 7; 2 *Code Rep., p.* 145; 4 *H. R.*, 226; 5 *ibid.*, 172; 7 *Barbour*, 80.

Points and authorities for Defendant in Error:

First. The Plaintiffs in Error, William R. Marshall and Joseph M. Marshall as parties to the promissory note described in the Complaint, became and assumed the legal liability of guarantors and sureties for the payment of the same. *See* 14 *Johnson's Rep., p.* 349, *Campbell vs. Butter;* 1 *Hill's Rep., p.* 91, *Labran & Ives, vs. Woram;* 13 *Johnson's Rep., p.* 175, *Nelson vs. Dubois;* 9 *Mass. Rep., p.* 313, *White vs. Howland;* 11 *Mass. Rep.*, 436, *Mores vs. Bird;* 2 *Comstock Rep.*, 225, *Brown vs. Curtis;* 7 *Mass. Rep.*, 232, *Ulen vs. Kitridge; Story on Promissory Notes, Secs.* 479 *and* 480, *and notes on page* 641, 3*d Ed.; same, p.* 630, *Secs.* 475 *and* 476, *and notes; do., Secs.* 477 *and* 479, *p.* 638.

Second. The endorsement of the promissory note by Marshall & Co. at the time of the making, and before delivery

thereof, was an original undertaking on their part to pay the same, or at least to guarantee the payment thereof. [In support of this point, see the authorities above cited.]

Third. The endorsement by Marshall & Co. having been made at the date of the note, and before delivery, for the express purpose of giving credit to the maker and enabling him to negotiate the same to the payee thereof, renders them primarily liable as original parties to the note. 6 *Conn. Rep., p.* 315; 7 *Conn. Rep., p.* 310; 11 *Conn. Rep., p.* 440; 9 *Vermont Rep., p.* 345; 12 *Vermont Rep., p.* 219; 16 *Vermont Rep., p.* 554; 17 *Vermont Rep., p.* 285; 1 *N. Hamp. Rep., p.* 385; 2 *McCord Rep., p.* 388; 9 *Ohio Rep., p.* 39; 13 *Ohio Rep., p.* 328.

Fourth. The time and circumstances when and under which the note was made, endorsed and delivered, may be properly alleged and proved, to enable the Court to apply the law governing the same. See the authorities before cited, and *4th Watts' Rep., p.* 448; 9 *Ohio Rep., p.* 39; 2 *McLean Rep. p.* 553.

Fifth. The decision and judgment below is well sustained by the law of the case. [See authorities before cited.]

Brisbin & Bigelow, Counsel for Plaintiffs in Error.

Ames & Van Eiten, Counsel for Defendant in Error.

By the Court—Sherburne, J. This action is founded upon a promissory note made by one Alexander Rey on the 14th day of June, 1855, payable to James W. Simpson, the Defendant in Error, for the sum of $3517,08. Marshall & Co. endorsed their firm name on the back of the note before the delivery thereof to the payee; and it is alleged, substantially, in the Complaint, that they so endorsed the note for the purpose of becoming security with Rey, for the payment of the same to Simpson; that afterwards and before maturity, Rey delivered the same to Simpson for a valid consideration, and that Simpson took the same upon the credit of the firm name of Marshall & Co. It is also alleged that the note was duly protested for non-payment.

This is another of the cases which must follow that of Allen

Pierse, Plaintiff in Error, *vs.* Irvine, Stone & McCormick, decided at this term of the Court. The reasons given for the decision in that case, apply equally to this.

Judgment below affirmed.

JAMES M. WINSLOW, Plaintiff in Error, *vs.* BOYDEN & WILLARD, Defendants in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The Plaintiffs below, Boyden & Willard, brought their suit to recover $1,945 08, the alleged value of goods, wares, and merchandize, furnished by them to Messrs. Eaton & Denison, upon a letter of credit signed by the Defendant Winslow.

The Complaint contained three counts: the first upon the letter of credit, the second for goods sold and delivered at Defendant's request, and the third upon a promissory note for the amount of the purchase made by Messrs. Eaton & Denison, payable to order of Boyden & Willard, and endorsed by Winslow, before delivery to the payees. The facts creating his liability upon the note, are the same substantially, as are alleged in the cases of *Pierse vs. Irvine, Stone & McCormick*, and *Marshall & Co. and Rey vs. Simpson, ante pages* 369 *and* 380.

The Defendant demurred to the first and third counts in the Complaint; to the first, on the ground that it did not show a compliance, on the part of the Plaintiffs, with the terms of the contract, and to the third count, because the Defendant was only liable as second endorser on the note, and as the same was still in the hands of the payees, they could not maintain an action against the Defendant, and because the facts set up in the

said last count, do not change or alter the character of the liability of the Defendant from that of second endorser.

The District Court overruled the Demurrer, and Judgment was afterwards entered against the Defendant, for want of an Answer.

The following are the points and authorities relied upon by the Plaintiff in Error:

The Court below erred in overruling the Demurrer in this action, and in allowing judgment to be entered in favor of the Defendants in Error, for the following reasons:

The Complaint sets up three distinct and separate causes of action.

The Demurrer to the first cause of action, set up in the said complaint, was well taken, because the complaint does not show that the letter of credit, upon which the said first cause of action was based, was complied with on the part of the Defendants in Error.

The Complaint does show that the goods mentioned in the said Complaint were delivered to "Eaton & Denison."

The Complaint does not show that the goods mentioned in the said Complaint, were shipped or caused to be shipped by the Defendants in Error, to the Plaintiff in Error, as they were, by the terms of said letter of credit, bound and required to do.

It does not appear in the said complaint that the said Defendants in Error forwarded the bills of lading of the said goods to the said Plaintiff in Error, as the letter of credit required.

It appears in the said complaint that the said goods were sold to the said "Eaton & Denison," upon their individual credit, and not upon the credit of the Plaintiff in Error, and that the Defendants in Error took the promissory note of the said "Eaton & Denison," for the said goods, payable four months after the date thereof.

It does not appear that there has been any default in the payment of the said note, nor that the said note now belongs to the said Defendants in Error.

The Demurrer to the last cause of action set up in the said complaint was well taken, because,

First. The Plaintiff in Error is not liable as endorser of the said note to the Defendants in Error.

The Plaintiff in Error is second endorser, and the Defendants in Error are, in legal contemplation—

First. Endorsers of the said note.

Second. The Plaintiff in Error cannot be held in any other character than that of endorser of the said note and is not liable in this action.

The Defendant in Error, in giving credit to "Eaton & Denison," discharged the Plaintiff in Error, from liability, on the letter of credit. *Fillmore vs. Wheeler*, 17 *Johns.* 226; *Herrick vs. Carmer*, 12 *Johns.* 159; *Dean vs. Hall*, 17 *Wend.* 214; *Hough vs. Gray*, 19 *Wend.* 202-3; *Sealmy vs. Hungerford*, 2 *Hill* 80; *Webb vs. Rice*, 6 *Hill* 219; *Hall vs. Newcomb*, 3 *Hill* 233; *Hall vs. Newcomb*, 7 *Hill* 416; *Ellis vs. Brown*, 6 *Barb.* 282; *Spies vs. Gilmore*, 1 *Com.* 321; 2 *Com.* 553; *Cuzen vs. Chambers*, 1 *Spenc. N.J.R.; Fear vs. Dunlap*, 1 *Green Io. R.* 331; *Jennings vs. Thomas*, 13 *Sm. & Marsh.* 617; *Taylor vs. McCune*, 1 *Jones Penn.; Story on Prom. Notes, sec.* 134; *Story on Bills, sec.* 215; *Stevens vs. Cooper*, 1 *Johns. Ch. R.* 429; *Brewster vs. Silence*, 4 *Selden* 207; 5 *Denio* 484.

As to the letter of credit—17 *Wend.* 179; 8 *Wend.* 512-516; 4 *Wheaton* 225; 9 *Wheaton* 680-702; 5 *Johns.* 370; 10 *Johns.* 180; 8 *Bing.* 156.

The following are the points and authorities relied upon by the Defendants in Error:

First. There is no error in the record or proceedings of the Court below.

Second. It distinctly appears in and by the first count of the complaint of the Plaintiffs below, that the said Plaintiffs fully complied with, fulfilled and performed, on their part, all and every of the terms, conditions and provisions of the letter of credit therein mentioned, on their part to be kept, performed or done.

Third. It does not appear from the said complaint that the Defendants in Error have violated any of the provisions of the said letter of credit; but on the contrary, it does appear that they have not violated any of the said provisions.

Fourth. The fourth and fifth specified grounds of demurrer

to the first count of the said complaint, present no valid objection to the said count. *Holmes & Drake vs. D'Camp*, 1 *John. R.* 34; *Toby vs. Barber*, 5 *John. R.* 68; *Raymond vs. Merchant*, 3 *Cow. R.* 147; *Hughes vs. Wheeler*, 8 *Cow. R.* 77; *Monroe vs. Hoff*, 5 *Denio* 360; *Waydell vs. Luce*, 3 *Denio* 410; *Smith vs. Johnson*, 17 *John R.* 340; *Canning vs. Huckley*, 8 *John. R.* 202; *Burdick vs. Green*, 15 *John. R.* 247; *Murray vs. Governeur*, 2 *John. Cases* 438; *Hening vs. Sangre*, 3 *John. Cases* 71; *Schumuber vs. Louies*, 7 *John. R.* 311; *Johnson vs. Weed*, 9 *John. R.* 310; *Cole vs. Sackett*, 1 *Hill* 516; *Frisbie vs. Larned*, 21 *Wen.* 450; *Waydell vs. Luce*, 5 *Hill* 448.

Fifth. The third count of the said complaint is sufficient in law in all respects, and the demurrer thereto was properly overruled in the Court below. 1 *Parsons on Contracts*, (*2d ed.*) *pp.* 206 *and* 207; 17 *Wen.* 215, 5 *Mass.* 545; 3 *Mass.* 274, 11 *Mass.* 436.

Sixth. If either the first or third count of the said complaint is sufficient in law it fully supports the judgment of the Court below.

Wilkinson, Babcock & Cotton, Counsel for Plaintiff in Error.

H. R. Bigelow, Counsel for Defendants in Error.

By the Court.—Sherburne, J. The complaint contains three counts upon the same cause of action. There is a demurrer to the first and third counts.

It appears from the third count, that on the second day of June, 1854, B. L. Eaton and John A. Denison, made their promissory note for the sum of $1,945 08, payable to the defendants in Error, that before the delivery of the same to the payees, the Plaintiff in Error wrote his name in blank on the back of the same, and that he did so for the express purpose of giving the makers, Eaton & Denison, credit with the payees, and of becoming security for the payment of said note; and that afterwards before the maturity of the note, the makers delivered the same to the payees, the Defendants in Error, for a good and valuable consideration, they relying upon the name

of Winslow for their security. There is also an allegation of the usual demand and notice.

These facts present the same points which were raised in the case of Allen Pierse, Plaintiff in Error, *vs.* Irvine, Stone & McCormick, decided at this term, and the judgment below must be affirmed for the same reasons which were given in that case.

As the action may be sustained upon the third count, it is unnecessary to notice the objections to the first.

[Judgment affirmed.]

AMES & HOYT, Plaintiffs in Error, *vs.* GATEY, McCUNE & Co., Defendants in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

Gatey, McCune & Co., the Plaintiffs below, brought their suit against the Defendants, Ames & Hoyt, to recover the value of certain boilers and mill machinery furnished them by the Plaintiffs.

The Defendants answered, alleging defects in the boilers, &c., and charging damages, upon which an issue was joined, by the Plaintiffs' Reply. The testimony of the Plaintiffs was taken by commission.

Upon the trial of the cause, and after the introduction of the Plaintiffs' evidence, the Complaint was amended (upon terms) upon motion, by inserting certain words, "to make the Complaint conform to the evidence." A verdict was returned by the Jury in favor of the Plaintiffs. A motion for a new trial was made on behalf of the Defendants, which motion was refused, and the Bill of Exceptions forms part of the record in this Court.

It appears from the Bill of Exceptions, that the Commissioner who executed the Commission to take the testimony of

the Plaintiff, "had not appended his certificate to the Deposi-
"tion of *each* of the said witnesses as required by Rule 13 of the
"Rules of the said District Court, and had only appended a
"certificate at the close of the last Deposition."

The Defendants' Counsel objected to the reading of the Depositions on the trial of the cause, for the foregoing reason: the objection was overruled, and exceptions taken and noted.

Points and authorities of Plaintiffs in Error:

First. The Court erred in receiving the commission and the testimony introduced thereby, because the certificate of the commisssoner was not appended to each deposition, and because the commissioner omitted to certify that the several depositions were signed by the witnesses in his presence. *Vide Rev. Stat., Chap.* 95, *Sec.* 28; 3 *Pickering's Rep.*, 516; *Rule* 13, *Rules of District Court, M. T.; Packson vs. Hobby*, 20 *Johns. R.*, 357; *Smith vs. Randall*, 3 *Hill R.*, 495; *Fleming vs. Holenbeck*, 7 *Barbour R.*, 271; *Amory vs. Fellows*, 5 *Mass. R.*, 219; *Bradsheet vs. Baldwin*, 11 *Mass. R.*, 229; *Hallum vs. Field*, 23 *Wendall*, 38; *Bailey vs. Cochran*, 2 *Johns.*, 417; *Davis vs. Allen*, 14 *Pick. R.*, 313; *Mass. Rules No.* 11, 16 *Mass.* 73; *Barnes vs. Bull et. al.*, 1 *Mass.*, 73; *Pettibone vs. Denanger*, 4 *Wash. C. C. R.*, 215, 219; *Bodenim vs. Montgomery, ibid.*, 186; *Brideman vs. Kirk*, 3 *Cranch*, 293; *last three cases cited in Cowan & Hill's notes to Phillip's Evidence*, 3*d Ed., Part* 2*d., p.* 670, 672; 2 *U. S. Rev. Laws, p.* 67, 69; *Doane, King & Co., vs. McCunen & Co., District Court, First District; Converse vs. Barrows & Prettyman, District Court, M. T., Third District.*

Second. The Court erred in receiving testimony of the distinctive value of the articles enumerated in the complaint, and the error was not cured by the instruction of the Court to disregard it. *Monell vs. Parmala*, 1 *Comstock*, 519; *Myer vs. Molcon*, 6 *Hill*, 296; *Reporter's note, and case there cited; Clark vs. Vorce*, 19 *Wend.*, 232.

Third. The Court erred in allowing the amendment, as it substantially changed the claim of the Plaintiff. *Rev. Stat., p.* 340, *Sec.* 90.

Points and authorities of Defendants in Error:

First. The depositions of Samuel Gatey, John S. McCune, and Girard B. Allen, introduced on the part of the Plaintiffs below, upon the trial were competent evidence in the cause, and were properly received as such by the Court below. *See Rev. Stat., p.* 475, *Sec.* 29; 2 *Metcalf's Rep.*, 522, *Amherst Bank vs. Root et. al.;* 20 *Pickering Rep.*, 441, *Reed vs. Boardman;* 20 *Pickering Rep.*, *Buckhead et. al.;* 1 *Washington Rep.*, 372, *Barnet vs. Watson;* 4 *Johnson Rep.*, 130, *Bolte vs. Van Rooten.*

Second. The testimony given in chief on the part of the Plaintiffs below, to prove the value of the property, was properly received and admissible, because the same was competent and received before the complaint and answer were amended, and after the pleadings were amended by leave of the Court, to conform to the proofs contained in the depositions, the former evidence was excluded by the Court, and the jury instructed to wholly disregard it, because immaterial and unnecessary in the cause, and because the evidence contained in the written depositions, fully proved the cause of action and justified the verdict of the jury. *See Rev. Stat., p.* 340, *Secs.* 86, 87, 90, 92; 12 *Wendell, p.* 41, *Creary vs. Sprague & Craw; Same, p.* 504, *Beebe vs. Bull.*

Third. Allowing an amendment to the pleadings upon the trial was purely a matter resting in the sound discretion of the Court below, and that discretion was properly exercised in the cause. *See Rev. Stat., p.* 340, *Secs.* 86, 87, 90, *and* 92; 6 *Hill's Rep.*, 291, *Hill vs. Stocking*; 7 *Wendell's Rep.*, 345, *Reed vs. Drake.*

Fourth. The verdict and judgment below was fully justified and warranted by the evidence and law of the case.

Brisbin & Bigelow, Counsel for Plaintiffs in Error.

Ames & Van Etten, Counsel for Defendants in Error.

The judgment of the District Court was reversed, and a new trial ordered, upon the ground that the Commission was not executed in accordance with the requirements of Rule 13 of the District Court. (See Appendix.)

No opinion on file.

THE STEAMBOAT FALLS CITY, Plaintiff in Error, *vs.* NATHANIEL P. KERR, Defendant in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

Nathaniel P. Kerr, the Plaintiff below, sued the Steamboat Falls City, under Chapter 86 of the Revised Statutes of Minnesota.

The Complaint set forth that the "Plaintiff furnished and loaned to J. B. Gilbert, who was the master and manager of said boat and in command thereof, the sum of $416 51 in money, for the use of said boat, to buy and purchase stores and supplies for said steamboat: which sum was immediately laid out, expended and used in purchasing and furnishing stores, provisions and supplies for the use and benefit of said boat, and which were afterwards used on said boat to enable her to proceed in her usual business in carrying freight and passengers," &c.

That, at the time the money was so furnished, the Defendant, by one Jenkins, the clerk thereof, gave an acknowledgement for the same, payable at three days sight, directed to the Treasurer of the St. Anthony Falls Steamboat-Company (the owners of the Defendant); that the said Chase had accepted the same as such Treasurer, but that the same had not been paid upon presentment for that purpose; and that the said written acknowledgment was still in the Plaintiff's hands, ready to be delivered up, &c.

The Defendant demurred to the Plaintiff's complaint, upon the ground,—

First. That it did not show that the debt therein specified was contracted on account of supplies furnished for the use of said boat, nor for any other matter or thing specified in section 1, chapter 86 of the Revised Statutes.

Second. That the complaint shows that said debt was for money loaned the master of said boat.

Third. Because it shows that the Plaintiff received and accepted a negotiable draft or instrument for said indebtedness on C. L. Chase, and which was accepted by him, thereby merging and destroying any lien upon, or right of holding said boat, or making her a party to the action.

The District Court overruled the demurrer, and the following Opinion was filed by Judge SHERBUNE:

SHERBURNE, J. This is a demurrer to the Complaint. The Plaintiff claims to recover of the Defendant the sum of four hundred and seventeen dollars and fifty-one cents, for money advanced to the master and manager of said boat to purchase supplies for the same. The complaint alleges, in a clear and intelligible manner, that the money was advanced for the purpose of purchasing supplies: that it was immediately expended for that purpose, and that the supplies so furnished were actually used upon said boat to enable her to proceed on her usual business in transporting and carrying freight and passengers.

To this part of the complaint the demurrer raises the objection that, inasmuch as the Plaintiff advanced money only to purchase the supplies, and did not in fact furnish them by his own delivery, he does not bring himself within the authority of Section 1, page 437 of the Revised Statutes of this Territory. The language of so much of the Section as applies to this cause is, "that every boat shall be liable for all debts contracted by the master, &c. on account of supplies furnished for the use of such boat," &c. The facts alleged in the complaint being admitted by the demurrer, the simple question arises: Can a third party who advances money to a master to supply the necessities of the boat, when the money is actually expended for that purpose, maintain his action by force of the statute provision above cited? The boat having received the supplies and used the Plaintiff's money, the equity of the case is clearly with the Plaintiff. But the action in this form is unknown to the common law—is founded upon the Statute cited, and therefore, according to all rules of law, must be construed with some degree of strictness. This rule, however, does not go so

far as to compel a court to put such a construction upon a statute provision as to prevent its obvious meaning and intention.

A legitimate enquiry is: What did the Legislature that enacted the Law design to effect by it? This enquiry becomes necessary in the interpretation of all statutes, in order to determine clearly the meaning of the language used to harmonize what may seem contradictory, and explain that which is uncertain. If, in the passage of the statute law under consideration, the Legislature designed to enlarge the credit of boats, and at the same time protect the creditors by a simple statute-lien upon the boat in favor of the creditor, it seems obvious enough that the object was accomplished.

It is the duty of courts to give such construction to the several parts of the law as shall best carry out the intention of the Legislature and best subserve the interests of those intended to be aided by it. The language of the law is: "on account of supplies furnished for the use of such boat." Now, the most obvious meaning of this language is this:—If any person, by his money, his credit, or other means, supplies the necessities of the boat, he shall have a lien upon the boat to the extent of the credit given. It is a most narrow construction, as it seems to me, to say that he who furnishes the boat with money to purchase the necessary supplies is in a worse condition than he who in the pursuit of his ordinary business sells his goods to the boat for profit and gain.

The interests of the boat and of the owners of the boat are promoted, in a case of want of money to purchase supplies, more by the advancement of the money sufficient to obtain them than by a delivery of the necessary articles. In the usual course of trade, the supplies necessary to run a steamboat on the Mississippi waters would be necessarily purchased of many different persons and at different places. It would be a great inconvenience both to debtor and creditor, and sometimes impracticable, to divide and subdivide the indebtedness to an extent which would often be necessary in the business of the boat, if money could not be obtained instead of supplies. It requires no argument to show that the interest of all parties is best promoted by placing an amount of money in the hands

of the officers of the boat sufficient to make the necessary purchases.

The common law in this country, though not in England, gives to the master a lien upon the vessel for his necessary expenses, whether advanced in money or otherwise. See *Ingersol vs. Van Bokkelin*, 7 *Cowan's Rep.* 670; *Lane vs. Penniman*, 4*th Mass.* 92; *Newhall vs. Dunlap*, 14 *Mass. R.*. 182. And such is now the settled law in this country. 3 *Kent's Com.* 167, *and note.*

By the civil law the master, *or any other person* who fits out a vessel or *advances money for that purpose*, has a lien upon the vessel. (See authorities cited in 3 *Kent*, 168.) I find no distinction anywhere made between a case of furnishing supplies and advancing money for that purpose, nor can I perceive the least reason for it. It is fair always to presume that a legislature, when enacting laws upon any subject, has in view the common law upon the subject. If we take this view of it, the legislature which enacted this law, knowing that by the common law an authority to furnish supplies and create a lien necessarily included an authority to advance money for that purpose, must have intended that the provision in question should receive a similar practical and liberal construction.

An infant, under the age of twenty-one years, is liable for money advanced for necessaries for his use, and such is the settled law: and yet this doctrine is based exclusively upon the principle that the infant is liable only for necessaries. He is not, however, liable for money loaned to him to procure necessaries: and the reason given by the courts why he is not, is that he is presumed to be incapable of expending the money judiciously. (See *Comyn on Contracts*, *p.* 626, and cases there cited.) There can be no pretence in this case that the master of the boat was not quite as competent to purchase the necessary supplies as a stranger would have been, and the reason therefore applicable to the case of infants does not exist in this.

So, where the wife can render her husband liable only for necessaries, one who lends her money to pay for such necessaries may maintain an action against the husband. Starkie, in his work upon evidence, says "there seems to be no satisfac-

tory reason why one who has lent money to the wife (who has been turned out of doors by the husband), in order to provide her with necessaries, should not be entitled to recover it from her husband. 2 *Starkie's Ev.* 697. See also *Harris vs. Lee*, 1 *P. W'ms.* 482, cited in note, *p.* 698, same volume: in which it was held that one loaning money to the wife to pay for necessaries and surgeon's fees, stood in the place of the person furnishing the necessaries, and was entitled to recover. And yet the husband was only liable for necessaries, as the boat in this case is liable for supplies.

On the whole, I am satisfied that the objection is not well taken.

The complaint also shows that, at the time the loan was made by the Plaintiff, an acknowledgment, in writing, of the amount of the indebtedness of the boat on account of the loan, was made by the clerk of the boat and delivered to the Plaintiff, directed to the Treasurer of the proprietors of said boat, requesting him to pay the amount at three days sight; and that the same was accepted by the Treasurer, but has not been paid. It is objected by the demurrer that the acceptance of this instrument by the Plaintiff was a discharge of the lien upon the boat. I have decided otherwise in the case of Edward H. Beebe against the Steamboat "Iola", on a motion for a new trial.

The demurrer is overruled. The Defendant has twenty days to answer upon payment of costs of demurrer.

Judgment was entered for want of an answer, and the Defendants sued out a writ of Error.

[The points and authorities of the Plaintiff in Error are not on file.]

The following are the points and authorities relied upon by the Defendant in Error:

First. The complaint alleges and shows that the debt was contracted by the master and agent of the Defendant "on account of supplies furnished for the use of such Defendant, the Steamboat "Falls City," and sets forth a cause of action clearly

within the provisions of chapter 86 of the Revised Statutes of Minnesota. Moneys furnished the master or agent of a boat, for the express purpose of and used by him for "purchasing and furnishing stores and provisions to enable her to proceed on her usual business," are supplies within the meaning of that Act. See *Rev. Stat. p.* 437, *chap.* 86, *sec.* 1, *et seq.*; 3 *Kent's Com.* 170, *note* "b", and cases referred to; *Davies' Me. Rep.* 71, *David vs. Child; Wares' D. C. Rep.* 322, *The Paragon;* 2 *Gallis' Rep.* 345, *The Jerusalem;* 7 *Cowen's Rep.* 670, *Ingersol vs. Van Bokkelin;* 4 *Mass. Rep.* 92, *Lane vs. Penniman;* 14 *Mass. Rep.* 182, *Newhall vs. Dunlop.*

Second. The Plaintiff in his complaint alleges that he is ready to produce the draft or instrument mentioned therein, or to deliver the same to the Defendant, as the Court may direct: and relies solely upon his lien *in rem.* See 12 *Wheaton's Rep.* 611, *Ramsay vs. Allegre;* 9 *Miss. Rep.* 59; *Steamboat "Charlotte" vs. Raymond;* 6 *same*, 552, 555; 9 *same*, 64; 10 *Peters' R.* 532; 11 *John.* 513; 14 *John.* 404; 3 *Johnson's Cases*, 71; 5 *Wend.* 490; 7 *Hill*, 128; 10 *N. H.* 505; 5 *Barbour*, 398; 6 *same*, 244; 9 *Conn.* 23; 1 *McCord*, 94; 3 *McLean*, 265.

Third. The decision and judgment in the Court below were authorized by the law governing the case.

ATWATER & COWLES, Attorneys for Plaintiff in Error.

AMES & VAN ETTEN, Attorneys for Defendant in Error.

The judgment of the Court below was reversed in the Supreme Court, upon a point not raised in the District Court, to wit: that the contract set forth in the complaint was made and entered into without the limits of the Territory, and that chapter 86 Revised Statutes would not apply to such a contract, the remedy of the Plaintiff being against the owners of the boat. The Opinion was delivered by WELCH, Chief Justice, but was not filed.

NOTE.—I have given the Opinion of Judge SHERBURNE (District Court), as it bears directly upon the actual issues of the cause both in the District and Supreme Courts and seems to be a fair and impartial construction of the Statute therein referred to. The Opinion is founded upon the decisions of the Courts of Missouri and other States upon a similar statute.—*Reporter.*

MOODY & PERKINS, Appellants, *vs.* CHARLES L. STEPHENSON, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

One Joseph McAlpin had been arrested in a civil action, at the suit of Charles L. Stephenson, (Plaintiff below,) and was held to bail upon an undertaking, signed by Joseph Moody and Geo. D. Perkins, (Defendants below,) who became "bound "to the Plaintiff in the sum of $500, that the Defendant Mc- "Alpin, should at all times render himself amenable to the "process of the Court during the pendency of the action, and "to such process as may be issued to enforce the judgment "therein, in case the Plaintiff should recover judgment," &c.

The complaint sets forth this undertaking, and alleges that judgment had been rendered against the Defendant McAlpin, in said former action, and that on the 8th day of March, 1855, an execution had been duly issued against his property, which execution had been returned unsatisfied.

That an order had thereupon been made by the Judge of the District Court, requiring the Defendant McAlpin to appear before said Court, to make discovery on oath concerning his property, and forbidding any transfer, &c.

That the Sheriff made his return on said order, from which it appeared that the Defendant McAlpin, could not be found within his county.

That he did not render himself amenable to the said order, and did not appear in Court in pursuance thereof, and asks judgment against the Defendants, the sureties upon the said undertaking, for the amount of the indebtedness against McAlpin.

The Defendants in their answer deny, upon information and belief, the commencement of the action against McAlpin, and deny that McAlpin was duly arrested, but admit the arrest under the order of Court as set forth in the complaint, and that in consideration of his release and discharge from custody, they had executed the undertaking set forth in the complaint.

They deny that judgment was duly rendered against McAlpin, and allege that the judgment mentioned in the complaint was wholly void.

They further deny, upon information and belief, that an order of discovery was issued against McAlpin, or that the Defendant was returned as "not found," by the sheriff of said county, or that such return was endorsed on said order.

But deny that the Defendant McAlpin did not render himself amenable to the order of the Court issued to enforce the said judgment, and allege that he did render himself and was at all times amenable to the order of said Court in accordance with the conditions of the undertaking executed by the Defendants.

Upon motion, the Defendants' answer was stricken out, and judgment ordered in favor of the Plaintiff. The grounds of the motion to strike out will appear from the points of the Counsel for the Respondent.

The points and authorities relied upon by the Appellants are as follows:

First—The proceedings in the former suit of the Respondent *vs.* Joseph McAlpin, are a part of the record in this cause, and are made so by the averments of the complaint.

The complaint first alleges that on the 7th day of February, 1855, the Plaintiff below commenced an action against Joseph McAlpin & Co., and placed the summons in the hands of the Sheriff for service, and that it was duly served, &c.

That afterwards, on the 20th day of February, 1855, the Defendant, McAlpin, was duly arrested and held to bail under an order of Court in that action.

That the Defendants below, thereupon executed and delivered to the Plaintiff, the undertaking upon which this action was brought.

The allegation in the answer *denying* that the defendants below have *any knowledge* or *information thereof*, sufficient to form a belief as to the truth of the first allegation in the complaint, forms a good issue, and this form of denial is expressly authorized by Statute. *See R. S. p.* 337, *sec.* 66; 6 *Howard's Pr. Rep. p.* 485; *same* 329; 7 *Ib.* 171.

Secondly. If a party in his pleadings alleges matter which is immaterial and issue is taken upon it by the adverse party, *he cannot* object to the pleadings that the matter is immaterial because he has himself tendered the issue. 1*st Chitty's Pleadings, p.* 228; *Gould's Pleadings, s.* 161, 162, *chap.* 3; *same, p.* 186, 187; 1*st Monell's Pr. p.* 566; 2*d Ed. Whitaker Pr.* 322; 6 *Howard's Pr. Rep. p.* 485, *case of King vs. Utica Insurance Co.*

Third. The answer secondly admits that McAlpin, (the defendant in the former suit) was arrested at the time stated in the complaint, but denies upon the information and belief of the defendants, that such arrest was legal or duly made, this denial forms a good issue to a material averment in the complaint, which requires the introduction of record evidence to determine, and which the defendants are entitled upon their answer to have tried. *See R. S. p.* 337, *sec.* 66, *and amendments.*

Fourth. The *positive denial* of the Defendants below, contained in their answer, of the allegation in the complaint, that judgment was duly rendered for the Plaintiff against McAlpin, and the allegation of the answer that the judgment (if any) was irregular and wholly void, is not inconsistent in any respect with the other denials contained in the answer, and does not attack the record, but takes the place and simply performs the office of the plea of "*Nul tiel record,*" and is fully authorized by our Statute and system of Pleading. *R. S. p.* 339, *sec.* 77.

Fifth. The *denial* by the defendants, *in the answer*, of the allegation in the complaint, that McAlpin did not appear as required by the order of discovery issued against him, and did not render himself amenable to the same, is positive, and *puts in issue* the material and only statement upon which the plaintiffs' recovery of damages in this action is based, which the Defendants below were entitled to have tried upon the evidence as a question of fact.

Sixth. The answer is clearly not a sham.

Because the element and character of a sham answer is its apparent falsity, and it cannot be regarded as *frivolous*, inasmuch as it puts in issue every material averment contained in

the complaint, and which the Defendants below were entitled to have tried in the ordinary manner. *See* 1 *Code Reporter*, (*new series*) *p.* 134, 157; *Whitaker Pr.* 2*d Ed. p.* 515; 6 *Howard's Pr. Rep. p.* 485; 7 *Howard's Pr. Rep.* 59 *and* 171; 10 *Howard's Pr. Rep. p.* 455; 12 *Howard's Pr. Rep. p.* 500; 8 *Barbour Sup. C. R. p.* 75; 14 *same* 393.

Seventh. The Order for Judgment and the Judgment rendered below were both erroneous.

Also, because the complaint does not contain or show any facts sufficient to constitute a cause of action against the Defendants below. Inasmuch as it does not state the amount of the judgment, or that a judgment for any sum was actually recovered against McAlpin, the principal, nor what sum was demanded in the complaint, in that suit, or for what amount execution was issued, or that the judgment recovered had not been reversed or paid and satisfied before the commencement of this action, or any other facts upon which the Defendants below were liable to the Plaintiff.

Eighth. The legality and validity of the order and judgment in the former suit against McAlpin, as stated in the complaint having been put in issue by the denials in the answer, the Defendants were entitled of right to have the issue tried, as upon the plea of "*Nul tiel record*," and might show by the production of the record or other competent evidence upon the trial that no such valid order or judgment existed, and thereby discharge themselves from liability upon the undertaking. *See* 3 *Johnson's Rep. p.* 466; 2*d Wendell Rep.* 246; 2 *Mass. Rep. p.* 481; 13 *Mass. Rep. p.* 92.

The following are the points and authorities relied upon by the Respondent:

The Court below was correct in ordering judgment for the Plaintiff below, nothwithstanding the answer of the Defendants below, because said answer contained no sufficient defence and was, therefore, frivolous, in that,

First. The denial in said answer of "any knowledge or information thereof, sufficient to form a belief," as to the commencement of the action in which the Defendants below became bail, is a traverse of mere matter of inducement, and ten-

der an immaterial issue; which is not and never was admissible in a pleading. *Stephens on Pleading* 241-2-3; *Van Santvoord's Pleading*, 243-4; 2 *English* 123, *cited in U.S. Dig. for* 1849, *page* 362; 3 *How. Pr.* 410; and in that

Second. The Defendants below having in their answer admitted the execution and delivery by them as bail of the undertaking mentioned and set forth in the complaint, which undertaking admits the arrest of their principal, Joseph McAlpin, one of the Defendants in the civil action in which said undertaking was given, by virtue of an order issued by Hon. Moses Sherburne, Judge of the Court in which said action was brought, and that said undertaking was executed and delivered in consideration of the release and discharge from said arrest of the said Joseph McAlpin, were estopped from denying the legality of said arrest. 1 *C. R. N. S.* 106; *Ib.* 206; *Whittaker's Practice*, 2*d ed.* 1 *vol.* 234; 7 *How. Pr.* 37; (*S. C.* 12 *Barb.* 612;) 8 *Wend.* 481-2; *Ld. Raymond*, 1535; 6 *How. Pr.* 86; (*S. C.* 1 *C. R. N. S.* 406;) 24 *Wend.* 175; 9 *Wend.* 462; 19 *Wend.* 122; 1 *C. R. N. S.* 57; (*S. C.* 11 *Barb.* 303;) 3 *Rich.* 14; (*cited in U. S. Dig. for* 1847, *page* 75;) 3 *Pick.* 80; 1 *Cush.* 388; 13 *How. U. S. Rep.* 212; and in that

Third. The Defendants below, as bail in the original action, were estopped to deny the validity of the judgment therein, having admitted its rendition *de facto.* 26 *Me.* 411, 423; 15 *Me.* 73, 78; 22 *Me.* 128, 130; 13 *How. U. S. Rep.* 212, *and cases cited ante to last point;* and in that

Fourth. The denial in said answer of knowledge or information sufficient to form a belief as to the issuing, and return by the Sheriff of the order of discovery mentioned and set forth in the complaint of the Plaintiff below, which were matters of record, and therefore presumptively within their knowledge, or means of knowledge, was frivolous, and therefore not admissible in an answer, and proper to be struck out on motion. 1 *C. R. N. S.* 204; 1 *C. R. N. S.* 225; 4 *Sandf. Sup. Court* 708; and in that

Fifth. The denial in said answer of the Defendants below, of the allegation of the complaint, that the then principal, Joseph McAlpin, did not render himself amenable to the order of Court issued to enforce the judgment mentioned in said

complaint, is contradicted by the Sheriff's return, set forth in said complaint, which must be deemed *conclusive.* 7 *Wend.* 352; 1 *Caines* 588; 2 *Hill* 336; 4 *Day* 1; 1 *Verm.* 76; 7 *Mo.* 345; 21 *Me.* 34; 11 *Me.* 493; 6 *Me.* 350; 4 *Mass.* 478; 6 *Mass.* 494-5; 10 *Mass.* 313; *Ib.* 591-601; 15 *Mass.* 230; and in that,

Sixth. The allegation in said answer, "that as they are informed, and verily believe, he (Joseph McAlpin aforesaid,) "did render himself, and was at all times amenable to the order "of the Court herein," directly contradicts the previous denial on the part of said Defendants in said answer, of "any knowledge or information sufficient to form a belief," as to the issuing of such order; and in that,

Seventh. Said answer being thus shown to present no good issue nor valid defence, was clearly frivolous and that, therefore, the Court below correctly ordered judgment for the plaintiff, on his motion duly noticed and made, notwithstanding said answer. 1 *C. R.* 38; 15 *Missouri* 628; 1 *C. R.* 72; 1 *C. R.* 84; 1 *C. R.* 68, (*S. C.* 3 *How. Pr.* 289;) 2 *N. J.* 99; 2 *English* 123.

Ames & Van Etten, Counsel for Appellants.

Geo. A. Nourse, Esq., Counsel for Respondent.

[The judgment of the District Court was reversed, but no opinion is found on file.]

Moody & Perkins, Plaintiffs in Error, *vs.* Charles L. Stephenson, Defendant in Error.

The words "all *penal* judgments" &c. in Section 2, Chapter 81 Revised Statutes of Minnesota, should read: "all *final* judgments."

The effect of Section 2, Chapter 81 Revised Statutes is to allow all final judgments in the District Courts to be removed to the Supreme Court by writ of Error, or Appeal, but not by both.

Moody & Perkins *v.* Stephenson.

A party may take either an Appeal or a writ of Error: but having made his election and taken either, he cannot afterwards take the other, without first discontinuing the first and paying costs.

Where an Appeal and writ of Error were both taken in the same cause, the writ of Error was dismissed with costs to the Defendant in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

This was a motion to dismiss the writ of Error issued in the above-entitled cause, upon the ground that an appeal had already been taken thereon.

AMES & VAN EITEN, Counsel for Plaintiffs in Error.

GEO. A. NOURSE, Counsel for Defendant in Error.

By the Court.—CHATFIELD, J. Stephenson, the Defendant in Error, recovered judgment in the District Court against Moody & Perkins, and they appealed to this Court. After the Appeal was taken, Stephenson sought to enforce the judgment notwithstanding the Appeal, by a compliance with the provisions of section 18 of chapter 81 of the Revised Statutes. Moody & Perkins then sued out a writ of Error upon the judgment, and gave the necessary security to effect a Supersedeas. Upon this state of facts, the Defendant in Error moves to dismiss the writ of Error, and for judgment for costs. The question made by the motion is this: Can a party remove a judgment in the District Court to this Court by both writ of Error and Appeal? can both be sustained?

Chapter 81 of the Revised Statutes, page 413, provides two modes for the removal of judgments from the District Court to the Supreme Court—one by Appeal: the other by writ of Error. Section 1 of that chapter provides that "a judgment "or order in a civil or criminal action in any of the District "Courts may be removed to the Supreme Court, as provided "in this chapter." Section 2 of the same chapter is in these words: "All penal judgments in the District Courts may be "examined and affirmed, reversed or modified by the Supreme "Court, or, if necessary, a new trial may be ordered; such ex-"amination may be had upon a writ of Error or Appeal as "hereinafter provided." The word "penal" in section 2 is

probably a typographical error: *final* should be the word to make that section consistent with the manifest design of the chapter,—the design to subject all judgments in the District Courts to removal to the Supreme Court. The definitions of actions contained in Section 1 clearly embrace penal actions; no separate section was therefore necessary to bring mere *penal* judgments within the provisions of the chapter. Section 2 is the only one in the chapter that declares the modes or means of removing judgments from the District Courts to the Supreme Court, and, strictly construed according to its exact words, allows a writ of Error or Appeal in cases of *penal* judgments only. The error is thus manifest, and it is equally clear that the substitution of the word *final* for the word "penal" would render the whole chapter effectual and consistent with its intent and purposes.

The effect of Section 2, then, is to allow "all *final* judgments" in the District Courts to be removed to the Supreme Court "by writ of Error or Appeal,"—but not by both. They are separate remedies: and the party seeking relief against error in a judgment of the District Court may take either, at his election. Having made his election and taken either, he cannot afterwards take the other, unless he first discontinue the one first chosen and pay the costs thereon. The language of the Statute providing these remedies is in the alternative, and must by its very terms be so construed as to give a party only a choice between the two; and the propriety and justice of such construction is very palpable. A construction allowing a party to take both remedies at the same time would subject the opposite party to be harrassed and oppressed by a plurality of suits for the same cause, and the Court to an unnecessary waste of time and labor in hearing repeated arguments and making repeated decisions upon the same matter: for if both can be entertained, both must be heard and decided, and the judgment be thus duplicated. Such a construction cannot be tolerated. As well might a party bring two or more original actions for the same cause at the same time. The writ of Error must be dismissed, and the Plaintiffs in Error should pay to the Defendant in Error ten dollars for the costs of the motion to dismiss.

The Defendant in Error also claims that he is entitled to judgment for the costs upon the writ of Error in this Court. I think he is entitled to such judgment. The issuing of a writ of Error is the commencement of a suit to review the judgment in the District Court. The writ issues, of course, and the party who sues it out takes it at his peril. This Court has jurisdiction of the writ, and, through it, of the subject-matter and the parties. There is no want of jurisdiction, and the only reason why the Court will not proceed to judgment upon the merits of the record brought up by it is that another proceeding allowed by law for the same purpose—an appeal—had, before the issuing of the writ of Error, been selected and taken by the party who sued out the writ. The Appeal pending at the time the writ of Error issued, operates as an abatement of the suit on the writ of Error. The Defendant in Error,—who alleges the Appeal as an abatement of the suit on the writ, or, what is tantamount to it, a cause for dismissing the writ,—is entitled to judgment for costs to the same extent that the Defendant would be upon judgment in his favor on a plea of pendency of a former suit for the same cause in abatement in an original action. It seems to me that they stand upon the same principle. I do not see any obstacle in the way of rendering such a judgment for costs, and think it is just that the Defendant in Error should have it and that the Plaintiffs in Error should pay it.

Order accordingly.

J. W. Bass, Plaintiff in Error, *vs.* William H. Randall and Truman M. Smith, Defendants in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

This suit was brought by the Plaintiff in Error against the Defendants in Error, to recover the amount of their joint promissory note, payable to order of J. W. Bass for $400.

The Defendants in their answer admit the execution of the note, but deny that the same was their individual note, and allege that it was made by them as the agents and attorneys for Charles W. Borup, H. H. Sibley, (and some sixty others,) and that the Plaintiff well knew that they had made the same as agents of said parties, and had accepted and received the same with full knowledge thereof: that they (Defendants) had never received any consideration or value for said note, but that the consideration for which the same was executed was as follows: that one Alpheus G. Fuller had agreed to erect a first class Hotel on the North East corner of Jackson and Seventh streets in the city of Saint Paul, and in consideration thereof, the said Defendants' principals, (the said Borup and others,) had agreed to pay the said Fuller the sum of $10,000; and the said Plaintiff and one John Randall had also agreed to convey to said Fuller lands suitable and convenient upon which to erect said Hotel, and such quantity as might be desired and required therefor: that the said principals contracted to pay said sum, upon the faith and consideration of the promises of the said Plaintiff and said John Randall: that afterwards, upon demand, the said Plaintiff refused to convey his proportion of said land to said Fuller, except upon the consideration that the Defendants, as agents of the said principals, would execute the note mentioned in the Complaint: that thereupon they did, as such agents, execute said note and deliver the same to said Plaintiff, in consideration of which the said Plaintiff executed his warranty deed for said land required by said Fuller, and therein covenanted that he was seized of the same in fee simple, that he had good right to convey, &c., &c., but allege that the said Plaintiff was not then well seized thereof, and had no right to convey the same, and allege that for the foregoing reasons, the consideration for said note had wholly failed.

The Plaintiff demurred to this Answer, because it appears on the face of the Pleadings that the note therein set forth is one which binds the Defendants personally; and the allegations of agency and of the Plaintiffs' knowledge thereof, constitute no legal defence to the action.

And because the answer admits a sufficient consideration for said note to enable the Plaintiff to maintain his action.

And because the alleged failure of consideration can only be taken advantage of by said Fuller.

The Demurrer was overruled, with leave to Reply. The Plaintiff waived the right to reply and judgment was entered against for costs of Demurrer.

Points and authorities of Plaintiff in Error:

First. Conceding that the Defendants acted as the agents of the principals named in the answer, and that the Plaintiff had knowledge of this fact, still the Defendants are personally bound, because their agency in no way appears in the instrument, and they signed their own names.

Second. The answer discloses a sufficient consideration for the note, to wit: a deed with covenants to A. G. Fuller.

Third. The alleged failure of title to the land is a matter solely between the Plaintiff and A. G. Fuller.

Fourth. The answer contains no sufficient allegation of failure of title. No facts are alleged showing *total* failure of title.

Points and authorities of Defendants in Error:

First. The only propositions raised by this demurrer are as to whether the Defendants are exempted from liability by the allegation that the note sued upon was made by them as agents, with the knowledge of the Plaintiff, and as to whether the alleged failure of consideration can be taken advantage of by the Defendants, who advanced the consideration. *Vide Rev. Stat., p.* 336, *Sec.* 62; *N. Y. Code, Voorhies, 3d Ed., p.* 155, *Sec.* 145; *Van Santvoord Pl.*, 419; *Glenny vs. Hitchins*, 2 *Code Rep.*, 56; 9 *H. P. R.*, 98; *Grant vs. Lacher*, 2 *Code Rep.*, 2; *Hunter vs. Frisbie, ib.*, 59; *Punly vs. Carpenter*, 6 *H. P. R.*, 361; *White vs. Low*, 7 *Barb., S. C. R.*, 204, 206.

Second. There was no consideration for the note sued upon because it appears from the answer that the consideration was the performance by Bass of an act, viz: the conveyance of the land, which act the answer shows that Bass was legally obligated to perform. It was, therefore, *nudum factum and void. Chitty on Contracts*, 7 *Am. Ed., p.* 41; *ib., p.* 45, 46; *ib., p.* 52, *note m. and* 3.

Third. The answer shows a total failure in averring a covenant of seizin and a breach; but it is competent to show a partial or entire failure of consideration and set off *pro tanto* in this action. *Vide Rawle on Cov. for title*, 90—99; *Byles on Bills, p.* 181, 182; *Rev. Stat. p.* 338; *Bliss et al. vs. Nyas*, 8 *Mass*, 46—50; *Tallmadge vs. Wallus*, 25*th Wend.*, 107, *adversely cited; Laws of* 1853, *p.* 20, *Sec.* 6.

Fourth. No eviction was necessary, because the covenant is broken as soon as made. *Vide Rawle on Cov. for title*, 85, *and cases cited in note.*

Fifth. The breaches are sufficiently assigned, but conceding that they are not, the Plaintiff has specified no such ground of demurrer, and is, as we have seen by reference to the Statute under the first point, precluded from availing himself of such insufficiency. *Vide Rawle on Cov. for title, p.* 84, 85, *& c.*

Sixth. The Defendants may avoid themselves of this failure because they are privies. The rule is not the same it would have been were the action in the bond, because in that case the seal imports a consideration. But even in the latter case, late authorities allow the consideration to be inquired into. *Rev. Stat., p.* 337, 338, *Secs.* 66, *and* 67; *Am'd'ts Rev. Stat., p.* 8, *Sec.* 19; *Chitty on Contracts, p.* 52, 53, 54; *Chitty's Pl.*, 1, *pp.* 14, 15, 4 *Kent's Com.*, 471.

Seventh. There is no analogy between the state of these Defendants and that of a party suing upon the covenant in the conveyance—the defence here being a simple breach of the contract to do the *act* which was the consideration of the note in suit.

Hale & Palmer, Counsel for Plaintiff in Error.

Brisbin & Bigelow, Counsel for Defendants in Error.

[The judgment of the District Court was reversed, and the cause remitted to said Court, with directions to enter judgment upon said Demurrer in favor of said Plaintiff in Error, for the amount demanded in the complaint, with costs. No opinion on file.]

J. W. Bass & Co. Plaintiffs in Error, *vs.* R. P. Upton, Defendant in Error.

The Lien of a Warehouseman upon goods for Warehouse Charges, and the Lien of a Warehouseman upon goods for Money advanced for freight charges, depend upon different principles of law.

The Defendants, in their answer, set up in an intelligible manner two distinct grounds of defence, but did not allege them in two distinct counts or in two separate statements: the Plaintiff demurred to one ground of defence and replied to the other; —Held, That the Plaintiff might waive the irregularity in the Answer, and that the Demurrer and Reply were properly pleaded.

A Warehouseman who receives goods from a Steamboat in the carrying trade, and pays to such boat the freight charges, does not by reason of such payment obtain a lien upon the goods.

A Steamboat in the carrying trade, that receives goods and contracts to carry them to a place stated, is not entitled to freight charges; and no lien attaches to the goods in favor of the boat until the contract is performed, unless it shall appear that the performance of such contract became impracticable.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The Opinion in this cause contains a sufficient history to enable us to understand the issues presented by the pleadings.

The following are the points and authorities relied upon by the Plaintiffs in Error:

The Court below erred in sustaining the demurrer to a portion of Defendants' answer; such demurrer should have been overruled, because,—

First. It was interposed to only a part of an entire defence. The defence interposed is, that the Defendants had a lien upon the property: and it is but *one* defence. The items of charges upon which the lien is founded cannot be considered or treated as separate defences. If any of them were such as could not create a lien, the Plaintiff should proceed by motion to strike out such items. If none were such as to create a lien a demurrer was the proper remedy, but it should have been to the entire defence. *Revised Stat. p.* 338, *sec.* 69: *and Amendments to Rev. Stat. p.* 9, *sec.* 26; 3 *How. Pr. Rep.* 410, *Manchester et. al., Superintendents, &c. vs. Storrs et. al.;* 4 *ibid,* 226, *Dur-*

kee vs. The S. & W. Railroad Co.; 4 *ibid*, 373, *Slocum vs. Wheeler;* 4 *ibid*, 413, *Cobb vs. Frazer;* 6 *ibid*, 383, *Smith vs. Brown; Van Santvoorde's Pl.* (2*d Ed.*) 683 *et. seq. and* 700.

Second. The Defendants were entitled to and had a lien for their advances as well as for their labors bestowed upon the property.

The goods were delivered by the Plaintiff to Gilbert at Pittsburgh, to be transported for the Plaintiff to St. Anthony, or to the highest point attainable on the Mississippi River, between St. Paul and St. Anthony. Gilbert consigned them to the Defendants at St. Paul by the steamboat "James Lyon," with instructions to the Defendants to pay the charges of the "James Lyon": and the Defendants received the goods and paid the charges, pursuant to such instructions. Gilbert acted within his authority. The "James Lyon" had a lien for her charges: and when she transferred, or passed over to the Defendants the bill of lading or letter of Gilbert, with the goods, and the Defendants paid those charges, the lien was transferred also.

Gilbert was acting for, and as the agent of the Plaintiff: and the Plaintiff admits his authority to consign to the Defendants by paying a portion of the Defendants' charges.— *Everett vs. Coffin & Cartwright*, 6 *Wend.* 603; *Judah et. al. vs. Kemp*, 2 *John. Cases*, 411; *see also Opinions in Salter vs. Everett, in* 15 *Wend.* 474 *and* 20 *Wend.* 267; 2 *Lord Ragmond*, 866; 2 *Saunders' Rep.* 47 "f"; 4 *J. R.* 103; *Angell on the Laws of Carriers*, (2*d Ed.*) *sec's.* 365 *to* 368 *inclusive.*

The following are the points and authorities relied upon by the Defendant in Error:

The Court below properly rendered judgment for the Plaintiff below, because,—

First. The answer of the Defendants below sets up two separate and distinct defences: to one of which the Plaintiff might properly demur, and reply to the other. *Rev. Statutes Minnesota Territory, Am'd'ts, p.* 9, *sec.* 26; 3 *C. R.* 59; *S. C.* 4 *How. Pr.* 373; 5 *How. Pr.* 5; *ib.* 206; 3 *C. R.* 215; 2 *C. R.* 49; 8 *How. Pr.* 193; 12 *Barb. S. C. Rep.* 9. And because,

Secondly. The issue of fact could not properly be decided otherwise than in favor of the Plaintiff below, upon the facts admitted of record by the Defendants below; and because,

Thirdly. The demurrer to part of the answer of the Defendants below was properly sustained: inasmuch as,

Fourthly. No facts appear in said answer showing that either the steamer "Falls City," or the master, J. B. Gilbert, (in said answer mentioned), ever had a *lien* upon the goods mentioned in the complaint and answer in this action, or ever had authority to create a lien thereupon. 5 *Cush.* 137; 2 *Merivale*, 404; 6 *Mass.* 422; 5 *T. R.* 604; 1 *East.* 335; 15 *Mass.* 396; 6 *East.* 27, (*note*); 5 *Taunton*, 642–5; *Story on Agency, sec.* 360, *and cases there cited; ib.* 372; *Strange*, 1178; 6 *East.* 17; *ib.* 538; 1 *Doug.* 1. And inasmuch as,

Fifthly. Any lien which the "James Lyon" (mentioned in said answer) may have had on said goods for payment of freight money thereon, was extinguished by payment of said freight money and the delivery up and surrender of the possession of said goods to Defendants below by said "James Lyon." 5 *T. R.* 604; 6 *East.* 27; *Story on Agency, sec.* 367, *sec.* 372.

Sixthly. No lien is given at common law nor by statute to warehousemen on goods received by them, to secure re-payment of freight money by them advanced thereon: and *no custom of the trade* establishing such lien is pleaded in this action. 5 *Taunton*, 645; 2 *Merivale*, 404; *Sess. Laws M. T.* 1855, *p.* 60, *chap. XVI. sec.* 22; 11 *Barb. S. C. Rep.* 120.

Brisbin & Bigelow, Counsel for Plaintiffs in Error.

Geo. A. Nourse, Counsel for Defendant in Error.

By the Court—Sherburne, J.—This is an action in the nature of replevin and is brought into this Court upon a demurrer to the answer. In order to understand the grounds of the decision, it becomes necessary to look at the form, as well as the substance, of that portion of the answer, following a general denial, which is in the following language:

"The Defendants further answering allege, that they are warehousemen, doing business as such in the City of St. Paul, and were so doing business during and throughout the year 1855, and that while the Defendants were doing business as aforesaid, one J. B. Gilbert, was the master of a certain steamboat known as the Falls City, and that during the time aforesaid, the Plaintiff delivered to the said J. B. Gilbert, master

as aforesaid, at Pittsburgh, the goods and property mentioned and described in the complaint, to be transported for the Plaintiff to the City of St. Anthony, or to the highest point on the Mississippi River attainable, between the City of St. Paul and the said City of St. Anthony. And the Defendants aver, that while the said J. B. Gilbert was lawfully in the possession of the said goods and property, he delivered them to and upon a certain steamboat called the James Lyon, to be transported by the said steamboat to the said City of St. Paul.

"And the Defendants further allege that the said Gilbert, lawfully possessed of the said goods and property, consigned the same to the Defendants at St. Paul, and authorized and directed the Defendants to receive and store the said goods and property in their warehouse at St. Paul, and also authorized and directed the Defendants to pay to the said steamboat James Lyon, her charges for transporting the same, namely, the sum of one dollar per hundred for each hundred weight of the property so transported.

"And the defendants allege that afterwards, and on or about the 30th day of June, 1855, the said steamboat James Lyon, delivered to the Defendants at their warehouse aforesaid, the property mentioned and described in the complaint, and being of the weight of 122,794 pounds, and demanded thereon account as her charges for transporting the same, the sum of eleven hundred and sixty-six dollars and fifty-five cents. And the Defendants aver that thereupon and in pursuance of and conformity to the authority and direction aforesaid, they received the said property and goods, and paid to the said steamboat the sum of eleven hundred and sixty-six dollars and fifty-five cents.

"And the Defendants aver, that as such warehousemen they bestowed certain work and labor upon and attention to the said goods and property, in receiving, carrying and storing the same, and that the receiving, carrying and storing of the goods and property, was fully worth the sum of one hundred and seventeen dollars.

"And the Defendants allege that upon the premises herein contained the Defendants, as warehousemen, acquired and had a lien upon the goods and property mentioned to the extent of

the sum paid as aforesaid to the said James Lyon, and the labor and attention bestowed upon the same in receiving, carrying and storing as aforesaid; and Defendants aver that from the time the said property was received as aforesaid, until the commencement of this action, it remained in the possession of the Defendants.

"And the Defendants further aver that the Plaintiff has not paid the sum chargeable as aforesaid, upon the said property, nor any part thereof, except the sum of seven hundred and eighty-three dollars and fifty-five cents, and that there was due and unpaid thereon, at the time of the commencement of this action, the sum of five hundred dollars.

"And the Defendants further answering, aver that it is the common and universal custom of warehouseman in the city of St. Paul, to charge for moneys paid out as herein aforesaid, the sum of three per cent. per month, and that the Plaintiff knew of this custom, and dealt with the defendants with full knowledge thereof.

"Whereupon the Defendants ask that the Plaintiff be adjudged," &c.

The Defendant in Error demurs to that portion of the answer commencing with the words "and that while the Defendants were so doing business as aforesaid," and ending with the words, "and paid to the said steamboat the sum of eleven hundred and sixty-six dollars and fifty-five cents."

Also to that portion of said answer commencing with the words "and the Defendants allege that upon the premises," and concluding with the words "to the extent of the sum paid as aforesaid to the said James Lyon." Also, to that portion of said answer commencing with the words, "and the Defendant "further answering aver, that it is the common and universal "custom," and ending with the words "with full knowledge thereof," to the remaining part of the answer, the Defendants in Error has interposed a reply—the intention being, apparently, to demur to that portion of the answer which claims a lien for the money advanced to the steamboat James Lyon, and to reply to that portion which claims a lien on account of warehouse charges.

The first point made by the Plaintiffs in Error is that there

is but one defence set up in the answer, and that the law does not authorize both a reply and demurrer to the same defence, nor a reply to a part and demurrer to the remainder. Or if it should appear that there are two defences in the answer, still they are not separately stated, and the objection still remains. And that in that case the Plaintiff should have corrected the pleadings by motion.

There can be no doubt that there are two distinct grounds of defense set up in the answer. The Plaintiffs in Error claim a lien upon the goods; first, on account of the advances made by them to the steamboat James Lyon; and second, for warehouse charges. That these liens depend upon separate and distinct principles of law, it requires no argument to prove, because even if the lien should be held good for both the advances and the charges, still they would necessarily be sustained, each upon a statement of facts, widely different from the other, and Upton should not be denied the right of testing each distinct statement of facts upon its own merits. There may be some doubt, whether Bass & Co., had a lien upon the goods as security for the payment of their warehouse charges. This, however, Upton does not deny, but in his reply to that portion of the answer, alleges payment. To that portion of the answer, claiming a lien for advances, he demurs, presenting an issue of law.

The objection is that the form of the answer does not warrant both a demurrer and reply, even if it contain two defences. This question we propose to consider. A demurrer to an answer is authorized by section 26, of the amendments to the Revised Statutes, page 9, in the following language: "The "Plaintiff may demur to one or more of several defences or "counter claims, and reply to the residue." This language, in itself considered, does not confine the Defendant in Error, within the narrow limits contended for by the Plaintiffs. The authority to demur is given in its broadest sense, and we must have reference to the rules which existed prior to the Code, to guide us in attempting to arrive at a just and reasonable interpretation of its intention and meaning. It may be necessary in particular cases to change the rules of law which formerly prevailed, even in cases in which the Code is silent upon the

subject; but it can only be so, when the provisions of the Code are so inconsistent with the rules of common law, that both cannot stand. In such case, the Code must prevail. But a comparison of the two, upon the question now before us, will show no such inconsistency. The right to demur is preserved. It may be to one or more defences. Here the attempt is to demur to one defence. Was this defence so stated as to admit of a demurrer? It cannot be pretended that there are two separate and distinct formal counts. But it will be seen that the statement of facts on which it has been said the two defences rest, are separately stated and free from that confusion which would be likely to mislead the opposite party or the Court. It is not even suggested that either party has been misled by the informality referred to, nor that the real and proper issues have not been fully presented and heard. The objection would not have prevailed before the adoption of the Code. A demurrer at common law was either to the whole or a part of the declaration, and this rule equally applies to one count, part of which is sufficient, and the residue is not, *when the matters are divisible in their natures. See Chitty's Pleadings, vol.* 1, 577.

Has the rule of law applicable to the case been changed by the Code? The counsel of the Plaintiffs rely considerably upon sec. 69 of the Revised Statutes on page 338, requiring that each defence shall be separately stated. It may be reasonable to presume that the intention of this provision is, that there shall be as many distinct counts as defence; and it has already been said that the answer does not, in form, contain two distinct counts. This defect might probably have been corrected on motion of the adverse party; but instead of doing so, he has demurred and replied as he would have done if the two defences had been in separate and distinct counts. It by no means follows, that because the Statute requires defences to be separately stated, that such an error as appears in this answer, may not be waived by the Defendants. Formerly, no more than one defence could be interposed to the declaration, or to *the same part of it*, but the error was cured either by a reply or answer to each defence or by general demurrer. *See Introduction to Story's Pleading*, 37 *and cases cited.*

But the necessity of stating defences separately is not new in our Code. It has always been required. Our Code does nothing more than affirm the law and practice in this respect, which existed at the time it was enacted. At common law, but one defense could be pleaded, but the Statute of 4 Ann, authorizing more than one, required that each ground of defence should be stated in a separate plea, as at common law. *See Gould's Pleading*, 429, *Law's Pleading*, 131, *and* 1 *Chitty's Pleading* 512-13, and such has, with a few exceptions, been the practice to the present time.

I do not think the authorities cited by Counsel for the Plaintiffs in Error support the objection. The case of *Manchester vs. Storrs and others*, 3 *How. Prac. Reps.* 410, came before the Court on a demurrer to a part of a complaint. When the cause was heard, the Statute Provisions of New York (since amended) required that a demurrer should be to the whole complaint. The point, therefore, before the Court, was entirely different from the one raised here.

In *Durkee vs. R.R. Company*, 4 *How. P. Reps.* 226, there is a demurrer to a complaint, because it contained three causes of action in the same count; and the causes were such, as could not, at common law, have been united in the same declaration, even if in distinct counts. There can be no doubt that it was bad on demurrer, and that the decision was right and just.

In *Slocum vs. Wheeler*, 4 *How. Practice Reports* 373, the Court merely holds that the Defendant cannot, at the same time, demur to and answer the same cause of action. I am not aware that any other rule is contended for in this cause.

In the case of *Cobb vs. Frazer*, *same book* 413, it is held that a demurrer will not lie to a part of an entire defence. But in the case at bar, we hold that the answer contains two distinct grounds of defence. The authority is not, therefore, in point.

The next case cited is that of *Smith vs. Brown and others*, 6 *How. Prac. Reps.* 383. This was a motion to strike out some of the causes of a demurrer, and the motion was denied. Neither the point decided, nor the reasoning of the Court seem to have any bearing upon the question under consideration.

It is true that the answer is bad in form, but it contains the substance—clearly and distinctly alleged—of two separate grounds of defence. Shall the Defendants take advantage of their own error? The Plaintiff has waived it, and the authorities cited go very far in sustaining him. See also 1 *Chitty's Pleadings*, 359, and the cases there cited; also, *Howard vs. R. R. Company*, 5 *How. P. Rep.* 296: in which Mr. Justice SILL held *in effect* that, though an answer and demurrer to the same cause of action is irregular in practice, yet the irregularity may be waived by the Plaintiff. A different ruling in questions of this kind must give the cause to the party committing the error, on account of the very error which he has committed. He makes an informal pleading—complains that the opposite party has waived the informality, and joins his cause, notwithstanding the merits fully appear and are against him. This position cannot be sustained.

Again, the objection should have been taken by motion to strike out the demurrer. See *Manchester vs. Storrs*, *Slocum vs. Wheeler*, and *Cobb vs. Frazer*, before cited; also *Amendments to Revised Statutes*, Sec. 70, on page 9.

The remaining question in this case is, whether the Defendants (Plaintiffs in Error) acquired a lien upon the goods in question to the extent of their advances to the steamboat James Lyon. The goods are alleged in the answer to have been delivered to one J. B. Gilbert, master of the steamboat Falls City, at Pittsburgh, "to be transported for Upton to the City of St. Anthony, or to the highest point on the Mississippi River attainable between the City of St. Paul and the said City of St. Anthony." The answer shows that the contract was never fulfilled, and fails to give any reason why it was not. No lien could attach to the goods by virtue of an undertaking not performed, even in favor of the Falls City steamboat: and neither the James Lyon nor the Defendants could acquire rights through Gilbert which he had not himself. If he had shipped them to St. Paul and then stored them on his own account, under the state of facts appearing from the pleadings in this cause he could not have retained them on account of any lien acquired by by a partial performance of his obligation to transport them to the highest point between St. Paul and St. Anthony. The

reason of this is so strong that the principle needs no support of precedent. The case of *Portland Bank vs. Stubbs et. al.* is in point: see 6 *Mass. R.* 422. PARSONS, C. J. in that case, says: "No freight was due until the voyage was performed and the salt ready to be delivered at Boston, because no impediment to performing the voyage appears. If a ship on her way is prevented from further proceeding, and the shippee will receive his goods, he shall pay a *pro rata* freight: but this is not the case before us." It was held, therefore, that no lien attached: and both the facts in the case and the Opinion are applicable to this. See also *Gross on Law of Lien*, 358.

But, admitting the contract to have been performed and the goods stored in the proper place, still the Defendants acquired no lien for the money advanced. There was no contract to that effect by the Plaintiff, nor any one authorized by him; and they could only acquire it, if at all, by the custom of the place: and such a custom is not alleged in the answer. 11 *Barb. S. C. Rep.* 120, *Gage et. al. vs. Gitner et. al.;* 5 *Taunton*, 645; *Session Laws M. T.* 1855, *sec.* 22, *p.* 60.

Judgment below affirmed.

EVALON S. MOSES, Appellant, *vs.* B. F. IRVINE & Co., Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

It appears from the order in this cause, that it was originally a Certiorari from a judgment of a Justice of the Peace.

A motion was made in the District Court, to quash the writ of Certiorari, which motion was denied

The order denying the motion was reversed in the Supreme Court, but the order of reversal is the only paper which can be found on file.

DAVID HONE, Appellant, *vs.* WILLIAM WOODRUFF, Respondent.

HERTZELL & BURRISS, Appellants, *vs.* WILLIAM WOODRUFF, Respondent.

Whether Covenants are dependant or independent must always depend upon the intention of the parties, as it may be gathered from the stipulations or covenants contained in the agreement.

And where the intention is doubtful,—the nature of the transaction, the purpose and object of the parties, and the obvious effect of the stipulation of each party in regard to the time of the performance, must be considered together, in order to determine what must have been their intention.

Where a party seeks to vitiate a Contract on the ground of false representations, it must appear that such false statements had relation to matters existing at the time they were made or prior to that time, and must also have been in part the inducement of the Plaintiff to make the contract, or they cannot vitiate it.

The loose conversations of a party to a Contract, prior to making the agreement, can not be considered upon the question of consideration. The presumption of law is that the prior conversations upon the subject of the contract were merged in the writing.

APPEALS FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

These two actions were commenced, in the District Court of Washington County, by Bill in Chancery, by differents parties Complainants against the same Defendant (William Woodruff), to cancel certain deeds of conveyance for town-lots in the town of Point Douglas, upon the ground that the same were obtained by false and fraudulent representations.

The facts and issues in each case are the same, and the causes were submitted upon the same points and arguments. The Opinion contains sufficient reference to the history of the causes to enable us to understand the issues.

The District Court denied the relief sought in the Bill of Complaint, and the Complainants appealed to the Supreme Court.

The following are the points and authorities relied upon by Appellants:

First. A party to a deed of conveyance or other contract

or agreement for the sale of real-estate may show that the consideration named in such instrument or conveyance was not the actual consideration paid or to be paid, and that a different consideration from the one named moved the parties to the execution thereof: or that no consideration actually passed from the grantee to the grantor, or that the consideration for which the instrument was executed and therein named has wholly failed; and parol evidence is admissible and competent to vary, contradict or explain the consideration clause expressed in the instrument.

Second. The evidence fully establishes actual fraud on the part of the Defendant as charged in the bill, which renders the deed from the Plaintiffs to the Defendant voidable, if not actually void, and clearly entitled the Complainants to the relief demanded in the bill. Where a vendee, by his acts and representations, be guilty of a fraud in procuring a title to land, no title in equity passes to him: and courts of equity will relieve the vendor from the effect of the deed.

Third. Upon the general principle of equitable relief, when the bill seeks that a contract or deed may be rescinded or cancelled, or the title passed by decree, parol evidence is admissible to prove circumstances and facts inconsistent with and contradicting the terms of the deed, for the purpose of establishing the fraud, to entitle the Complainant to relief.

Fourth. Upon the evidence, the Complainants are clearly entitled to the relief demanded in the complaint.

See: 16 *Wendell's Rep. p.* 460, *McCrea vs. Purmort et. al.;* 14 *Johnson's Rep. p.* 210, *Sheppard vs. Little;* 1 *Comstock's Rep. p.* 509, *Bingham vs. Sutherland et al.;* 3 *Taunton's R. p.* 473, *Rex vs. Inhab. of Seam.;* 20 *Johnson's Rep. p.* 338, *Bowen vs. Bell;* 7 *Pickering's Rep.* 533, *Ballard vs. Briggs;* 4 *N. H. R. p.* 229, *Morse vs. Shattuck;* 3 *ibid, p.* 170, *Scoby vs. Blanchard;* 4 *ibid. p.* 397, *Pritchard vs. Brown;* 8 *Cowen's Rep. p.* 304, *Belden vs. Seymour;* 6 *Green. (Me.) Rep. p.* 364, *Schillinger vs. McCann;* 20 *Pickering's Rep. p.* 247, *Clapp vs. Tirrell;* 17 *Mass. Rep. pp.* 249, 257, *Wilkinson vs. Scott;* 8 *Conn. Rep. p.* 314; 6 *Yerg. p.* 75; 10 *ibid, p.* 121; 10 *ibid, p.* 206; 15 *Me. Rep. p.* 332; 3 *ibid, p.* 332; 1 *A. K. Marshall, p.* 500; *Harrington's Ch. Rep. p.* 279; 7 *Paige's Ch.*

R. p. 390; 5 *Johns. Ch. Rep. p.* 174; 1 *Paige's Ch. Rep. p.* 284; 2 *Story's Eq. Juris. secs.* 695, 700.

The following are the points and authorities relied upon by the Appellees:

First. The Plaintiffs' witnesses prove a compliance on the part of the Defendant with the terms of his written contract sufficient to entitle him to a deed.

Second. Part testimony to conversation between the parties to a written contract occurring prior to, at the time of, or subsequent to the execution of the contract, is inadmissible to vary or contradict the terms of such contract. 1 *Greenleaf's Evidence* (*4th Ed.*) *p.* 351; *Preston vs. Merceau*, 2 *W. Bl. p.* 1249; *Coker vs. Guy*, 2 *B. & P. pp.* 565, 569; *Sinclair vs. Stevenson*, 1 *C. & P.* 582; *Bogert vs. Cariman, Anthon's R. p.* 70; *Bayard vs. Malcolm*, 1 *Johns.* 467; *McClelland vs. Cumberland Bank*, 11 *Shep.* 566; *Shankland vs. Corporation of Washington*, 5 *Peters*, 390; *Hunt vs. Rousman*, 8 *Wheat.* 174; *Randall vs. Phillips*, 3 *Mason's C. C. R.* 378; *Gilpin vs. Conequa, Peters' C. C. R.* 85; *Taylor vs. Riggs*, 1 *Peters*, 596; *Story's Eq. Juris. 2d vol. sec.* 1527, *p.* 994.

Third. When an act is to be done by one party *before* another act, which is the consideration of it, is to be done by the other, the covenants to do such acts are independent. *Tileson vs. Newell*, 13 *Mass.* 410; *Cinch vs. Ingersoll*, 2 *Pick.* 300; *Goodwin vs. Holbrook*, 4 *Wend.* 377; *Cunningham vs. Murrell*, 10 *Johns.* 145; *Craddocks vs. Aldridge*, 2 *Bibb*, 15; *Mullins vs. Cabness, Minor*, 21; *Platt on Costs*, 38; *Tompkins vs. Elliot*, 5 *Wend.* 496; *Tileson vs. Newell*, 13 *Mass.* 410; *Muldun vs. McClelland*, 1 *Sett.* 1.

Fourth. The relief sought by the Plaintiffs, under the facts of the case, would be contrary to the principles of equity, and violate the maxim that "he who seeks equity must do equity." 1 *Story's Eq. sec.* 64, *p.* 76; *ibid, secs.* 64, 76, 77.

Ames & Van Etten, Counsel for Appellants.

Hollinshead & Becker, Counsel for Respondents.

By the Court.—SHERBURNE, J.—These causes depend upon the same facts and are disposed of as one.

On the ninth day of May, 1850, the Plaintiff entered into an agreement in writing under seal, with the Defendant, whereby in "consideration of the benefits and profits arising from "the erection of a steam saw-mill on the premises hereby con- "veyed by this title bond," &c., he agreed to convey to the Defendant certain lots of land therein described, "so "soon as the building for said mill shall be commenced and a "portion of the machinery on the ground." It appears as well from the bill as from the testimony introduced by the complainant, which is not contradicted, that the Defendant commenced the woodwork of said mill and brought on the ground a portion of the machinery according to the terms of the agreement, and that, thereupon, the conveyances were made to the Defendant, according to the stipulation on the part of the Plaintiff. It is also in evidence, introduced by the complainant, that the Defendant continued to go on with the work of building the mill after the said conveyances were made, and completed the same, and put in operation. But that in consequence of some failure in the machinery, the mill run but a short time, and that the Defendant soon after abandoned it and caused a part of it to be taken away. It also appears that he lost several thousand dollars by the operation.

The relief prayed for in the bill is to have the deed of the lots, from the Plaintiff to the Defendant, cancelled. The counsel of both parties have discussed the question very fully, of whether the covenants in the original agreement were dependant or independent. It seems to us that this question is wholly immaterial upon the facts of the case. The Plaintiff cannot object that he might, by the terms of the contract, have delayed making his deed till the mill was completed, for he waived it by his voluntary act. He made the deed as stipulated, and must have chosen his own time. But if it were otherwise, can there be any question as to the intention of the parties as expressed in the contract? Whether covenants are dependent or independent must always depend upon the intention of the parties as it may be gathered from the stipulations or covenants contained in the agreement. It often happens, owing to

the looseness with which agreements are sometimes drawn, that the intention of the parties is doubtful; and in such cases the nature of the transactions, the purpose and object of the parties, and the obvious effect of the stipulations of each party in regard to the time of the performance, must be considered together, in order to determine what must have been the real intention.

But in the cause before us there is no such uncertainty. The owner of the lots conveyed to the Defendant was the owner of other real estate at the same point. He was willing to give a portion of it in consideration of such improvements as would enhance the value of the portion which he retained. The Defendant was willing to make the improvements for the consideration mentioned, but he required that the conveyances should be made to him before he had completed them. Accordingly, it was agreed that they should be made when he had made the progress in the mills already stated. He did what he was required to do, before receiving the deeds. The complainant was then bound to execute them by the plain terms of the written agreement. There is nothing in the agreement admitting even of a doubt. The covenants were independent. The commencement of the building of the mill and bringing a portion of the machinery on the ground was a condition precedent to the conveyance, and having been performed, a Court would have decreed a conveyance. The Plaintiff performed what he was bound to do by his covenants, and nothing more. In any view of the matter the complainant cannot be aided by this point in the case. *Tileson vs. Newall*, 13 *Mass. R.* 410; *Couch vs. Ingersoll*, 2 *Pick.* 300.

But the gravimen of the charge is, that the original agreement was obtained by the Defendant by fraud and fraudulent statements. It is undoubtedly true that fraud vitiates contracts, and that a Court of Equity may, so far as possible, give such direction to the matter as will protect those who have been injured by the fraud. But this must be done within those rules which have been established by statute and judicial authority.

The argument of the Plaintiff proceeds upon the ground that the Defendant procured the original agreement to be made by

a fraudulent misrepresentation of facts, and claims that for this reason the deed or deeds made under the agreement should be cancelled. But however correct the conclusion may be, as drawn from the premises stated, the fraud is not proved. The false statements must have had relation to matters existing at the time they were made, or prior to that time, and must also have been, in part, the inducement for the Plaintiff to make the contract, or they cannot vitiate it. The willful misrepresentation of material facts is one thing, and the failure to fulfill a promise is another. The loose conversation of the Defendant prior to making the agreement, as alleged in the bill, cannot be considered. The statement of the Defendant, that he should come to Point Douglas to reside, and induce others to come, &c., was not a misrepresentation of any fact; and even if it can be considered as a part of the consideration of the agreement, it was only a promise to be fulfilled subsequently, and cannot affect the deed. There is no doubt that the consideration of a deed may be inquired into, but it does not follow, because the formal receipt in it is not conclusive evidence of the payment of the consideration, that the deed itself is void or voidable, by proof of non-payment. But in this case the contract was reduced to writing, and there is no reason appearing from all the facts sufficient to warrant a presumption that all the stipulations and considerations regarded by the parties at the time, were not put in writing. The presumption of law is that the prior conversations upont he subject of the contract were merged in the writing, and there is nothing in this case to take it out of the general rule. *See* 1 *Greenleaf's Evidence, sec.* 275.

Admitting, then, that the written agreement required the Defendant to build the mill and keep it in operation, how does the case stand? The answer must be that he has failed to perform, and has not, therefore, paid the full consideration of the conveyances to him. The remedy of the Plaintiff is by an action, to compel performance on the part of the Defendant, or for the recovery of damages, or both. Taking the strongest view of the facts assumed even by the Plaintiff, and there is no such fraud shown by the evidence as can vitiate the deed of the real estate to the Defendant. At worst it was only a

promise which the Defendant did not intend to fulfil. The case, however, shows conclusively that he did originally intend to perform, to the extent of his agreement. A large proportion of his expenses in building the mill were incurred after he had received the conveyances which are sought to be cancelled. He proceeded to the entire completion of the mill and put it in operation. It failed in consequence of some defect in the machinery, and he was subjected to a heavy loss by the operation. The facts are so far from proving fraud that they prove entire good faith on the part of the Defendant in entering into the original agreement. In no view of the case, can the bill be sustained; for whatever might have been the original intention of the Defendant, there are no facts in the case which authorize a cancelling of the deed.

[Judgment below affirmed.]

AARON W. TULLIS, Appellant, *vs.* CHARLES BERGFELD, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The Respondent and Plaintiff below, brought this suit against Aaron W. Tullis, to recover the possession of a quantity of personal property alleged to have been wrongfully and unlawfully taken from the Plaintiff, and unjustly withheld by the Defendant.

The answer admits the taking, but set up that on the 7th day of December, 1855, a judgment was obtained against Joseph Bergfeld, and execution issued thereon and placed in the hands of the Defendant, as Sheriff of Ramsey County.

That he had levied upon the property mentioned in the Plaintiff's complaint, as the property of Josph Bergfeld, by virtue of said execution.

The Plaintiff, in his reply, denied that the same was the property of Joseph Bergfeld.

A jury trial was had, and a verdict given in favor of the Plaintiff.

A motion for a new trial was made, founded upon objections to the jury, taken at the trial of the cause, and upon the admission of certain evidence upon the trial. The motion was denied, and judgment entered in favor of the Plaintiff according to the verdict.

The Defendant appealed from this judgment to the Supreme Court.

The record sent up, presents the full bill of exceptions as settled, with the evidence offered and objections taken at the trial, but no points or authorities are on file.

The judgment of the Court below was reversed, and a new trial ordered.

Hollinshead & Becker, Counsel for Appellant.

Wilkinson, Babcock & Cotton, and M. E. Ames, Counsel for Respondent.

[No opinion on file in the Supreme Court.]

Francis, Walton & Warren, Plaintiffs in Error, *vs.* Bond & Kellogg, Defendants in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The Plaintiffs below, (Plaintiffs in Error,) claimed judgment against the Defendants for $538, and interest, and upon the trial, obtained a verdict for $86 19. The case comes to this Court upon Writ of Error, and the Plaintiffs' Bill of Exceptions forms part of the record.

No points or authorities are on file, for either party. The minutes of the Court show that the judgment of the Court below was affirmed, but no opinion was filed.

A. M. FRIDLEY AND WIFE, Appellants, *vs.* WM. L. BITLEY AND WIFE, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

This was an action commenced by the Respondents, for the foreclosure of a Mortgage, executed by the Appellants. The Defendants answered setting up a defence to the action, to which answer the Plaintiff demurred. The District Court sustained the Demurrer, and judgment was entered for want of an answer.

The Defendant appealed from the Order sustaining the Demurrer.

The record in this cause is so imperfect, that no report can be prepared.

The judgment of the District Court was reversed, but no opinion is on file.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA,

IN JANUARY TERM, 1858.

CASTNER & HINCKLEY, ET. AL. Appellants, *vs.* CHARLES SYMONDS, Respondent.

The Statute defining what shall constitute a *Levy* upon Real Estate changes the Common Law rule.

No Real-Estate can be sold under a Judgment-Lien until the requirements of the Statute in regard to a Levy have been fulfilled.

Where a Sheriff, in making a levy upon real-estate, did not go upon the premises, but went in sight of them, and did not leave a copy of the execution upon the premises nor with any one occupying the same, and did not demand payment,—HELD, That this was no Levy under our Statute.

The Sheriff's Certificate of Sale on Execution should be a statement of facts, and not of any conclusions of law he might form as to what constitutes a Levy.

The Sheriff's Certificate or Return should be conclusive in a case which involves the rights of third parties, who have relied on the judicial records of the county and have become purchasers in *good faith* and without laches: but otherwise, when parties have purchased with full knowledge of an illegal sale; in such cases the return can be disproved.

The Notice of Sale forms no part of the Sheriff's levy; the Levy must be complete before the advertisement of sale is made.

This was an Appeal from the final order and decree of the District Court of Ramsey County, made and entered in said cause by Hon. R. R. NELSON, Judge of said Court, sitting as a Court of Chancery.

The following is the Opinion of Judge NELSON, in the District Court:

NELSON, J. A bill for relief was filed and suit commenced for the Complainant, Symonds, on the 26th day of January, A. D. 1853, in the District Court for the County of Ramsey, against Castner & Hinckley. The Defendants, Castner & Hinckley, were allowed, on the 24th of October, 1853, to put in their joint and several answers after a decree *pro confesso* had been entered against them. On the 28th of November, 1856, by stipulation, Emmett & Moss were made parties defendants, and upon the 9th day of December 1856 filed their joint and several answers, and also served a cross bill, to which exceptions were taken by the Complainant in the original suit.

It appears that a judgment was rendered on the 8th day of May, 1852, against Charles Symonds and Daniel F. Brawley, in favor of John M. Castner and John S. Hinckley, for the sum of $121 74; that execution issued to the sheriff of Ramsey County on the judgment, in the usual form prescribed by statute; that the sheriff, on the 2d day of October, 1852, sold Lots Nos. 14 and 15, Block No. 33, in Rice & Irvine's Addition to the Town of St. Paul: and Lot No. 2 of Section 12, Township 28, Range 22,—being the property of the Complainant in this suit,—for the sum of $150: and on the 13th of November following made his return. It was admitted on the hearing, that the Sheriff, without leave of the Court, amended his return subsequently, by including the north-west quarter of the north-east quarter of Section 12, Township 28, Range 22, among the property sold by him. An affidavit is on file among the papers showing an attempt on the part of the Sheriff, on the 21st of February, 1853, to procure the assent of the Court to the amendment, but there is no evidence that the Court sanctioned the course adopted by the Sheriff.

Castner and Hinckley, the execution creditors, purchased the property sold by the Sheriff, and received a deed from him on the 6th day of December, 1843, after the time for redemption had expired. They subsequently, on the day of the commencement of this suit in equity, sold and conveyed the premises to Messrs. Emmett & Moss. An application by motion

was made to the District Court on the 22d day of January, 1853, by the Complainant, Symonds, to have the sale set aside, which was denied, but for what reason does not appear, no opinion having been filed by the Judge. A few days after this motion was denied, application was made by bill to the equity side of the Court for relief.

Two important questions present themselves in investigating this case:—

1st. Did the Sheriff *levy* on the property sold on the 2d day of November, 1852?

2d. If there was no levy, can Emmett & Moss, the assignees or purchasers from Castner & Hinckley, hold the property?

Several minor questions were presented upon the argument, which, from the view we take of the case, it will be unnecessary to decide.

The whole gist of the proceedings is involved in the construction to be given the statute providing for the *levy* on real property under an execution.

If the levy was actually made so as to affect the property, the sale was legal, and the Plaintiff, Symonds, has no equity resulting from his own laches. The time for redemption had expired, and a tender of the money to the Sheriff was made one day too late.

The law providing for the levy on property by execution was taken from the Report of the New-York Commissioners, who framed a revised code of laws to the Legislature of that State in 1850. The provision defining what shall constitute a levy was a new one—entirely changing the common-law rule, and making it essential that certain well-defined acts should be performed by the sheriff before a levy should be complete. The seizure is a distinct act: and no real property can be sold by the Sheriff, although a judgment-lien existed, until the requirements of the statute are fulfilled.

In most States, a levy on lands has been the subject of judicial construction, but our statute expressly fixes the act or acts which constitute it. (*Sec.* 91, *p.* 363, *R. S.*) "All property "liable to an attachment is liable to execution: it must be *levied* "*on* in the same manner as similar property is *attached*. Until "a *levy*, property is not affected by the execution."

The statute in regard to attachments on real property provides that "a copy of the warrant, certified by the Sheriff, "must be left with the occupant of the premises, or, if there "be no occupant, in a conspicuous place thereon;"—*Revised Stat. sec.* 140, *p.* 346. And although this portion of the statute, when applied to executions, would seem to be merely declaratory to the sheriff, the last clause of section 91 clearly settles the question: "Until a levy, property is not affected by the execution."

It was contended by the Defendants' Counsel, that, judgments being a lien upon real estate, there was no reason for making the Sheriff perform any other act to complete a levy than advertising the property for sale. This position is fully sustained by the decisions in those States where the advertisement constitutes the levy, and no act is necessary to perfect it: but it will be found upon examining the statutes of most of the States, that an old rule has been materially changed, and certain statutory provisions have been made substantive requirements before a levy is perfected.

This change is certainly a good one, and relieves judgment-creditors from great embarrassment.

In proceedings where attachment has been obtained as a provisional remedy the statute provides that the judgment must be collected out of the property held by the warrant, and no formal levy by execution is necessary. If there should not be property enough to satisfy the judgment, the levy upon other property must be in accordance with section 140, page 346 Revised Statutes.

The testimony of Sheriff Brott shows clearly that he failed to comply with the statute. He says: "*In making the levy I* "*did not go upon the premises: I got in sight of it. I did* "*not leave a copy of the execution upon the premises nor with* "*any one occupying the same, and did not demand payment,*" &c.

This testimony was objected to before the referree—I suppose upon the ground that the return was conclusive. We do not think so: a sheriff's return is *prima facie* evidence of the facts stated therein, and his certificate would be so received. No particular form is prescribed for the return, but we think

that it would be within the spirit of the statute that he should be required to state the fact of a delivery of a copy, with day, hour, &c. to whom and where: as the necessity of such a return would always remind him of the acts to be done on making service.

The certificate should be a statement of facts and not of any conclusions of law he might form as to what constituted a levy. When the case involves the rights of third parties, who have relied on the judicial records of the county and have become purchasers in *good faith* and without laches, public policy would seem to require that the return should be conclusive, leaving the party to his remedy against the officer: but in other cases we think the return can be disproved.

Again: the judgment-lien, by our statute, runs against real property for ten years; the lien then ceases.

The time when a lien by actual levy on execution should attach becomes important often between creditors and otherwise. It would seem, therefore, to be a wise provision, making the ceremony of a levy a well-defined and distinct act, capable of being clearly identified, in place of the uncertain acts and intentions formerly required to show a *levy*, which it is nearly if not impossible to controvert against the Sheriff's official certificate.

The policy of denying judgment-liens for a longer period than ten years, unless an action is commenced on a judgment obtained upon the original judgment, may be perhaps very unquestionable; but one thing is certain: that in communities where numerous statutory liens against real property exist, the amount of money paid for searches far exceeds the money collected upon judgments. We have, therefore, arrived at the conclusion that no levy was made by the sheriff, and Castner & Hinckley derived no title to the property under the sale.

The sale was not merely irregular: it was *erroneous*; and no protection is offered to the purchaser from Castner, for the sheriff acted without authority. Emmett was the attorney of Castner & Hinckley in the suit upon which the judgment was obtained against Brawley & Symonds: was conversant with all their difficulties: signed the execution issued to the Sheriff, and is presumed to have instructed him in regard to the levy.

Moss, at the time of the purchase from Castner & Hinckley of the property in controversy, was either the law-partner of Emmett or was with him in the same office, and, it appears from the testimony of Mr. Rice, knew that proceedings were being commenced by Symonds to recover the property sold by the Sheriff. In fact, from his own testimony, it appears that he examined the records in the clerk's office, the return of the sheriff, and all the papers connected with the case. He was informed, therefore, of the motion which was made by Symonds to set aside the sale, and the grounds upon which the motion was based.

The affidavits are on file, and form a part of the records of the case. He was not a purchaser without full knowledge of the facts.

It is very doubtful if he could hold the property had he been a *bona fide* purchaser at the sheriff's sale.

The cases cited by the Defendants' Counsel apply where by judicial construction *notice of sale* is held to be the only levy upon lands. They are totally inapplicable under our statute, which defines what constitutes a levy upon real property, and that "until a levy, property is not affected by the execution." In those cases, an omission of the notice of sale is declared by statute not to affect a *bona fide* purchaser.

The notice of sale by our statute forms no part of the levy. The levy must be complete before the advertisement of sale is made, and an omission of the proceedings subsequent to the *levy* will not invalidate it where the interests of a *bona fide* purchaser are concerned.

Upon full examination, we are led to the conclusion that a decree must be entered in favor of the Complainants, in accordance with the prayer in the Bill.

The cause was brought on for argument at the January Term, 1858, of the Supreme Court: when the Counsel for Appellants submitted the following objections to the jurisdiction of the Court:

The Defendants in the action aforesaid come and object to the jurisdiction and authority of the Hon. William H. Welch

and the Hon. R. R. NELSON, Justices of the Supreme Court of the late Territory of Minnesota to hear and determine the action aforesaid as a Supreme Court, and respectfully submit the following grounds for said jurisdictional objection:

First. That the Court aforesaid has been, by virtue of the adoption and ratification of the Constitution of the State of Minnesota with the consent and by authority of an act of Congress, superseded by the authorities and Courts of said State, and can only act as a United States District Court.

Second. That, by an act of the Legislature of the State of Minnesota, approved January 11th, 1858, the time for holding the Supreme Court is postponed, and the laws of the Territory aforesaid, providing for holding a term of the Supreme Court on the second Monday in January of each year, repealed.

Third. That the action aforesaid is carried by Appeal to the Supreme Court of the State of Minnesota, and not to the District Court of the United States aforesaid.

Fourth. That the papers and pleadings in said case were not certified to or filed in this Court until the 11th of January, 1858, and that the same were not so filed at the instance or by the consent of Defendants aforesaid.

Fifth. That the Judges of the Supreme and District Courts of the State of Minnesota heretofore elected have accepted their several offices, and are legally qualified to act as such.

Sixth. That due notice for the hearing of said action has not been given.

Whereupon, the said Defendants, without intending any disrespect to this Court or any Judge thereof, respectfully ask that the honorable Court will refuse to take jurisdiction of said case, and that this their objection to such jurisdiction may be filed, so that their legal rights may not be prejudiced in the premises.

Which objections were all overruled by the Court.

[The points and authorities of the Appellants are not on file.]

The following are the points and authorities relied upon by the Counsel for the Respondent:

First. The proceedings of the sheriff under the execution by which he affected to make title were irregular, and the sale void;

1. Because he did not resort to the personal property of the debtor first, although there was sufficient personal property in the possession of the debtor to satisfy the debt of which the sheriff had notice.

2. Because he gave no notice of the execution, and made no demand of payment to and on the debtor, or his agent on the premises.

3. Because there was no levy upon the property affected to be sold, and the execution never attached thereto.

4. Because no copy of the writ of execution was left upon the premises nor with any one occupying them, or served in any manner.

5. Because the return of the sheriff to the execution is void and inconclusive: in that it was altered and interpolated without authority, after the same was filed: in that it shows no resort to the personal property of the debtor first, to satisfy the debt, nor no levy, nor no acts constituting a levy in law, nor a sale of the property described in the answers of the Appellants and claimed by them; and is otherwise irregular and void.

6. Because the land was not sold in parcels.

Second. The sheriff's sale should be set aside upon equitable considerations:

1. Because the Defendants, Castner & Hinckley, being plaintiffs in the execution, should not in equity, under the circumstances, ask more than the payment of their debt or costs, or to be reimbursed for their bid, which amount has been tentered and paid into Court.

2. Because the Respondent was absent at the time of the issuance of the execution, and returned but a few days before the sale, and was prevented from attending the same by sickness.

3. Because he was misled as to the time of redemption, by the sheriff, to whom he applied.

4. Because the price bid was greatly inadequate.

5. Because the Respondent paid the amount required by the sheriff to him on the day which he understood was in time.

6. Because of the extreme hardship of the case.

7. Because the Appellants seek an unconscionable advantage.

Third. That the Defendants, Castner & Hinckley, being the plaintiffs in the execution, are affected in law by constructive notice of the irregularities in the proceedings and the equities of the Plaintiff; and the Defendants, Emmett & Moss, being their grantees, and having been the attorneys for the said Plaintiffs in the said execution, are in like manner affected by such constructive notice.

Fourth. That all of the Defendants were notified and informed, in point of fact, of the irregularities of said proceedings and of the rights and equities of the Plaintiff, before taking any title or claiming any estate in the land.

Fifth. That Emmett & Moss, the Defendants who claim title, are not *bona fide* purchasers for value.

Authorities: *Revised Statutes of Minnesota Territory, sec.* 82, *sub.* 71, *p.* 362; *sec.* 93, *chap.* 71, *p.* 363; *sec.* 91, *p.* 363, *chap.* 70; *sec.* 140, *p.* 346, *ch.* 71; *sec.* 108, *p.* 366, *appendix; sec.* 43, *p.* 12; "*Sheriffs,*" *p.* 66; *secs.* 111, 112, *ch.* 71, *p.* 366; *ch.* 82, *sec.* 14, *p.* 412; *chap.* 70, *sec.* 158, *p.* 319. *Gwynn on Sheriffs, pp.* 255–8, 211; *Dutton vs. Tracy,* 4 *Conn.* 356; *Green vs. Burk,* 23 *Wend.* 493; *Gantley's lessees vs. Ewing,* 3 *Howard's* (*S. C.*) *Rep.* 707; *McBurrie vs. Overstreet,* 8 "*B*" *Monroe's R.* 300; *Gwynn on Sheriffs,* 200; *Williams et al. vs. Reyton, lessee,* 4 *Wheat.* 77; 4 *Cond. R.* 395; *Stead's Ex'rs. vs. Couse,* 4 *Cranch,* 403; 2 *Pet. Conn. Rep.* 151, *and notes*; 11 *Wend.* 22; 2 *Humphrey's R.* 455; *Davies vs. Maynard,* 9 *Mass.* 242; *Lancaster vs. Pope,* 1 *Mass.* 86; *Williams vs. Armory,* 14 *Mass.* 20; *Willington vs. Gale,* 13 *Mass.* 483; *Curtis vs. Norton,* 1 *Humph.* 278; *Bowler vs. Bell,* 20 *Johns.* 338; *Weyland vs. Yipton,* 5 *S. R.* 232; *Lothrop vs. Abbot,* 4 *Shep.* 421; *Anderson vs. Carlisle,* 7 *How.* (*Miss.*) 408; *Morton vs. Walker, ibid,* 554; *Barbour's Ch. Pr. pp.* 74, 619, 627, 539, 540; *Davies vs. Maynard,* 9 *Mass. pp.* 246–7; *Eddy vs. Knapp,* 2 *Mass.* 154; *Meuns vs. Osgood,* 7 *Green.* 146; *Libby vs. Copp,* 3 *N. H.* 45; *Anderson vs. Cunningham, Minor,* 48; *Pound vs. Pullen,* 3 *Yerg.* 338; *Buckholder vs. Keller,* 2 *Barr,* 51; *Elliott vs. Doughty,* 7 *Black.* 199; *Sleeper vs. Newburg Seminary,* 19 *Vt.* 451; *Morton vs. Edwin,* 19 *Vt.* 77; *Peirse vs.*

Strickland, 26 *Maine*, 227; *Harrison vs. Dox, dem. of Rapp.* 2 *Blackf.* 1; *Simons vs. Catlin*, 2 *Caines*, 61; *Goodyer vs. Junce, Yelv.* 179; *Parsons vs. Lloyd*, 3 *Wils.* 341; *Read vs. Markle*, 3 *Johns.* 525; *Lawrence vs. Speed*, 2 *Bibb*, 401; *Hayden vs. Dunlop*, 3 *Bibb*, 216; *Lessee of Allen vs. Parish*, 3 *Ohio*, 187; *Lessee of Stall vs. McAllister*, 9 *Ohio*, 19; *Jackson ex dem.: Sanders, Sanders et al. vs. Caldwell*, 1 *Cow.* 641, 642; 1 *Barr's Prac.* 301–2; *Smith vs. Pope*, 5 "*B*," *Monroe*, 337; *Waite vs. Dolby*, 8 *Humph. Rep.* 406; *Barbour's Ch. Pr.* 539, 541; *Anderson vs. Youlk*, 2 *Harris & Gills*, 346; *Am. Ins. Co. vs. Oakley*, 9 *Paige*, 229; *Greele vs. Emery, in Chancery, New-York, cited in last authority; Millspaugh vs. McBride*, 7 *Paige*, 509; *Yupp vs. Vincent*, 8 *Paige*, 176; *Snyder vs. White*, 6 *How. Pr. R.* 321; *Regrea vs. Rea*, 2 *Paige*, 339; 1 *Story's Eq. Juris. sec.* 395, *p.* 422.

James Smith, Jr. Counsel for Appellants.

H. J. Horn, with Hollinshead & Becker, Counsel for Respondents.

The decree of the District Court was affirmed, but no further opinion was filed.

Thomas Foster, Appellant, *vs.* Alexis Bailley, et al., Respondents.

This was an Appeal from the judgment of the District Court of the County of Dakota, Third Judicial District, (Judge Chatfield.)

The cause was decided upon questions of fact—as contained in the evidence which forms part of the record.

The following are the points and authorities relied upon by the Appellant:

First. The execution of the trust vested in said Judge, in the case under the Act of Congress, of May 23, 1844, is regulated by the rules and regulations of the Legislature of the Territory. *Act of May* 23, 1844, 5 *Stat. at Large U. S.* 657.

Second. Under the Act of the Legislature of this Territory, of March 3d, 1855, persons claiming under the first settler or claimant, are entitled to the land. *Session Laws of Minnesota*, 1855, *p.* 28, *&c.*

Third. All the parties claim title through or under Alexis Bailley, as the original claimant, and the original title is not questioned.

Fourth. Thomas Foster exhibits a paper title to the extent of his claim, derived directly from Alexis Bailley, and prior to any other derivative title from him of which title Henry G. Bailley, Henry H. Sibley, and William G. Le Duc had notice long before they received their conveyance or claimed any title.

Fifth. By the writings between Thomas Foster and Alexis Bailley, of August 13, 1851, Foster's title and interest vested immediately, and the grant being executed and not executing would have been good as a gift without any consideration. 2 *Bl. Comm. p.* 441.

Sixth. The evidence discloses a sufficient consideration to support an executory agreement between the parties.

Seventh. Thomas Foster and Alexis Bailley became equal co-partners in the two claims, as described in the said writings, and the loss of one of their claims did not impair Foster's equal interest as a co-partner in the balance.

Eighth. The loss of one of their claims is shown to have been occasioned without any default of Foster, and is traced to the acts of Alexis Bailley.

Ninth. Parol testimony is incompetent to change the effect or very the terms of the writings of August 13, 1851.

The following are the points and authorities relied upon by the Respondent:

First. The paper writing of August 13th, 1851, does not convey or transfer, nor purport to convey or transfer, any interest whatever in the lands in question, or in any lands or

claim whatever; but is simply a designation, by name and boundaries, of several claims. It contains no reference to a consideration, and no words of transfer.

Second. It is not under seal and is not a grant. If any effect is to be given to it as a transfer, parol testimony is admissible to show the consideration, and explain its ambiguities.

Third. If the evidence discloses a contemplated consideration sufficient to support an executory agreement, it also shows an entire failure of that consideration and an entire failure of Foster to perform the agreement on his part.

Fourth. The agreement was made *before the survey* and is therefore inoperative to transfer any rights. The parties at that time were all trespassers upon the public lands, and the agreement was therefore against public policy and void.

Fifth. The Act of Congress of May 23, 1844, extends relief only to settlers upon the "*surveyed* public lands." *Vide U. S. Stat. at Large, vol. 5, p. 657.*

Sixth. Though the Statute authorizes this Court to review and pass upon questions of fact, as well as of law, in cases of this character, yet this Court in reviewing a question of fact will hesitate to disturb the decision of the Court below if there be any testimony to support it; and will observe to the fullest extent, the doctrine established by all experience and authority, that the tribunal before whom the witness appears in person upon the stand, can judge far better of the veracity, credibility and reliability of such witness, and estimate with far greater certainty the consideration to which his testimony is entitled, than the Court of Review, who only see that testimony upon paper.

Seventh. The preponderance of evidence upon every question of fact in this case is clearly with the Respondents.

H. J. Horn, Hollinshead, and Sanborn & French, Counsel for Appellant.

Brisbin & Bigelow, Counsel for Respondents.

By the Court—Nelson, J. The proceedings in the Court

below originated under the Law of Congress, approved May 23, 1844, *U. S. Stat. at Large, vol.* 5 *p.* 657, *and the Law of the Territory of Minnesota*, 1855, *chap.* 7, *p.* 29.

They were instituted to determine the conflicting claims between the Appellant and the Respondents, to a portion of what was known as "Bailley's Addition" to the Town of Hastings, in the County of Dakota, and the statements of the parties filed with the Judge of the Court below, in accordance with the 4th section of the Territorial Law above referred to, stand as the pleadings in the case.

The record in this Court is very full and presents this case fairly, and we shall embody in our opinion only a brief synopsis of the proceedings, referring to the record, for a better narration of facts.

Foster's statement claims a deed from the Judge for the one undivided half part of lot numbered (2,) (3) and (8,) in section twenty-seven, Township numbered (115,) Range number (17,) west of 5th Meridian, or such portions as lie within the addition above mentioned.

The Respondents claim in their statement a deed for the whole of the above lots, in addition to some other tracts of land not included in this controversy.

It was conceded upon the hearing below that Alexis Bailley, one of the Respondents, was the original settler and claimant, and the Appellant and other Respondents claim to derive their title from him.

There is no dispute as to Bailley's first claim and its legality. The questions presented are purely of fact, and involve the rights of the parties as they existed at the time of the entry of the land by the Judge.

H. G. Bailley, Le Duc, and Sibley, sustain their claim by deed from Alexis Bailley, Sept. 1, A.D. 1854, in which deed an undivided three-quarters of the land is conveyed to them and they become tenants in common with the grantor of the whole tract.

Foster bases his claim upon a written acknowledgment by Alexis Bailley, given to him on the 13th day of August 1851, in which he is described as an equal partner with Bailley, in this property in dispute.

Now, if this written acknowledgment (it was in duplicate,) which declares the understanding of Foster and Alexis Bailley, in regard to the claims situated in and about the present town of Hastings, imposes an obligation upon the parties, without any other qualification than appears upon its face, then the execution of it having been admitted, Foster has the prior right, so far as the other Respondents are concerned and his claim should be confirmed.

Upon examining the writing, it is found that no consideration is expresssed upon its face, nor does it disclose upon what terms Foster and Bailley became equal partners in the claims mentioned therein, one of which is the property in dispute, and the Judge below very properly remarks, that the consideration upon which the partnership was acknowledged, and the terms upon which it was consented to, became a subject of enquiry. It was incumbent upon Foster, we think, to establish affirmatively, the causes which induced this partnership, and fully sustain, by weight of evidence, the considerations which he alleges were the inducements for the arrangement. The testimony of the two parties, Foster and Bailley, are at variance upon this point, but while no witness is introduced to corroborate the statement of Foster, we find that one witness, Truax, does in his testimony sustain the testimony of Bailley substantially, in regard to the nature of the transaction, and the motives which are alleged by Bailley to have led him to provide for Foster.

In the doubtful state of the testimony, we can come to no other conclusion than that arrived at by the learned Judge below, after a full review of the testimony.

Did Foster carry out faithfully the arrangement which had been entered into between him and Alexis Bailley? If not, was he prevented by Bailley's acts from performing on his part the terms of the contract?

We have carfully examined all the testimony which would tend to elucidate the truth in regard to this part of the controversy, and have come to the conclusion that although there appeared an evident anxiety upon the part of Foster to secure his interest in this property, and for that purpose he did personally occupy the "Eastern Claim," as it is called, a sh ort

time, he still seems from his actions to have abandoned any real claim he might have had to the premises, and turned his attention to improving and securing the claim that he occupied at the time of the hearing back of the "Lake." The precarious state of the times and the disposition manifested for jumping claims in that vicinity, should have warned Foster to have been on the alert, but he appears to have neglected his arrangements, or at least placed them in the charge of unreliable persons, thus jeopardizing his interests, and ruining the success of the project.

The charge preferred by Foster that Bailley was instrumental in bringing about the loss of the Eastern Claim, and conspiring to prevent his obtaining it, we do not think is sustained by the testimony.

It is of such a serious character and involves to a certain extent his success in this suit, that he should have affirmatively and clearly established the fact. This has not been done, and it seems very strange that Parker, who of all others, ought to have been an important witness to throw light upon this point of the transaction, and whose testimony should have sustained the charge of collusion or conspiracy to keep him out of the "Eastern Claim," was not introduced as a witness. He bore a conspicuous part in many of the important proceedings connected with these claims, and we are at a loss to account for his silence.

Foster was the only material witness to sustain his claim below, and he in no way seeks to introduce corroborative testimony. We cannot undertake to reverse the judgment upon this state of facts, and therefore must affirm the decision of the Court below.

I fully concur in the views expressed by Justice NELSON.

CHAS. E. FLANDRAU.

LORENZO D. SMITH, Appellant, *vs.* DIEDRICK UPMAN, Respondent.

This was an Appeal from a judgment in the District Court of Winona County.

Upman, the Plaintiff below, set forth in the complaint that he was, on and before the 18th August, 1854, the Register of the Land Office of the United States, for the district of lands subject to sale at Winona; that said office was opened on the 5th day of December, 1854, and that the Plaintiff performed his duties as such Register until about the 5th February, 1857, when he was removed therefrom by the President; and that he performed the duties of said office faithfully in all respects, and did not charge or receive any illegal fees for services therein.

That the Defendant, prior to said 5th day of December, 1854, was duly appointed Receiver of public moneys of the United States in and for said Land Office, for the district aforesaid, and had performed the same from that time until the 5th February, 1857, and still continued to perform the same.

That, by virtue of an act of the Congress of the United States entitled "An Act in addition to certain other Acts, granting Bounty Land to certain Officers and Soldiers who have been engaged in the Military Service of the United States," approved March 3d, 1855, a large number of warrants from the Department of the Interior were issued to divers persons for land, according to the terms of said Act, and located upon lands of the United States, within said district, during the time the Plaintiff served as Register aforesaid.

That, by the sixth section of said Act, Registers and Receivers of the several land offices were authorized to charge and receive for their services in locating all warrants under the provisions of said Act the same compensation to which they are entitled by law for sales of the public lands at the rate of $1,25 per acre—the said compensation to be paid by the assignees or holders of such warrants.

That, by virtue of the regulations of the Department of the Interior, it is made the duty of the Receivers of the public moneys of the United States to receive from the assignees or holders of such warrants the compensation of the Register and Receiver for locating the same.

That the Defendant had received from the assignees and holders of warrants issued under said act, as compensation of the services of the Plaintiff and Defendant for locating the same, the sum of $13,322 50, the lawful fees charged therefor—one-half of which, to wit: the sum of $6,611 25, belonged to the Plaintiff as his compensation for his services as Register aforesaid; that said sum had been received by the Defendant, and that he refused to account therefor to the Plaintiff.

The Answer admits the appointment of the Plaintiff and Defendant as Register and Receiver of said Land office.

But as to the allegation "that the Plaintiff performed his "duties faithfully as Register and in all respects, and did not "charge or receive any illegal fees for services therein," the Defendant denies any knowledge or information thereof sufficient to form belief.

"And the answer further admits the issuing of certificates "or warrants under the Act of March 3d, 1855, and of the lo- "cation of the same at the time, in the manner, and to the ex- "tent stated in the said complaint.

"And the answer further shows that the Defendant admits "that, as alleged in the complaint, it is made the duty of the "Receivers of the public moneys of the United States for the "respective land districts, to collect and receive from the as- "signees or holders of such warrants the compensation of the "Register and Receiver for locating such warrants authorized "by the said Act—one-half of which compensation belongs by "law to such receiver, and one-half thereof to such Register; "but as to whether one-half of the compensation or percent- "age mentioned in the sixth section of the said Act cited in "said complaint belongs absolutely to the Register, Defendant "has no knowledge or information sufficient to form belief.

"And the answer further shows that during the time stated "in the complaint, the Defendant received in his official capa-

"city, by way of the compensation or per centage specified in "the said sixth section of said act, the sum of $13,322 50, the "amount stated in the complaint; but whether of the amount "so received the Plaintiff was by law entitled to one-half, to "wit, the sum of $6,661 25, absolutely as his compensation "for his services in aiding as Register aforesaid in the location "of said warrants, the Defendant has no knowledge or informa- "tion sufficient to form a belief; nor as to whether the said "sum of $6,611 25, or any part thereof, except such as has "been paid the Plaintiff by the Defendant, as hereinafter "stated, to wit: the sum of over $1,800 and about $2,000, but "the precise amount Defendant cannot now state,—was re- "ceived by the Defendant for the Plaintiff; nor whether the "same, or any part, except as aforesaid, was or is the property "of the Plaintiff as alleged and stated in the said complaint "or otherwise."

The part and portion of the answer above quoted was objected to by the Plaintiff's Counsel,—

Because, the same is not a denial of any allegation in the complaint, but is an admission, under cover of a denial, of the cause of action stated in the complaint:

And because the same is irrelevant, redundant and frivolous:

—And was stricken out, on motion.

The answer then denies the indebtedness as stated in the complaint: and, for a *second* defence, states that the Plaintiff has paid the Defendant over $1,800 and about $2,000, out of the $13,322 50 received by the Plaintiff in his official capacity, as compensation for locating said warrants.

For a *third* defence, the answer states, that during each official year in which the Plaintiff performed the duties of Register aforesaid, he had received a salary for his services, provided by the second section of the Act of Congress approved April 20, 1818, entitled "An Act for changing the compensation of Registers and Receivers of land offices," to wit: $500 annual salary, and $2,500 additional by way of commission or percentage—in all $3,000—except that for the last official year the sum of $48 65 of the $500 salary has not been received by the said Register.

That said commission or percentage consisted of the commission provided by said Act of April 20, 1818, on cash entries of land, and the like commission allowed by virtue thereof on entries by land warrants issued under various acts of Congress, previous to the said Act of March 3, 1855, and the said sum of over $1,800 and about $2,000 paid to the Plaintiff by the Defendant as aforesaid out of the said sum of $13,322 50.

And further, that the said sum of $6,611 25, after deducting over $1,800 and about $2,000 paid the Plaintiff thereupon by the Defendant as aforesaid, is the excess of surplus of the commissions or percentage received by the Defendant over and above said sum of $2,500, for each and every official year, received by the said Register as compensation for his services as aforesaid.

That it was made the duty of the Receivers to safely keep in their possession, until instructed in regard to the same, such excess or surplus of commissions or percentage received by them over and above an amount sufficient to make the Register's maximum of receipts by way of such commissions or percentage for each official year the sum of $2,500 as aforesaid; and that the Defendant retains in his possession the aforesaid excess or surplus, and is ready and willing, at all times, to do as he shall be instructed in regard to the same by the proper authority.

The Plaintiff demurred to this *third defence*,—

Because, the second section of the Act of Congress approved April 20, 1818, therein referred to, had relation to a different time, to a commission on a different fund, and to a different service, from the time, warrants and service specified in the Plaintiff's complaint, and to which the Act of Congress approved March 3, 1855, had reference.

And because, the compensation allowed to the Registers and Receivers of the land offices of the United States by the sixth section of the Act of Congress approved March 3, 1855, entitled "An Act in addition to certain other Acts granting Bounty Land to certain Officers and Soldiers who have been engaged in the Military Service of the United States," was additional and specific, and thereby expressly allotted to the service

therein mentioned to be paid by the assignees or holders of warrants issued in pursuance of that Act; and the Act of April 20, 1818, does not and could not refer to or in any way affect the provisions of the Act of March 3d, 1855.

The Demurrer was sustained, and judgment afterwards entered against the Defendant for want of an answer.

Berry & Waterman, Counsel for Appellants.

Hollinshead & Slade, Counsel for Respondents.

There are no points and authorities on file on behalf of either party. The Supreme Court affirmed the judgment appealed from, but there is no Opinion on file.

APPENDIX.

RULES OF PRACTICE

IN THE SUPREME COURT OF THE TERRITORY OF MINNESOTA, ADOPTED AT THE JULY TERM, 1852.

RULE I. The clerk shall administer to each attorney and counsellor, on his admission, the following oath:

"You do swear that you will support the Constitution of the United States; that you will demean yourself, in the office of an attorney and counsellor in all the courts of this Territory, in an upright, courteous and gentlemanly manner, with fidelity to the court and to clients: So help you GOD."

RULE II. Alternate speaking will not be allowed. Counsel for the appellant or plaintiff in error, on bringing on any motion, shall open and be entitled to reply.

RULE III. The clerk shall keep his office at the seat of government, and may appoint a deputy, who, upon taking an oath to support the Constitution and faithfully perform the duties of the office, may do and perform all things appertaining to said office which the clerk himself might do.

RULE IV. 1. The clerk shall keep a general docket or register, in which he shall enter the titles of all suits, actions and proceedings at law and in equity, including the names of the parties and the attorneys or solicitors by whom they prosecute or defend; and he shall enter thereunder, from time to time, of the proper dates, brief notes of all papers filed and all proceedings had therein: the issuing of writs and other process, the teste and return thereof, the court or officer to whom directed: the return of any court, officer or other person thereto: the filing of any bond or other security, and the issuing of a certificate of *supersedeas:* and of all rules, orders, decrees and judgments in any action, suit or proceeding, whether of course or on motion: also, proper references to the number and term of all papers and proceedings.

2. The clerk shall also keep a judgment record, in which he shall

enter all judgments and decrees, the names of the parties thereto plaintiff and defendant: the date of the judgment or decree, its number and term, the amount thereof, if the recovery of money or damages is included therein, and the amount of costs—which record shall be properly indexed.

3. The clerk shall keep a court journal, in which he shall enter, from day to day, brief minutes of all proceedings in court.

RULE V. The clerk shall file all papers presented to him, endorse thereon the style of the suit, its number and term, the character of the paper and date of filing; and after filing, no paper shall be taken from the office unless by consent of parties, or order of the court or a judge thereof.

At the commencement of each term, the clerk shall furnish the court and bar with separate lists of all causes pending therein which have been noticed for argument and of which a note of issue has been filed four days before the commencement of the term. Causes shall be placed upon the list according to the date of the notice of the Appeal or writ of Error.

RULE VI. Motions, except for orders or rules of course, shall be brought on upon notice, accompanied with the papers upon which the same are founded, except when made upon the records or files of the court.

RULE VII. When any decision or order of a District Court other than a judgment or final decree is appealed from, the clerk of the District Court, along with a certified copy of the order or decision and notice of Appeal, shall certify and transmit to this court, with all convenient speed, copies of all pleadings, affidavits, depositions, papers and documents on which such order was founded, or used upon the motion for the same, or necessary to the explanation or understanding thereof, at the expense of the parties appealing.

RULE VIII. Upon an Appeal from a judgment, the clerk of the District Court, in addition to the copies of the notice of Appeal and judgment-roll, shall, upon the request of either party to such Appeal, and at the expense of the party applying, certify and transmit to this court copies of any papers, affidavits or documents on file in the District Court in the action in which the Appeal is taken which such party may deem necessary to or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the Appeal.

RULE IX. When a writ of Error shall issue from this court to bring up the record of any judgment or decision of a District Court, upon the service of the writ of Error on the clerk of the District

Court, he shall certify and return therewith, at the expense of the party bringing the writ of Error, a transcript of the record or judgment-roll.

RULE X. Upon an Appeal from a decree or final order in Chancery being perfected, the clerk of the District Court with whom the Appeal is entered shall, at the expense of the party bringing the Appeal, certify and transmit to this court copies of the bill, answer, and other pleadings if any—of all orders, proofs, depositions and reports, and verdict and case, if any, on which the decree was founded, or necessary to the understanding thereof, and also of the decree and of any subsequent order in relation thereto.

RULE XI. The clerk of a District Court shall in no case be bound to make a return to any writ of Error or Appeal, or certify or transmit any copy of a paper or record to this court, until his fees therefor are paid. And unless a party appealing or bringing a writ of Error shall procure the return of the clerk of the District Court and his certificate and transcript, to be filed with the clerk of this court, within ninety days after the service of the writ or of notice of the Appeal on the clerk below, or such further time as shall be allowed by a Judge, such writ of Error or Appeal shall be deemed abandoned, and the opposite party, on filing an affidavit of the facts, may have an order of course entered with the clerk, dismissing the writ of Error or Appeal for want of prosecution, with costs; and the court below may thereupon proceed as if no writ of Error or Appeal had been brought.

RULE XII. If the return made by the clerk of the court below shall be defective, or full copies of all the orders, papers or records necessary to the understanding or decision of the case in this court shall not be certified or transmitted, either party may, on an affidavit specifying the defect or omission, apply to one of the judges of this court for an order that such clerk make a further return and supply the omission or defect without delay.

RULE XIII. Whenever it shall be necessary or proper in the opinion of any Judge of this court that original papers of any kind should be inspected in this court on Appeal, such judge may make such rule or order for the transmission, safe-keeping and return of such original papers as to him may seem proper; and the court will receive and consider such original papers in connection with the transcript of the proceedings.

RULE XIV. The attorneys and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively in this court, until

others shall be retained or appointed and notice thereof shall be served on the adverse party.

RULE XV. Causes shall be noticed for the first day of the term, and may be noticed for argument by either party. Criminal cases shall have a preference, and may be moved on behalf of the United States out of their order on the calendar.

RULE XVI. The appellant or plaintiff in error bringing on the argument of a cause shall, at the opening thereof, furnish each member of the court with a case or paper-book, which shall consist of copies of the transcript or papers certified and returned by the court below, and the reasons of that court for its decision, if any were filed. The folios of the case or paper-book shall be distinctly numbered in the margin, and the numbering of all the copies shall correspond. To the copies of the case furnished the members of the court, shall be appended a note of the points on which the party relies for a reversal of the order, judgment or decree of the court below, with a list of the authorities to be cited in support of the same. On the opening of the argument on his part, the other party shall furnish the members of the court with copies of his points and authorities.

RULE XVII. On or before the first day of the term at which a cause is noticed for argument, each party shall deliver to the other a copy of the points which he will make upon the argument, and of the authorities he intends to cite in support of the same. Each party shall also furnish the clerk with a copy of his points, who shall annex the same to the transcript or return of the clerk below, and no other assignment of errors or joinder in error shall be necessary.

RULE XVIII. In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall add to the copies of his points furnished the court the leading facts which he deems established with reference to the portions of the evidence where he deems the proof of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

RULE XIX. The party who has noticed and placed the cause on the calendar for argument may take judgment of affirmance or reversal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases and points as required by these rules.

RULE XX. Causes may be submitted on written briefs or arguments. Either party may submit a cause on his part on a written brief or argument.

RULE XXI. In all cases of the dismissal of any Appeal or writ of Error in this court, it shall be the duty of the clerk to issue a mandate or other proper process in the nature of a *procedendo* to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as if no writ of Error or Appeal had been brought.

RULE XXII. A *remittitur* shall contain a certified copy of the judgment of the court, signed by the clerk and sealed with the seal thereof, and shall be transmitted to the clerk of the court below as soon as may be after the final adjournment of this court.

RULE XXIII. On reversal of a judgment of the District Court rendered on a judgment removed into it from an inferior court, this court will render such judgment as ought to have been given in the court below, including the costs of that court and also for the costs of this court; and the plaintiff in error or appellant may have execution thereupon.

RULE XXIV. In all cases where a judgment of the District Court for the recovery of money only is affirmed, judgment may be entered in this court for the amount thereof, with interest and costs, and damages, if any are awarded, to be added thereto by the clerk; and the party in whose favor the same was rendered may have execution thereupon from this court.

RULE XXV. In case of a reversal of a judgment, order or decree of a District Court, rendered or made in a cause commenced therein, if there is no *remittitur*, the prevailing party shall have judgment in this court for the costs of reversal, and the costs of the court below, and execution therefor.

RULE XXVI. In all cases in which a *remittitur* is ordered, the party prevailing shall have judgment in this court for his costs, and execution thereon, notwithstanding the *remittitur*.

RULE XXVII. Costs, in all cases, shall be taxed in the first instance by the clerk and inserted in the judgment, subject to the review of the court or a judge thereof; and the clerk of the court below may tax the costs of the prevailing party in this, when the same are to be inserted in the judgment.

RULE XXVIII. In all cases, the clerk shall attach together the writ of Error, if any, the transcript and papers certified and returned by the clerk of the court below, and annex thereto a copy of the judgment or decree of this court, signed by him; and the papers thus annexed shall constitute the judgment-roll.

RULE XXIX. Executions to enforce any judgment of this court may issue to the sheriff of any county in which a transcript of the

judgment shall have been filed and docketed: such executions shall be returnable in sixty days from the receipt thereof by the officer. On the return of an execution satisfied, or acknowledgment of satisfaction, in due form of law, by the party who recovered the same, or his representatives or assigns, the clerk shall make an entry thereof upon the record.

RULE XXX. All other writs and process issuing from or out of the court shall be signed by the clerk, sealed with the seal of the court, tested of the day when the same is issued, and made returnable on any day in the next term, or in the same term when issued in term time; and a judge may, by an endorsement thereon, order process to be made returnable on any day in vacation when, in his opinion, the exigency of the case requires it.

RULE XXXI. Any of the foregoing rules may be relaxed, modified or suspended by the court in term time, or by a judge thereof in vacation, in particular cases, as justice may require.

RULE XXXII. The reporter shall be entitled, upon receipting to the clerk, to take from his office any papers on file, but not to retain them for a longer period than twenty days.

RULES OF PRACTICE

FOR THE DISTRICT COURTS IN ACTIONS AND PROCEEDINGS AT LAW ON THE TERRITORIAL SIDE.

SUPREME COURT, *July Term*, 1852.

Ordered, That the following rules be adopted for the government of the practice of the several District Courts of this Territory, in civil actions and proceedings at law not brought upon the federal side of those courts:—

RULE I. On the trial of causes, one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause to the jury, unless the justice who holds the court shall otherwise order; and he may limit counsel as to time.

At the hearing of causes at a general or special term, or in vacation, no more than one counsel shall be heard on each side, except by permission of the court.

RULE II. Where a party makes a case or bill of exceptions, he shall procure the same to be filed within ten days after the case shall be settled, or the same or the amendments thereto shall be adopted, or the bill of exceptions sealed, or it shall be deemed abandoned.

RULE III. Whenever a motion for a new trial is made on the minutes of the court, and a party desirous to appeal from an order granting or denying the same, a case shall be made and served, and adopted or amended and settled, after the entry of such order, within the same times and in the same manner as is allowed by law for preparing a statement of a case after trial. In cases reserved by the court, no case need be prepared unless directed by the judge.

RULE IV. Enumerated motions are motions arising on issues of law, case agreed between the parties without trial, case reserved,

motions for a new trial on a case or bill of exceptions, motions in arrest of judgment, for judgment notwithstanding the verdict, or to set aside a dismissal of the action ordered on the merits of the trial, when such motions are heard at a general or special term, and not at the same term in which the trial, if any, was had.

Non-enumerated motions include all other questions submitted to the court.

RULE V. Enumerated motions shall be noticed for the first day of term by either party. The papers to be furnished by the party bringing on such motion to the court and opposite party shall be: a copy of the pleadings, case, bill of exceptions, special verdict, or other papers on which the question arises; the copy to be furnished the opposite party shall accompany the notice. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party may move that the cause be stricken from the calendar. At the hearing, each party shall furnish the court and opposite party a statement in writing of the points on which he relies, with a note of the authorities to sustain the same.

RULE VI. Notices of non-enumerated motions shall be accompanied with copies of the affidavits and papers on which the same shall be made, except papers on file which shall be referred to in the notice. When noticed for the first or a subsequent day of the term, the motion may be heard on any day thereafter in the same term.

RULE VII. Notes of issue of all enumerated motions noticed for a general or a special term, shall be filed four days before the commencement of the court for which the same may be noticed. And the same shall be placed upon the calendar according to the date of the issue, case agreed on, or of the trial at which the question arose, immediately after the issues of fact on the same calendar.

RULE VIII. The attorney, or other officer of the court who draws any case, bill of exceptions, or report of referrees, shall distinctly number and mark each folio of one hundred words in the margin thereof; and all copies shall be numbered or marked in the margin so as to conform to the original.

RULE IX. Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify.

RULE X. Where the service of the summons, and of the complaint accompanying the same, shall be made by any person other than the sheriff, it shall be necessary for such person to state in his affidavit of service, when, at what place, and in what manner

he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein.

RULE XI. Commissions to take testimony without the Territory may be issued on notice and application to a judge, or to the clerk of the county where the action is pending, either in term time or in vacation. Within five days after the entry of the order for a commission, the party applying therefor shall serve a copy of the interrogatories proposed by him on the opposite party, if he has appeared; within five days thereafter the opposite party may serve cross-interrogatories; after the expiration of the time for serving cross-interrogatories, either party may give five days notice of settlement before the clerk or judge: if no such notice be given within five days, the interrogatories and cross-interrogatories, if any, served, shall be considered adopted. Whenever a commission is applied for by one party and the other party wishes to join therein, interrogatories and cross-interrogatories to be administered to his witnesses, may be served and settled or adopted within the same times and in the same manner as those to the witnesses of the party applying. After the interrogatories are settled or adopted, they must be annexed to the commission, and the same forwarded to the commissioners.

RULE XII. Should any or either of the commissioners fail to attend at the time and place for taking testimony, after being notified thereof, any one or more commissioners named in the commission may proceed to execute the same.

RULE XIII. The witnesses shall severally subscribe their depositions; and the commissioner or commissioners taking the same shall certify at the bottom of each deposition that it was subscribed and sworn to before them, and date and sign such certificate: they shall also endorse upon the commission the time or times and place of executing it, and whether any commissioner not attending was notified. They shall annex the depositions to the commission, seal them up in an envelope, and direct to the clerk of the proper county: they may be transmitted by mail or private conveyance; the clerk, on the receipt of the same, shall open the envelope and file it with the commission and depositions, marking thereon the time: they cannot be taken from his custody without the order of the court, but he shall produce them in court to be used on the trial, at the request of either party.

RULE XIV. Process may be tested and made returnable on any day in term-time or vacation except in cases specially provided for by law. The judge ordering any process may direct when the same shall be returnable.

RULE XV. Whenever interlocutory costs are to be taxed the same shall be taxed in the first instance by the clerk. When a trial is put off on payment of costs, or a sum specified, the party shall have twenty-four hours to pay the same. If any dispute arise as to the amount, the same shall be immediately taxed by the clerk. In other cases where costs are ordered to be paid and no time is mentioned in the order, the party shall have ten days after notice of the order to pay the same: but where relief is granted on payment of costs, the payment is a condition precedent. If any person ordered to pay costs shall not do so within ten days after service of a certified copy of the order and a demand of the costs, if the amount is ascertained or has been taxed, on filing proof thereof, an execution to collect the same may be issued by the clerk, or the party entitled thereto may apply for an attachment.

RULE XVI. Whenever notice of a motion shall be given and no one shall appear to oppose, the party moving shall be entitled, on filing an affidavit of service, to the relief or order asked for in the notice. If the party giving such notice shall not appear, or shall not make the motion, the opposite party appearing shall be entitled to costs for opposing and an order dismissing the motion, on filing proof of service of the motion on him.

RULE XVII. When a plaintiff is ordered to file security for costs, if the same shall not be filed and notice thereof served within ninety days after notice of such order, the defendant may apply for a dismissal of the action.

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

RULE XIX. Judgments, and copies to annex to the judgment-rolls, shall in all cases be signed by the clerk, and no other signature thereto shall be required.

RULE XX. In cases where these rules or the statutes do not apply, the practice shall be regulated by the former practice of the Court of King's Bench, in England, so far as the same is applicable —not as a positive rule, but as furnishing a just analogy and suitable guide to regulate the same.

RULES OF PRACTICE

FOR THE DISTRICT COURT IN SUITS AND PROCEEDINGS IN EQUITY ON THE TERRITORIAL SIDE.

SUPREME COURT, *July Term*, 1852.

Ordered, That the following rules of practice be adopted for the government of the District Courts of this Territory, in equity suits and proceedings not brought upon the federal side of said courts :—

RULE I. The several clerks shall keep in their respective offices such registers and books, properly indexed, as may be necessary to enter the titles of causes, with minutes of the proceedings in such causes: to enter the minutes of the court, docket decrees: enter orders and decrees, and all other necessary matters and proceedings. They shall keep the proceedings in equity in books separate from those in which proceedings at law are entered, and shall also keep the pleadings and other papers separate.

RULE II. Bills in which the answers of the several defendants on oath are not waived shall be verified by the oath of the plaintiff, or, in case of his absence from the Territory or other sufficient cause shown, by the oath of his agent, attorney or solicitor; and all bills for discovery merely shall be verified in the same manner.

RULE III. In bills, answers and petitions which are to be verified by the oath of a party, the several matters stated, charged, averred, admitted or denied, shall be stated positively, or upon information and belief only according to the fact. The oath administered to the party shall be, in substance: that he has read the bill, answer or petition, or has heard it read and knows the contents thereof; and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information or belief, and as to those matters, he believes it to be true. And the substance of the oath administered shall be stated in the jurat.

RULE IV. The plaintiff in his bill shall be at libery to omit, at his option, the part which is usually called the "common confederacy" clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff: also what is commonly called the "charging" part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill: also, what is commonly called the "jurisdiction" clause of the bill,—that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may in the narrative or stating part of the bill, state and avoid, by counter amendments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also may contain a prayer for general relief; and if an injunction, or writ of *ne exeat*, or any other special order, is required, it shall be specially asked for.

RULE V. Process of subpœna to appear and answer shall be substantially in the following form:—

To A B, Defendant:

You are hereby commanded, in the name of the United States, to appear before the District Court of the county of , in the judicial district of the Territory of Minnesota, at , in said county, on or before the day of , 185 , to answer a bill of complaint in chancery, exhibited against you by E F, complainant, and on file in the office of the clerk of said court for said county, and to do further what the said court may order or direct. And this you are not to omit under the penalty which may be imposed by law.

Witness the Hon. , Judge of said
[L. S.] court, at , in said county, the day
of , 185 .

J H K, Clerk.

RULE VI. Process may be in the same form, expressive of the intent, as that heretofore used in courts of chancery. It shall be tested in the name of the judge of the district, on the day it is issued, or, if his office be vacant, in the name of any other judge: and be made returnable, at the place where the clerk's office is kept in which the bill is filed or decree or order entered, on any day except Sunday, either in term or vacation, when no other time is fixed by law, or in the order granting the same. It shall be filed with the proper clerk, on or after the return day.

RULE VII. In every case where no special provision is made by law as to security, the judge who allows an injunction shall take from the plaintiff or his agent a bond to the party enjoined, in such sum as may be deemed sufficient, and not less than five hundred dollars, either with or without sureties, in his discretion, conditioned to pay to the party enjoined such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the plaintiff was not entitled to such injunction, such damages to be ascertained by a reference, or otherwise, as the court having jurisdiction of the cause in which such injunction issues shall direct. But he shall not allow the injunction upon the plaintiff's own bond only, without security, unless the plaintiff himself justifies in an amount double the penalty of the bond.

RULE VIII. When an injunction bill is filed to stay proceedings in a suit at law, the plaintiff shall state in his bill the situation of such suit, and whether an issue is joined or a verdict or judgment obtained therein.

RULE IX. If a preliminary injunction or a *ne exeat* is prayed for in the bill, the defendant may put in his answer on oath, for the purpose of moving thereon for the dissolution of the injunction or a discharge of the *ne exeat*, although an answer on oath is not required by law, or is waived by the plaintiff in his bill. But such answer shall have no greater or other force as evidence than the bill.

RULE X. An injunction or *ne exeat* shall not be dissolved or discharged, although the whole equity of the bill is denied by the answer, unless such answer is duly verified by oath; and where the plaintiff waives an answer on oath, if, in addition to the usual oath of the party, the material facts in the bill on which the injunction or *ne exeat* rests are duly verified by the affidavit of a creditable and disinterested witness, annexed to and filed with the bill, it shall not be a matter of course to dissolve the injunction or discharge the *ne exeat* on the oath of the defendant: but the court, in its discretion, may retain it till the hearing.

RULE XI. If the plaintiff waive the necessity of the answer being made on the oath of the defendant, it must be distinctly stated in the bill.

RULE XII. A defendant shall be at liberty by answer, to decline answering any part of the bill, or any interrogatory or part of an interrogatory from answering which he might have protected himself by demurrer; and the defendant may by answer protect himself from answering further, in the same manner and to the same extent as he could by plea; and he shall be at liberty so to decline

or protect himself notwithstanding he shall answer other parts of the bill from which he might have protected himself by plea or demurrer.

RULE XIII. If the bill has not been sworn to, the plaintiff may amend it at any time before plea, answer, or demurrer put in, of course and without costs. He may also amend of course, after answer, at any time before he replies thereto, until the time for replying expires, and without costs if a new or further answer is not thereby rendered necessary; but if such amendment requires a new or further answer, then it shall be on payment of costs to be taxed. He may also amend sworn bills, except injunction bills, in the same manner, if the amendments are merely in addition to and not inconsistent with what is contained in the original bill, such amendment being verified by oath as the bill is required to be verified; but no amendment of an injunction bill shall be allowed without a special order of the court and upon due notice to the adverse party, if he has appeared in the suit. Amendments of course may be made without entering any rule or order for that purpose, but the clerk shall not permit any amendments to be made unless the same appear to be duly authorized; and in every case of an amendment of course, the plaintiff's solictor shall either file a new engrossment of the bill with the clerk where the original bill is filed or furnish him with an engrossed copy of the amendments, containing proper references to the places and lines in the original bill on file where such amendments are to be inserted or made. But no amendment shall be considered as made until the same is served upon the adverse party, if he has appeared in the cause; and in all cases where the plaintiff is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant shall have the same time to answer after such amendment as he originally had.

RULE XIV. If the defendant demurs to the bill for want of parties, or for any other defect which does not go to the equity of the whole bill, the plaintiff may amend of course on payment of costs, at any time before the demurrer is noticed for argument, or within ten days after notice of the demurrer.

RULE XV. If any persons other than those named as defendants in the bill shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties; and as to persons who are without the jurisdiction, and may properly be made parties, the bill may

pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

RULE XVI. In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

RULE XVII. Orders to which, by the rules and practice of the court, a party is entitled of course, shall be entered by a brief minute thereof, to be made by the clerk under the title of the cause in the book kept for entering the titles of causes and memoranda of the proceedings in such causes, as prescribed in the first rule. The day on which such order is made shall be noted in the entry thereof.

RULE XVIII. Service of notices and other papers shall be made upon the solicitor of the adverse party, where one is employed. In case of absence from his office, service may be made by leaving the same with his clerk or law-partner in such office, or with a person having charge thereof: and, if no person be found in the office, by leaving the same, between six in the morning and nine in the evening, in a suitable and conspicuous place in such office: or if the office be not open so as to admit service therein, by leaving the same at the residence of the solicitor, with some person of suitable age and discretion.

In all cases where the solicitors of the adverse parties do not reside in the same town, service of papers may be made by putting them into the post-office, properly endorsed, and directed to the solicitor of the adverse party at the place of residence of such solicitor, and paying the postage thereon.

RULE XIX. No service of notices or papers in the ordinary proceedings in a cause need he made on a defendant who has not appeared therein, except in cases especially provided for. For the purpose of this rule, a defendant is deemed to have appeared when he has served notice of appearance in person, or by solicitors on the opposite party.

RULE XX. The time of all notices of hearing, or of special motions, or the presenting of petitions, shall be at least eight days. Copies of the papers on which any special application is founded

shall be served on the adverse party the same length of time previous to the application, except where copies have been already served or the papers are on file, and then they shall be referred to in the notice. Service by mail shall be double time. Notices shall be requisite of all motions not allowed to be made *ex parte* by the former practice of the courts of chancery in England.

RULE XXI. When the defendant pleads or demurs to a bill, the plaintiff shall have ten days to file a replication to his plea or amend his bill; and if he does not take issue on the plea or amend his bill within the time, either party may notice the plea or demurrer for argument. If the plea is allowed, the plaintiff may, within ten days after notice of such allowance, take issue upon the plea, upon payment of costs occasioned thereby.

RULE XXII. The defendant may amend his answer of course and without costs on the entry of an order therefor, if the same is not excepted to, at any time within twenty days after the same is filed and before the cause is noticed for hearing on bill and answer, or on bill, answer and replication, and before notice of an application for a reference to take proofs, or order that the testimony be taken in open court: but he shall not so amend more than once. And when the answer is excepted to, the defendant may, within five days thereafter, amend the same on payment of the costs of the exceptions answered. In case of amendment, the defendant shall file a new engrossment of the answer with the clerk, or an engrossed copy of the amendments with references to the place in the answer on file where the amendments are to be inserted or made. No amendment shall be considered as made until a copy of the amended answer, or of the amendments and references, is served on the adverse party; and in all cases, the plaintiff shall have the same time to reply or except to an amended answer which he originally had.

RULE XXIII. When the answer is to the whole bill, the plaintiff shall have ten days after such answer is put in and notice thereof given, to except to the same: or if the answer is to part of the bill only, he shall have ten days after the plea or demurrer to the residue of the bill has been allowed or overruled, to except to such answer; at the expiration of which time, if no exceptions are taken and no order for further time has been granted, the answer shall be deemed sufficient. Exceptions to an answer shall not prevent the dissolution of an injunction, or discharge of a *ne exeat.*

RULE XXIV. On excepting to an answer for insufficiency, if all

the exceptions are submitted to by the defendant, or a part are submitted to and the rest abandoned, the plaintiff may give notice that the defendant put in a further answer within twenty days after such notice, or that an attachment will issue, or the bill be taken as confessed, at the election of the plaintiff.

RULE XXV. If the defendant does not put in a further answer within the time prescribed, or within such further time as may be allowed by the court, the plaintiff, on filing an affidavit showing such default, may have an order of course to take the bill as confessed, or, on application to the court, may have an order that an attachment issue. When exceptions for insufficiency are allowed by the court, the defendant shall put in a further answer within ten days after notice of the order, or the bill may be taken as confessed, or an attachment be issued.

RULE XXVI. If the plaintiff does not reply to the defendant's answer within ten days after it is deemed sufficient, he shall be precluded from replying, unless further time is granted. No special replication shall be filed but by leave of the court on cause shown.

RULE XXVII. Where the cause stands for hearing on bill and answer against part of the defendants, if the plaintiff does not use due diligence in proceeding against the other defendants, any of those who have perfected their answer may apply to dismiss the bill for want of prosecution; and on such application further time shall not be allowed to the plaintiff of course, without any excuse shown for the delay.

RULE XXVIII. Within thirty days after the filing and service of a replication, either party may give notice of an application to the court for a reference to take testimony, or that the proofs and evidence in the cause be taken in open court in term-time or in vacation. If no such notice be given within that time, nor further time allowed, the cause shall be brought to a hearing upon the pleadings without proofs.

RULE XXIX. Upon a reference to take testimony, either party may, within twenty days thereafter, give notice of the time and place of taking testimony before the referee, which notice shall not be less than six days. The referee shall proceed in the taking of testimony from day to day until the witnesses on both sides are examined, and the documentary and written evidence on each side is produced, proved and marked: and shall not adjourn, except by consent of the parties or counsel, or for good cause shown, or to procure the attendance of a witness who is absent, after due dili-

gence to procure him, for any longer period at one time than three days. Testimony may also be taken by deposition, in the cases and manner provided by statute, at any time before the testimony in the cause is closed.

RULE XXX. The referee shall mark all the written and documentary evidence produced and proved, or offered before him as exhibits, and annex the same to the depositions, if any, and his return. He shall take down the testimony as nearly as may be in the language of the witnesses, omitting such parts as are clearly immaterial. If any witness, evidence, question or answer is objected to, he shall note the objection, and then receive or take down the evidence. He shall return the depositions and exhibits, after the testimony shall be closed, with all convenient speed to the office of the clerk with whom the bill of complaint is filed. When the witnesses produced before the referree are all examined and the exhibits marked, and no further adjournment shall be allowed as provided in the preceding rule, the testimony shall be considered closed; and no further proofs shall be taken within the Territory, except by leave of the court, on a special application after notice. If objectionable testimony be received, it may be stricken out on the hearing. When both parties appear before the referee, the proofs of the party holding the affirmative shall be taken first: then those in answer thereto: and then those in reply, unless the referee otherwise direct.

RULE XXXI. The witnesses shall subscribe their depositions respectively after the same are read over to them. No alteration shall be made in testimony after it is written down. If a witness wishes to correct or explain any statement in his deposition, the correction shall be noted at the bottom before signing. The party producing a witness shall examine him first: then the other party may cross-examine him: and then the party calling him may re-examine him as to the matter of the cross-examination, and no further examination shall be had; but this shall not prevent the other party from calling him as a witness to prove his own case. The referee shall certify at the bottom of each deposition that the same was subscribed and sworn to before him.

RULE XXXII. Process of subpœna to compel the attendance of witnesses before the court, or a referee, or master, shall issue of course, and the time and place of attendance shall be specified in the writ.

RULE XXXIII. Where the testimony in a cause shall have been taken in open court, any party intending to appeal from an order or

decree entered therein shall, within twenty days after notice of said order or decree, prepare and serve a case containing the evidence and proceedings on the hearing only, which shall be amended and adopted, or settled in the same manner as cases in actions at law, and within the same times.

RULE XXXIV. Causes shall be noticed for hearing for the first day of term when heard in term-time. A note of issue, specifying the date of the issue, shall be delivered to the clerk who is to make up the calendar, at least four days previous to the commencement of the term; and the clerk shall thereupon place the causes upon the calendar according to their date, immediately after enumerated motions in actions at law. Each party shall deliver to the court and opposite party, at the hearing, a copy of the points and authorities on which he relies.

RULE XXXV. Costs shall in all cases be taxed by the clerk, subject to review by the court on appeal. When relief is granted on payment of costs, the payment is a condition precedent. When costs are ordered to be paid and no time of payment is fixed in the order, the party whose duty it is to pay the same shall have ten days after notice of the order and until the amount is ascertained by taxation, if not specified in the order.

RULE XXXVI. Whenever notice of a motion shall be given and no one shall appear to oppose, the party moving shall be entitled, on filing an affidavit of service, to the relief or order asked for in the notice. If the party giving such notice shall not appear, or shall not make the motion, the opposite party appearing shall be entitled to costs for opposing and an order dismissing the motion, on filing proof of service of the notice on him.

RULE XXXVII. Whenever a Justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify.

RULE XXXVIII. No re-hearing shall be granted after the term at which a final decree of the court shall have been entered, if an Appeal lies to the Supreme Court, except upon the ground of irregularity in the first hearing, or newly discovered evidence.

RULE XXXIX. The same notice of the sale of mortgaged premises under a decree shall be given as is required by law of sales of real estate on execution.

RULE XL. It shall be the duty of every solicitor or other officer of this court to act as the guardian *ad litem* of an infant defendant in any suit or proceeding, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian

to examine into the circumstances of the case so far as to enable him to make the proper defence when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable.

RULE XLI. It shall not be necessary to recite the substance or any portion of a bill, petition or affidavit in any decree or order founded in whole or in part thereon, but shall be sufficient merely to refer to the same, when necessary to render the decree or order intelligible.

RULE XLII. One counsel on a side only shall examine or cross-examine a witness; on the hearing of a cause or motion, no more than one counsel shall be heard on each side, except by permission of the court.

RULE XLIII. The eleventh, twelfth and thirteenth rules of practice in actions and proceedings at law on the Territorial side of the court, relating to the issuing and return of commissions and the taking of testimony without the Territory, shall apply to suits and proceedings in equity.

RULE XLIV. In cases where these rules or the statutes do not apply, the practice shall be regulated by the former practice of the Court of Chancery in England—not as a positive rule, but as furnishing an outline and guide to regulate the same.

TERRITORY OF MINNESOTA,
ss.

I, George W. Prescott, Clerk of the Supreme Court of said Territory, do hereby certify that the foregoing are true copies of the Rules of Practice in the Supreme Court aforesaid and for the District Courts in said Territory, as adopted by the said Supreme Court at the July Term, 1852, as appears from the originals on file in my office.

Witness my hand and official seal, at the Capitol in
[L. S.] the City of St. Paul, this first day of May, A. D. 1858.

GEO. W. PRESCOTT,
Clerk of Supreme Court.

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is immaterial, and by legal necessity cannot influence the verdict. So of instructions to the jury upon irrelevant topics. *Coit vs. Waples and Zirkle*, 134.

ADMISSION.

2. New matter or a counter-claim set up in an answer will be taken as true, unless controverted by a reply; and if not denied or controverted, it is unnecessary to introduce evidence in support of such new matter or counter-claim. *Taylor vs. Bissell*, 225.

AMENDMENT.

1. "The Jury find and return a verdict for the plaintiff and against the defendant, and costs of suit," in an action of Replevin, is a correct verdict in substance, and where the intention is obvious the Court will give effect to the verdict as intended. It may be amended in matters of form; the words "and for costs" must be rejected as surplusage, but in nowise affect the finding upon the issue. *Coit vs. Waples and Zirkle*, 134.

2. Where in an action of Replevin the jury find generally for the plaintiff *with costs*, this Court will so amend the verdict and judgment as to assess the damages at six cents and limit the costs recoverable to the same sum. *Ib.*

ANSWER.

1. A denial of any knowledge or information sufficient to form a belief, as to whether a Bill of Exchange made by the plaintiff and accepted by the defendants was presented at the place of payment indicated in the Bill, is a denial of an immaterial allegation. *Freeman vs. Curran and Lawler*, 169.

2. Where a plaintiff sues as a survivor of a co-partnership, a denial of any knowledge or information sufficient to form a belief as to the survivorship, or as to whether the plaintiff was one of the co-partners, is a denial of an immaterial allegation. *Ib.*

3. A denial that the plaintiff is the legal owner and holder of the instrument sued upon and of the indebtedness, simply denies a conclusion and is bad. *Ib.*

4. Where a complaint contains immaterial allegations, and the Answer takes issue upon such allegations, it is doubted that a motion to strike out such denials where they are coupled with other good matters of defense would be entertained: otherwise, where the answer is entirely bad. *Ib.*

5. A motion to strike out an Answer and for judgment need not be made within twenty days after the service of the Answer. *Ib.*

6. Although, as a general rule, it is too late to move for a judgment—notwithstanding the Answer—after the action has been noticed for trial, exception will be made to this rule in cases where the Answer contains no merits. *Ib.*

7. In an action to recover the possession of personal property, an Answer is sufficient which sets up an outstanding title in a third person, and it is unnecessary for the party to connect himself with such title. *Loomis vs. Youle*, 175.

8. New matter or a counter-claim set up in an Answer will be taken as true unless controverted by a Reply; and if not denied or controverted, it is unnecessary to introduce evidence in support of such new matter or counter-claim. *Taylor vs. Bissell*, 225.

9. The allegation in Answer that the defendant "*charged* twenty-five dollars for his commissions" will not be available as a counter-claim. It should allege that his services were worth that or some other sum, and that the charge therefor was just and reasonable. Evidence could not be admitted under such an allegation, to prove that the charge was just and reasonable or that the services were worth the amount charged. *Farrington vs. Wright*, 241.

10. Such an allegation would not be cured by a proper verification. In verifying the Answer, he in effect only swears that he charged such an amount—not that such charge was just and true. *Ib.*

11. Where a Demurrer to an Answer was sustained and the defendant filed an amended answer, he cannot upon Writ of Error re-examine the original Demurrer, as he waives all objections to the order sustaining the same by answering over. *Becker vs. The Sandusky City Bank*, 311.

12. Equities existing between the original parties to a Note which originated subsequent to the endorsement thereof to the holder, cannot be set up as a defense] by the maker against the holder. *Ib.*

APPEAL.

1. A decree dissolving an injunction is an interlocutory decree, and not properly the subject of Appeal. *Chouteau et al. vs. Rice et al.* 24.

2. Under the Organic Law and the Statutes of Minnesota, appeals will only lie from final decrees. *Ib.*

3. Section 11, page 414, Revised Statutes of Minnesota 1849, does not authorize an Appeal to this Court from an order made by the Court below setting aside a judgment or the Report of Referrees and awarding a new trial. *Ib.*

4. The Statute clearly denies an Appeal from any judgment or order which in effect retains the cause for further hearing in the Court below. *Ib.*

5. A case brought into the District Court by Appeal from the judgment of a Justice of the Peace must be tried upon the pleadings below, unless they are amended by leave of the District Court; and if the jury assess the damages at a sum greater than laid in the complaint, judgment cannot be rendered thereon without a remittitur of the excess. *Elfelt et al. vs. Smith*, 125.

6. Upon an Appeal from an order refusing to award a new trial, this Court has no power to affirm the judgment with twelve per cent. damages and double costs. *St. Martin vs. Desnoyer*, 156.

7. When an Appeal from the judgment of a Justice of the Peace is properly taken and a return thereto made, the whole proceedings before a Justice become a mere *lis pendens* in the District Court, and the plaintiff then has the same right to dismiss the action at any time before trial as he would have had in the Court below; and where the District Court has allowed the dismissal of the action upon the motion of the plaintiff, a Writ of Error will not lie. *Fallman and Fallman vs. Gilman*, 179.

8. An order made by the District Court, setting aside a sale upon an execution issued out of that Court vacating the Sheriff's return thereon and directing the issuance of a new execution, is an appealable order. *Tillman and Christy vs. Jackson*, 183.

9. An order of the District Court vacating and quashing a Warrant of Attachment is not an appealable order. *Humphrey vs. Hezlep*, 239.

10. No Appeal will lie from a judgment of a Justice of the Peace unless it exceed fifteen dollars, exclusive of costs. *Dodd vs. Cady*, 289.

11. Where an Appeal is taken from a judgment rendered in the District Court the evidence given upon the trial of the cause in that Court is no part of the record and cannot properly be considered by this Court upon Appeal. *Claflin et al. vs. Lawler et al.* 297.

12. Although the evidence in this case consisted of depositions read in the Court below, there is no more propriety in sending up written than oral testimony; we have no right to look beyond the records in the cause. *Ib.*

13. The Record consists only of the pleadings, the decision of the Judge, and the judgment. *Ib.*

14. Upon an Appeal, this Court will not undertake to revise the judgment below or give judgment upon the evidence, but will only consider the facts as they are exhibited by the record. *Ib.*

15. There are but two modes by which a cause can be removed from a District Court to the Supreme Court, to wit: by Appeal and by Writ of Error.—*Ames vs. Boland et al.* 365.

APPEARANCE.

ASSIGNMENT.

ATTACHMENT.

ATTORNEY.

BILL OF EXCEPTIONS.

CERTIORARI.

"CLAIM MEETING."

CHANCERY.

12. Parol evidence of pre-existing or contemporaneous understandings and verbal agreements tending to vary or contradict the terms of a contract which has been reduced to writing and signed by the parties thereto, is inadmissible. *The Bank of Hallowell vs. Baker and Williams*, 261.

13. But Courts of Equity will relieve where the contract has been executed through fraud or by mistake or surprise. *Ib.*

14. Voluntary incumbrancers whose liens attach *pendente lite* need not be made parties defendant; and they cannot compel the complainant to insert in his Bill of Complaint the conflicting rights and equities existing between them and the defendant, for the purpose of obtaining a decree to determine their rights and equities. *Steele vs. Taylor*, 274.

15. But after decree between the original parties, voluntary incumbrancers may have their equities and rights to the property determined, and may file their bill to protect the same. *Ib.*

16. But such incumbrancers may be made defendants in a suit, by the express consent of the complainant, or by some act on his part recognizing them as proper defendants. *Ib.*

COMMON CARRIER.

1. A Common Carrier can acquire no lien upon goods or property belonging to the United States Government, for services rendered in transporting such goods. *Dufolt vs. Gorman*, 301.

2. The lien of a warehouseman upon goods for warehouse charges and the lien of a warehouseman upon goods for money advanced for freight charges depend upon different principles of law. *Bass & Co. vs. Upton*, 408.

3. A warehouseman who receives goods from a steamboat in the carrying trade and pays to such boat the freight charges, does not by reason of such payment obtain a lien upon the goods. *Ib.*

4. A steamboat in the carrying trade—that receives goods and contracts to carry them to a place stated—is not entitled to freight charges; and no lien attaches to the goods in favor of the boat until the contract is performed unless it shall appear that the performance of such contract became impracticable. *Ib.*

COMPLAINT.

1. In pleading a Judgment Record, a variance between the declaration and the Record as set forth therein, in the amount declared on, or names of parties, will be fatal. *Lawrence vs. Willoughby*, 87.

2. In an action under the Statute of Forcible Entry and Detainer, the Complaint must *particularly* describe the premises detained. *Lewis vs. Steele and Godrey*, 88.

3. The plaintiff's recovery is limited by the amount demanded in his Complaint. *Elfelt vs. Smith*, 125.

4. Under the Statute of Replevin of Wisconsin it is necessary to allege a *wrongful* taking, and a declaration from which such allegation is absent is bad upon demurrer, but will be cured after verdict; and after a plea upon the merits it is too late to review an erroneous decision of the Court below in overruling the demurrer. *Coit vs. Waples and Zirkle*, 134.

5. In an action to recover the possession of personal property, it is an indispensable allegation that the plaintiff is either the owner or entitled to the possession of the property; and the absence of such averments is not cured by the provisions of Sections 86, 87 and 88 of Chapter 70 of the Revised Statutes.—*Loomis vs. Youle*, 175.

6. A Complaint under Chapter 87 Revised Statutes, for Forcible Entry and Detainer, before a Justice of the Peace, which simply charges that the defendant forcibly entered and does detain from the plaintiff certain lands, describing

CONTRACT.

1. Forbearance to use legal means by one party to secure himself, at the request of another, and consequent loss, is sufficient consideration to support a Contract. *Brewster vs. Leith*, 56.

2. An agreement to *sell* and *convey* real-estate upon condition of payment of the consideration-money at a future specified time, is an Executory Contract; and no sale is made or consummated, and no rights acquired, except upon full payment of the consideration-money and performance of the condition at or before the time agreed upon. *Ahl vs. Johnson*, 215.

3. In such a Contract, the time of payment or performance of the condition precedent is an essential element; and such condition must be performed within the specified time, before a party may claim any right to the property. *Ib.*

4. But Courts of Equity will relieve where unavoidable events, or circumstances beyond the control of the party seeking relief, have rendered the performance of the condition within the specified time an impossibility; but in such case, the party seeking relief must show affirmatively that his failure to perform was not the result of gross negligence or *laches* on his part. *Ib.*

5. A Deed or other instrument, executed with intent to convey property before the same has been purchased from the United States Government, is a mere nullity, and no title or interest passes to the grantee in such conveyance. *Brisbois vs. Sibley & Roberts*, 230.

6. When a Contract is made by which one party incurs liabilities or obligations to another, and the terms and conditions of such liabilities or obligations are reduced to writing and signed by the parties thereto, without fraud, mistake or surprise, such written Contract must control and supersede all other and different terms founded upon pre-existing or contemporaneous verbal understandings or agreements in regard to the subject-matter of the Contract. *The Bank of Hallowell vs. Baker and Williams*, 261.

7. And such a Contract is conclusive of what the agreement was, and of all the terms and conditions thereof. *Ib.*

8. Parol evidence of pre-existing or contemporaneous understandings and verbal agreements tending to vary or contradict the terms of a contract which has been reduced to writing and signed by the parties thereto, is inadmissible. *Ib.*

9. But Courts of Equity will relieve where the Contract has been executed through fraud or by mistake or surprise. *Ib.*

10. The intention of a party to a Contract should control its legal effect, when such intention is clearly manifest from the face of the Contract; but when the intention is not clear, the contract is to be construed most strongly against the promissor. *Brewster et al. vs. Wakefield*, 352.

11. A steamboat in the carrying trade that receives goods and contracts to carry them to a place stated, is not entitled to freight charges: and no lien attaches to the goods in favor of the boat until the contract is performed, unless it shall appear that the performance of such contract became impracticable.—*Bass & Co. vs. Upton*, 408.

12. Whether covenants are dependent or independent must always depend upon the intention of the parties as it may be gathered from the stipulations or covenants contained in the agreement. *Hertzell & Burriss vs. Woodruff*, 418.

13. And where the intention is doubtful,—the nature of the transaction, the purpose and object of the parties, and the obvious effect of the stipulation of each party in regard to the time of the performance, must be considered together in order to determine what must have been their intention. *Ib.*

14. Where a party seeks to vitiate a Contract on the ground of false representations, it must appear that such false statements had relation to matters existing at the time they were made or prior to that time, and must also have been in part the inducement of the plaintiff to make the Contract, or they can not vitiate it. *Ib.*

15. The loose conversations of a party to a Contract prior to making the agreement cannot be considered upon the question of consideration. The presumption of law is that the prior conversations upon the subject of the Contract were merged in the writing. *Ib.*

COSTS.

1. Where in an action of Replevin the jury find generally for the plaintiff *with costs*, this Court will so amend the verdict and judgment as to assess the damages at six cents and limit the costs recoverable to the same sum. *Coit vs. Waples and Zirkle*, 134.

COUNTER CLAIM.

1. New matter or a Counter-Claim set up in an answer will be taken as true unless controverted by a reply; and if not denied or controverted, it is unnecessary to introduce evidence in support of such new matter or counter-claim. *Taylor vs. Bissell*, 225.

2. The allegation in an answer that the defendant "*charged* twenty-five dollars for his commissions" will not be available as a counter-claim. It should allege that his services were worth that or some other sum, and that the charge therefor was just and reasonable. Evidence could not be admitted under such an allegation, to prove that the charge was just and reasonable or that the services were worth the amount charged. *Farrington vs. Wright*, 241.

COVENANT.

1. A declaration in Covenant must aver a demand for the specific articles named in the covenants, and it is error to receive evidence of a demand for specific articles when only a demand for money is averred. *Snow and Bryant vs. Johnson*, 48.

2. Where covenants between parties are independent, or where it is evident from the articles of agreement that the act to be done by one was to precede the act to be done by the other, then, upon a failure of him who was to do the first act, the other would have a right to recover upon a general averment of performance. But where the covenants are mutual and concurrent—the act of the one dependent upon the act of the other—not only a readiness and willingness to perform must be averred, but an actual tender both averred and proved. *Ib.*

3. J. covenanted to sell and convey to S. & B. by good and sufficient deed of conveyance: S. & B. covenanted to pay $400 in groceries, liquors and provisions, one-half in the month of April then next and the remainder when called for,—HELD, That the covenants were concurrent, and that performance or tender of performance must be averred and proved. *Ib.*

4. Whether covenants are dependent or independent must always depend upon the intention of the parties as it may be gathered from the stipulations or covenants contained in the agreement. *Hertzell & Burriss vs. Woodruff*, 418.

5. And where the intention is doubtful,–the nature of the transaction, the purpose and object of the parties, and the obvious effect of the stipulation of each party in regard to the time of the performance, must be considered together, in order to determine what must have been their intention. *Ib.*

CLIMINAL LAW.

1. The evidence of co-defendants in a criminal prosecution is inadmissible, and they will not be permitted to testify for or obliged to testify against each other; and if the defendants are tried separately, the rule is the same. *Baker vs. The United States*, 207.

2. But a defendant, after being discharged or after judgment rendered against him, may be a competent witness for a co-defendant. *Ib.*

3. In cases of criminal prosecution before a Justice of the Peace, the District Court may, upon Certiorari, affirm the judgment of the Justice with costs in both Courts, and render such judgment against the defendant and the sureties upon his recognizance. *Ib.*

4. Maliciously killing a dog is not an indictable offense under Sections 65, 66, 67, 68 and 69 of Chapter 119 Revised Statutes of Minnesota. *The United States vs. Gideon*, 292.

5. Under Section 39, Chapter 101 Revised Statutes of Minnesota, providing for the punishment of persons who shall "wilfully and maliciously kill, maim or disfigure any horses, cattle or other beasts of another person," &c.—HELD, *First*, That the value of the animal injured or killed should be alleged and proved; *Second*, That it is not necessary to prove malice against the animal. *Ib.*

DAMAGES.

1. The question of Damages is the peculiar province of juries; and unless they are so excessive as to warrant the inference of prejudice, partiality or corruption, a verdict will not be disturbed on the ground of excessive damages.—*St. Martin vs. Desnoyer*, 156.

2. Upon an appeal from an order refusing to award a new trial, this Court has no power to affirm the judgment with twelve per cent. damages and double costs. *Ib.*

DECREE.

1. An Interlocutory Decree is one which is made pending the cause and before a final hearing on the merits. *Choudeau et al. vs. Rice et al.* 24.

2. A Final Decree is one which disposes of the cause—either sending it out of Court before a hearing is had upon the merits or after hearing is had upon the merits, decreeing either in favor of or against the prayer in the bill. *Ib.*

3. A decree dissolving an injunction is an Interlocutory Decree, and not properly the subject of appeal. *Ib.*

4. Under the Organic Law and the Statutes of Minnesota, appeals will only lie from final decrees. *Ib.*

DEED.

1. A Deed or other instrument, executed with intent to convey property before the same has been purchased from the United States Government, is a mere nullity, and no title or interest passes to the grantee in such conveyance. *Brisbois vs. Sibley & Roberts*, 230.

DEFAULT.

1. A notice of a motion for a judgment notwithstanding an answer, is a regular and valid proceeding under our practice, and the party noticing the motion may, upon default, take his order. The party taking such order, however, must see that all former proceedings on his part are regular, and that his order is founded upon the record and practice of the Court. *Farrington vs. Wright*, 241.

2. This Court will, upon Writ of Error, correct an order taken upon default where such order is not sustained by the record and practice. *Ib.*

DELIVERY.

1. Taking a party in the sight of a raft of logs and declaring them to be his property, and marking them at his instance,—held to be sufficient delivery.—*Brewster vs. Leith*, 56.

ERROR.

5. Where, upon the trial, both parties consent that the jury may take the minutes of testimony, and after the lapse of four hours the Judge recalls them and reads a deposition which was introduced in evidence, it is not Error: especially in the absence of a specific objection, and where the testimony is immaterial. *Ib.*

6. The decision of a District Court on a motion for a new trial cannot be reviewed on Error. *Ib.*

7. Where words alleged to be slanderous are of equivocal import, it is not Error to submit to the jury the question of the intent with which the words were spoken. *St. Martin vs. Desnoyer*, 156.

8. Is it Error for counsel in addressing the jury to comment upon the amount of a former verdict in the same action? If it be, it stands upon a footing with the introduction of improper evidence, and, unless objection is made on the trial, cannot be assigned as Error. *Ib.*

9. When an appeal from the judgment of a Justice of the Peace is properly taken and a return thereto made, the whole proceedings before the Justice become a mere *lis pendens* in the District Court, and the plaintiff then has the same right to dismiss the action at any time before trial as he would have had in the Court below; and where the District Court has allowed the dismissal of the action upon the motion of the plaintiff, a Writ of Error will not lie. *Fallman and Fallman vs. Gilman*, 179.

10. The Territorial Courts, although not organized under the Constitution, are nevertheless, in a qualified sense United States Courts, because they are created by authority of the United States: and it is not Error to describe them as "United States District Courts." *Chouteau et al. vs. Rice et al.* 192.

11. It is not Error for the Chancellor to hear and allow or disallow exceptions to a bill in Chancery without referring the same to a Master. *Goodrich vs. Rodney* [*Parker*] *and E. C. Parker*, 195.

12. This Court will, upon Writ of Error, correct an order taken upon default where such order is not sustained by the record and practice. *Farrington vs. Wright*, 241.

13. A Writ of Error will not subject to review questions of law arising upon the evidence offered in the Court below: such questions can only be incorporated in the record by Bill of Exceptions. *St. Anthony Mill Company vs. Vandall*, 246.

14. Where a demurrer to an answer was sustained and the defendant filed an amended answer, he cannot upon Writ of Error re-examine the original demurrer, as he waives all objections to the order sustaining the same by answering over. *Becker vs. The Sandusky City Bank*, 311.

15. There are but two modes by which a cause can be removed from a District Court to the Supreme Court, to wit: by Appeal and by Writ of Error. *Ames vs. Boland et al.* 365.

16. In case of final judgment in the District Court, a party may elect which of the two modes he will pursue: if the grievance rests in an appealable order, the only remedy is by Appeal. *Ib.*

17. The words "all *penal* judgments" &c. in Section 2, Chapter 81 Revised Statutes of Minnesota, should read "all *final* judgments." *Moody & Perkins vs. Stephenson*, 401.

18. The effect of Section 2, Chapter 81 Revised Statutes is to allow all final judgments in the District Courts to be removed to the Supreme Court by Writ of Error or Appeal, but not by both. *Ib.*

19. A party may take either an Appeal or a Writ of Error: but having made his election and taken either, he cannot afterwards take the other, without first discontinuing the first and paying costs. *Ib.*

20. Where an Appeal and Writ of Error were both taken in the same cause, the Writ of Error was dismissed with costs to the Defendant in Error. *Ib.*

EVIDENCE.

controversy is between the original parties, or to determine the mutual liability of the endorsers when there are several. *Pierse vs Irvine, Stone & McCormick*, 369.

33. And the admission of extrinsic Evidence to show the real intention of the parties and to show the real nature of the contract, is no infringement of the Statute of Frauds—although such evidence alters the *prima facie* character of the instrument. *Ib.*

EXECUTION.

1. An order made by the District Court, setting aside a sale upon an Execution issued out of that Court vacating the Sheriff's return thereon and directing the issuance of a new Execution, is an appealable order. *Tillman and Christy vs. Jackson*, 183.

2. Chapter 2, Section 3 of the Revised Statutes, providing that where a sale upon Execution "is of real estate which consists of several known lots or parcels they must be sold separately," is merely directory to the Sheriff; and a violation of the provisions by the officer will not invalidate the sale, the only remedy in such cases being upon the officer. *Ib.*

3. A purchaser of property sold by virtue of an Execution *pendente lite*, is a *voluntary* purchaser and takes his title subject to the *lis pendens*, precisely as if by a voluntary conveyance of the property by the judgment creditor. *Steele vs. Taylor*, 274.

4. Such a title is not imposed upon him by operation of law, as he acts for himself in making his bids for the property, and takes it *cum onere*. *Ib.*

5. The statute defining what shall constitute a *levy* upon real estate changes the common-law rule. *Castner & Hinckley et al. vs. Symonds*, 427.

6. No real estate can be sold under a judgment lien until the requirements of the statute in regard to a levy have been fulfilled. *Ib.*

7. Where a Sheriff, in making a levy upon real estate, did not go upon the premises, but went in sight of them, and did not leave a copy of the Execution upon the premises nor with any one occupying the same, and did not demand payment,—HELD, That this was no levy under our statute. *Ib.*

8. The Sheriff's certificate of sale on Execution should be a statement of facts, and not of any conclusions of law he might form as to what constitutes a levy. *Ib.*

9. The Sheriff's certificate or return should be conclusive in a case which involves the rights of third parties who have relied on the judicial records of the county and have become purchasers in *good faith* and without laches, but otherwise when parties have purchased with full knowledge of an illegal sale: in such cases the return can be disproved. *Ib.*

10. The notice of sale forms no part of the Sheriff's levy: the levy must be complete before the advertisement of sale is made. *Ib.*

FERRY CHARTER.

(See LEGISLATURE.)

FORCIBLE ENTRY.

1. In an action under the Statute of Forcible Entry and Detainer, the complaint must *particularly* describe the premises detained. *Lewis vs. Steele and Godfrey*, 88.

2. The statute requiring these actions to be brought before two Justices, an adjournment when only one is present is irregular. *Ib.*

3. A complaint under Chapter 87 Revised Statutes, for Forcible Entry and Detainer, before a Justice of the Peace, which simply charges that the defendant forcibly entered and does detain from the plaintiff certain lands, describing them, is fatally defective, and a summons served in such a case by reading it in the presence of the defendants is no service. *Fallman and Fallman vs. Gilman*, 179.

FRAUD.

1. When a contract is made by which one party incurs liabilities or obligations to another, and the terms and conditions of such liabilities or obligations are reduced to writing and signed by the parties thereto, without fraud, mistake or surprise, such written contract must control and supersede all other and different terms founded upon pre-existing or contemporaneous verbal understandings or agreements in regard to the subject-matter of the Contract. *The Bank of Hallowell vs. Baker and Williams*, 261.

2. And such a contract is conclusive of what the agreement was, and of all the terms and conditions thereof. *Ib.*

3. Parol evidence of pre-existing or contemporaneous understandings and verbal agreements tending to vary or contradict the terms of a contract which has been reduced to writing and signed by the parties thereto, is inadmissible. *Ib.*

4. But Courts of Equity will relieve where the contract has been executed through fraud or by mistake or surprise. *Ib.*

GARNISHMENT.

1. Negotiable paper is not such "property, money or effects" as the statute contemplates in describing what species of property may be made the subject of garnishment. *Hubbard vs. Williams*, 54.

2. Property, money or effects, to be attachable under the statute, must be in the possession, or under the control, or *due* from, the person summoned as Garnishee. It must be due to the defendant in the judgment or decree which forms the basis of the writ, at the time when the writ is served upon him. *Ib.*

3. A Garnishee is bound to disclose all his indebtedness to the defendant named in the process, and his answers are not merely voluntary. *Dodd vs. Brott*, 270.

GUARANTY.

1. Parol evidence is admissible to prove in what capacity a party writes his name on the back of a note—whether as endorser, guarantor or surety, when the controversy is between the original parties, or to determine the mutual liability of the endorsers when there are several. *Pierse vs. Irvine, Stone & McCormick*, 369.

2. And the admission of extrinsic evidence, to show the real intention of the parties and to explain the real nature of the contract, is no infringment of the Statute of Frauds, although such evidence alters the *prima facie* character of the instrument. *Ib.*

3. A party who writes his name upon the back of a note at its inception (*i. e.* before it is delivered to the payees), for the purpose of inducing the payees to take the same, or "for the purpose of guaranteeing the payment" thereof or becoming security to the payees for the amount thereof, is liable as an original maker. The *facts* create the liability. *Ib.*

4. If the facts stated in a complaint make the defendant liable, it is unnecessary to inquire in what character his liability originated. *Ib.*

HABEAS CORPUS.

1. Judges of Probate are not invested with any powers which authorize them to issue writs of Habeas Corpus. *Case of Francis Lee*, 60.

INDICTMENT.

1. Words charging the commission of an act which if committed would subject the person charged therewith to an indictment at common law, are actionable *per se*, and the words "You have stolen my belt" are therefore actionable *in themselves*. *St. Martin vs. Desnoyer*, 156.

2. Maliciously killing a dog is not an indictable offense under Sections 65, 66, 67, 68 and 69 of Chapter 119 Revised Statutes of Minnesota. *The United States vs. Gideon*, 292.

3. Under Section 39, Chapter 101 Revised Statutes of Minnesota, providing for the punishment of persons who "shall wilfully and maliciously kill, maim or disfigure any horses, cattle or other beast of another person," &c.—HELD, *First*, That the value of the animal injured or killed should be alleged and proved; *Second*, That it is not necessary to prove malice against the animal. *Ib.*

INJUNCTION.

1. A decree dissolving an Injunction is an interlocutory decree, and not properly the subject of Appeal. *Chouteau et al. vs. Rice et al.* 24.

ISSUE.

1. Where a plaintiff sues as survivor of a co-partnership, a denial of any knowledge or information sufficient to form a belief as to the survivorship, or as to whether the plaintiff was one of the co-partners, is a denial of an immaterial allegation. *Freeman vs. Curran and Lawler*, 169.

3. A denial that the plaintiff is the legal owner and holder of the instrument sued upon and of indebtedness, simply denies a conclusion of law, and is bad. *Ib.*

INSTRUCTIONS TO JURY.

1. Where the Court undertakes to instruct the jury as to the law arising from a view of all the facts before them, all those facts, as detailed by each witness, should be incorporated in the Bill of Exceptions whenever the ruling of the Court is excepted to. *Desnoyer vs. Hereux*, 17.

2. It is Error in a Judge to instruct a jury that they may disregard the declaration, if the evidence were such as to warrant a recovery—and that the right of the plaintiff could not be affected by the declaration on file. *Ib.*

3. Where counsel requests the Court to charge the jury on a number of propositions collectively and the Court refuse to charge as requested, if any one of the propositions is not correct, error will not lie for such refusal.—Per FULLER, J. *Castner et al. vs. Steamboat Dr. Franklin*, 73.

4. Counsel must state the precise point which he wishes decided, and if the decision is against him he must except to it specifically. *Ib.*

5. This Court will not award a new trial on the ground that the District Court refused an adjournment asked to procure testimony impertinent to the issue, nor on account of the admission of testimony in support or rejection of testimony in controversion of an issue not made by the pleadings: such testimony is immaterial, and by legal necessity cannot influence the verdict. So of instructions to the jury upon irrelevant topics. *Coit vs. Waples and Zirkle*, 134.

6. The Court below charged the jury that "if they believed from the evidence that the property was forcibly taken from the plaintiffs, after its delivery to them by those under whom the defendant claims title, they must find for the plaintiffs:" of this the defendant cannot complain, but rather the plaintiffs, as proof simply of a *wrongful* taking would have warranted a verdict. *Ib.*

INTEREST.

1. A promissory note bearing interest at a specified rate "from the date thereof" bears such specified rate *after* maturity, and until paid. *Brewster et al. vs. Wakefield*, 352.

2. Legal interest is to be applied only when no rate is agreed upon or specified in the contract. *Ib.*

JUDGMENT.

JURISDICTION.

3. Upon an appeal from an order refusing to award a new trial, this Court has no power to affirm the Judgment with twelve per cent. damages and double costs. *St. Martin vs. Desnoyer*, 156.

4. Pleadings in an action before a Justice of the Peace must be verified: and it seems that a Justice has no jurisdiction of a case wherein the pleadings are not verified, except by his own consent and by waiver of the parties; and a cause may be dismissed by a magistrate upon his own motion if the pleadings are not verified. *Taylor vs. Bissell*, 225.

5. A Justice of the Peace has exclusive jurisdiction where the amount claimed does not exceed fifteen dollars. *Dodd vs. Cady*, 289.

6. No appeal will lie from a judgment of a Justice of the Peace unless it exceed fifteen dollars, exclusive of costs. *Ib.*

7. And a waiver or consent of parties will not confer jurisdiction in the District or Supreme Court. *Ib.*

8. In case of final judgment in the District Court, a party may elect which of the two modes he will pursue. If the grievance rests in an appealable order the only remedy is by appeal. *Ames vs. Boland et al.* 365.

9. The jurisdiction of the Supreme Court of this Territory is appellate only, except as provided by law. *Ib.*

10. There must be some decision, judgment, decree or appealable order in the Court below, before the Supreme Court can acquire any jurisdiction of a cause. *Ib.*

11. A reserved case brought to the Supreme Court by agreement of counsel upon which no judgment was rendered in the District Court, cannot be examined in the Supreme Court. Their judgment must be one of affirmance or reversal of the judgment below, or a modification of a judgment. *Ib.*

12. A consent, stipulation or agreement of parties may waive Error, but will not confer jurisdiction. *Ib.*

13. Congress has clothed the members of this Court with all the equity powers of the English Court of Chancery. The equity jurisdiction of the Courts of the United States is independent of the local law of any State, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived. (See *dissenting Opinion* of GOODRICH, J.—*Chouteau, Jr. vs. Rice et al.* 31.)

JURY.

1. The length of time a Jury shall be kept together is a matter within the discretion of the Court, and cannot be reviewed on Error. *Coit vs. Waples and Zirkle*, 134.

2. Where, upon the trial, both parties consent that the Jury may take the minutes of testimony, and after the lapse of four hours the Judge recalls them and reads a deposition which was introduced in evidence, it is not Error—especially in the absence of a specific objection, and where the testimony is immaterial. *Ib.*

3. "The Jury find and return a verdict for the plaintiff and against the defendant, and costs of suit," in an action of replevin, is a correct verdict in substance, and where the intention is obvious the Court will give effect to the verdict as intended. It may be amended in matters of form; the words "and for costs" must be rejected as surplusage, but in nowise affect the finding upon the issue. *Ib.*

3. Where words alleged to be slanderous are of equivocal import, it is not Error to submit to the Jury the question of the intent with which the words were spoken. *St. Martin vs. Desnoyer*, 156.

4. A verdict will be set aside which is the quotient arising from the division by twelve of the aggregate of twelve different sums specified by each individual juror, but it is incompetent to prove such facts, or any facts impeaching the verdict, by jurors themselves, or by third persons upon hearsay from jurors. *Ib.*

JUSTICE OF THE PEACE.

PRACTICE.

PROBATE COURTS.

Act is not a supplement to the Act of the Legislative Assembly of Wisconsin Territory; it supersedes and repeals the Statute of Wisconsin relative to Judges of Probate. *Ib.*

PROMISSORY NOTES.

1. Negotiable paper is not such "property, money or effects" as the statute contemplates in describing what species of property may be made the subject of garnishment. *Hubbard vs. Williams*, 54.

2. Evidence tending to show the ownership of a Promissory Note which is the cause of action in another than the plaintiff, is admissible. *Hartshorn vs. Green's Adm'rs*, 92.

3. An action cannot be sustained on a Note given to secure the payment of money to become due on the election of a candidate to a certain office. Such notes are void, as being against public policy. *Cooper vs. Brewster*, 94.

4. The assignee of an instrument in writing not negotiable cannot maintain an action thereon in his own name. *Spencer vs. Woodbury*, 105.

5. A denial of any knowledge or information sufficient to form a belief, as to whether a Bill of Exchange made by the plaintiff and accepted by the defendants was presented at the place of payment indicated in the Bill, is a denial of an immaterial allegation. *Freeman vs. Curran and Lawler*, 169.

6. A denial that the plaintiff is the legal owner and holder of the instrument sued upon and of indebtedness, simply denies a conclusion of law, and is bad. *Ib.*

7. Equities existing between the original parties to a Note which originated subsequent to the endorsement thereof to the holder, cannot be set up as a defense by the maker against the holder. *Becker vs. The Sandusky City Bank*, 311.

8. A Promissory Note bearing interest at a specified rate "from the date thereof" bears such specified rate *after* maturity and until paid. *Brewster et al. Wakefield*, 352.

9. Legal interest is to be applied only when no rate is agreed upon or specified in the contract. *Ib.*

10. The intention of a party to a contract should control its legal effect when such intention is clearly manifest from the face of the contract, but when the intention is not clear the contract is to be construed most strongly against the promissor. *Brewster et al. vs. Wakefield*, 352

11. Parol evidence is admissible to prove in what capacity a party writes his name on the back of a note—whether as endorser, guarantor or surety, when the controversy is between the original parties, or to determine the mutual liability of the endorsers when there are several. *Pierse vs. Irvine, Stone & McCormick*, 369.

12. And the admission of extrinsic evidence to show the real intention of the parties and to explain the real nature of the contract, is no infringement of the Statute of Frauds—although such evidence alters the *prima facie* character of the instrument. *Ib.*

13. A party who writes his name upon the back of a note at its inception (*i. e.* before it is delivered to the payees), for the purpose of inducing the payees to take the same, or "for the purpose of guaranteeing the payment" thereof or becoming security to the payees for the amount thereof, is liable as an original maker. The *facts* create the liability. *Ib.*

14. If the facts stated in a complaint make the defendant liable, it is unnecessary to inquire in what character his liability originated. *Ib.*

[See also: *Rey and Marshall & Co. vs. Simpson*, 380; *Winslow vs. Boyden and Willard*, 383.]

14. A reserved case brought to the Supreme Court by agreement of counsel upon which no judgment was rendered in the District Court, cannot be examined in the Supreme Court. Their judgment must be one of affirmance or reversal of the judgment below, or a modification of a judgment. *Ib.*

15. A consent, stipulation or agreement of parties may waive Error, but will not confer jurisdiction. *Ib.*

SUPREME COURT RULES.

(See *Appendix.*)

SURPLUSAGE.

1. A complaint sets forth fully all the facts necessary to constitute a cause of action upon a claim against a steamboat (under Chapter 86 Revised Statutes) and also a special contract made with the captain of the boat, in relation to the same cause of action: HELD, That if upon the trial the evidence was sufficient to prove the facts set forth in the complaint constituting a cause of action, the allegation as to the special contract will be deemed surplusage, and no proof of such special contract will be necessary to maintain the action. *Steamboat War Eagle vs. Nutting*, 256.

TERRITORIAL COURTS.

1. The Territorial Courts, although not organized under the Constitution, are nevertheless, in a qualified sense United States Courts, because they are created by authority of the United States: and it is not Error to describe them as "United States District Courts." *Chouteau et al. vs. Rice et al.* 192.

TITLE.

1. A deed or other instrument, executed with intent to convey property before the same has been purchased from the United States Government, is a mere nullity, and no title or interest passes to the grantee in such conveyance. *Brisbois et al. vs. Sibley & Roberts*, 230.

2. A party claiming title by pre-emption must prove actual residence upon the land and improvements made thereon by him. *Ib.*

3. A meeting of occupants of the public lands belonging to the United States, held at St. Paul on the 10th day of July, 1848, for the purpose of adopting such measures as they might deem expedient to protect and to secure to the settlers and owners their rights and claims to land upon which the Village of St. Paul was located (to wit: upon lands belonging to the United States Government), at the land sales to be held in August 1848, was a meeting opposed to the policy and laws of the Government of the United States, and any act or acts of such meeting to carry out the purposes and objects thereof were illegal and void. *Ib.*

4. Courts will not interfere for the purpose of adjusting the differences and supposed rights of parties claiming by virtue of the acts of such a "claim meeting," as they are illegal and void *ab initio*. *Ib.*

5. A purchaser of property sold by virtue of an execution *pendente lite*, is a *voluntary* purchaser and takes his title subject to the *lis pendens*, precisely as if by a voluntary conveyance of the property by the judgment creditor. *Steele vs. Taylor*, 274.

5. Such a title is not imposed upon him by operation of law, as he acts for himself in making his bids for the property, and takes it *cum onere*. *Ib.*

TRESPASS.

1. In an action of trespass *quare clausum fregit et de bon. a* for taking away a cow that had been taken up as an estray, Evidence of the cost of advertising under the statute, and the value of pasturage, was admitted:—held to be Error. *Gervais vs. Powers and Willoughby*, 45.

VARIANCE.

VERDICT.

VERIFICATION.

WAIVER.