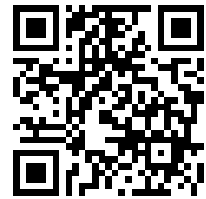
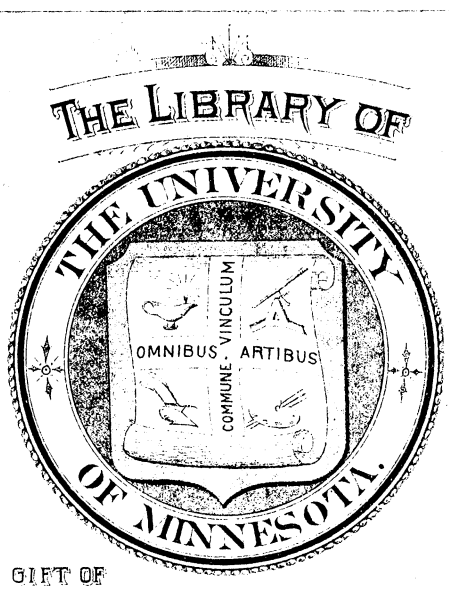
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A DIGEST OF THE DECISIONS

OF THE

SUPREME COURT OF MINNESOTA

FROM THE

ORGANIZATION OF THE COURT TO APRIL, 1892

As reported in the MINNESOTA REPORTS, Volumes 1 to 47, and the NORTHWESTERN REPORTER

WITH A FULL TABLE OF THE CASES DIGESTED, SHOWING ALSO WHERE THEY HAVE BEEN OVERRULED, AFFIRMED, CITED, ETC., AND A TABLE OF STATUTES CITED AND CONSTRUED

IN TWO VOLUMES

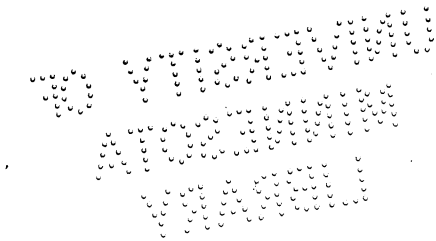
VOL. 2

PREPARED BY MEMBERS
OF THE
EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM

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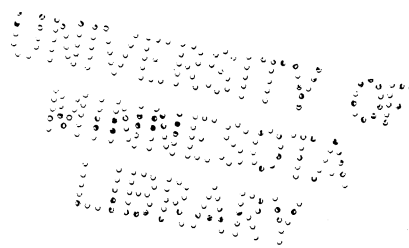


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DIGEST OF DECISIONS

OF THE

SUPREME COURT OF MINNESOTA,

AS CONTAINED IN THE

MINNESOTA REPORTS, VOLS. 1 TO 47, INCLUSIVE, AND IN THE NORTHWESTERN REPORTER, VOLS. 1 TO 51, INCLUSIVE.[1]

A STAR (*) INDICATES THAT THE CASE REFERRED TO IS ANNOTATED.

N.

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NAVIGABLE WATERS.

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Right of navigation—Rafts.

1. The owners of rafts have the same rights to the navigable waters of the Mississippi river as those of steam-boats.—Castner v. The Dr. Franklin, 1 Minn. 73, (Gil. 51.)

Mooring.

2. The owner of a raft of logs on the Mississippi river has a right to moor the same to the bank in a proper place and manner, in respect to the right of passage of other rafts, and for a reasonable time, to enable him to make a sale of the logs.—Hayward v. Knapp, 23 Minn. 430.

3. The reasonableness of the period, place, and manner of such mooring of a raft, with respect to the right of passage of other rafts, is a question for the jury, under proper instructions from the court.—Hayward v. Knapp, 23 Minn. 430.

Landing.

4. Where the Mississippi river is in fact navigable, it is in law a navigable stream, and parties navigating its waters enjoy the same rights, and are entitled to the same exemptions, as in rivers navigable at common law; and the right to land freight and passengers extends to high-water mark.—Castner v. The Dr. Franklin, 1 Minn. 73, (Gil. 51.)

Negligence in navigation.

5. Propelling a raft of logs in the channel of a river by means which impart such motion to the raft as to place it beyond the control of the navigator is negligence.—Hayward v. Knapp, 23 Minn. 430.

6. It is the duty of one navigating a raft of logs, not only to use proper care and diligence

[1] NOTE. The Minnesota cases in vol. 51, N. W. Rep., are digested to and including page 923.

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to avoid collision with other rafts or vessels, after seeing them, but also to use proper diligence to see them in time.—Hayward v. Knapp, 23 Minn. 430.

Riparian owner—Right to use of water.

7. A riparian owner on a navigable river may use the water flowing past his land for any purpose, so long as he does not obstruct navigation. —Morrill v. St. Anthony Falls Water-Power Co., 2 N. W. 842, 26 Minn. 222; State v. Minneapolis Mill Co., 2 N. W. 839, 26 Minn. 229.

Obstruction—Actions.

8. A person who has entered into a contract obligating himself to drive logs down a stream navigable for such purposes, knowing that the stream had been and was unlawfully obstructed, and who is hindered and subjected to expense, in performing his undertaking, by reason of such impediments, is not entitled to maintain a private action for damages against the person creating such obstructions in the highway.—Brennan v. Lammers, (Minn.) 48 N. W. 766.

46 Minn. 209.

9. A complaint by riparian owners on a navigable stream, simply alleging that defendant had so obstructed the navigation of the river as to prevent plaintiffs from transporting wood used in their business by means of the river, does not state facts sufficient to enable plaintiffs to maintain a private action, the injury to plaintiffs being the same in kind as that sustained by the general public.—Swanson v. Mississippi & R. R. Boom Co., (Minn.) 44 N. W. 986.

42 Minn. 532.

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I. What Constitutes.

Dangerous premises.

1. The owner or occupant of real property is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons coming thereon by his invitation, express or implied, for the transaction of business, or any other purpose beneficial as to him.—Nash v. Minneapolis Mill Co., 24 Minn. 501.

2. Plaintiff was injured by the falling of the walls of a building of defendants, on a lot adjoining his own. *Held*, that defendants were not liable for such injury if they had exercised reasonable care to make such walls safe, and, after such care, believed them safe.—Schell v. Second Nat. Bank of St. Paul, 14 Minn. 43, (Gil. 34.)

Premises adjoining highways.

3. The owner and occupant of premises, who maintains a private passage-way opening into his basement, within the limits of a public street, and which, through his negligence, has become dangerous to persons traveling on the street, is liable for injuries occasioned thereby. That the law also imposes a liability on the city does not relieve him. —Landrue v. Lund, (Minn.) 38 N. W. 699.

38 Minn. 538.

4. The owner of a lot abutting on a public street in a city, who erects a building on it with a roof so constructed that ice and snow collecting on it will naturally and probably fall upon the sidewalk below, is liable, without other proof of negligence,

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to a person injured by the falling ice or snow while traveling on the sidewalk with due care; and it is no defense in such a case that he exercised all the diligence and care he could to remove the snow and ice from the roof.—Hannem v. Pence. (Minn.) 41 N. W. 657.

40 Minn. 127.

Elevators.

5. In an action for injuries sustained through the giving away of a passenger elevator it appeared that the fall of the elevator was in consequence of the cable breaking. The cable had been in use for three or four years without accident, but had worn some, and there was evidence that the wearing could easily have been seen if properly looked after. *Held*, that the question of negligence was properly submitted to the jury.—Goodsell v. Taylor, (Minn.) 42 N. W. 873.

41 Minn. 207.

6. The fact that machinery has been used with safety for years, and is not obviously dangerous, will not justify a presumption that it will continue safe, and that its use may be continued, without examining it to ascertain if its safety may not have been impaired from wear.—Goodsell v. Taylor, (Minn.) 42 N. W. 873.

41 Minn. 207.

7. The rule as to the degree of care required, and as to the *onus* of proof in case of injury from giving way of machinery, applicable between a common carrier of passengers and his passengers, is applicable as between the owner and manager of a passenger elevator and the passengers in it.—Goodsell v. Taylor, (Minn.) 42 N. W. 873.

41 Minn. 207.

Railroad tracks and machinery.

8. Defendant, while engaged under contract with a city in grading a public street, used dump-cars running on a track a considerable distance along the street for the purpose of transporting earth. The cars moved slowly, and were dangerous only to persons attempting to ride on them, or accidentally falling on the track in front of the wheels. A boy, five years of age, while riding on one of the cars, jumped or fell off, and was killed. It did not appear that he was seen by any of defendant's employes in time to have prevented the accident, or that there was any negligence in the management of the cars or in conducting the work. *Held*, that defendant was not liable on the ground of negligence. His duty to exercise reasonable care did not extend to the employment of men specially to keep watch of the approach of children or others to prevent them from riding upon the cars, but when, in the use of ordinary care, their presence was discovered, to use due diligence to prevent any injury to them.—Emerson v. Peteler, 29 N. W. 311, 35 Minn. 481.

Distinguishing Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207.

9. Where the turn-table of a railroad stands in a public place, and is of such a character, and in such a position, as to tempt young children to play upon it, though it stands on the company's own premises, they are bound to take proper measures to prevent injury to young children playing upon it, and may be liable for injury resulting from such failure, though the child injured was an actual trespasser at the time.—Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207.

Stated in Twist v. Winona & St. P. R. Co., 39 N. W. 404, 39 Minn. 168, to be limited by Kolsti v. Minneapolis & St. L. Ry. Co., 19 N. W. 655, 32 Minn. 133; Emerson v. Peteler, 29 N. W. 312, 35 Minn. 484.

10. A railroad company is not required to so fasten or secure a turn-table that it cannot be displaced and put in motion by children, this being more than the ordinary care required in regard to such machinery.—Kolsti v. Minneapolis & St. L. Ry. Co., 19 N. W. 655, 32 Minn. 133.

11. In an action against a railroad company for the death of a child who was crushed against a turn-table that was pushed aside from its proper position, while the child was playing about it, it is a question for the jury whether defendant had exercised the requisite degree of care in securing such turn-table, though it may have been fastened in the manner usual with railroad companies.—O'Malley v. St. Paul, M. & M. Ry. Co., (Minn.) 45 N. W. 440.

43 Minn. 289.

12. In an action against a railroad company for damages caused by frightening plaintiff's mules by the negligent blowing of a whistle on defendant's locomotive it appeared that plaintiff was employed to haul a load of goods from a warehouse near defendant's track. When plaintiff approached the warehouse he found that access thereto was obstructed by defendant's freight-cars. Plaintiff asked the engineer of a detached engine standing near by to move the cars. The engineer, after looking around for the yard-master to get an order to move the cars, and not seeing him, suddenly blew several blasts with his whistle, causing plaintiff's mules to run away. There was evidence that the whistle was blown as loudly as it could be, and that it was such as was used to drive cattle from the track. Plaintiff's mules were gentle and not easily frightened. Another team standing near the place was also frightened. Plaintiff's team could easily be seen from the engine. The engineer testified that he whistled for the yard-master, and that he blew the whistle in the usual manner for that purpose. *Held*, that the evidence was sufficient to carry the question of negligence to the jury, and a verdict for plaintiff would not be disturbed.—Gibbs v. Chicago, M. & St. P. R. Co., 4 N. W. 819, 26 Minn. 427.

Telegraph wires.

13. Wires of a telegraph company in a public street were broken by the weight of ice produced by water thrown on them by the city fire department in extinguishing a fire, and fell into the street, where they became partly imbedded in ice, and formed a dangerous obstruction. *Held*, that it was the duty of the company to remove the fallen wires within a reasonable time after notice, and that it could not relieve itself from this duty by assuming to abandon the property.—Nichols v. City of Minneapolis, 23 N. W. 868, 33 Minn. 430.

Lumber pile in street.

14. A complaint for damages resulting from injury to a minor child, caused by the fall of a stick

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of timber from defendants' lumber pile, alleged to have been carelessly and insecurely constructed in the street, states a cause of action.—Holly v. Bennett, (Minn.) 49 N. W. 189.

46 Minn. 386.

Runaway teams.

15. Leaving a horse unhitched in the street is not necessarily a want of ordinary care, but it may be shown that he was trustworthy to stand unhitched, that he was under the observation and control of somebody near, or other circumstances showing the exercise of ordinary care.—Griggs v. Fleckenstein, 14 Minn. 81, (Gil. 62.)

16. Leaving a horse unfastened and unattended in a public street of a city is evidence of negligence in an action to recover for injuries caused by his running away.—Courternier v. Secombe, 8 Minn. 299, (Gil. 264.)

Explosions.

17. Permitting the water in the boiler of a steam-boat to fall below three inches above the flue is, unless the same happened through inevitable accident, an act of negligence, for which the owner is liable.—McMahon v. Davidson, 12 Minn. 357, (Gil. 232;) Fay v. Davidson, 13 Minn. 523, (Gil. 491.)

18. Plaintiff, a deck-hand on a steam-boat, was injured by the explosion of the boiler of another steam-boat while the two boats, operated by defendants, jointly interested in their earnings, were going up the Mississippi, side by side. *Held*, that the fact of such explosion was *prima facie* evidence against defendants that it was caused by their fault or negligence, or that of their servants.—Connolly v. Davidson, 15 Minn. 519, (Gil. 428.)

19. Act Cong. July 7, 1838, (5 U. S. St. at Large, p. 306, § 13,) entitled an act to provide for the better security of lives of "passengers" on steam-boats, which makes the bursting of a boiler thereon *prima facie* evidence of negligence on the part of the owner, in an action for "injuries to person or property" caused thereby, applies as well to suits for injuries sustained by employes as to those for injuries to passengers.—Fay v. Davidson, 13 Minn. 523, (Gil. 491;) Connolly v. Same, 15 Minn. 519, (Gil. 428.)

Fires.

20. Though a person may burn the grass and stubble on his own land, he must exercise care and prudence in that respect; and, if he burns the grass at a time when it is probable that damages to others will follow, he will be liable if such damages do in fact result from the burning.—Dewey v. Leonard, 14 Minn. 153, (Gil. 120.)

21. Defendant set a fire on his land to protect his haystacks, but it appeared that almost immediately after the fire was started it got beyond control, that there was a wind blowing, and the grass and stubble were very dry. *Held*, that the question of defendant's negligence should have gone to the jury.—Richards v. Schleusener, (Minn.) 42 N. W. 599.

41 Minn. 49.

22. For the purpose of protecting his property from a fire raging near, defendant started a back fire. The day was windy, and in the direction in which the wind was blowing, and extending to plaintiff's farm, was a marsh covered with tall, dry grass. It did not appear whether any care was taken by defendant to prevent the fire from injuring others. *Held* sufficient to sustain a verdict for plaintiff in an action for injuries sustained from defendant's fire.—Jesperson v. Phillips, (Minn.) 48 N. W. 770.

46 Minn. 147.

Who liable for injuries.

23. Where a building contractor lets the stone and brick work of a building to a subcontractor, and afterwards pays the subcontractor on account of the work, and inserts timbers into the walls, knowing that improper materials were used in building the same, or having had opportunities to know the same, he must be deemed to have accepted the work, and to have sanctioned the workmanship and material used.—Bast v. Leonard, 15 Minn. 304, (Gil. 235.)

24. In an action to recover damages caused by explosion of the boiler of the steam-boat John Rumsey, it appeared that defendant and one Rumsey shared in the profits earned by several boats, some of which were owned by defendant, and some by Rumsey. *Held*, that an instruction that if defendant "was equally interested with Rumsey in the earnings and profits of the John Rumsey that made them partners in running the boat," was not objectionable as being, in effect, an instruction that any interest in the earnings, etc., without regard to its character, would make them partners, the meaning of the instruction being that equality of interest in all respects would have that effect.—Connolly v. Davidson, 15 Minn. 519, (Gil. 428.)

25. Where several co-servants are engaged in the same work, so that the negligence of one may endanger the other, each is bound to exercise the same care and skill as an ordinarily prudent man would do under similar circumstances, and is responsible for injury to his fellow-servant resulting from failure or neglect in that respect.—Griffiths v. Wolfram, 22 Minn. 185.

26. A co-servant cannot be made responsible for injuries to his companions resulting from defects in the work on which they are engaged, and not from the neglect of the party sought to be charged.—Griffiths v. Wolfram, 22 Minn. 185.

27. Defendant had a lease of, and exclusive control and possession of, the third story of a building. A faucet in this story was turned by some one, and water ran from it, injuring plaintiff's goods in a lower story. A short time before the accident, defendant's goods stored on the third floor were sold at auction, and defendant had loaned the key to such story to the purchaser. *Held*, that defendant was responsible for the proper care of the water fixtures, and that the decision of the trial court that defendant was negligent would not be disturbed.—Rosenfield v. Arrol, (Minn.) 46 N. W. 768.

44 Minn. 395.

28. The plaintiff corporation had constructed and was operating a canal through its lands for the use of its water-power, and had granted

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rights of way across the canal, and to erect and maintain a bridge across it, to several parties to whom it had conveyed mills and sites along the canal. The canal had been bridged over in part by plaintiff and in part by its grantees with its license, and the bridge so made, bordering on a public street, was open for travel as one thoroughfare in front of the several mills. *Held*, that plaintiff, having the ownership, possession, and control of the bridge, was liable to a person rightfully upon any portion of it for injuries caused by plaintiff's failure to exercise reasonable diligence to keep the bridge in repair, or to take reasonable precautions to prevent accident from its being in disrepair, though such condition resulted from the negligence of the owners of one of the mills; and that, as between plaintiff and such owners, the duty to repair being upon the latter, plaintiff could recover from them the amount paid by plaintiff in settlement of a claim for such injuries, as the parties were not *in pari delicto*, and plaintiff might adjust and pay such claim without action, and thereupon recover indemnity from the mill owners. Negligence on the part of plaintiff's agent charged with the duty of looking after and inspecting the condition of the entire platform, in failing to warn the mill owners of its weak and decayed condition, which was known to him, or to take any action thereupon, was not such contributory negligence on the part of plaintiff as to defeat its right to indemnity, as it owed no such duty to the mill owners, who, as between it and them, were alone bound to repair.—Minneapolis Mill Co. v. Wheeler, 16 N. W. 698, 31 Minn. 121.

Who entitled to damages.

29. Defendants, wholesale dry goods merchants, maintained an elevator in a shipping room for freighting purposes solely. No one was allowed in the room except defendants' employes, teamsters specially invited to aid in handling heavy packages, and expressmen. Plaintiff's intestate was sent for goods purchased of defendants, and was told to call at the door of the shipping-room opening into an alley, but to wait outside. The intestate, however, entered the room, and was killed by falling down the elevator shaft. *Held*, that plaintiff could not recover, though no guards were placed about the shaft.—Trask v. Shotwell, (Minn.) 42 N. W. 609.

41 Minn. 66.

30. An express company is liable for negligently running a truck on a depot platform against a policeman, whose habit it was to visit the station at train time.—Ingalls v. Adams Exp. Co., (Minn.) 46 N. W. 325.

44 Minn. 128.

Province of jury.

31. The question of exercise of ordinary care in the use of one's own property so as to avoid injury to another is for the jury.—Marsh v. Webber, 16 Minn. 418, (Gil. 375.)

32. Where the facts in regard to alleged negligence are fairly in doubt or controversy, the question as to the existence of negligence is one for the jury.—Erd v. City of St. Paul, 22 Minn. 443.

33. When the evidence as to negligence is such that fair-minded men of ordinary intelligence might differ as to the inferences to be drawn, it is error to take the case from the jury.—Bennett v. Syndicate Ins. Co., (Minn.) 39 N. W. 488.

39 Minn. 254.

II. Remote and Proximate Cause.

What constitutes proximate cause—In general.

34. Where several concurring acts or conditions of things, one of which is a wrongful act or omission, produce an injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission.—Campbell v. City of Stillwater, 20 N. W. 320, 32 Minn. 308.

35. Defendant's team, being left unhitched, ran away in the principal street of a town, thereby frightening the team of W., which was securely hitched, causing them to also run away, and in doing so they ran into plaintiff's horse, injuring him so that he died. *Held*, that defendant's negligence in leaving his team unhitched was the proximate cause of the injury to plaintiff's horse, and that defendant was liable for such injury.—Griggs v. Fleckenstein, 14 Minn. 81, (Gil. 62.)

36. Where plaintiff unlawfully permits his cow to run at large, by reason of which she strays upon a railroad track and is injured by a passing train, his unlawful act will be deemed a proximate, and not a remote, cause of the injury.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

37. The complaint in an action against a city alleged that a railway company laid its track and operated its railroad along side of and in places lengthwise upon one of the streets, and that the track was so constructed that a carriage driven even with care on or over it would be in great danger of being overturned and broken; that there was no fence or barrier of any kind between the part of the street occupied by the track and the part not so occupied; and that, while plaintiff in his buggy was driving his horse along said street, his horse was suddenly frightened by a car moving along the track, and, notwithstanding plaintiff's efforts to prevent him, ran upon the track where it was laid on and along the street, overturned the buggy, and injured plaintiff. *Held*, that such injury might reasonably have been anticipated as a natural consequence of the omission to place some barrier to prevent it, and that the complaint was valid, as against a demurrer on the ground that the frightening of the horse by the moving car, and not the neglect of the city to properly guard the street, was the proximate cause of the injury.—Campbell v. City of Stillwater, 20 N. W. 320, 32 Minn. 308.

38. A freight train, while running at night, broke apart, and the forward part of the train, having been afterwards stopped, was run into by the detached rear cars, and the conductor, who was at the rear of the train, was killed by the collision. In an action against the railway com-

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pany for damages for his death, there was evidence that the immediate cause of the breaking apart of the train was that a brake which had been applied to one of the rear cars, being so defective that it would not remain wound up when the car was in motion, was released by the jar of the car, and that the consequent collision and recoil of that car with the one in front of it broke the coupling between them. *Held*, that the defective brake was the proximate cause of the death of the conductor, notwithstanding that a sudden increase of the speed of a locomotive on passing to a down grade might have contributed to the breaking apart of the train, and that the subsequent stopping of the forward part of the train and the collision were the natural and probable result of the breaking apart of the train, which were to be referred to the same defect as a proximate cause.—Ransier v. Minneapolis & St. L. Ry. Co., 20 N. W. 332, 32 Minn. 331.

What constitutes proximate cause—Fires.

39. Defendant set fire in his stubble-field after plowing three furrows around the field to prevent the fire from spreading. The fire "jumped" the plowed strip, and spread upon the prairie, where defendant attempted to extinguish it. The evidence tended to show that defendant did not entirely extinguish the fire, but that it smouldered for two days in the soil of a neighboring slough, and then broke out afresh, and spread to plaintiff's land. *Held*, that it could not be said as a matter of law that plaintiff's injury was too remote to warrant a recovery against defendant.—Krippner v. Biebl, 9 N. W. 671, 28 Minn. 139.

40. The fact that the fire remained latent in the slough so long did not, as a matter of law, excuse defendant from liability for the subsequent injury.—Krippner v. Biebl, 9 N. W. 671, 28 Minn. 139.

41. A fire, caused by sparks escaping from defendant's locomotive, commenced on the property of one N., and then was communicated to an adjoining barn, and from thence to the barn of plaintiff, which was about 60 feet from the point where the fire commenced. *Held*, that the injury of plaintiff was not, as a matter of law, too remote to justify a recovery.—Johnson v. Chicago, M. & St. P. Ry. Co., 16 N. W. 488, 31 Minn. 57.

42. Where plaintiff's property was injured by fire caused by sparks escaping from defendant's locomotive, *held*, that the fact that one N. negligently left combustible matter exposed to the danger of being set on fire by sparks from a locomotive, and that the fire actually started in such material, did not preclude a recovery by plaintiff.—Johnson v. Chicago, M. & St. P. Ry. Co., 16 N. W. 488, 31 Minn. 57.

—— Injuries caused by fright.

43. Defendant, while on the highway near plaintiff's house, shot and killed a dog. Plaintiff's wife, who, unseen by or without the knowledge of defendant, stood near by and saw the shooting, was, owing to her previous delicate state of health, so startled and frightened by the occurrence as to become seriously ill. *Held* that, even assuming the act to have been a tort, the mere killing of the dog was not the proximate cause of the injury to plaintiff's wife.—Renner v. Canfield, 30 N. W. 435, 36 Minn. 90.

44. If the acts of defendant amounted to any tort which, in any view, could be held to be the proximate cause of this injury, the gist of it must have been, not the killing of the dog, but negligence in shooting it in such proximity to plaintiff's house as might naturally and reasonably be anticipated as likely to injure the inmates.—Renner v. Canfield, 30 N. W. 435, 36 Minn. 90.

45. If the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury.—Purcell v. St. Paul City Ry. Co., (Minn.) 50 N. W. 1034.

—— Nature of injuries.

46. If an injury is the direct cause of a diseased condition which results in paralysis, the paralysis may be ascribed to the injury as a proximate cause.—Bishop v. St. Paul City Ry. Co., (Minn.) 50 N. W. 927.

47. Plaintiff, a man of 50 years, received in a cable railway accident injuries which rendered him unconscious for a few moments, but on regaining consciousness he did not seem to be seriously injured. On the right side of his head were a few cuts and a contusion, which did not seem harmful, and the marks of which disappeared in a few days. He went about his business the same day, but, while he had always before the accident been in good health, he afterwards became nervous and irritable, unable to sleep, and suffered a dull, heavy pain in the back of his head, extending sometimes down his back. Seven months after the accident, his entire left side became paralyzed. The medical expert testimony was contradictory, but some physicians testified that the paralysis, in their opinion, was caused by the rupture of a blood-vessel, and that the rupture resulted from the injury received in the accident. *Held*, that the jury were warranted in finding the accident the proximate cause of the paralysis.—Bishop v. St. Paul City Ry. Co., (Minn.) 50 N. W. 927.

Contributing act of third person.

48. A party is not relieved from liability for injuries caused by his negligence because of the culpable act of some third person that contributed thereto.—McMahon v. Davidson, 12 Minn. 357, (Gil. 232;) Griggs v. Fleckenstein, 14 Minn. 81, (Gil. 62.)

49. Where the negligence of defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence of defendant was a proximate cause of the injury.—Johnson v. Northwestern Telephone Exchange Co., (Minn.) 51 N. W. 225.

Province of jury.

50. In an action against a railroad company for the death of a child which was crushed against a turn-table which was turned from its proper position, while the child was playing in defendant's yard, it is a question for the jury whether the displacement of the turn-table conduced to the injury.

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—O'Malley v. St. Paul, M. & M. Ry. Co., (Minn.) 45 N. W. 440.

43 Minn. 289.

III. Contributory Negligence.

In general.

51. Contributory negligence on the part of plaintiff will prevent recovery, unless the injury is the result of intentional wrong on the part of the defendant.—Carroll v. Minnesota Val. R. Co., 13 Minn. 30, (Gil. 18;) Griggs v. Fleckenstein, 14 Minn. 81, (Gil. 62.)

52. Where, in an action for negligence, there is no evidence that the injury complained of was wantonly, maliciously, or intentionally inflicted, and uncontroverted facts show the plaintiff guilty of contributory negligence, it is proper for the court to instruct the jury, as matter of law, that plaintiff cannot recover.—Donaldson v. Milwaukee & St. P. Ry. Co., 21 Minn. 293; Brown v. Same, 22 Minn. 165.

53. If a person, in doing that which it is his right to do in the discharge of his duty, exercise ordinary care and prudence, he is not chargeable with contributory negligence, although the result showed that he imperiled his life or personal safety in doing as he did.—Carroll v. Minnesota Val. R. Co., 14 Minn. 57, (Gil. 42.)

54. A person who might, with the exercise of ordinary care, have avoided an injury, cannot recover therefor, even if it is incurred while in the enjoyment of his own property, for he has no right, even there, to invite peril, or run into danger caused by the negligent acts of his neighbor.—Schell v. Second Nat. Bank of St. Paul, 14 Minn. 43, (Gil. 34.)

55. In a suit for damages from the defective construction of a tunnel which plaintiff had permitted defendant to drive under its premises, it was shown that the tunnel was destroyed by the influx of water from a river at a point where the plaintiff had excavated rock from the bed of the river, before the tunnel had reached that point, but after the direction of the tunnel had been determined upon, and that plaintiff's injury resulted from such destruction. *Held*, that it was a question of fact whether such excavation had not directly contributed to the injury; the burden of proof in such instance being upon the defendant.—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 249.)

56. In an action for personal injuries, involving questions of the negligence of both parties, the court instructed the jury that "each party had a right to rely, at all times, and under all circumstances, until the contrary appeared, that the other would use ordinary care and diligence to prevent a collision." *Held*, that this language was not to be taken as meaning that each party might regulate its conduct with absolute reliance upon the presumption that the other would exercise ordinary care, as it appeared that this, when taken in connection with the rest of the charge, meant no more than that each party, in regulating his own conduct, might have regard to the presumption that the other would exercise reasonable care, which involved no error.—Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651, 31 Minn. 526.

57. Plaintiff's goods stored in the basement of a building were injured by water from a faucet turned on in an upper story under the control of defendant. *Held*, that contributory negligence was not shown by testimony that plaintiff had informed defendant that when there was danger of the pipes freezing he would shut the water off in the basement, the time when freezing might reasonably be expected not having arrived.—Rosenfield v. Arrol, (Minn.) 46 N. W. 768.

44 Minn. 395.

Knowledge of danger.

58. A failure, under ordinary circumstances, to make diligent use of available means to avoid a known and apprehended danger, where it is apparent that if such means had been used the danger would have been averted, will be regarded as contributory negligence.—Brown v. Milwaukee & St. P. Ry. Co., 22 Minn. 165.

59. The fact that plaintiff co-operated with defendant in operating a threshing-machine with the knuckles and tumbling-rod uncovered, contrary to law, will not prevent the defense of contributory negligence being interposed.—Hocum v. Weitherick, 22 Minn. 152.

60. Plaintiff's office adjoined a building which was burned, leaving the outer walls standing. A month or more thereafter plaintiff entered his office after a storm commenced, during which the walls of the burned building were blown down, crushing plaintiff's office in their fall, and injuring him severely. *Held*, the dangerous condition of the walls being apparent to plaintiff, that he was guilty of contributory negligence in entering the building during the storm, and that he was not entitled to recover damages for his injuries.—Schell v. Second Nat. Bank of St. Paul, 14 Minn. 43, (Gil. 34.)

61. Defendant piled a quantity of smoke-stacks and other material so near to the track of a railway, and in such a manner, that one of the cars of a passing train caught one of the smoke-stacks, pushed it against a tower in which plaintiff was stationed in his employment of signaling trains, and he was injured thereby. *Held*, that it was a question for the jury whether so piling the smoke-stacks was an act of negligence as to plaintiff, under the circumstances, and that the action of the railroad company in continuing to run its trains, and of plaintiff in continuing in his employment of signaling trains, could not be alleged by defendant as negligence in law, but for which the injury would not have happened, defendant having made it dangerous for them to continue their lawful employment.—Martin v. North Star Iron Works, 18 N. W. 109, 31 Minn. 407.

62. Plaintiff's cellar was overflowed and his goods damaged, on several occasions, in consequence of the obstruction of a sewer by reason of the negligence of defendant city having the control and management of it. *Held*, that it was not, as matter of law, contributory negligence on his part to allow goods to remain in the cellar after the first overflow.—Taylor v. City of Austin, 20 N. W. 157, 32 Minn. 247.

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63. The plaintiff watered his cattle at holes cut in the ice of a lake, from which defendant and others had long been accustomed to take ice. Plaintiff had warned his servant not to let the cattle go to the lake unattended, as there was danger of their falling into openings from which the ice had been taken. The servant let the cattle out of the barn. They had not been watered since the day before, and went to the lake unattended, and were drowned in an opening made by defendant. *Held* that, though plaintiff and his servant had no notice of this opening, the servant's negligence contributed to the injury, and plaintiff could not recover.—La Riviere v. Pemberton, (Minn.) 48 N. W. 406.

46 Minn. 5.

Of traveler on public street.

64. In an action for damages for injuries caused by the negligence of the defendant, it appeared that the defendant had dug a ditch by the side of the sidewalk for the purpose of putting in sewer pipes; that where the ditch crossed the sidewalk an obstruction was placed. Plaintiff, walking along the street in the night, when he came to the obstruction, turned into the street and fell into the ditch. *Held*, that the plaintiff was not guilty of contributory negligence in turning into an unimproved street in the night-time at a place other than the regular crossing.—Collins v. Dodge, (Minn.) 35 N. W. 368.

37 Minn. 503.

65. In an action for an injury caused by defendant's negligently driving his buggy against plaintiff in a public street, it not appearing that the street was much thronged with vehicles, it was not negligence per se in plaintiff to go along in the street, for a lawful purpose, without looking behind him to see if vehicles might be approaching from that direction. — Undhejem v. Hastings, 38 N. W. 488, 38 Minn. 485.

Of children.

66. In an action for injuries to a boy employed in defendant's mill it appeared that he was an unusually bright boy, nearly 13 years old; that he had been at work in the mill for a month, and during that time had ridden daily on the elevator to his work in the sixth story of the mill; and that he must have seen that if, when the elevator was ascending, an object was extended any considerable distance over and outside of the railing around the elevator, it would come in contact with the sides of the shaft. He was injured by a beam or joist coming in contact with the back part of his head, while ascending in the elevator. He testified that he did not recollect whether he leaned over, but the physical facts demonstrated that he must have leaned over the top of the railing so that his head extended 8 or 10 inches beyond it. No necessity or controlling cause for so doing appeared. *Held* that, holding him responsible simply for the exercise of such care as could reasonably be expected from one of his age and capacity, he was guilty of gross negligence.—Ludwig v. Pillsbury, 28 N. W. 505, 35 Minn 256.

67. A boy 10½ years old, and of average intelligence, who had often been near a railway turntable, and had a general knowledge of its structure and operation, and had been repeatedly warned by his father that it was dangerous to play on it, and told not to do so, and knew that the railway company prohibited children from playing on the table, engaged with other boys in swinging on it, and was injured. *Held*, contributory negligence. —Twist v. Winona & St. P. R. Co., (Minn.) 39 N. W. 402.*

39 Minn. 164.

Limiting Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207.

Care of children.

68. In an action by a parent for injuries to a child 4½ years old from falling off a sidewalk into an excavation, in consequence of a defective condition of the railing guarding the same, the evidence showed that the child was an active, intelligent child, in good health, accustomed to be on the street, but usually in charge of the parents or nurse; that the plaintiff lived nearly opposite the defective sidewalk, and knew of the defect; that the child, without the knowledge of its parents or person in charge, went on the sidewalk, and fell through the unprotected portion, and was injured. *Held*, that negligence, as a matter of law, was not shown; nor did any presumption of negligence on the part of either parent or child arise from such facts.—City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125.)

69. Defendant's grain elevator was operated by machinery moved by horse-power in an adjoining "power-house." The place was attractive to children, and plaintiff's intestate, a boy six years old, was left alone in the power-house by defendant's employe, who had knowledge of his presence, and was caught in the uncovered machinery and killed. *Held*, that the acts or omissions of the child's parents in suffering him to be on the street, in the vicinity of the power-house, was not negligence proximately contributing to the injury, and a verdict in plaintiff's favor would not be disturbed. — Gunderson v. Northwestern Elevator Co., (Minn.) 49 N. W. 694. 47 Minn. 161.

70. Where a child of 17 months, having been left in the house for a few minutes by its mother, escapes by an open door to the street, where it is run over by a street-car, the mother is not guilty of contributory negligence.—Weissner v. St. Paul City Ry. Co., (Minn.) 50 N. W. 606.

47 Minn. 468.

71. A mother allowed her son, a child of six, to go out to coast with a younger brother, in the yard of the house in which they lived, while she was engaged in household duties. Afterwards she called them to come in, and, when they had started, resumed her work. Instead of coming in, the children went on the street to coast, and a few moments afterwards one was killed in a collision between his sled and a street-car. *Held*, that a finding that the mother was not negligent was warranted.—Strutzel v. St. Paul City Ry. Co., (Minn.) 50 N. W. 690.

47 Minn. 543.

Imputed negligence.

72. Plaintiff, while riding by invitation in the private carriage of another upon a public street in a city, with no authority over the driver, was injured by reason of a defect in the street. *Held*,

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that plaintiff might recover therefor against the city on the ground of its negligence in respect of the condition of the street, notwithstanding the negligence of the driver of the carriage contributed to produce the injury.—Follman v. City of Mankato, 29 N. W. 317, 35 Minn. 522.

73. In an action for injuries to a child 18 months old from being run over by defendant's railway train, there was evidence tending to show negligence both on the part of defendant in the management of the train, and on the part of the father of the plaintiff in the care of the child. *Held*, that the negligence of the father was to be imputed to the child, so as to bar a recovery by the latter for the injuries.—Fitzgerald v. St. Paul, M. & M. Ry. Co., 13 N. W. 168, 29 Minn. 336.

Province of jury.

74. The degree of care required to be shown, where contributory negligence is charged, varies with the character and degree of the danger to be avoided or guarded against; and where the facts are in issue the question is one for the jury.—Erd v. City of St. Paul, 22 Minn. 443.

75. The jury must determine the existence of contributory negligence when the facts on which the same is predicated are in dispute.—Erd v. City of St. Paul, 22 Minn. 443.

IV. Actions.

Pleading.

76. An averment of damages caused by negligence, without previous allegation of facts to show the negligent acts causing such damages, is a mere conclusion of law, and avails nothing.—Lee v. Emery, 10 Minn. 187, (Gil. 151.)

77. An allegation of negligence, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate pleadable fact. Hence, in an action for damages resulting from certain acts of another, alleged to have been negligent and careless, the complaint is not demurrable as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any possible evidence admissible under the allegations.—Rolseth v. Smith, (Minn.) 35 N. W. 565.*

38 Minn. 14.

78. A complaint which alleges that "defendant, by himself and his servants, negligently, carelessly, and intentionally set fire to and burned a stack of straw in the vicinity" of plaintiff's premises, "and so negligently and carelessly watched and tended said fire that * * * it came into plaintiff's said premises, and consumed his hay," states a cause of action, though the specific acts constituting the negligence are not stated.—Keating v. Brown, 13 N. W. 909, 30 Minn. 9.

79. The complaint, in an action for damages for the death of plaintiff's intestate by the negligence of defendant, set forth as acts of negligence the construction of defendant's railroad through a street in the city in such manner as to render the highway dangerous for public use, for which no necessity appeared; neglecting to station a flagman at the crossing of the railroad with the street, although required to do so by a city ordinance; and "wrongfully and negligently" running a train along the street, without any brakeman at the forward end of the train. *Held*, that this sufficiently alleged negligence in the particulars specified, although it was not apparent in what way the alleged breach of duty caused the injury.—Johnson v. St. Paul & D. R. Co., 17 N. W. 622, 31 Minn. 283.

80. The complaint in an action against a street-railway company alleged that defendant negligently and willfully permitted one of its turntables to be and remain in a dangerous and unsafe condition in the respect of leaving a dangerous opening in the same unprotected; that one of defendant's cars, in charge of its servant, was driven on the turn-table, and carelessly and negligently swung around thereon, while plaintiff's child, four years old, was standing thereon; and that by reason of the negligence of defendant the child's foot passed through the opening, and he was injured. *Held*, that this stated a cause of action, even if it be taken as admitted that the driver of the car did not know that the child was on the turn-table. If there was contributory negligence on the part of the child or its parents, that was matter of defense; it was not necessarily to be inferred on the face of the complaint.—Ekman v. Minneapolis St. Ry. Co., 24 N. W. 291, 34 Minn. 24.

81. The complaint alleged that defendant negligently, wantonly, and recklessly caused the whistle of its locomotive to be blown off, with a noise, near a team of horses, and violently frightened said team, and caused them to become unmanageable and to run away; that the negligent, careless, and unlawful blowing of said whistle was the sole cause of said team running away; and that by reason thereof, and without negligence on the part of the driver of the team, said team ran away, and ran against plaintiff, without negligence on her part, and struck her with great violence; and that she was permanently injured, etc. *Held* sufficient to show on its face that the wrongful act of defendant was the proximate cause of the injury complained of.—Dugan v. St Paul & D. R. Co., (Minn.) 42 N. W. 538.

40 Minn. 544.

82. Proof of contributory negligence upon the part of the plaintiff in an action for negligence is admissible under a general denial in the answer.—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 249.)

Evidence—Burden of proof.

83. Contributory negligence is a matter of defense, and plaintiff, in making out his case, need not prove the absence of it.—Hocum v. Weitherick, 22 Minn. 152; Whittier v. Chicago, M. & St. P. Ry. Co., 24 Minn. 394; Wilson v. Northern Pac. R. Co., 3 N. W. 333, 26 Minn. 278; Clark v. Chicago, M. & St. P. Ry. Co., 9 N. W. 75, 28 Minn. 69.

84. There is no presumption in law of negligence on the part of a child of tender years or its parents in the bare fact that it is found in a street or upon a sidewalk without an attendant.—City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125.)

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Evidence — Competency and relevancy in general.

85. The mere falling of a wall in process of construction, not occasioned by the act of God or of third persons, taken in connection with facts showing that unfit materials were used in the construction, or the work otherwise imperfectly done, is competent evidence to show negligence in the erection of the wall on the part of the contractor, rendering him liable for damages resulting therefrom, though the work was actually done by a subcontrator.—Bast v. Leonard, 15 Minn. 304, (Gil. 235.)

86. In an action against a building contractor for damages sustained by the fall of a brick wall in course of erection by a subcontractor, to whom the work was let by defendant, evidence of the contract between defendant and the owner of the building, that the owner complained to defendant, while the work was in progress, as to its character, as to who directed the subcontractor where to lay the foundations, how many anchors were furnished by the defendant, and how far they should have been put in, is all competent, as is also the opinion of competent persons as to the cause of the falling of the building, and as to whether builders present at the making of mortar could tell whether it was good or not.—Bast v. Leonard, 15 Minn. 304, (Gil. 235.)

87. In an action for injury resulting from the running away of a horse, the fact that defendant came up immediately after the accident, and claimed and took away the runaway horse, is evidence that he was the party in charge of the horse at the time the runaway occurred, and responsible for the injury.—Courternier v. Secombe, 8 Minn. 299, (Gil. 264.)

—— Custom and usage.

88. In an action against a builder for negligence in stretching a guy-rope across a street so low that plaintiff was swept off his wagon by it and injured, an ordinance of the city regulating the height of such guys is not admissible, as the grant of a privilege by the city cannot exempt the builder from liability for injuries resulting from not stretching the guy high enough.—Larson v. Tobin, (Larson v. Ring,) 44 N. W. 1078, 43 Minn. 88.

89. Evidence of the height at which builders usually stretch such guys is inadmissible, as custom could not sanction the practice if it was negligent in itself.—Larson v. Tobin, (Larson v. Ring,) 44 N. W. 1078, 43 Minn. 88.

90. In an action against a railroad company for damages caused by the displacement of a plank in a highway crossing, testimony as to how planks at such crossings are usually laid is admissible as bearing on the question whether defendant used due care in constructing and maintaining such crossing.—Kelly v. Southern Minn. R. Co., 9 N. W. 588, 28 Minn. 98.

91. On a question of negligence in the care of a railway turn-table, for the purpose of preventing children having access to it being injured by it, evidence that the fastenings to the turn-table were similar in character to those in general use on such turn-tables is competent. Following Kelly v. Railway Co., 9 N. W. 588, 28 Minn. 98.—Kolsti v. Minneapolis & St. L. Ry. Co., 19 N. W. 655, 32 Minn. 133.

—— Similar accidents.

92. For the purpose of showing the defective character of a railroad switch, alleged to have caused an engine to be thrown from the track, evidence that other engines and cars missed the track at the same point, both before and after the accident complained of, may be competent as tending to show that the common cause of the accidents was dangerous or unsafe.—Morse v. Minneapolis & St. L. Ry. Co., 16 N. W. 358, 30 Minn. 465.

93. In an action for damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant railway company in allowing its track to become and remain out of repair, the defects alleged were a broken rail and defective switch at the point where the accident occurred, which caused the intestate's death. *Held*, that evidence of other defects in defendant's tracks at other places, not shown to have in any way contributed to the injury complained of, or to have been the result of a cause presumptively operating at the place of the casualty, or which might have caused the defects which produced the injury, was not admissible.—Morse v. Minneapolis & St. L. Ry. Co., 16 N. W. 358, 30 Minn. 465.

94. In an action for injuries received in an accident caused by a broken switch-rail, evidence that engines had previously run off the track at the same place, both before and after the time in question, is admissible, when it is shown that at the time such accidents occurred the switch was in substantially the same condition as respects the particular defects complained of.—Clapp v. Minneapolis & St. L. Ry. Co., 29 N. W. 340, 36 Minn. 6.

95. In an action against a railroad company for damages caused by the defective condition of a crossing over defendant's track, whereby plaintiff's horse caught its foot in the same, and was injured, a witness for plaintiff was asked how his (witness') horse's foot got caught at the same crossing. *Held* that, no objection having been made to the question on the ground that it was indefinite, the court had a right to presume that its purpose was to show a similar accident caused by the same defect, and the question was properly allowed.—Kelly v. Southern Minn. R. Co., 9 N. W. 588, 28 Minn. 98.

——Subsequent precautions and repairs.

96. In an action against a railroad company for injuries received at a street crossing plaintiff may show that immediately after the accident defendant adopted certain precautions to prevent similar accidents, as tending to show that the omission to take such precautions before the accident was negligence.—Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

97. In an action against a railroad company for damages caused by the defective condition of a crossing, evidence that after the injury defendant repaired the defect complained of is admissible.—Kelly v. Southern Minn. R. Co., 9 N. W. 588, 28 Minn. 98.

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98. In an action against a railway company for damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant in allowing its track to become and remain out of repair, the defects alleged were a broken rail and defective switch at the point where the accident occurred which caused intestate's death. *Held*, that evidence that after the accident defendant repaired the switch alleged to have been defective was not competent as an admission of the previous unsafe condition of the switch. Overruling O'Leary v. City of Mankato, 21 Minn. 65.—Morse v. Minneapolis & St. L. Ry. Co., 16 N. W. 358, 30 Minn. 465.

Instructions to jury.

99. In an action for injuries resulting from defendant's negligence, where evidence of contributory negligence has been admitted without objection, the jury are properly directed to take it into consideration, for, whether admissible or not under the pleadings as drawn, it is a proper issue to be made in the case.—Blakeley v. Le Duc, 19 Minn. 187, (Gil. 152.)

100. Upon a charge to the jury in an action for negligence that the burden was upon defendant to prove contributory negligence on the part of plaintiff, if a specific instruction is desired by defendant that contributory negligence affirmatively appearing from the evidence on the part of plaintiff would be as effectual to bar a recovery as if proved by defendant, defendant should request it to be given.—Greene v. Minneapolis & St. L. Ry. Co., 17 N. W. 378, 31 Minn. 248.

NEGOTIABLE INSTRUMENTS.

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I. Nature and Requisites.

What constitutes bill of exchange.

1. An order directing the drawee to pay to payee or order "the two hundred and fifty dollars due us by you on account of cash paid for repairing engine, and this will be receipt in full of all demands of us," is a draft or inland bill of exchange.—Hillstrom v. Anderson, (Minn.) 49 N. W. 187.

46 Minn. 382.

2. An order for the payment of a sum certain to a third person is none the less a bill of exchange because it shows on what account it is to be applied, or the consideration which has been received.—Hillstrom v. Anderson, (Minn.) 49 N. W. 187.

46 Minn. 382.

What constitutes promissory note.

3. An obligation in the following form: "Certificate of deposit. Chicago, July 14, 1864. Hyde & Broughton have deposited in this office $535.75 in treasury notes to the credit of themselves, and payable to their order hereon in United States 6 per cent. interest-bearing bonds,"—is not a promissory note, but a special contract for the delivery of bonds of a certain character, and of the nominal amount specified; and its indorsement operates only as a transfer of the beneficial interest, and does not create the liabilities of indorser.—Easton v. Hyde, 13 Minn. 90, (Gil. 83.)

II. Execution and Delivery.

Signature.

4. A note executed by an agent must show, from the instrument itself, that it is on behalf of the principal; it is not sufficient that the agent signing it designate himself as such.—Fowler v. Atkinson, 6 Minn. 578, (Gil. 412.)

5. Defendants made a promissory note as follows: "Nine months after date, for value received, we, the trustees of school-district No. 20, county of Olmsted, promise to pay A. W. Bingham, or bearer, the sum of $69, with interest at the rate of 10 per cent. per annum from date;" and signed their individual names, adding the word "Trustees." *Held*, that *prima facie* they were personally liable, and the burden was upon them to show the contrary.—Bingham v. Stewart, 13 Minn. 106, (Gil. 96.)

6. Where one executes a note, and affixes the word "Pres." to his signature, he is *prima facie* personally liable thereon, the word "Pres." being taken as *descriptio personæ* merely, in the absence of evidence to the contrary.—Brunswick-Balke-Collender Co. v. Boutell, (Minn.) 47 N. W. 261.

45 Minn. 21.

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7. In an action against an individual on notes that he has signed, affixing the word "Pres." to his name, defendant, in order to overcome his *prima facie* personal liability, must not only show that he executed the notes on behalf of the corporation of which he is president, and that plaintiff knew this, but also that the debt evidenced by them was one that the corporation had authority to contract, and that it authorized him to contract it.—Brunswick-Balke-Collender Co. v. Boutell, (Minn.) 47 N. W. 261.

45 Minn. 21.

Date.

8. Where a note is intended to bear date as of the time of its execution, but is wrongly dated by mistake, the mistake may be corrected, except as to an innocent purchaser or indorsee, who would be prejudiced by the correction.—Almich v. Downey, (Minn.) 48 N. W. 197.

45 Minn. 460.

Delivery.

9. A promissory note has no legal inception or existence as a binding contract until delivered. —Stein v. Passmore, 25 Minn. 256.

10. After a note has been executed and delivered to the payee, the contract between him and the maker is complete, and when he hands it back to the maker, who obtains indorsements thereon and redelivers it, the indorsers cannot be held as joint makers.—Joyslin v. Kent, (Minn.) 50 N. W. 1110.

47 Minn. 271.

III. Interpretation.

Time of payment.

11. A promissory note, payable in one year, with interest at 4 per cent. a month, contained the following words after the signature: "With privilege of two years, by paying interest annually at 4 per cent. per month." *Held*, that the note was for one year, with the right in the maker, in case he paid the interest at the end of the first year, to retain the money for the second year; and, failing so to do, the note became due at the end of the first year, and thereafter drew interest at 7 per cent. per annum.—Chapin v. Murphy, 5 Minn. 474, (Gil. 383.)

Contemporaneous agreements — Parol evidence.

12. In settlement of an action on a promissory note given by defendant for the price of a boiler and engine purchased from the payee, who had assigned the note to plaintiff, defendant gave a new note, in consideration of an agreement by the payee of the first note to repair the boiler, which defendant alleged had been warranted, and had proved defective. *Held*, that the fulfillment of the contract to repair was not a condition precedent to the payment of the new note.—Jagger v. Winslow, 15 N. W. 242, 30 Minn. 263.

13. Parol evidence is inadmissible to show that an absolute agreement on a note to pay money is to be performed only on a contingency.—Curtice v. Hokanson, (Minn.) 38 N. W. 694.

38 Minn. 510.

14. Parol evidence is inadmissible to show that when a note was executed there was an oral agreement between the parties that, if the maker should be forced to assign for benefit of creditors, the payee should file his claim on the note with the assignee, and release the maker from all claims other than such as might be paid by the assignee. —Harrison v. Morrison, (Minn.) 40 N. W. 66.*

39 Minn. 319.

Distinguishing Healy v. Young, 21 Minn. 389.

IV. Negotiability.

What instruments negotiable—Certainty as to amount.

15. A note which contains a stipulation for the payment of a reasonable attorney's fee, in addition to the face amount of the note, in case suit is brought for its collection, is not negotiable.—Jones v. Radatz, 6 N. W. 800, 27 Minn. 240.

16. An instrument in the usual form of a negotiable promissory note promised payment of a specified sum, "with interest at 10 per cent. per annum from date until paid; seven, if paid when due." *Held*, that it was sufficiently certain to be negotiable, the increase in interest might be treated as a penalty; only 7 per cent. interest being payable after maturity.—Smith v. Crane, 22 N. W. 633, 33 Minn. 144.

—— Payment in money.

17. A promissory note or bill of exchange, payable in "currency," is payable in money, and is negotiable.—Butler v. Paine, 8 Minn. 324, (Gil. 284.)

—— Unconditional promise.

18. To constitute a valid negotiable instrument the promise must be absolute and unconditional, and dependent upon no contingency.—Third Nat Bank v. Armstrong, 25 Minn. 530.

19. A note payable when a certain person shall be elected to a certain office, irrespective of the question of its validity, is not negotiable, and, if payable to the payee or bearer, possession is no evidence of title.—Cooper v. Brewster, 1 Minn. 94, (Gil. 73.)

—— Conditional sale.

20. An instrument in the form of a promissory note, given for the purchase price of machinery, provided that the title thereto should remain in the payee, and should not pass to the maker until the note and interest thereon were fully paid, and contained a reservation on the part of the payee of the right to take possession of the machinery whenever he should deem himself insecure. *Held*, that it did not constitute a negotiable promissory note.—Third Nat. Bank v. Arm strong, 25 Minn. 530.

Distinguished in Beer v. Aultman-Taylor Co., 19 N. W. 388, 32 Minn. 91.

21. An instrument in the following form is a non-negotiable promissory note: "On or before the first day of June, 1876, for value received in a Minnesota Seeder, I promise to pay to Thompson & Duncan, or order, thirty-eight dollars, payable at the ——, in New Ulm, with interest at 10 per cent. per annum, payable annually from date until paid; and, in addition, I will pay five dollars attorney's fees if the note is collected by suit. For

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the purpose of obtaining credit, I certify that I own * * *. The express condition of the purchase and sale of said seeder, No. 3,096, is that the title, ownership, and right of possession does not pass from Thompson & Duncan until this note and interest is paid in full; and the said Thompson & Duncan have full power to declare this note due, and take possession of said seeder, No. 3,096, at any time they may deem themselves insecure, even before maturity of said note." Following Bank v. Armstrong, 25 Minn. 530.—Stevens v. Johnson, 9 N. W. 677, 28 Minn. 172.

22. A written contract consisted of a promise to pay a certain sum of money, with interest, in the form of a promissory note, with agreements added thereto for a reduction for payments on or before maturity, and for payment of attorneys' fees if suit should be commenced on the note, and that it was a condition of the sale and purchase of the machine for which the note was given that the title thereto did not pass from the payees named in the note until payment of the note and interest in full, and that they should have power to declare the note due and take possession of such machine at any time they might deem themselves insecure, and sell said machine, and apply the proceeds on the unpaid balance of the price. *Held*, that it was not a promissory note. Following Third Nat. Bank v. Armstrong, 25 Minn. 530.—Edwards v. Ramsey, 14 N. W. 272, 30 Minn. 91.

—— Collateral mortgage.

23. The fact that a note in the form of a negotiable promissory note is secured by a collateral mortgage upon real estate, duly recorded, does not affect the negotiability of the note; and payment of the amount of the note by the maker to the payee before maturity, and the formal satisfaction of the mortgage by the payee, will not defeat a recovery against the maker upon the note by an indorsee who took it in good faith before its maturity. Gen. St. Minn. 1878, c. 40, § 24, providing that "the recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, * * * so as to invalidate any payment made * * * to the mortgagee," does not apply to such a case.—Blumenthal v. Jassoy, 12 N. W. 517, 29 Minn. 177.

Seal.

24. An instrument in form a promissory note, but under seal, is not negotiable.—Helfer v. Alden, 3 Minn. 332, (Gil. 232.)

25. Under Gen. St. Minn. 1878, c. 23, § 9, which provides that "bonds and other obligations under seal for payment of money, payable to bearer or to some person designated as bearer, or payable to order, issued by any corporation or joint-stock company, shall be negotiable in the same manner and to the same extent as promissory notes," the affixing of the corporate seal to a note made by a corporation does not affect its negotiability.—Auerbach v. Le Sueur Mill Co., 9 N. W. 799, 28 Minn. 291.

26. An instrument in the form of a negotiable promissory note had, after and opposite to the signature of the maker, brackets inclosing the word "Seal." *Held* that, although there was no reference to a seal in the body of the instrument, it was a sealed instrument, and not negotiable.—Brown v. Jordhal, 19 N. W. 650, 32 Minn. 135.

V. Validity.

Fraud—False representations.

27. To maintain the defense to a promissory note given in part payment for the purchase of a business stock, and transferred to plaintiff after maturity, that there were fraudulent representations inducing the purchase, the same facts must be proved which would be necessary to maintain an action for damages for deceit in the sale.—Wilder v. De Cou, 18 Minn. 470, (Gil. 421.)

28. Plaintiff, holding a tax-deed for a farm occupied by defendant, after inffectual negotiations between them for a settlement, brought suit against defendant for possession of the land, whereupon defendant compromised the matter with plaintiff by executing to him a promissory note, in consideration for which plaintiff executed to defendant a quitclaim deed of the land. *Held*, that statements made by plaintiff, during and prior to the negotiations for settlement, to the effect that he had a valid title to the land, and could recover possession unless defendant settled with him, although in fact his tax-deed was void, and vested no title in him, as was afterwards judicially determined, were rather expressions of opinion than positive statements of fact, and were not such fraudulent representations as to constitute a defense to an action on the note.—Perkins v. Frinka, 15 N. W. 115, 30 Minn. 241.

29. In an action on a promissory note, given upon the settlement of an action on a former note, defendant alleged that the execution of the note was obtained by fraud. *Held*, that testimony by him as to representations by plaintiff's attorney to him at the time of its execution, as to the legal effect of the terms of settlement, was not admissible; there having been no relation of trust or confidence between defendant and plaintiff's attorney, and no misunderstanding as to the facts.—Jagger v. Winslow, 15 N. W. 242, 30 Minn. 263.

30. In an action on promissory notes by the payee against the maker, there was evidence tending to sustain the defense alleged, that defendant was induced to execute the notes by fraudulent representations of plaintiff's agent as to their contents. *Held*, that it was not important whether defendant was negligent in trusting to such representations.—Aultman v. Olson, 26 N. W. 451, 34 Minn. 450.

31. In an action on promissory notes given to the agent of the payee, the answer set up fraud practiced by such agent in procuring the notes to be executed in terms materially different from those in fact agreed to by the maker. *Held*, that this was a good defense to the maker, he having acted in good faith, irrespective of whether the agent acted, in the particular matters to which the fraud related, with or without authority. To such a case the law of rescission or of reformation of contracts has no application, the defense

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being that the notes are not the maker's contracts, but are void.—Aultman v. Olson, 26 N. W. 451, 34 Minn. 450.

32. L. assigned to C. certain letters patent at a fixed price, part of which C. paid, and gave L. his notes for the remainder. C. afterwards brought action against L., alleging that he was induced to purchase the letters patent, which were worthless, by the false and fraudulent representations of L., and alleging damage, and demanding judgment to the amount of the price which he alleged he had paid. Meantime L. indorsed some of the notes to S., who had notice of the fraud, and he brought action on the notes against C. *Held* that, in the action by C., he could not recover on account of the notes, unless he had paid them, or might be obliged to pay them, and the bringing of that action did not affect his right to defend against the notes on the ground of the fraud.—Smith v. Carlson, (Minn.) 30 N. W. 761.*

36 Minn. 220.

33. A false representation by the holder of a series of notes that the first one had been paid at maturity, on the faith of which representation a purchaser buys the other notes, giving his own in payment therefor, is such a fraud as will entitle the purchaser to rescind the contract though no actual damage be shown, and is a good defense to an action on the purchaser's own notes, where the rights of *bona fide* purchasers have not intervened.—MacLaren v. Cochran, (Minn.) 46 N. W. 408.

44 Minn. 255.

Intent of payee.

34. The intention of the payee to convert to his own use a note given to him for the benefit of another, would be no defense to the maker, if in fact the note was not so converted, but was used in accordance with the intention of the maker.—Elias v. Finnegan, (Minn.) 33 N. W. 330.

37 Minn. 144.

VI. Consideration.

Sufficiency.

35. Where, by the mutual agreement of debtor and creditor, a book-account is put into a note, payable at a future day, the transaction is *prima facie* evidence that the remedy upon the debt is thereby suspended until the maturity of the note, and the extension of credit is a new and adequate consideration for the note and a mortgage given to secure it.—Lundburg v. Northwestern Elevator Co., (Minn.) 43 N. W. 685.

42 Minn. 37.

36. An answer by the maker of a promissory note that it was given as collateral security for a pretended precedent debt, and that no such debt existed, of which defendant had notice, is good.—Dunning v. Pond, 5 Minn. 302, (Gil. 238.)

37. In an action on a promissory note, an answer by one, who indorsed it before delivery, that he was an accommodation indorser, and that the maker received no sufficient consideration for the note, is insufficient.—Dunning v. Pond, 5 Minn. 296, (Gil. 234.)

38. In an action on a promissory note by the payee it appeared that defendant gave the note, at plaintiff's solicitation, as collateral security for a past-due note of the same amount of defendant's son, who had just failed in business. *Held*, that this showed an entire want of consideration.—Security Bank of Minnesota v. Bell, 21 N. W. 470, 32 Minn. 409.

39. Where the only evidence of want of consideration, pleaded as a defense to a note, is that it was given for the right to manufacture and sell a patented article within certain territory, which right had not been interfered with, a verdict for plaintiff should not be disturbed.—Owsley v. Geenwood, 18 Minn. 429, (Gil. 386.)

40. Promissory notes given for the price of a harvesting-machine, signed by the buyer and a surety, were delivered to the seller's agents, who afterwards allowed the buyer to substitute other notes which were signed by himself, but the signature of the surety on which was forged, and sent the new notes to the seller, the payee named therein; the agents not knowing that the signature of the surety was forged. The payee afterwards procured from the surety other notes executed by him, secured by mortgage of his real estate, ostensibly to secure the notes upon which the surety's signature was forged, which both parties supposed to be the original notes; both surety and payee being ignorant of the forgery and substitution. *Held*, that the notes and mortgage so given must be treated as given to secure the original indebtedness, and that a finding that they were without consideration was erroneous.—Egan v. Fuller, 29 N. W. 813, 35 Minn. 515.

Illegal consideration.

41. A promissory note, given by husband to wife in pursuance of an agreement for alimony, made to facilitate divorce proceedings, and resting on no other consideration, is void.—Adams v. Adams, 25 Minn. 72.

42. The fact that defendant was a party to an illegal agreement, and *in pari delicto*, will not affect his right to plead its illegality in an action on a note for which it furnished the sole consideration.—Adams v. Adams, 25 Minn. 72.

Failure.

43. Where a promissory note is given for the agreed price upon a contract to convey real estate in fee-simple, want of title in the vendor deos not constitute a failure of consideration for the note.—Lough v. Bragg, 18 Minn. 121, (Gil. 106.)

Distinguishing Lowry v. Hurd, 7 Minn. 356, (Gil. 282.)

44. Defendant, an inventor, pending an application for a patent, assigned a portion of his invention to plaintiff. Subsequently plaintiff assigned to defendant, taking his promissory note therefor. *Held*, that the fact that after the reassignment a patent was issued to plaintiff for a portion of the theory of the invention so reassigned, and that by reason thereof the subsequent application of defendant for a patent for his invention was rejected, on the ground that it would infringe the patent issued to plaintiff, was no defense to the note.—Clark v. Smith, 21 Minn. 539.

45. Where an acceptance was given to the payee of a bill of exchange in consideration of his agree-

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ment to make certain payments, the fact that he violates that agreement does not constitute a failure of consideration, so long as he remains legally obligated by his promise.—Vanstrum v. Liljengren, (Minn.) 33 N. W. 555.

37 Minn. 191.

46. A partial failure of consideration may be a defense to an action on a negotiable promissory note, brought by the original holder, or one who stands in his shoes.—Torinus v. Buckham, 12 N. W 348, 29 Minn. 128.

Distinguishing Walters v. Armstrong, 5 Minn. 448. (Gil. 364;) Whitacre v. Culver, 9 Minn. 295, (Gil. 279;) Leighton v. Grant, 20 Minn. 345, (Gil. 298.)

47. Where there is one consideration, not susceptible of apportionment, for several promissory notes, a partial failure of that consideration cannot, in the absence of fraud or mistake, impeach any one of the notes in an action on it.—Leighton v. Grant, 20 Minn. 345, (Gil. 298.)

Distinguished in Torinus v. Buckham, 12 N. W. 349, 29 Minn. 131.

VII. Alteration or Modification.

Alteration.

48. After an accommodation indorsement was made upon a promissory note, the maker, without the knowledge or consent of such indorsee, inserted in the body of the note, "Payable before maturity, and interest on unexpired term refunded, if I so elect," and then negotiated the same to an innocent *bona fide* holder for value. *Held* that, as such alteration did not affect the indorser's contract, it was as to him immaterial.—Herrick v. Baldwin, 17 Minn. 209, (Gil. 183.)

49. E. signed a negotiable promissory note as surety for H., and delivered it to H., on condition that he should not deliver it to plaintiff, the payee, until he procured the signature of J. as co-surety. H. failed to get J.'s signature, but, without the knowledge or consent of E., procured R. to sign the note as co-surety, and then delivered it to plaintiff, who took it for a valuable consideration, without any notice of the facts stated. *Held*, that E. could not avail himself, as against plaintiff, of the condition imposed by him; and that the obtaining the signature of J. as co-surety was not such an alteration of the instrument as to discharge E.; at least where the payee had no notice when he took the note of the circumstances.—Ward v. Hackett, 14 N. W. 578, 30 Minn. 150.

Modification.

50. An agreement, made after maturity of a note, to accept payment at a particular place, is, without some new consideration, void. It is also void if made before maturity, in consideration of part payment to be made after maturity.—Colter v. Greenhagen, 3 Minn. 126, (Gil. 74.)

51. Where, upon the execution of a promissory note, the payee, as part of the contract, indorses an agreement upon the note that, in case the maker should erect a dwelling-house upon the lot therein described on or before a certain date, the note should be canceled, the right to cancel the note in this way is a privilege or option to be exercised within the time limited, and, unless extended, the privilege will lapse, and the note become absolute; but a voluntary extension of the privilege if acted on will be binding on the parties, and will be deemed to rest on a sufficient consideration.—Stout v. Watson, (Minn.) 48 N. W. 195.

45 Minn. 454.

VIII. Accommodation Paper.

Evidence.

52. Parol evidence is admissible to show that notes were executed and delivered as accommodation paper solely.—Pray v. Rhodes, (Minn.) 43 N. W. 838.

42 Minn. 93.

Rescission.

53. An accommodation note has no validity until it has passed into the hands of a third party for value, and until negotiated the maker can rescind the agreement.—Second Nat. Bank v. Howe, (Minn.) 42 N. W. 200.

40 Minn. 390.

54. Where, on receiving notice from the maker of an accommodation note that he rescinds and revokes the act, an officer of a bank falsely and fraudulently makes statements in reference to the solvency and financial standing of such payee, of a character calculated to and which actually mislead the maker, and induce him to withdraw his previous rescission of the contract, and to consent to the negotiation of the note to the bank, the latter can be held responsible if it subsequently receives the note from the payee; and it is not material that at the time of the notice, and when the false and fraudulent statements were made, the bank was not interested in or connected with the note.—Second Nat. Bank v. Howe, 42 N. W. 200, 40 Minn. 390.

IX. Indorsement and Transfer.

Sufficiency to pass title.

55. An indorsement of a promissory note "for collection" makes the indorsee an agent for the collection of the note, and does not pass the title so as to make him a proper party plaintiff in a suit upon such note.—Rock County Nat. Bank of Janesville, Wisconsin, v. Hollister, 21 Minn. 385; Third Nat. Bank of Syracuse, New York, v. Clark, 23 Minn. 263.

56. A transfer by the trustee of a corporation of a promissory note, payable to its order, and the legal title to which is in such corporation, without the direction of its executive committee, who alone have power to authorize such transfer, is binding, and vests a good title, even as against the corporation, the beneficial owner, if the indorsee knew nothing of the restriction on the power of the trustee.—Downer v. Read, 17 Minn. 493, (Gil. 470.)

57. On a sale by plaintiffs to defendants of lumber, to be paid for in promissory notes secured by mortgage executed by a third party and held by defendants, nothing was said about defendants indorsing the notes. *Held*, that any assignment or transfer of the notes that would convey the title would fulfill the contracts in regard to them on the part of the defendants.—Paine v. Smith, 24 N. W. 305, 33 Minn. 495.

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58. Gen. St. Minn. 1878, c. 73, § 89, providing that in actions on promissory notes the possession of the note is *prima facie* evidence that the same was indorsed by the "person" by whom it purports to be indorsed, applies to corporations as well as natural persons, (Gen. St. Minn. 1878, c. 4, § 1;) and an indorsement made by the duly-authorized agent of a corporation, by simply writing the name of the corporation, without indicating that it was made by an agent, is sufficient.—First Nat. Bank v. Loyhed, 10 N. W. 421, 28 Minn. 396.

59. Under Gen. St. Minn. 1878, c. 73, § 89, the possession of a note by an indorsee, purporting to be indorsed by a corporation, is *prima facie* evidence that it was so indorsed, without proof that the person who made it had authority to do so.—National Bank of Battle Creek v. Mallan, (Minn.) 34 N. W. 901.

37 Minn. 404.

60. Where a draft which was intended for "C. A. R." was erroneously indorsed to "C. R.," and was shown to have been inclosed in a letter duly addressed and mailed to "C. A. R.," at his place of business in a distant city, but miscarried, and was never received by him, and was fraudulently indorsed and collected by a stranger, *held*, in a subsequent action to recover the amount of the draft by the true owner, that, in the absence of any identification of the fraudulent indorser, or that any person bearing the name "C. R.," so indorsed, lived in or received his mail, at the time, in the city to which the letter was sent, the mistake in the original indorsement was not sufficient to raise an issue for the jury upon the question of plaintiff's negligence, and a verdict was properly directed for him.—Lennon v. Brainard, (Minn.) 31 N. W. 172.

36 Minn. 330.

Sufficiency to create liability of indorser.

61. A payee of a note assumes the liability of an indorser by writing on the back of the note: "For value received I hereby assign and transfer the within note, together with all interest in and all right under the mortgage securing the same."—Maine Trust & Banking Co. v. Butler, (Minn.) 48 N. W. 333.

45 Minn. 506.

62. As to subsequent *bona fide* holders of a negotiable note, one is an indorser who, not being a party to the note, places his name on the back thereof after its execution and delivery, before maturity, and before it has been indorsed by the payee.—Buck v. Hutchins, (Minn.) 47 N. W. 808.

45 Minn. 270.

63. By a general indorsement of a promissory note by the holder thereof, pursuant to a previous contract in writing by him to assign the note, no mode of assigning it being indicated, he assumes the usual liabilities of an indorser.—Collom v. Matthews, (Collom v. Bixby,) 21 N. W. 855, 53 Minn. 50.

64. Defendants, the payees and holders of a note, desiring to raise money on it, wrote their names on the back of it, and applied to plaintiffs to discount it. On plaintiffs' request defendants left the note with them for the sole purpose of giving them an opportunity of ascertaining the solvency of makers. Afterwards plaintiffs refused either to discount the note, or to return it, and defendants brought suit for the value of the note, in which they obtained judgment, which plaintiffs paid. *Held*, that defendants were not liable as indorsers; that payment of the judgment invested plaintiffs with title to the converted property as of the date of the conversion, which was merely the obligation of the makers of the note, without any contract of indorsement by defendants,—no such contract ever having been consummated.—Haas v. Sackett, (Minn.) 41 N. W. 237.

40 Minn. 53.

65. A. indorsed an unsigned note, and delivered it to the payee named, who was to procure the signature of C. thereto as maker; A. to be liable as indorser only. *Held*, C.'s signature having been obtained, that the payee was the agent of A. in procuring C.'s signature, and A. was liable as indorser.—Rogers v. Stevenson, 16 Minn. 68, (Gil. 56.)

Indorsement after maturity.

66. The holder of a promissory note past due agreed with the maker that if defendant would indorse the same he would extend the time of payment. Defendant thereupon, at the maker's request, but without knowledge of this agreement, wrote his name on the back. *Held*, that such indorsement, so made, did not make him liable as maker or indorser; that it might have authorized the writing of a contract of guaranty above his name, but, none having been written, he was not liable as guarantor.—Moor v. Folsom, 14 Minn. 340, (Gil. 260.)

Indorsement by partner — Ratification.

67. T. and P. were partners. Dissolving, they divided all the assets but one note, which T., under mistake of law, and without special authority from P., indorsed in the late firm name, and procured to be discounted, taking one-half the proceeds. P., before the note fell due, knowing the note to have been discounted, demanded and received the other half of the proceeds. *Held*, that he could not plead ignorance of the fact of discounting after protest of the note, and that thereafter retaining his portion of the proceeds of its discount was a ratification by him of the indorsement as made by T., and binding upon him.—First Nat. Bank of Mankato v. Parsons, 19 Minn. 289, (Gil. 246.)

Effect of indorsement before delivery.

68. A party other than the payee of a promissory note, putting his name on the back thereof before delivery, thereby becomes a joint maker, and liable as such.—Pierse v. Irvine, 1 Minn. 369, (Gil. 272;) Rey v. Simpson, 1 Minn. 380, (Gil. 282;) Winslow v. Boyden, 1 Minn. 383, (Gil. 285;) McComb v. Thompson, 2 Minn. 139, (Gil. 114;) Marienthal v. Taylor, 2 Minn. 147, (Gil. 123;) Robinson v. Bartlett, 11 Minn. 410, (Gil. 302;) Stein v. Passmore, 25 Minn. 256.

The cases of Pierse v. Irvine, 1 Minn. 369, (Gil. 272,) McComb v. Thompson, 2 Minn. 139, (Gil. 114,) and Marienthal v. Taylor, 2 Minn. 147, (Gil. 123,) are distinguished in Levering v. Washington, 3 Minn. 330, (Gil. 230.)

69. Where a person puts his name on the back of a note to give it credit with the payee, and

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the payee is influenced in receiving the note and parts with something by reason of the name, the person so indorsing may be held as an original maker.—McComb v. Thompson, 2 Minn. 139, (Gil. 114.)

70. Where a party other than the payee indorses a promissory note before its delivery to give it credit, he is liable thereon as a joint maker, although he received no valuable consideration.—Robinson v. Bartlett, 11 Minn. 410, (Gil. 302;) Priedman v. Johnson, 21 Minn. 12.

71. One who consents to become an indorser on a note, and signs the same, and delivers it to the maker, for whose debt it is given, to be delivered to the payee solely on condition of the latter's consent to extend the time of payment of the whole debt according to the terms of the note, cannot be bound by the delivery of the note after the payment of a large sum thereon, upon the refusal of the payee, who had knowledge of the condition, to comply therewith, and as to him the note is invalid.—Wager v. Huntington, (Minn.) 34 N. W. 745.*

37 Minn. 392.

72. In an action on a promissory note against the maker and indorser, evidence that before making the note defendants were negotiating for the sale of real estate, the note to be secured by a mortgage thereon; and that the indorser objected to the terms of sale because the mortgage would be a second one, whereon plaintiff agreed to purchase the note, and look to the security for payment, asking only a reasonable discount, if the indorser would take it, and the mortgage, at a certain price,—is not material, as the transaction was nearly two months before the indorsement, and it was not shown that the indorsement had any connection with the former transaction.—Knoblauch v. Crossman, (Minn.) 37 N. W. 586.

38 Minn. 352.

Parol evidence to vary or explain indorsements.

73. Where, prior to delivery, and to give credit to a note, a party indorses the same, parol testimony is competent to show the circumstances under which such indorsement was made, and to charge him as an original maker instead of an indorser.—Pierse v. Irvine, 1 Minn. 369, (Gil. 272;) Rey v. Simpson, 1 Minn. 380, (Gil. 282;) Winslow v. Boyden, 1 Minn. 383, (Gil. 285;) McComb v. Thompson, 2 Minn. 139, (Gil. 114.)

The cases of Pierse v. Irvine, 1 Minn. 369, (Gil. 272,) and McComb v. Thompson, 2 Minn. 139, (Gil. 114,) are distinguished in Levering v. Washington, 3 Minn. 330, (Gil. 230.)

74. A party other than the payee, who, before delivery, writes his name on the back of a promissory note, with the purpose of giving credit thereto, is liable as joint maker, and cannot vary that obligation by parol evidence.—Peckham v. Gilman, 7 Minn. 446, (Gil. 355.)

75. Parol testimony is inadmissible to show that an indorsement of commercial paper by the payee, in ordinary form, makes his liability other than that of an indorser.—Levering v. Washington, 3 Minn. 323, (Gil. 227;) Borup v. Nininger, 5 Minn. 523, (Gil. 417;) Coon v. Pruden, 25 Minn. 105.

The case of Levering v. Washington, 3 Minn. 323, (Gil. 227,) distinguishes Pierse v. Irvine, 1 Minn. 370. (Gil. 272;) McComb v. Thompson, 2 Minn. 139, (Gil. 114;) Marienthal v. Taylor, 2 Minn. 147, (Gil. 123.) The case of Coon v. Pruden, 25 Minn. 105, distinguishes McComb v. Thompson, 2 Minn. 139, (Gil. 114.)

76. If, in addition to an indorsement of a promissory note, there are other words showing its character and the relation the party intended to assume, the agreement so expressed cannot be varied by parol.—McComb v. Thompson, 2 Minn. 139, (Gil. 114.)

77. In an action upon a promissory note, if there is anything to be found in the writing itself that indicates what particular relation a party intends to assume to the note, parol evidence is not admissible to vary the relation.—McComb v. Thompson, 2 Minn. 139, (Gil. 114.)

78. Where a note is indorsed in blank, parol evidence is admissible to show that the indorsement was made for the purpose of guarantying the note, and becoming security to the payee for its amount.—Pierse v. Irvine, 1 Minn. 369, (Gil. 272.)

79. Where a partner makes a note to the order of the firm, and the firm indorses it, parol evidence is not admissible to show that the payee indorsing the note was in fact a maker.—Coon v. Pruden, 25 Minn. 105.

80. The indorsement of a negotiable note or bill before maturity by the payee creates an absolute warranty to the immediate and subsequent indorsees that either the maker or acceptor will pay the same upon due presentment, or the indorser will cause the same to be paid upon due notice of its dishonor, and this warranty cannot be changed by evidence of contemporaneous agreement.—First Nat. Bank of St. Paul v. National Marine Bank, 20 Minn. 63, (Gil. 49.)

81. A note, signed by a corporation by its secretary, was made payable to the order of "A. J. B., Treasurer." It was indorsed, "A. J. B., Treasurer." *Held* that, as it did not appear of what A. J. B. was treasurer, the indorsement was *prima facie* his individual contract, but that extrinsic evidence was admissible to show that he made it only in his official capacity as treasurer of the signing corporation.—Souhegan Nat. Bank v. Boardman, (Minn.) 48 N. W. 1116. 46 Minn. 293.

Transfer without indorsement.

82. A promissory note may be transferred by mere delivery, so as to vest the title and right to sue in the holder; but in such case the transferee takes the note subject to all disabilities, and not as a *bona fide* holder.—Pease v. Rush, 2 Minn. 107, (Gil. 89.)

Distinguished in Van Eman v. Stanchfield, 10 Minn. 262, (Gil. 204.)

83. Title to a promissory note may be transferred without indorsement or delivery of such note.—Nininger v. Banning, 7 Minn. 274, (Gil. 210;) Foster v. Berkey, 8 Minn. 351, (Gil. 310.)

The case of Nininger v. Banning, 7 Minn. 274, (Gil. 210,) distinguishes Borup v. Nininger, 5 Minn. 523, (Gil. 417.)

84. A note payable to order, and passed without indorsement, is not taken in the regular

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course of business.—Pease v. Rush, 2 Minn. 107, (Gil. 89.)

85. Where a promissory note payable to the husband is transfered by him directly to his wife, without indorsement, the title thereto vests in her, so far as the maker is concerned, although she paid no valuable consideration for such transfer.—Tullis v. Fridley, 9 Minn. 79, (Gil. 68.)

86. The mere possession of an overdue promissory note, by a person other than the payee, without the indorsement of the payee, is not evidence of ownership in such person.—Van Eman v. Stanchfield, 13 Minn. 75, (Gil. 70.)

Distinguishing Pease v. Rush, 2 Minn. 107, (Gil. 89.)

Rights and liabilities of indorsers.

87. The indorsement by the payee of a promissory note under seal creates the same liability on his part as the indorsement of a negotiable note, but not as to subsequent holders, unless indorsed to the indorsee or his order, or the indorser expressly promises to pay the note.—Helfer v. Alden, 3 Minn. 332, (Gil. 232.)

88. The indorser of a promissory note may, at any time after maturity, pay the same and enforce it against the principal; or, when several judgments have been recovered against him and the maker, may pay the one against himself, and take an assignment of and proceed to enforce the one against the maker. Comp. St. Minn. c. 60, § 36, authorizing plaintiff, at his option, to sue all parties to a note in one action, does not change this rule, and an indorser paying such judgment may have the same assigned to himself or a third person, and proceed to enforce it against the maker.—Folsom v. Carli, 5 Minn. 333, (Gil. 264.)

What defenses available to the maker.

89. A defense arising between the original parties to a promissory note, subsequent to its indorsement to one as security, is not available in an action by the indorsee on the note.—Becker v. Sandusky City Bank, 1 Minn. 311, (Gil. 243.)

90. Want of delivery by the maker is no defense to a promissory note in the hands of a *bona fide* purchaser for value before maturity.—Kinyon v. Wohlford, 17 Minn. 239, (Gil. 215.)

91. Mere want of consideration between maker and payee is not sufficient, in an action by the indorsee, to require proof that he gave value for it. The further element of fraud or illegality between the original parties is required.—Cummings v. Thompson, 18 Minn. 246, (Gil. 228.)

92. Simple want of consideration for a promissory note is no defense thereto in the hands of an innocent indorsee for value, without notice of such infirmity, although he may have purchased the same for less than its face value.—Daniels v. Wilson, 21 Minn. 530.

93. Where a promissory note of a third person is taken in good faith before maturity in payment of a pre-existing debt, the indorsee is entitled to protection as a *bona fide* holder against any equities between the antecedent parties.—Stevenson v. Hyland, 11 Minn. 198, (Gil. 128.)

Bona fide purchasers—Who are, generally.

94. One who purchases a note secured by mortgage given for the purchase price of land pending a suit against the payee by the maker to cancel the deed and mortgage and recover back his payments, and with a guaranty from the payee against such suit, and all lawful claims of the maker in respect to the note and mortgage, is not a *bona fide* purchaser.—Dorr v. Steichen, 18 Minn. 26, (Gil. 10.)

—— Notice of defects or equities.

95. Where a negotiable note is discounted by a bank through its cashier, the mere fact that the cashier was a stockholder and director of the corporation, which was the payee and indorser of the note, will not charge the bank with notice of any equities against it.—First Nat. Bank v. Loyhed, 10 N. W. 431, 28 Minn. 396.

96. L., an individual doing business under the name of the "Bank of B.," holding several notes payable to himself by his name, or by the name of the Bank of B., indorsed the notes, and sent them to plaintiff, another bank, requesting plaintiff to discount them, and place the proceeds to his credit, which plaintiff did. Afterwards plaintiff returned the notes to L. for collection, having indorsed them: "Pay Bank of B., or order, for collection account of" plaintiff. L., having received the notes for collection, transferred them by indorsement before their maturity, with plaintiff's indorsements uncanceled upon them, to defendant, in payment of a pre-existing debt from L. to defendant. Defendant noticed the indorsements when he received the notes, but asked no questions, and no notice to him of plaintiff's rights was shown, except such as might be inferred from the facts stated. *Held*, that the indorsements were notice to defendant of plaintiff's title, and that defendant's conduct in forbearing to make inquiries was not merely proof of negligence, but, in the absence of anything to support a contrary conclusion, was proof of *mala fides*.—Merchants' Nat. Bank v. Hanson, 21 N. W. 849, 33 Minn. 40.

97. The indorsement of a negotiable note, making it payable simply to the order of A., who has no personal interest in the transaction, the indorsement being really made for the benefit of B., is not a transfer to B. in the usual course of business, so as to exclude defenses by the maker, as against the payee.—Elias v. Finnegan, (Minn.) 33 N. W. 330. 37 Minn. 144.

98. It is not essential that the written promise to accept a bill be shown or exhibited to a person who takes the bill relying upon its existence; but, if he chooses to act without inspecting the promise in writing, he is held to have such information as he would have acquired by reading the same.—Woodard v. Griffiths-Marshall Grain Commission Co., (Minn.) 45 N. W. 433. 43 Minn. 260.

99. In an action on a negotiable promissory note, defendant offered to prove that he signed the note, supposing it to be merely a receipt for a plough which the agent of the payee had delivered to him to try; that such agent presented the instrument to him for his signature, told him

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it was a receipt, and at his request read to him the language of a receipt; that there was no one who could read English within half a mile of the place; that he believed the agent read it truly, and, relying on such reading, signed it, supposing it to be a receipt, and not intending to sign, and not knowing that he was signing, a note. No proof was offered that plaintiff was not a *bona fide* holder. *Held*, that the negligence of defendant in executing the note precluded the defense, as against a *bona fide* holder, that he was induced to sign and deliver it by false and fraudulent representations.—Mackey v. Peterson, 13 N. W. 132, 29 Minn. 298.

100. The purchaser of what purports to be, or is said to be, negotiable paper, must exercise ordinary prudence in respect to knowledge derived from an inspection of the paper.—Stein v. Rheinstrom, (Minn.) 50 N. W. 827.

47 Minn. 476.

101. Defendants issued their bonds to one S., payable to him or the holder thereof, and obligated in the body for the payment of the principal in five years, and interest annually, "on the presentation of the corresponding interest warrants" to the county treasurer. Interest coupons were attached. They were stolen from S., and, after some of the interest was due, sold to plaintiff with all the coupons attached. *Held*, that the overdue interest was a suspicious circumstance, sufficient to put plaintiff on its guard, and that it took subject to its grantor's infirmity of title.—First Nat. Bank of St. Paul v. County Com'rs Scott County, 14 Minn. 77, (Gil. 59.)

102. A mere general recital in a bond issued by a railway company, negotiable on its face, that such bond belongs to a series of bonds secured by a trust-deed of the property of the company, is not sufficient to destroy its negotiability, or to put *bona fide* purchasers of the bonds upon inquiry as to the existence of conditions in the deed qualifying the terms of payment in the bond, or affecting his right to maintain a suit at law thereon, upon default in the payment thereof when due.—Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co., (Minn.) 51 N. W. 658.

—— Overdue paper.

103. A negotiable instrument, payable at a time certain, is overdue as soon as that time is past, whether it is payable generally or only at a specified place; and one taking it afterwards acquires no better title than that of the party from whom he purchased.—First Nat. Bank of St. Paul v. County Com'rs Scott County, 14 Minn. 77, (Gil. 59.)

104. Gen. St. Minn. 1878, c. 66, § 27, provides that, in the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment, but that this section does not apply to negotiable instruments transferred in good faith, and upon good consideration, before due. *Held*, that the statute places an overdue bill or note upon the same footing as any other chose in action, and that a purchaser of an overdue draft takes it subject to any set-off arising out of an independent transaction against an intermediate holder, if such set-off could have been asserted against such holder while the drafts belonged to him.—Le Due v. First Nat. Bank, 16 N. W. 426, 31 Minn. 33.

105. In determining whether a purchaser of a draft, payable on demand, takes it as overdue paper, subject to all equities or defenses existing against the assignor, the test is the length of time the draft has been outstanding, without reference to whether the draft has ever been presented to the drawee for payment.—Le Due v. First Nat. Bank, 16 N. W. 426, 31 Minn. 33.

106. A draft payable on demand was transferred nearly five months after date. *Held* that, there being no explanation as to why the draft was outstanding so long, the court was justified in finding that the purchaser took it as overdue and dishonored paper.—Le Due v. First Nat. Bank, 16 N. W. 426, 31 Minn. 33.

107. Under Gen. St. Minn. 1878, c. 66, § 27, by which the assignment of an overdue promissory note is subject, like the assignment of any other chose in action, to "any set-off or other defense existing at the time of, or before notice of, the assignment," the assignee of such a note takes it subject not only to defenses existing against the payee at the time of his assignment, but also subject to defenses existing against an intermediate holder, while the note belonged to him.—Tuttle v. Wilson, 23 N. W. 864, 33 Minn. 422.

X. Sureties and Guarantors.

Validity of guaranty—Conditional delivery.

108. In an action on a note, it appeared that the guarantors had signed it under an agreement to guaranty its payment, provided certain others would also join in the guaranty, and had written their names on the back of the note, and left it with the agent of the payees with the understanding that unless those signatures were obtained, their indorsements should be inoperative. The other signatures were not obtained, and there was no evidence to show that plaintiff was a purchaser in good faith without notice and for value. *Held*, plaintiff could not recover against such guarantors. Westman v. Kumweide, 15 N. W. 255, followed.—Merchants' Exch. Bank v. Luckow, (Minn.) 35 N. W. 434.*

37 Minn. 542.

Liabilities of guarantors.

109. One who, before maturity, unconditionally guaranties the payment of a note, becomes absolutely liable upon default of the maker.—Hungerford v. O'Brien, (Minn.) 34 N. W. 161.

37 Minn. 306.

110. The guarantor is not entitled to notice of the maker's default, and the mere neglect of the holder to pursue a remedy against the maker does not discharge him. So, if the paper had been previously indorsed to the guarantor, the failure of the holder at maturity to make demand of the maker, and give notice to the prior indorser, does not discharge the guarantor.—Hungerford v. O'Brien, (Minn.) 34 N. W. 161.

37 Minn. 306.

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111. Where the holder of a note brings suit against the guarantor of collection, without having first attempted to collect from the maker by due process of law, it is incumbent on him to prove that the maker was, at the maturity of the note, and still continues, so utterly insolvent that an action against him would have been fruitless.—D. M. Osborne & Co. v. Thompson, (Minn.) 33 N. W. 1.
36 Minn. 528.

Equitable rights of surety as against payee.

112. Where one of several signers of a joint note is surety for the others, but such fact does not appear upon the face of the paper, the payee is not, in the absence of any notice, bound to inquire into the relations of the makers as between themselves, nor, until informed thereof, is he bound to regard the equitable rights of such surety.—Benedict v. Thoe, (Minn.) 35 N. W. 10.
37 Minn. 431.

Release or discharge.

113. Defendant was liable on a promissory note as accommodation and second indorser. The first indorser made an assignment for the benefit of his creditors, the property being sufficient to pay all claims, and afterwards, and before the action, the assignee, with the consent of the holder of the note, and without defendant's knowledge, reconveyed the property to the assignor. *Held*, that the holder of the note, by consenting to such reconveyance of the trust-estate, and relinquishing his right to have the note paid from the proceeds thereof, without defendant's consent, thereby released him from liability.—Willis v. Davis, 3 Minn. 17, (Gil. 1.)

114. Possession of a promissory note, payable to the bearer, while presumptive evidence that the possessor is the owner or lawful holder, and entitled to receive payment, raises no presumption that he is authorized to make any arrangement in regard to it for the benefit of another as the owner.—Woodbury v. Larned, 5 Minn. 339, (Gil. 271.)

XI. Acceptance.

What constitutes.

115. A promise in writing to accept a bill of exchange, made within a reasonable time before it is drawn, will amount to an acceptance of the bill in favor of a person to whom the promise is communicated, and who also takes the bill for a valuable consideration, on the faith and credit of the promise.—Woodard v. Griffiths-Marshall Grain Commission Co., (Minn.) 45 N. W. 433.
43 Minn. 260.

116. The word "except," written and signed upon a bill of exchange by the drawee, is an acceptance.—Vanstrum v. Liljengren, (Minn.) 33 N. W. 555.
37 Minn. 191.

117. The words "payable the fifteenth day of May, 1883," written and signed by the drawee upon a bill of exchange drawn upon him, constitute a qualified acceptance.—Vanstrum v. Liljengren, 33 N. W. 555, 37 Minn. 191.

By partner.

118. An acceptance by a partner, in his own name, of a bill of exchange drawn upon the firm, is not binding either upon the firm or accepting partner.—Heenan v. Nash, 8 Minn. 407, (Gil. 363.)

Liabilities of acceptor.

119. It is no defense in an action against the acceptor of a bill of exchange that there was no consideration as between the drawer and payee of the bill.—Vanstrum v. Liljengren, (Minn.) 33 N. W. 555.
37 Minn. 191.

120. Even though a bill of exchange be really, but not in terms, given to the payee for the purpose of collection, the payee may maintain an action in his own name against the drawee, upon the acceptance of the latter.—Vanstrum v. Liljengren, 33 N. W. 555, 37 Minn. 191.

Acceptance and payment of forged draft.

121. A forged draft was presented for payment, and the drawee, without an examination, which he might have had, paid the same to defendant, who had negotiated the draft in the ordinary course of business. *Held*, in an action by the drawee against the holder to recover back the amount paid, that a drawee is presumed to know his correspondent's signature, and if without availing himself of an opportunity to examine a draft he pays it, he cannot recover from a holder who is free from fault, as for moneys paid by mistake.—Bernheimer v. Marshall, 2 Minn. 78, (Gil. 61.)

XII. Demand, Protest, and Notice.

Demand.

122. A bill of exchange, payable to the order of the drawer at a specified place, and accepted by the drawee, need not, in order to entitle the payee to bring an action against the acceptor thereon, be presented at the place named for payment. If the acceptor has funds there, that may relieve him from damages and costs, but will not operate as a defense to the debt.—Freeman v. Curran, 1 Minn. 169, (Gil. 144.)

123. The holder of a note or bill, payable on a day certain at a specified place, is not bound to make a demand at the time and place specified in order to maintain an action thereon; but, if the maker was ready to pay at the time and place, he may avoid damages and costs by pleading a tender of payment, and bringing the money into court.—Balme v. Wambaugh, 16 Minn. 116, (Gil. 106.)

124. The indorsement of a non-negotiable note, as between the indorser and indorsee, is, in legal contemplation, equivalent to the drawing of a bill of exchange by the indorser in favor of the indorsee, entitling the former to presentment, demand, and notice.—Hart v. Eastman, 7 Minn. 74, (Gil. 50.)

125. To fix the liability of an indorser upon an indorsement made upon an overdue note, it must be presented for payment within a reasonable time. What is a reasonable time is a question of

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mixed law and fact, to be determined by the jury under instructions of the court, but where nothing but the time of the delay appears the court will instruct the jury how to find. A delay of one year is unreasonable, as a matter of law, and will discharge the indorser.—Hart v. Eastman, 7 Minn. 74, (Gil. 50.)

126. Where a note has been made by a member of a firm to the order of the firm, and indorsed by it, the relation of the firm is that of indorser, and demand on the maker is necessary to make the firm liable.—Coon v. Pruden. 25 Minn. 105

127. The residence of the maker of a promissory note is, in the absence of evidence to the contrary, presumed to be in the state where such note is made or dated.—Herrick v. Baldwin, 17 Minn. 209, (Gil. 183.)

128. Where the maker of a note, before its maturity, removes his residence from the state where it is so made, and takes up his permanent residence elsewhere, it is sufficient if presentment for payment be made at his last place of abode in the state from which he has so removed. —Herrick v. Baldwin, 17 Minn. 209, (Gil. 183.)

Protest and notice.

129. Under Laws 1856, c. 5, § 5, which requires a notary protesting a note to serve notice by mailing the same to an indorser, directed to the post-office nearest his reputed place of residence, mailing a notice to a post-office where the indorser had a box and frequently got his mail, but which was not nearest his reputed place of residence, is insufficient service. — Marshall v. Baker, 3 Minn. 320, (Gil. 224.)

130. Under Laws Minn. 1856, c. 5, § 4, notice of protest might be made by mail as well on a resident of a town where the same is mailed as if he resided elsewhere. — Kern v. Von Phul, 7 Minn. 426, (Gil. 341.)

131. A notice of protest, properly folded and addressed, is sufficient, whether inclosed in an envelope or not. — Kern v. Von Phul, 7 Minn. 426, (Gil. 341.)

132. Comp. St. Minn. c. 5, § 96, making the certificate of protest of a notary evidence of the fact of protest, refers as well to past as future protests.—Kern v. Von Phul, 7 Minn. 426, (Gil. 341.)

133. At the time of the making of a promissory note, Act 1856, p. 9, § 5, permitted service of notice of protest by mail. Subsequently, and before its maturity, by Act July 26, 1858, (Pub. St. c. 5, § 5,) relating to protests of commercial paper, the provision permitting such service was repealed. *Held*, in an action against an indorser, that the law in force at the maturity of the note governed, and that service of a notice of protest by mail was insufficient.—Levering v. Washington, 3 Minn. 323, (Gil. 227.)

134. The fact that notices of protest were properly sent and postage prepaid may be shown by proof outside of the notary's record.—Rogers v. Stevenson, 16 Minn. 68, (Gil. 56.)

135. An instrument of protest recited presentment and demand at the last place of abode of the maker in the state, said maker having left the state, and having no residence or place of business therein. *Held* that, no objection having been made to its introduction on the trial, objection to its competency, as showing the facts so recited, would not be considered in the appellate court, and, under the circumstances, it was sufficient evidence to sustain a finding of due presentment and demand.—Herrick v. Baldwin, 17 Minn. 209, (Gil. 183.)

136. Gen. St. Minn. 1866, c. 26, § 9, does not make the protesting of promissory notes and inland bills of exchange necessary to charge the indorser, but simply makes the notary's certificate *prima facie* evidence of the facts certified therein.— Bryant v. Lord, 19 Minn. 396, (Gil 342.)

137. An instrument of protest of a note by a notary in another state recited facts showing proper demand of payment and refusal, and certified that he "duly notified the indorser" thereof. *Held*, that such an instrument being made by Gen. St. Minn. 1878, c. 26, § 8, *prima facie* evidence of the facts therein certified, it was to be received as *prima facie* evidence that the indorser was actually or personally served with the proper notice; but on its being made to appear in rebuttal that the indorser never received such notice in fact, it devolved on the holder of the note to prove the facts showing exercise of such diligence as the law accepts as equivalent to evidence of actual notice.—Bettis v. Schreiber, 17 N. W. 863, 31 Minn. 329.

138. The provision of Gen. St. Minn. 1878, c. 26, § 8, making instruments of protest of a bill or note by a notary *prima facie* evidence of the facts therein certified, extends to a certificate of notice to indorsers included in such protest.— Bettis v. Schreiber, 17 N. W. 863, 31 Minn. 329.

139. Under Gen. St. Minn. 1878, c. 26, § 7, providing that notice of protest may "be given by depositing the same in the post-office, postage paid, and directed to the party protested against at his reputed place of residence, and the notary shall, in such instrument of protest, certify to the time and manner of such service upon the several parties protested against," evidence that a notice of protest was not received is not admissible, in the absence of evidence tending to show that such notice was not in fact deposited in the post-office, directed, etc., for the purpose of contradicting the notary's certificate.—Wilson v. Richards, 9 N. W. 872, 28 Minn. 337.

140. A statement in a notary's certificate of protest that notices of protest "were put in the post-office at," etc., is equivalent to a statement that the notary himself put the notices in the post-office.—Wilson v. Richards, 9 N. W. 872, 28 Minn. 337.

Waiver.

141. An agreement entered into by all the parties to a note to extend the time of payment 15 days does not operate as a waiver of demand and notice.—Michaud v. Lagarde, 4 Minn. 43, (Gil. 21.)

142. Adding to an indorsement the words, "not to be paid by us in any event, within one year from

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date," does not waive presentment for payment, but merely extends the time of payment by the indorser.—Hart v. Eastman, 7 Minn. 74, (Gil. 50.)

143. Defendants, having a general contract providing that they should receive notice of nonpayment of all notes to be indorsed by them under it, subsequently indorsed such notes, containing, in the body thereof, an express waiver of presentment for payment, protest, notice of protest, and non-payment. *Held*, that such waiver, was binding on them, as in the case of any other indorser, notwithstanding the general agreement.—Bryant v. Lord, 19 Minn. 396, (Gil. 342.)

144. The payee of a promissory note indorsed it as follows: "For value received, I waive notice and protest, and guaranty payment." *Held*, that this was a waiver of demand of payment, and notice of non-payment to him as indorser.—Wolford v. Andrews, 13 N. W. 167, 29 Minn. 250.

145. Parol evidence is not competent to show that, when negotiable paper was indorsed, the indorser verbally waived presentment and notice of non-payment.—Farwell v. St. Paul Trust Co., (Minn.) 48 N. W. 326.

45 Minn. 495.

Excuse for not making demand, or giving notice of dishonor.

146. Presentment for payment is not excused by knowledge that the maker is insolvent, and that the note will not be paid.—Hart v. Eastman, 7 Minn. 74, (Gil. 50.)

147. Where a promissory note is payable at the office of the makers, presentment and notice of non-payment are not excused by the fact that before maturity the makers had become insolvent, and removed from the state.—Farwell v. St. Paul Trust Co., (Minn.) 48 N. W. 326.

45 Minn. 495.

148. A note was made at the place where the payee, but not the maker, resided, and the payee indorsed it to one who was doing business at the same place and who knew that the maker resided in another state. Before maturity the maker, without the knowledge of the indorsee, removed to the former place. *Held*, that demand, so as to charge the indorser, was excused.—Salisbury v. Bartleson, (Minn.) 40 N. W. 265.

39 Minn. 365.

149. The absconding of the maker of a promissory note will not excuse the giving of notice to the indorser.—Michaud v. Lagarde, 4 Minn. 43, (Gil. 21.)

XIII. Payment.

Time.

150. In the absence of demand, the maker of a note, secured by a chattel mortgage, is entitled to the whole of the business hours of the last day of grace in which to pay the note.—Daly v. Proetz, 20 Minn. 411, (Gil. 363.)

What constitutes satisfaction.

151. A gift of a promissory note by the owner to the maker cancels the debt evidenced thereby.—Stewart v. Hidden, 13 Minn. 43, (Gil. 29.)

152. A negotiable note was, by its terms, payable at a particular bank, upon a day certain, but was never left with the bank or its officers, and the payee having it in his possession was absent at the time it fell due. *Held*, that a tender to the bank cashier, upon the day of maturity, of an amount sufficient to pay the note, coupled with a condition that the note be delivered, the tender not being kept good, nor in any manner renewed, did not operate to discharge the lien of a mortgage given to secure its payment.—Balme v. Wambaugh, 16 Minn. 116, (Gil. 106.)

153. The note teller of a bank protested a note sent to the bank for collection from another bank, but, he and his bank supposing that the protest was too late, and that therefore he had become liable to his bank, and the latter to the other bank, for his neglect, he paid the amount of the note to his bank, and the latter paid it to the other bank, which had no knowledge of the facts, but subsequently, on being informed of the transaction, indorsed the note to the teller, with intent to pass the title to him. *Held* that, as it did not appear that the payment by the teller or by his bank was made with intent to satisfy the note, the transaction did not operate as a satisfaction of it, so as to discharge the parties liable thereon.—Fogarty v. Wilson, 15 N. W. 175, 30 Minn. 289.

154. The payee of a note, who has agreed with the maker, in consideration of certain services rendered, to transfer such note to the maker's wife, cannot, after full performance by the maker, enforce collection against him, in violation of his contract, and such executed agreement is a valid equitable defense both against the payee and his assignee with notice.—Nunnemacker v. Johnson, (Minn.) 38 N. W. 351.

38 Minn. 390.

155. Matters of account in favor of the maker of a note, and which might be set off against it, do not constitute payment of the note, unless there was an agreement, express or implied, that they should be applied in payment.—Rugland v. Thompson, (Minn.) 51 N. W. 604.

XIV. Checks.

What constitutes.

156. A writing as follows: "D. & Co. Bankers: Pay to the order of, on sight, two hundred dollars in current funds," is not a check, no payee being indicated in it, or space left for the name of a payee, and no action can be maintained against the drawer.—McIntosh v. Lytle, 3 N. W. 983, 26 Minn. 336.

157. A draft for money drawn on a bank, pay able at a day subsequent to its date and the date of its issue, is not a "check," but a "bill of exchange," and is entitled to days of grace.—Harrison v. Nicollet Nat. Bank, (Minn.) 43 N. W. 336.

41 Minn. 488.

Validity—Presumption.

158. A check, (the drawer's signature being genuine,) in the hands of one not the drawer, is presumed to have been complete when signed, and to have been then delivered to the payee.—

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Hensel v. Chicago, St. P., M. & O. R. Co., (Minn.) 33 N. W. 329.

37 Minn. 87.

Forged indorsement.

159. If a check payable and delivered to a payee named, or order, comes into the hands of one not entitled to it, who forges the payee's indorsement and passes the check to another person, who receives the money on it, such other person is not liable for such money to the drawer, but may be liable to the payee.—Hensel v. Chicago, St. P., M. & O. R. Co., 33 N. W. 329, 37 Minn. 87.

XV. Actions.

Who may maintain action.

160. Under Pub. St. c. 60, § 27, providing that every action must be prosecuted in the name of the real party in interest, an indorsee of non-negotiable paper, if he is the owner, must sue in his own name.—Helfer v. Alden, 3 Minn. 332, (Gil. 232.)

161. One who claims title to a promissory note, pledged as collateral security, as the assignee of such pledgee, cannot maintain an action thereon unless he shows that he also owns the debt to secure which it is pledged.—Van Eman v. Stanchfield, 13 Minn. 75, (Gil. 70.)

162. S. agreed with the maker to assume and take up a certain promissory note then in the hands of one F., and, as part of the same transaction, agreed with F. to make payment of the said note to him. *Held*, that F. or his assignee could recover upon such agreement only upon proof that he was the owner of such note, or entitled, by virtue of some special property therein, to collect the same.—Van Eman v. Stanchfield, 13 Minn. 75, (Gil. 70.)

163. The pledgee of a promissory note payable to order, and transferred to him after maturity without indorsement, as collateral security, may, on default of the pledgor to pay the debt so secured, maintain an action thereon in his own name against the maker, under Gen. St. Minn. 1866, c. 66, § 26, which provides that "every action shall be prosecuted in the name of the real party in interest;" and it is not necessary that he demand payment to entitle him so to sue.—White v. Phelps, 14 Minn. 27, (Gil. 21.)

164. In an action on a promissory note, an allegation in the answer that plaintiffs have not now the possession of the note, and that when the action was commenced the note was in the possession of a third party, is immaterial.—Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

165. One may be the owner of a note, and bring suit thereon, without having possession thereof.—Armstrong v. Lewis, 14 Minn. 406, (Gil. 308.)

166. The holder of a promissory note under the unconditional and unrestricted indorsement of the payee has the legal title, and may sue in his own name, although, as between themselves, the assignor possesses the beneficial interest in the proceeds.—Elmquist v. Markoe, (Minn.) 47 N. W. 970.

45 Minn. 305.

Loss of note.

167. The fact that a promissory note has been destroyed by a third person to whom the payee delivered it with an offer to sell it, which was refused, will not affect the payee's right of recovery against the maker.—Homberg v. Kikhoffer, (Minn.) 45 N. W. 154.

43 Minn. 205.

Producing note.

168. To entitle one to recover on a promissory note it must be produced and filed, unless it is lost or destroyed, and then the bond required by Gen. St. Minn. 1866, c. 73, § 69, must be filed.—Armstrong v. Lewis, 14 Minn. 406, (Gil. 308.)

Defenses.

169. The facts that title to a promissory note sued upon has passed from plaintiff, and that he is not the real party in interest, constitute a good defense.—Rohrer v. Turrill, 4 Minn. 407, (Gil. 309.)

170. In an action upon a promissory note in the hands of the original parties, it may be shown that the note was never delivered, or was without consideration.—Ruggles v. Swanwick, 6 Minn. 526, (Gil. 365.)

171. In an action on a promissory note the answer set up that the money for which the note was given was advanced to defendant upon consideration that he would sell certain property to third parties. *Held* an attempt to vary the effect of the note, and as it did not appear from the answer that the agreement, if in writing, in any way referred to the note, or that it could be established except by parol evidence, it constituted no defense.—Esch v. Hardy, 22 Minn. 65.

Parties.

172. Under Gen. St. Minn. 1878, c. 66, § 36, providing that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same instrument, may, all or any of them, be included in the same action," an absolute guarantor, on the same instrument, of the payment of a promissory note, may be joined as defendant in the same action with the maker.—Hammel v. Beardsley, 17 N. W. 858, 31 Minn. 314.

173. Query, whether the pledgor should be made a party defendant to an action brought by a pledgee against the maker of a note, transferred to him, without indorsement, as collateral security.—White v. Phelps, 14 Minn. 27, (Gil. 21.)

Pleading—Complaint.

174. A complaint upon a promissory note alleging that before maturity such note was, for value received, sold, transferred, indorsed, and delivered to the plaintiff, sufficiently alleges title in plaintiff.—Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

175. In an action on a promissory note payable to two persons jointly, an allegation of partnership between them is surplusage, and need not be proved. Jaeger v. Hartman, 13 Minn. 55, (Gil. 50,) followed.—Birdsall v. Fischer, 17 Minn. 100, (Gil. 76.)

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176. Where a complaint shows that plaintiffs were the original owners of commercial paper, their ownership will be presumed to have continued.—Jaeger v. Hartman, 13 Minn. 55, (Gil. 50.)

177. In an action on a note payable to "Cabbott & Lester," an allegation that it was delivered to "J. S. Cabbott and one Lester" is sufficient to create a presumption that they were the payees and owners thereof; and an allegation that the "said Lester" indorsed the same to the plaintiff (J. L. Cabbott) was sufficient to show his right to sue thereon. Hayward v. Grant, 13 Minn. 165, (Gil. 154,) followed.—Cabbott v. Radford, 17 Minn. 320, (Gil. 296.)

178. A negotiable promissory note imports a consideration, and, in an action thereon, averment of a consideration is not necessary.—Hayward v. Grant, 13 Minn. 165, (Gil. 154;) Pinney v. King, 21 Minn. 514; Adams v. Adams, 25 Minn. 72.

179. In an action on a note expressed to be for value it is not necessary to set out the consideration thereof, and, if it should be in fact set out, it is not necessary to prove the same.—Friedman v. Johnson, 21 Minn. 12.

180. Where plaintiff in an action on a note is permitted, without objection, to introduce the note in evidence, it cannot afterwards be objected that the complaint did not allege a valid consideration for the note.—Frunk v. Irgens, 6 N. W. 380, 27 Minn. 43.

181. A complaint on a note "for value received," setting out the note in terms, sufficiently alleges a consideration. Following Frunk v. Irgens, 6 N. W. 380, 27 Minn. 43.—Elmquist v. Markoe, 40 N. W. 825, 39 Minn. 494.

182. An action on a note for the amount thereof, and also for interest thereon, is but a single cause of action, and the allegation as to interest is not the subject of a demurrer.—Daniels v. Bradley, 4 Minn. 158, (Gil. 105.)

183. A complaint alleged the making of a promissory note, and its indorsement upon an agreement consented to by the payee, indorser, and makers; that it should not be payable at maturity, nor until 15 days after its transfer by the indorser; and that when the note became payable the makers had absconded. *Held*, on demurrer, that the complaint did not state a cause of action against the indorser.—Michaud v. Lagarde, 4 Minn. 43, (Gil. 21.)

184. Where the complaint in an action on a promissory note fails to state when the note fell due, it will be presumed that it was due presently.—Libby v. Mikkelberg, 8 N. W. 903, 28 Minn. 38; Same v. Husby, 8 N. W. 903, 28 Minn. 40.

185. A complaint on a note payable to the order of S., which sets up the fact of her death, and that the note was subsequently transferred and assigned by her executor to plaintiff, and that plaintiff acquired title to the note as a distributee of the estate of S., through her executor, is good on a demurrer interposed on the ground that the complaint failed to show the ownership of the plaintiff.—Perkins v. Merrill, (Minn.) 33 N. W. 3.

37 Minn. 40.

186. A complaint upon a promissory note averred its making and execution by A. on February 4th, and that on March 16th, and before the plaintiff (the payee) accepted the same, B., for the purpose of making it good, and giving it credit, signed the same as maker by writing his name on the back thereof, as of that date, and then and there delivered it to the payee. *Held*, sufficient to charge B. as joint maker at the time of its legal inception, and before delivery.—Stein v. Passmore, 25 Minn. 256.

187. A complaint on a promissory note is not rendered demurrable by the fact that no revenue stamp appears upon the copy set out, since such a stamp is no part of the note itself.—Cabbott v. Radford, 17 Minn. 320, (Gil. 296.)

Pleading—Answer.

188. Where the complaint alleges the making of a note, and its indorsement to plaintiff, an answer admitting the making, but denying any knowledge or information sufficient to form a belief as to the other allegations of the complaint, is neither sham, frivolous, nor irrelevant.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

189. Where a note has passed through several hands, in the absence of evidence that the maker has actual or presumptive knowledge of such transfers, his denial of knowledge or information, sufficient to form a belief as to such transfers, raises a material issue.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

190. In an action on a bill of exchange, against the acceptor, the complaint averred that plaintiff was the surviving partner of a firm that had drawn its bill of exchange, payable at a specified place to its own order, upon defendant; that the same had been accepted, duly presented for payment, and payment refused; and that plaintiff was the lawful owner and holder thereof. The answer admitted the drawing and acceptance of the bill, but denied knowledge or information sufficient to form a belief as to the fact of presentment, or as to whether plaintiff was the surviving partner or lawful owner or holder of the bill, or as to whether defendants were indebted to him. *Held*, that these denials were immaterial, and raised no issue, and the answer containing them was properly stricken out.—Freeman v. Curran, 1 Minn. 169, (Gil. 144.)

Distinguished in Morton v. Jackson, 2 Minn. 223, (Gil. 185.)

191. In a suit upon a promissory note by an indorsee, allegation of indorsement is material, and denial of it upon information and belief puts plaintiff to proof thereof.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

Distinguishing Freeman v. Curran, 1 Minn. 169, (Gil. 144.)

192. In a suit by the payee of a promissory note against the maker thereof the defense was that the title was in an assignee for creditors of the payee, and that the payee had been enjoined in a suit between him and his assignee from collecting the note. *Held*, that the only question for the jury was as to the title to the note, and the assignment for creditors was admissible to prove a transfer, and if the title was shown to be in

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the assignee there could be no recovery.—Hartshorn v. Green, 1 Minn. 92, (Gil. 71.)

193. In an action brought upon a promissory note, payable to the payees as individuals, an allegation in the complaint that they were at the commencement of the suit partners, and its denial in the answer, raises no material issue.—Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

194. An allegation that plaintiff "is the owner and holder" of notes sued on, following an averment that the notes were made to plaintiff, is a legal conclusion; and an answer admitting that the notes were given, but denying generally other allegations, does not put in issue plaintiff's title.—Holbrook v Usher, (Minn.) 39 N. W. 74.
39 Minn. 122.

195. A statement, in a second defense to a suit on a note, that if the transfer alleged in the complaint was made, the assignee had notice of defendant's defense, is not an admission of the transfer, nor inconsistent with the first defense, denying such transfer.—Nunnemacker v. Johnson, 38 N. W. 351, 38 Minn. 390.

196. An answer denying that the note sued on by one claiming as indorsee was ever transferred to plaintiff, and alleging that the payee was the actual owner, puts in issue the alleged sale and indorsement to plaintiff.—Tarbox v. Gorman, 16 N. W. 466, 31 Minn. 62.

197. In an action on a promissory note the answer denied that defendant ever, at any time or place, made, executed, or delivered the note described, and further averred that the note described was obtained from defendant while he was so intoxicated as to be unable to understand or know what he was doing. *Held* to be a denial of the validity, and not the execution, of such note.—Henry v. Hinman, 21 Minn. 378.

198. In an action on a promissory note defendants answered that they executed it in no other capacity than that of officers of a corporation, and in a separate paragraph alleged that plaintiff had received certain stock of said corporation as security for the payment of the note. *Held*, that this paragraph, being but a part of the transaction before set out, is not demurrable as not stating a defense.—Pratt v. Sparkman, (Minn.) 44 N. W. 663. 42 Minn. 448.

199. The answer in an action on a promissory note against the maker denied any consideration for the note. *Held* that, under such denial, defendant might show that the note was given with an accompanying mortgage to defraud his creditors. —Webb v. Michener, 19 N. W. 82, 32 Minn. 48.

200. In an action on a promissory note, an answer by the maker that it was given for a pretended indebtedness, which did not exist at the date of the note, but which admits that he had previously purchased goods from the payee, and makes no allegation of payment therefor, is insufficient. —Dunning v. Pond, 5 Minn. 296, (Gil. 234.)

201. In an action on a promissory note against the makers and indorser thereof, the answer of the indorser alleged that it was agreed between him and his indorsee that he should not in any way be responsible for the payment or collection of the note. *Held*, that as, if such agreement was oral, it could not affect the liability created by the indorsement, the answer was to be construed as alleging a written agreement that the indorser should not be held liable thereon.—Collom v. Matthews, (Collom v. Bixby,) 21 N. W. 855, 33 Minn. 50.

202. A note given for the accommodation of the payee was by him assigned to the plaintiff. In a suit thereon the maker answered that it was given for the accommodation of the plaintiff. At the trial he offered to prove that when the note was made the plaintiff agreed in writing that the maker should not be personally liable, but that it should be paid out of the proceeds of other securities. *Held*, that the evidence was not admissible under the answer.—Lebanon Sav. Bank v. Penney, (Minn.) 46 N. W. 331.
44 Minn. 214.

203. In an action upon a promissory note the amended answer alleged that "about two weeks" prior to the maturity of the note it was agreed that it should be payable at a certain place, and that in consideration thereof the defendant paid plaintiff $300 on the note. *Held*, that the answer was sufficient as to part payment, but defendant might be required to make it more definite and certain as to the time of the alleged agreement and part payment.—Colter v. Greenhagen, 3 Minn. 126, (Gil. 74.)

204. The answer to a complaint in an action on promissory notes admitted the execution of the notes, and set up in defense a counter-claim for work and services performed before the execution of the notes, and alleged that such work and services were worth a sum exceeding plaintiff's demand, and that no part had ever been paid. *Held*, that while the giving of a promissory note is *prima facie* evidence of an accounting and settlement between parties, and that the maker is indebted to the payee, on such accounting to the amount of the note, the presumption can always be explained or rebutted, and the answer was sufficient in such case.—Wakefield v. Spencer, 5 Minn. 376, (Gil. 335.)

205. In an action on notes given for the price of a machine, brought by plaintiff as a transferee of the notes without indorsement by the payee, the answer denied the transfer, and set up a counter-claim for a false warranty of the machine, by way of set-off. *Held*, that such claim of set-off was in no way inconsistent with the denial of plaintiff's ownership of the note, and did not operate as an admission of his ownership.—Wilson v. Reedy, 20 N. W. 153, 32 Minn. 256.

206. In an action on a past-due note, an answer which admits the execution of the note, and counter-claims for breach of contract between plaintiffs and defendants for the sale and delivery of lumber, which was the only consideration of the note, is good on general demurrer.—Burns v. Jordan, (Minn.) 44 N. W. 523.
43 Minn. 25.

——. Reply.

207. An answer, in an action on a promissory note, alleged that it was given as collateral to a

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debt fraudulently represented as due. The reply admitted the statements, but denied that they were false or fraudulent. *Held*, that an issue was raised.—Dunning v. Pond, 5 Minn. 302, (Gil. 238.)

Pleading—Amendment.

208. In an action on a note, an alleged mistake in its date should be set up in pleading, but where the evidence of such mistake is received without objection, and the fact established, the pleadings may be amended to conform to the proof, or the omission disregarded.—Almich v. Downey, (Minn.) 48 N. W. 197.

45 Minn. 460.

Variance.

209. A complaint in an action on a promissory note alleged indorsement, protest, notice, etc., and defendant denied one of the indorsements, and the protest, demand, and notice. The proof offered was an instrument and certificate of protest thereof in all respects as described in the complaint, except that the instrument was under seal. *Held* a variance.—Helfer v. Alden, 3 Minn. 332, (Gil. 232.)

210. Where an answer in an action on a promissory note alleged a total want of consideration, proof of a partial want of consideration will not prevent a recovery of the full amount of the note.—Whitacre v. Culver, 9 Minn. 295, (Gil. 279.)

Distinguished in Torinus v. Buckham, 12 N. W. 349, 29 Minn. 131.

Evidence—Burden of proof.

211. A note was payable to the order of H., C. & *H.*, being the same names as the plaintiffs designated in the summons in an action upon it. *Held*, that it would be presumed that plaintiffs were such payees.—Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

212. In an action on a promissory note payable "to order," by a holder to whom it has been transferred unindorsed, the transfer must be proved, and mere possession of the note is not *prima facie* evidence of that fact.—Van Eman v. Stanchfield, 10 Minn. 255, (Gil. 197.)

213. Under Gen. St. Minn. 1878, c. 73, § 89, in an action upon a promissory note by one claiming as indorsee, the possession of the note is *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed; and where, in such case, the note purports to be indorsed by the payee, by the hand of an agent, it is not necessary, in order to make out a *prima facie* case, to show the authority of the agent.—Tarbox v. Gorman, 16 N. W. 466, 31 Minn. 62.

214. Such *prima facie* proof of title is rebutted by evidence that plaintiff, with knowledge of the facts, acquired the note from one to whom it had been indorsed as collateral security merely, and that, after the transfer to plaintiff, the obligation for which it had been held as collateral was discharged.—Tarbox v. Gorman, 16 N. W. 466, 31 Minn. 62.

215. In an action on a promissory note by an indorsee against the maker, the latter may prove, if pleaded, that it was obtained from him through fraud of the payee, and then plaintiff must show himself a *bona fide* holder for value.—Cummings v. Thompson, 18 Minn. 246, (Gil. 228.)

216. Where a note and contract are parts of one transaction, the contract entering into the consideration of the note, so that it is without consideration if the contract is void, if through the fraud of the payee the contract is void, the fraud taints the consideration of the note; and, the facts being pleaded and shown in an action on the note by the indorsee, he is called upon to show that he is a *bona fide* holder for value.—Cummings v. Thompson, 18 Minn. 246, (Gil. 228.)

217. Where defendant in an action on a promissory note relies on a partial failure of consideration as a defense, he must show to what extent the consideration has failed; and, if he does not do so, plaintiff will be entitled to judgment for the full amount of the note.—Bisbee v. Torinus, 2 N. W. 163, 25 Minn. 165.

—— Admissibility.

218. In an action on a promissory note, where the defense was that defendant had pledged with plaintiff, to secure the same, a promissory note made by another, which was lost through the negligence of plaintiff to enforce the same, it is competent to prove on the trial that the maker of the pledged note, at its maturity, owned real and personal property, on the question of his solvency.—Lamberton v. Windom, 13 Minn. 232, (Gil. 151.)

219. Where suit was brought on a promissory note by an indorsee, after maturity, evidence that the transfer was made by the payee for the purpose of having suit brought in the name of the indorsee, is not competent on the question of fraud in the execution of the note, or to affect the credibility of the testimony of such payee, it appearing that he is liable as indorser.—Wilder v. De Cou, 18 Minn. 470, (Gil. 421.)

220. In an action upon a promissory note by an indorsee the answer averred that defendant, at the time of signing the note, signed a certain written contract, falsely and fraudulently represented to him to embody a verbal contract made between the parties, the effect of which was to limit his liability on the note, and essentially different from the written contract. *Held*, that the note, verbal agreement, and written contract were one transaction; that the representations referred to the contract in fact, and not its legal effect, and the facts alleged were an actual fraud on defendant, and under the answer it was competent to prove the manner of misreading particular representations made, that defendant was unable to read English, or able to read it only with great difficulty, and all circumstances surrounding the transaction.—Cummings v. Thompson, 18 Minn. 246, (Gil. 228.)

221. In an action on a promissory note, brought by L. C. D., L. A. D., and F. W. A., as assignees of the note, the complaint alleged that plaintiffs were copartners under the firm name of L. C. D. & Sons. The answer denied the transfer of the note to plaintiffs, and denied that plaintiffs "were copartners, as alleged in

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said complaint, or otherwise." The note introduced in evidence had indorsed on it an assignment thereof to L. C. D. & Sons. *Held*, that this was not proof of title in plaintiffs, without evidence of their copartnership, as alleged, or other evidence of their identity with the assignees named.—Dessaint v. Elling, 17 N. W. 480, 31 Minn. 287.

222. In an action on a promissory note signed in the name of defendant by another the answer denied that defendant made or delivered the note, but the evidence, on trial by the court, was sufficient to sustain a finding of ratification by defendant of the making of the note by such other person. *Held*, that an order refusing a new trial should be affirmed.—Lincer v. Girrbach, 26 N. W. 229, 34 Minn. 410.

Instructions—Amount of recovery.

223. In an action on a promissory note given by defendant in compromise of a claim by plaintiff to defendant's farm by virtue of a tax-deed, in which the defense was that the note was obtained without consideration, by fraud and false representation, and it appeared that plaintiff's tax-deed has since been adjudged invalid, the jury were instructed that, even if they found that plaintiff obtained the note by fraud or false representations, yet he would be entitled to recovery upon it to the extent of the taxes he had paid on the land. *Held*, that this was error, as, if the note was obtained by fraud, no recovery could be had upon it, and, if not, plaintiff would be entitled to recover the full amount, as the relinquishment of a doubtful claim to the land was a sufficient consideration for the note.—Perkins v. Frinka, 15 N. W. 115, 30 Minn. 241.

224. In a suit by a *bona fide* holder of a note as a pledge from one whose title was defective, the recovery must be limited to the amount of the debt secured by the pledge.—St. Paul Nat. Bank v. Cannon, (Minn.) 48 N. W. 526.

46 Minn. 95.

Newly-Discovered Evidence.

As ground for new trial, see *Criminal Law*, 139; *Homicide*, 98, 99; *New Trial*, 49-77.

New Promise.

To revive debt discharged in bankruptcy, see *Bankruptcy*, 20.

NEWSPAPERS.

Designation of newspaper for publication of delinquent tax list, see *Taxation*, 100-113.

What is a newspaper.

1. The Northwestern Reporter, a weekly publication, devoted specially to the interests of the legal profession, and not publishing current or general news, though it may be properly denominated a "legal newspaper," is not a newspaper, within the meaning of the municipal court act of St. Paul, (Gen. St. 1878, c. 64, § 88,) authorizing service of summons by publication.—Beecher v. Stephens, 25 Minn. 146.

2. A paper issued weekly, containing principally religious news, and reading of interest to persons of a particular religious denomination, but containing a column each week devoted to the general news of the day, embracing every sort of news of interest to the general reader, is a "newspaper" within the meaning of Gen. St. Minn. 1878, c. 81, § 5, in which notices of sale on mortgage may be published.—Hull v. King, (Minn.) 37 N. W. 792.

38 Minn. 349.

3. A newspaper printed and published six days consecutively each week, there being no issue of it on Monday, is a daily newspaper within the meaning of Gen. Laws Minn. 1889, c. 47, which authorizes the designation of an official paper for the city of Duluth.—Tribune Pub. Co. v. City of Duluth, (Minn.) 47 N. W. 309.

45 Minn. 27.

Designation of official paper.

4. In 1878, and in every succeeding year, the common council of the city of St. Paul designated as the official paper of the city the "St. Paul Globe." In 1878 there was only a daily edition of the Globe, but shortly thereafter a weekly edition, called the "Weekly Globe" or "St. Paul Weekly Globe" was issued, fed from the daily issues. In the city, where only the daily issue circulated, when the "Globe" or "St. Paul Globe" was spoken of the daily issue was universally meant, and so understood by everybody. *Held*, that there was a sufficient designation of the "St. Paul Daily Globe" as the official paper of the city, even when there was a Weekly Globe.—Fairchild v. City of St. Paul, (Minn.) 49 N. W. 325.

46 Minn. 540.

Distinguishing Russell v. Gilson, 31 N. W. 692, 35 Minn. 336.

What constitutes a publication.

5. A deposit by the publishers, in the post-office, of newspapers to be delivered to subscribers, some residing within the city and some at a distance, is, as to the papers so deposited, a publication thereof.—Pratt v. Tinkcom, 21 Minn. 142.

NEW TRIAL.

I. Application, 1-6.
II. Grounds, 7-77.
III. When Granted, 78-87.
IV. Statutory New Trial as of Right, 88-107.

Allowed on appeal, see *Appeal and Error*, 662-668.
Costs, see *Costs*, 12, 13.
In condemnation proceedings, see *Eminent Domain*, 225, 226.
criminal cases, see *Criminal Law*, 134-139; *Homicide*, 97-99.
Necessary for review of sufficiency of evidence, see *Appeal and Error*, 352-355.
On appeal from justice of the peace, see *Appeal and Error*, 732-741.
Review of order on application for new trial, see *Appeal and Error*, 96-102, 268-272, 397, 463-473, 524-534.

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I. APPLICATION.

What decision may be vacated.

1. A dismissal of an action for insufficiency of evidence is a decision, within the meaning of the statute allowing a motion for a new trial upon the ground that the "decision" is not justified by the evidence and is contrary to law.—McCormick v. Miller, 19 Minn. 443, (Gil. 384;) Thompson v. Myrick, 24 Minn. 4; Volmer v. Stagerman, 25 Minn. 234.

2. In an action to set aside, on the ground of fraud and undue influence, a deed in the nature of a family settlement and certain conveyances executed for the purpose of carrying out such settlement, and for an accounting of the property received under such deed and conveyances, the court by the consent of parties first tried the issue as to fraud and undue influence, and left the matter of the accounting to be had thereafter. It was found that the deed and conveyances were procured by undue influence, and therefore void, and that plaintiff was entitled to a judgment declaring them void, and for an accounting. *Held*, that such finding was a "decision" within Gen. St. Minn. 1878, c. 66, § 253, and a motion would lie to vacate the same, and for a new trial, before the accounting ordered by the court was had.—Ashton v. Thompson, 9 N. W. 876. 28 Minn. 330.

Time for application.

3. Under Pub. St. c. 61, § 59, subds. 1-3, 6, which provide that a new trial may be granted for irregularity in the proceedings of the court, jury, or prevailing party, or any order of the court, or abuse of discretion by which a fair trial is prevented, misconduct of the jury or prevailing party, accident or surprise, and newly-discovered evidence, the motion for the new trial may be made after judgment.—Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

4. Although Gen. St. Minn. 1866, c. 66, § 222, providing for a stay of entry of judgment, after verdict, "until the hearing and final decision of a motion for a new trial," seems to require that, when a case has been tried by a jury, motion for a new trial should be made before judgment, as the right to move for a new trial upon the report of a referee or decision of a judge is expressly given by section 235, and no opportunity to move therefor is allowed before judgment, the district court may, in its discretion, after entry of a judgment of nonsuit, allow a motion for a new trial before the time to appeal from the judgment has expired.—Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

Modifying Ames v. Mississippi Boom Co., 8 Minn. 467, (Gil. 417.)

5. Under Gen. St. Minn. 1878, c. 66, §§ 253, 254, giving the right to make a motion for a new trial, but fixing no limit of time therefor except where the motion is made on the judge's minutes, such a motion, made otherwise than on the minutes, may be made after judgment, and within the time for an appeal, if the party have no reasonable opportunity to move before judgment, but he must use reasonable diligence in so doing.—Kimball v. Palmerlee, 13 N. W. 129, 29 Minn. 302; Deering v. Johnson, 22 N. W. 174, 33 Minn. 97.

Case settled.

6. A case properly settled and allowed cannot be disregarded in determining a motion for a new trial, though the court may be of opinion that it does not correctly set forth the facts.—Steinkrauss v. Minneapolis, L. & M. Ry. Co., 39 N. W. 70, 39 Minn. 135; Reichenberger v. Minneapolis, L. & M. Ry. Co., 39 N. W. 71, 39 Minn. 137.

II. GROUNDS.

In general.

7. Mere immaterial variance between the allegations and proof is not sufficient ground for a new trial.—Short v. McRea, 4 Minn. 119, (Gil. 78.)

8. The objection that the conclusions of law are not justified by the findings of fact on a trial by the court, though properly they should be taken by a motion to modify or correct such conclusions, may be made on a motion for a new trial.—Farnham v. Thompson, 26 N. W. 9, 34 Minn. 330.

9. The action of the trial court in striking out matter from a proposed case, even if improper, is not ground for a motion for a new trial.—Schumann v. Mark, 28 N. W. 927, 35 Minn. 379.

Rulings on evidence.

10. In an action for libel, the complaint set forth two causes of action for two distinct libels, both of which were submitted to the jury, and a general verdict rendered thereon. *Held*, that error in the reception of evidence as to one cause of action was good cause for granting a new trial.—Simmons v. Holster, 13 Minn. 249, (Gil. 232.)

11. Where, on cross-examination, a question, as put, is too general as to time, but the answer is confined to the proper period, the erroneous form of the question is no ground for a new trial.—McCormick v. Miller, 19 Minn. 443, (Gil. 384.)

12. The exclusion of testimony as to declarations of a witness tending to impeach his testimony is error requiring a new trial.—Tunell v. Larson, (Minn.) 34 N. W. 29.

37 Minn. 258.

13. Exclusion of evidence, apparently immaterial, where no suggestion or evidence is offered to show its materiality, is not ground for a new trial.—Weaver v. Mississippi & R. R. Boom Co., 16 N. W. 494, 31 Minn. 74.

14. The exclusion of testimony of a fact which the witness is afterwards allowed to testify to without objection is not ground for a new trial.—Weaver v. Mississippi & R. R. Boom Co., 16 N. W. 494, 31 Minn. 74.

15. The admission of evidence immaterial and irrelevant to the issue, which could not have affected the determination of the jury, is not ground for a new trial.—Wass v. Atwater, 22 N. W. 8, 33 Minn. 83.

Improper instructions.

16. An instruction to the jury which, standing alone, is on its face erroneous and prejudicial to a party, is not ground for a new trial, if, taking

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the charge as a whole, it is clear that the jury cannot have been misled.—Farnham v. Thompson, 18 N. W. 833, 32 Minn. 22.

17. Obscurity in a charge to the jury is not ground for a new trial, if no explanation was sought from the court.—Farnham v. Thompson, 18 N. W. 833, 32 Minn. 22.

Disqualification of juror.

18. The incompetency for implied bias of a juror serving at the second trial of an action, by reason of having acted as juror on the first trial thereof, nearly three years before, where not known to either party or their counsel, though the clerk's minutes contained a list of such jury, may be taken advantage of after verdict; and it is not necessary for a party to show affirmatively that injury was sustained thereby, nor is he chargeable with negligence in not ascertaining the objection from the record.—Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

Misconduct of or affecting jury.

19. An attempt by a juror to send a letter to the plaintiff, upon a subject of no interest to the parties to the action, though improper, does not furnish sufficient ground for setting aside a verdict for the plaintiff.—Eich v. Taylor, 20 Minn. 378, (Gil. 330.)

20. An unauthorized communication to a juror, pending a trial, which it is apparent could not have influenced his verdict in favor of the successful party, is no ground for a new trial.—Chalmers v. Whittemore, 22 Minn. 305.

21. A juror remarked to a stranger pending a trial that defendant "was catching it, and was making a fool of himself." *Held*, that the expression, being apparently founded on the proceedings and evidence in the cause, was no ground for a new trial.—Chalmers v. Whittemore, 22 Minn. 305.

22. Upon a view of the *locus in quo* had by the jury, one of the parties to the suit, by whom the place was being shown to the jury, made statements in regard to the case manifestly tending to influence their verdict. *Held* sufficient ground on which to grant a new trial.—Hayward v. Knapp, 22 Minn. 5.

23. In proceedings for condemnation of land, on a view of the premises, by the jury, in charge of an officer, under order of the court, the plaintiff, in answer to an interrogatory from the officer or one of the jurors, and without any bad intent, answered correctly that a line pointed out was one of the lines of the premises. *Held*, that this was not ground for a new trial.—Oswald v. Minneapolis & N. W. R. Co., 11 N. W. 112, 29 Minn. 5.

Modifying Hoberg v. State, 3 Minn. 262, (Gil. 181.)

24. A deputy-sheriff having charge of a jury sworn to assess the damages in condemnation proceedings, furnished them with cigars, which they used. In one affidavit filed in support of a motion for a new trial, made by the owner of the land, the deputy stated that the cigars were furnished by the railroad company, and that the jurors knew that fact. In another affidavit he stated that he bought the cigars himself, and that the railroad company's counsel refused to do so. On cross-examination he stated that he had said in the presence of the jury that he would get the cigars, and risk getting the company to pay the bill, and that he did so, and, some weeks later, when he sent in the bill for the carriages used by the jury in viewing the premises, he included the cigars, and the company paid it. He stated also that no one suggested furnishing the cigars, but that it was common practice for the officers to give them to jurors. The land-owner stated that he heard it said in the presence of the jury that the cigars were furnished by the railroad company. The jurors stated that they understood the cigars to be furnished by the officer at his own expense. *Held*, that the court erred in granting a new trial.—Gurney v. Minneapolis & St. C. Ry. Co., (Minn.) 43 N. W. 2.

41 Minn. 223.

25. A jury, after being out 24 hours, were brought in, and, being asked by the judge if there was any probability of their agreeing, the foreman stated that they stood 11 to 1. The court then stated that it was an important case, and they had better make another effort; and, after retiring, they again returned into court, in about 25 minutes, with a verdict. *Held*, that the disclosure of the foreman was no violation of his oath, and the verdict should not be interfered with.—McNulty v. Stewart, 12 Minn. 434, (Gil. 319.)

26. A jury, having leave to bring in a sealed verdict, stated to the officer that they had agreed, and were allowed to separate. In the morning, two of the jurors having claimed that they voted for the sealed verdict under protest, the jury were again sent out, and finally agreed upon a verdict. *Held*, misconduct, which justified granting a new trial.—Ætna Ins. Co. v. Grube, 6 Minn. 82, (Gil. 32.)

27. A new trial will be granted for misconduct of the jury which may have prejudiced the moving party, unless the successful party shows that no prejudice in fact resulted.—Koehler v. Cleary, 23 Minn. 325.

28. Where it does not appear that misconduct of a jury, complained of, was caused by misconduct of the prevailing party, or some one in his behalf, or was of such character as to affect the verdict, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict should not be set aside.—Koehler v. Cleary, 23 Minn. 325.

Objections to verdict or findings.

29. There is no substantial distinction between the statutory ground for a new trial, "insufficiency of the evidence to justify the verdict, or other decision, or that it is against law," in force prior to 1866, and the ground specified in Gen. St. Minn. 1866, c. 66, § 235, "that the verdict, report, or decision is not justified by the evidence, or is contrary to law."—Tozer v. Hershey, 15 Minn. 257, (Gil. 197.)

30. The failure of a jury to find fully and completely upon an immaterial question submitted to them for a special finding is no ground for a

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new trial.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

31. A judgment which is based on findings of a referee, not responsive to the issues, will, where the objection is properly taken, be set aside.—Cochrane v. Halsey, 25 Minn. 52

32. In an action for damages caused by a nuisance, to abate the same, and enjoin its continuance, the jury found generally upon the question of damages, but not sufficiently upon special facts to authorize an abatement and injunction, as prayed. Before entry of judgment the defendant appealed from an order denying a motion to vacate the verdict, and for a new trial. *Held*, that it could not be presumed that the court would enter judgment for anything more than the damages justified by the verdict, and about which there was no dispute, and that the motions were properly denied.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

33. When the record shows that a verdict is recorded before a motion to poll a jury was made, it cannot be contradicted by affidavits.—Steele v. Etheridge, 15 Minn. 501, (Gil. 413.)

Excessive damages.

34. A verdict will not be set aside on the ground that the damages are excessive, unless the amount is so large and disproportionate as to warrant the inference that the jury were swayed by prejudice, partiality, passion, or corruption.—St. Martin v. Desnoyer, 1 Minn. 156, (Gil. 131;) Beaulieu v. Parsons, 2 Minn. 37, (Gil. 26;) City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125;) Chamberlain v. Porter, 9 Minn. 260, (Gil. 244;) Chapman v. Dodd, 10 Minn. 350, (Gil. 277;) Du Laurans v. First Div. St. P. & P. R. Co., 15 Minn. 49, (Gil. 29;) Shartle v. City of Minneapolis, 17 Minn. 308, (Gil. 284.)

35. To warrant the exercise of the authority conferred on the district court by Gen. St. Minn. 1878, c. 66, § 253, to grant a new trial for "excessive damages appearing to have been given under the influence of passion or prejudice," the damages must be not merely more than the court would have awarded if it had tried the case, but they must, especially in an action for defamation, so greatly and grossly exceed what would be adequate in the judgment of the court that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion,—that is to say, of excited feeling,—rather than of sober judgment; or of prejudice,—that is to say, of a state of mind partial to a successful party or unfair to the other.—Pratt v. Pioneer Press Co., 18 N. W. 836, 20 N. W. 87, 32 Minn. 217.

36. In an action for diversion of a water-course in which the only question litigated was that of damages, there was a wide diversity in the opinion of the witnesses. *Held*, that an order granting a new trial, and setting aside a verdict as excessive, was within the sound discretion of the trial court.—Schaffer v. City of St. Paul, (Minn.) 43 N. W. 65.

41 Minn. 310.

Remittitur of excess.

37. A trial court may, in its discretion, refuse a new trial on condition that plaintiff remit such part of the verdict as shall, in the judgment of the court, leave the recovery not excessive. This may be done in actions of tort as well as on contract. Following Craig v. Cook, 9 N. W. 712, 28 Minn. 232.—Pratt v. Pioneer Press Co., 28 N. W. 708, 35 Minn. 251.

38. The fact that a motion for a new trial was denied only on the remission of a part of the verdict deemed by the trial court to have been erroneously included therein, does not show necessarily that the jury were actuated by passion or prejudice.—Grant v. Wolf, 24 N. W. 289, 34 Minn. 32.

39. In an action for injuries to property by removal of lateral support, evidence was given of the extent of the injury, and the condition of the property, as compared with its value when intact. The only expert witness placed the difference in value at $2,500. *Held*, that a verdict for $3,500 was not so excessive as to show that the jury were influenced by prejudice or passion, and it was proper to deny a new trial upon the consent of the plaintiff to allow a deduction to $2,000.—Kopp v. Northern Pac. R. Co., (Minn.) 43 N. W. 73.

41 Minn. 310.

Surprise, inadvertence, or accident.

40. The fact that a party, acting upon his attorney's advice that his cause would not be reached for trial before a certain time, absented himself, and the cause, being sooner reached, was tried in his absence, without his testimony, which was material, is no ground for a new trial.—Desnoyer v. McDonald, 4 Minn. 515, (Gil. 402.)

41. The facts relied on as grounds for a motion for a new trial for accident and surprise on the part of plaintiff, preventing him from being present at the trial, and from being prepared therefor, showed only that he relied on something upon which he had no right to rely; and such facts appeared to have been known to him and to his attorney at the time of an application for a continuance of the cause, but they were not then presented otherwise than by an oral unsworn statement of counsel. *Held*, that no ground for a new trial was shown.—Cheney v. Dry Wood Lumber Co., 26 N. W. 236, 34 Minn. 440.

42. A motion for a new trial was based on alleged misconduct of plaintiff and surprise on the part of defendant, consisting in plaintiff having proceeded with the trial when the cause was called in its order on the calendar, instead of having it set for a day certain, and giving defendant notice thereof, as his attorney had agreed to do with defendant's attorney. *Held* that, there being no affidavit of merits, the motion was properly denied.—O'Kieffe v. Lenfest, 28 N. W. 260, 35 Minn. 237.

43. As ground for a new trial, the party showed the absence from the trial of a necessary and material witness, who intended to be present, but was called away to a distance, and there disabled, so that attendance was physically impossible. The nature of the disability, or any circum-

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stances attending it, did not appear, or that a subpœna had been issued for the witness, or any step taken to enforce attendance, or that defendant was not fully aware of the facts witness would testify to; nor was any motion for a continuance then made. *Held*, that a case of accident or surprise against which the party could not have guarded was not made out.—Eich v. Taylor, 17 Minn. 172, (Gil. 145.)

44. Through the inadvertence of defendants' counsel in drawing their answer, as well as upon trial, Gen. St. Minn. 1878, c. 31, § 17, a special statute of limitations bearing on such damages as are caused by mill-dams, was entirely overlooked, and the jury were permitted to consider testimony as to damages anterior to the period. *Held* not an error for which the court was responsible, or for which a new trial should be granted.—Barrows v. Fox, (Minn.) 38 N. W. 777.

39 Minn. 61.

45. On the issue as to the priority of filing for record two mortgages, defendant, relying upon an abstract prepared by the register of deeds, showing that his mortgage was first recorded, made no preparation to prove the fact of the priority otherwise than by the record itself, as shown by the abstract, but the court, on behalf of plaintiff, admitted parol evidence of the filing, showing that his lien was first recorded. *Held*, that defendant was entitled to rely upon his abstract, and the record as thereby shown, as correct, and that he was entitled to a new trial, on discovery of evidence, after the first trial, that his deed was in fact first filed for record.—Shaw v. Henderson, 7 Minn. 480, (Gil. 386.)

46. Where a verdict has been procured on false testimony as to a lost letter, which defendant, through no lack of diligence on his part, could not anticipate, and was unprepared and unable to rebut at the time of the trial, and he has been guilty of no laches in making his application, the same is properly vacated, and a new trial granted.—Nudd v. Home Insurance & Banking Co., 25 Minn. 100.

47. An original record having been lost, a certified copy thereof was used at the trial of an action, which was subsequently discovered not to conform to the original in important particulars. *Held*, that the defeated party, having been misled thereby, and having had no reasonable ground for disputing the correctness of the copy at the time, was entitled to a new trial on the ground of surprise, unless it was apparent from the record that the errors complained of would not affect the result.—Farnham v. Jones, 19 N. W. 83, 32 Minn. 7.

48. In an action to restrain foreclosure of a mortgage on the ground of a fraudulent alteration thereof in a material part subsequent to its execution, plaintiff produced at the trial the original mortgage, unexpectedly to defendant, who supposed that it was lost. The mortgage on its face showed an erasure and alteration, which it was material for defendant to explain, but he was unable to do so, in the absence of the notary who witnessed its execution, and whose evidence he did not discover to be material until after an inspection of the instrument, subsequent to the trial. *Held*, that a new trial should be granted on the ground of surprise.—Russell v. Reed, 19 N. W. 86, 32 Minn. 45.

Newly-discovered evidence—Materiality and sufficiency.

49. Where a person, claiming goods adversely to one holding under a chattel mortgage, moves for a new trial on the ground of newly-discovered evidence, such evidence should be material, and where the evidence consists in an affidavit of the person executing the chattel mortgage that there was an agreement without consideration that the mortgage should be released, such evidence is immaterial, and the motion should be denied.—Smith v. Chapel, (Minn.) 30 N. W. 650.

36 Minn. 180.

50. In the distribution of the estate of a decedent, an issue was made as to whether an antenuptial contract executed by him had been rescinded, which was found in the negative. *Held*, that newly-discovered evidence of declarations by the husband that the contract had been annulled, which declarations were admissible, because they were against the husband's interest at the time they were made, were sufficient to justify granting a new trial upon that issue.—Hosford v. Hosford, 42 N. W. 1018, 41 Minn. 245.

51. Newly-discovered evidence, of such character that there is no reason to suppose that the verdict would be changed by it, is not ground for new trial.—Mead v. Constans, 5 Minn. 171, (Gil. 134;) Eddy v. Caldwell, 7 Minn. 225, (Gil. 166.)

52. If the issue which newly-discovered evidence tends to establish would not affect the successful party's right to judgment, it is no ground for new trial.—Sharpe v. Traver, 8 Minn. 273, (Gil. 239.)

—— Change of witness' testimony.

53. A motion by defendant for a new trial was based on impeaching testimony to the effect that witnesses for plaintiff had stated after the trial that they had sworn falsely, and that they were induced so to swear by the promises of plaintiff. *Held* that, in view of the improbability that such impeaching testimony was true, and of the fact that it was denied in positive terms by the affidavits of the witnesses and the plaintiff, the discretion of the trial court in denying the motion must be deemed to have been properly exercised.—Hoy v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 1117.

46 Minn. 269.

54. In an action by a lessee to recover damages for injuries to goods through water leaking through the roof, which was alleged to have been caused by the negligence of the person employed by the defendant to clean snow off the building, the same witness (who was janitor of the building) was relied upon by both parties to prove their respective positions, and he testified that the leakage occurred after the snow was cleaned off. On a motion by the defendant for a new trial on the ground of surprise, supported by the janitor's affidavit, which set out that upon reconsidering the matter and talking with others he found he was mistaken, and that the roof leaked before he sent the man to clean it, *held*, that the motion ought not to be granted, looking to the fact that other circumstances seemed to indicate that the janitor's testimony on the trial

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was correct.—Webb v. Barnard, (Minn.) 31 N. W. 214.

36 Minn. 336.

Newly-discovered evidence — Cumulative, contradictory, or impeaching evidence.

55. Newly-discovered evidence, which appears by the affidavits to be simply contradictory and cumulative, is no ground for a new trial.—Nininger v. Knox, 8 Minn. 140, (Gil. 110:) Johnson v. Coles, 21 Minn. 108; Gilmore v. Brost, 39 N. W. 139,* 39 Minn. 190; Schacherl v. St. Paul City Ry. Co., 43 N. W. 837, 42 Minn. 42; Jones v. Chicago, M. & St. P. R. Co., 43 N. W. 1114, 42 Minn. 183.

56. The fact that the evidence given at the trial was by the party himself does not prevent other evidence of the same fact by another from being cumulative.—Nininger v. Knox, 8 Minn. 140, (Gil. 110.)

57. As a general rule, newly-discovered evidence, tending only to contradict the testimony of a witness, will not be sufficient to justify a new trial.—Cirkel v. Ellis, (Minn.) 31 N. W. 513.

36 Minn. 323.

58. Newly-discovered evidence, which only tends to contradict the testimony of a witness at the trial, or which would not affect the general result, but only the amount of punitive damages, is not ground for a new trial.—Peck v. Small, 29 N. W. 69, 35 Minn. 465.

59. In an action for damages for forwarding goods contrary to express direction, plaintiff's wife testified to a direction to defendant to retain them, and defendant did not testify. *Held*, that alleged newly-discovered evidence that the wife had admitted a direction to defendant to forward the goods, being simply corroborative of what might have been testified to by defendant, and not of a character likely to change the result, was not ground for granting a new trial.—Mead v. Constans, 5 Minn. 171, (Gil. 134.)

60. A new trial will not be granted for the sole purpose of procuring evidence impeaching the testimony of a witness.—Gardner v. Kellogg, 23 Minn. 463.

—— Previous knowledge of party.

61. On a motion for a new trial on the ground of newly-discovered evidence, it appeared that the witness by whom the proposed evidence was expected to be given was a witness on a former trial for the moving party, but was not examined in respect to the matter sought to be proved on the new trial, because the attorney calling him was unwilling to risk his answers in consequence of statements previously made to him by the witness, although the witness was so connected with the transaction as to be probably familiar with the facts. *Held*, that the motion was properly denied.—Taylor v. Mueller, 15 N. W. 413, 30 Minn. 343.

62. On a motion for a new trial on the ground of newly-discovered evidence, it appeared that the evidence relied on consisted of the testimony of a witness who was out of the state at the time of the trial, and of a letter in his possession. But it further appeared that the moving party had refused a continuance proposed by the adverse party, accompanied with a suggestion that the testimony of such witness might be obtained for the trial, if continued, and that they had elected to go to trial without any evidence to sustain one of several defenses, on which the testimony of such absent witness might have aided them. *Held*, that the motion was properly denied.—Ward v. Hackett, 14 N. W. 578, 30 Minn. 150.

63. To justify granting a new trial for newly-discovered evidence, it must appear that the party was ignorant of its existence at the time of the trial. It is not enough that his counsel was ignorant of it.—Broat v. Moore, (Minn.) 47 N. W. 55.

44 Minn. 468.

—— Diligence.

64. Newly-discovered evidence, as ground for a new trial, must not only be material, and discovered since the trial, but of such character that it could not, with the due exercise of prudence, foresight, and diligence, have been discovered by the party offering it before or at the time.—Knoblauch v. Kronschnabel, 18 Minn. 300, (Gil. 272.)

65. A new trial will not be granted on the ground of newly-discovered evidence which the party might have procured for the first trial by the exercise of reasonable diligence, where a failure of such diligence is not excused.—Laurel v. State Nat. Bank, 25 Minn. 48.

66. Newly-discovered evidence, to justify a new trial, or make error of the refusal of the court to receive it after the case was partially submitted to the jury, must be of such a character that the party offering it could, with due exercise of prudence, diligence, and foresight, have discovered it before the trial.—Baze v. Arper, 6 Minn. 220, (Gil. 142.)

67. Where it is doubtful whether or not newly-discovered evidence, urged as a ground for a new trial, might not, with proper diligence, have been obtained for use on the first trial, a new trial will not be granted.—Nininger v. Knox, 8 Minn. 140, (Gil. 110.)

68. In an action against a bank to recover for the loss of a note left with it for collection, through its failure to notify the indorser of its dishonor, the issue was as to whether plaintiff's agent who left the note at the bank informed defendant of the indorser's residence. Defendant's employe, who took the note, testified that there was another person, whom he did not know, at the counter, at such time. *Held*, that newly-discovered evidence by the latter as to what was said at such time was no ground for a new trial; it not appearing that the bank by proper diligence could not have procured such evidence at the trial.—Nininger v. Knox, 8 Minn. 140, (Gil. 110.)

69. In an action on a note, defendant's answer denied that he had made and signed the note, and judgment was rendered for him. Plaintiffs moved for a new trial on the ground of newly-discovered evidence, consisting of testimony of

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one of the persons from whom plaintiffs purchased the note. *Held*, that due diligence required plaintiffs to make inquiries of such person in the first instance, and that the motion must be denied.—Evans v. Christopherson, 24 Minn. 330.

70. In an action on a note defendant testified that he had paid the same to plaintiffs' agent. There was judgment for plaintiffs, and defendant moved for a new trial, on the ground of newly-discovered evidence, consisting of testimony of the agent to whom he paid the note. *Held*, that due diligence required defendant to obtain the evidence of the agent before trial, and that the motion must be denied.—Krassin v. Shearan, 24 Minn. 355.

71. In an action by the seller of a machine, the title to which had been reserved in the contract of sale until the price should be paid in full, the question at issue was whether defendant, who had bought the machine from the purchaser, (J.,) had notice of plaintiff's claim on account of the unpaid purchase money. After verdict for defendant, plaintiff moved for a new trial on the ground of newly-discovered evidence, that since the trial he had discovered that one H. was present when defendant bought the machine from J., and heard J. state to defendant that plaintiff had a claim against the machine. The only excuse for not producing H. at the trial was that plaintiff did not know that H. knew anything about the matter until he (plaintiff) heard J.'s deposition read at the trial. The deposition of J. was taken in May and the trial occurred in June. *Held*, that the motion was properly denied, as due diligence was not shown.—Fenno v. Chapin, 8 N. W. 762, 27 Minn. 519.

72. Where the affidavits on which a motion for a new trial on the ground of newly-discovered evidence is made affirmatively disclose want of ordinary diligence and prudence on the part of the moving party in preparing for trial, and in obtaining evidence wholly within his own knowledge, and the newly-discovered evidence is admitted to be cumulative, a denial of the motion is not error.—Keith v. Briggs, 20 N. W. 91, 32 Minn. 185.

73. In an action for damages for the destruction of growing timber by fire caused by sparks from one of defendant's engines, defendant moved for a new trial on the ground of newly-discovered evidence, consisting in the fact that when the foliage came out in the spring after the fire it appeared that very little of plaintiff's timber had been killed, and that this fact could not have been so easily ascertained when the case was tried, because the leaves had then fallen. *Held*, that the motion was properly denied, it appearing that defendant was advised of the action before the leaves fell, and might then have had an examination made of the timber.—Austin v. Northern Pac. R. Co., 25 N. W. 798, 34 Minn. 351.

74. In an action on an agreement executed by defendant through his attorney, he denied that the agreement was authorized or ratified by him. Plaintiff gave defendant notice before trial to produce all correspondence between defendant and the attorney relative to such subject, but none was produced; and on the trial defendant denied the authority or any knowledge of the transaction, and the attorney denied having informed him of it. After verdict for defendant, plaintiff discovered for the first time letters between these parties tending to show such authority or ratification. *Held*, that plaintiff had shown sufficient diligence to entitle him to a new trial for this newly-discovered evidence.—Humphreys v. Havens, 9 Minn. 318, (Gil. 301.)

—— Affidavits on motion.

75. Upon an application for a new trial upon the ground of newly-discovered evidence, the failure to produce the witnesses at the trial must be sufficiently excused; and the affidavits of the proposed witnesses, as to what they will testify, should be presented, or satisfactory reason given for the failure so to do.—Keough v. McNitt, 6 Minn. 513, (Gil. 357.)

76. An affidavit stating the newly-discovered evidence, relied upon as ground for new trial, set forth that the party making it learned what the witness would swear to from a conversation had with another, who had seen, or heard taken, a deposition of such witness, which embodied such newly-discovered evidence, but did not attempt to show why a more direct statement of such evidence was not given. *Held* insufficient.—Eddy v. Caldwell, 7 Minn. 225, (Gil. 166.)

77. On motion for a new trial, on the ground of newly-discovered evidence, counter-affidavits are admissible to show that such evidence has no existence.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

III. When Granted.

Power to grant.

78. A referee is a subordinate officer of, and auxiliary to, the court, and the court has power to set aside his report and grant a new trial for errors appearing therein.—Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

79. The court has no power to grant a new trial on the ground that the jury may have been unduly influenced by certain testimony, which was admitted without objection, and which appears to have been at most merely superfluous; such ground not being within the grounds for granting a new trial specified in the statute.—Flower v. Grace, 23 Minn. 32.

As to portion of defendants.

80. Under an order, on a motion by defendant for a new trial, directing a new trial of the action, unless plaintiff should elect to take judgment against three of the defendants for a specified sum, and against another of them for a specified part of that sum, plaintiff cannot take judgment against the three as specified in it, and have a new trial as to the other. Mitchell and Vanderburgh, JJ. dissenting.—First Nat. Bank v. Lincoln, 40 N. W. 573, 39 Minn. 473.

81. Where two defendants make a joint motion to have the verdict against them set aside and for a new trial, it is not error to deny the motion if the verdict is justified as to either defendant.—Miller v. Adamson, (Minn.) 47 N. W. 452.

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82. Where, in an action to determine adverse claims to real estate, a claim asserted thereto by one of two defendants is admitted by the plaintiffs to be as determined upon the trial, it is error, as to such defendant, for the court to grant plaintiffs' motion for a new trial.—Lee v. Fletcher, (Minn.) 48 N. W. 456.

46 Minn. 49.

Trial by court—Death of judge.

83. Though a party moving for a new trial of a case tried without a jury cannot, by reason of the death of the trial judge, invoke such a reconsideration as he alone could give, a new trial should not be granted unless, after due allowance for the superior advantages of the trial judge, it is still clear that the result was opposed to the weight of evidence.—Reynolds v. Reynolds, (Minn.) 46 N. W. 236.

44 Minn. 132.

Irrelevant issue.

84. An order granting a new trial for the purpose of enabling a party to try a question not within the issues made by the pleadings is erroneous. —Bullis v. Cheadle, 30 N. W. 549, 36 Minn. 164.

Benefit to party—Nominal damages.

85. A new trial should not be granted if it is apparent that the result will not be changed, even though the record discloses error.—Dorr v. Mickley, 16 Minn. 20, (Gil. 8;) Lewis v. St. Paul & S. C. R. Co., 20 Minn. 260, (Gil. 234;) Webb v. Kennedy, 20 Minn. 419, (Gil. 374.)

86. A new trial may be denied where it is evident that it would not result in any benefit to the party applying therefor, though there was error in the former trial.—Maher v. Winona & St. P. R. Co., 18 N. W. 105 31 Minn. 401.

87. In an action to recover the price of a horse sold, defendant set up a breach of warranty. The testimony under the answer tended to show a warranty, but showed no damages. Verdict for plaintiff, and defendant moved for new trial. *Held*, that as the jury could at best give only nominal damages a new trial would not be granted.—Harris v. Kerr, (Minn.) 35 N. W. 379.

37 Minn. 537.

IV. Statutory New Trial as of Right.

When allowed.

88. Comp. St. Minn. c. 64, § 5, giving any person "against whom a judgment for the recovery of specific real estate is rendered" the right to a second trial, upon payment within six months after written notice of the judgment and payment of the costs and damages recovered thereby, does not apply to the plaintiff in an action of ejectment, for in such action there can be no judgment "for" a recovery either of the lands or damages against him.—Howes v. Gillett, 10 Minn. 397, (Gil. 316.)

Changed by Gen. St. c. 75, § 5, as amended by Laws 1867, c. 72. See Davidson v. Lamprey, 16 Minn. 449, (Gil. 404.)

89. Under Gen. St. Minn. c. 75, § 5, as amended by Laws 1867, c. 72, providing that "any person against whom a judgment is recovered in an action for the recovery of real property" may have a second trial, etc., plaintiff is entitled to a new trial where the judgment is against him.—Davidson v. Lamprey, 16 Minn. 445, (Gil. 402.)

Overruling Howes v. Gillett, 10 Minn. 397, (Gil. 316.)

90. Gen. St. Minn. 1866, c. 75, § 5, as amended by Laws 1867, c. 72, § 2, giving a right to a second trial, on demand and payment of costs, by the party against whom judgment is rendered in an action for the recovery of real estate, does not apply to an action under Gen. St. c. 75, § 15, by a landlord who has a right of re-entry against his tenant, or the assignee of his tenant, to recover the leased premises for non-payment of rent.—Whitaker v. McClung, 14 Minn. 170, (Gil. 131.)

91. Laws Minn. 1867, c. 72, § 2, which authorizes any person against whom a judgment has been recovered, in an action for the recovery of real property, to demand a second trial, on complying with certain conditions, is applicable to a case where, in an action to determine an adverse claim to property, judgment was obtained by defendant, who alleged title in himself, and demanded judgment for recovery of possession. —Eastman v. Linn, 20 Minn. 433, (Gil. 387.)

92. Gen. St. Minn. 1878, c. 75, § 11, giving a second trial as of right in an action for the recovery of real property, applies only to an action in which recovery of possession is sought, either on the part of plaintiff or of defendant. It does not apply to a statutory action to determine adverse claims to real property.—Knight v. Valentine, 29 N. W. 3, 35 Minn. 367.

93. Gen. St. Minn. 1866, c. 75, § 5, which provides that "any person against whom a judgment for the recovery of real property is rendered" may demand another trial, operates in favor of the personal representative of a deceased party to such suit, against whom judgment was rendered after his death, without revival against the representative.—Stocking v. Hanson, 22 Minn. 542.

94. Where proceedings in forcible entry and detainer under Gen. St. Minn. c. 84, § 11, become, under the common practice, to all intents and purposes, an action for the trial of the title of real property in the nature of ejectment, the party against whom judgment is rendered is entitled to a second trial, on compliance with Gen. St. Minn. 1878, c. 75, § 11.—Ferguson v. Kumler, 25 Minn. 183.

95. An action to set aside a deed of land on the ground of fraud is not "an action for the recovery of real property," within Gen. St. Minn. c. 75, § 11, allowing a second trial in such cases as a matter of right.—Somerville v. Donaldson, 1 N. W. 808, 26 Minn. 75.

96. In an action by a wife against her husband for a divorce, issues involving the title and right to possession of real estate claimed by her, of which he was in possession, were tried and determined, and the judgment dissolved the marriage, and adjudged that plaintiff was the absolute and sole owner of such real estate, describing it, and that he was entitled to the immediate possession thereof. *Held* that, under Gen. St. Minn. 1878, c. 75, § 11, providing for a second trial in actions for the recovery of real property

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on payment of costs and damages, defendant might have a second trial of the issues involving the title and right to possession of the real estate, without retrying the cause of action for divorce.—Schmidt v. Schmidt, 19 N. W. 649, 32 Minn. 130.

97. Gen. St. Minn. 1878, c. 75, § 11, giving a right to another trial in an action of ejectment as a matter of right, has no application to a case where defendant fails to answer, and permits judgment to be rendered against him by default. —Hallam v. Doyle, 29 N. W. 130, 35 Minn. 337.

98. A city in its complaint against a railroad company alleged that certain premises were occupied by defendant with its depot buildings, by means whereof a large portion of a street, landing, and levee was occupied and blockaded, and the city and public wrongfully excluded therefrom, and that the occupation and use of the premises by defendant was dangerous, and created a public nuisance. The prayer was that defendant be required to remove the buildings, that the nuisance be abated, and that defendant be ejected from the street, landing, and levee. An injunction was also sought. Defendant in its answer took issue on plaintiff's title and right of possession, alleging ownership and possession in itself, and also set up title by adverse possession. *Held*, that the action was for the recovery of real property, the other relief asked being merely incidental, and, under Gen. St. c. 75, § 11, plaintiff, on a verdict against it, was entitled to a new trial as of right.—City of St. Paul v. Chicago, M. & St. P. Ry. Co., (Minn.) 51 N. W. 662.

Demand and payment of costs, etc.

99. A notice of demand for a retrial of an action for the recovery of real property, permitted by Gen. St. Minn. 1866, c. 75, § 5, is a proceeding in the action, and if invalid may be set aside by the court, on motion or order to show cause.—Davidson v. Lamprey, 16 Minn. 445, (Gil. 402.)

100. Under Gen. St. Minn. 1866, c. 75, § 5, as amended by Laws 1867, c. 72, providing that, on payment of costs and damages within six months of notice of judgment in an action for the recovery of real property, either party may, by notice in writing, demand a retrial of the action, such payment of costs and damages and written notice of demand of another trial are conditions precedent to the right to a retrial.—Davidson v. Lamprey, 16 Minn. 445, (Gil. 402.)

101. A demand for a second trial in an action for the recovery of real property, under Gen. St. Minn. c. 75, § 11, may be made by the party himself, and a notice embodying such demand, made in his name by an agent authorized by him to make such demand, if seasonably served, is sufficient.—West v. St. Paul & N. P. Ry. Co., (Minn.) 41 N. W. 1031.

40 Minn. 189.

102. A payment to the clerk of the amount of judgment for costs and damages, in an action for the recovery of real property, is not, in the absence of an order or rule of court authorizing it, a payment into court or compliance with Gen. St. Minn. 1866, c. 75, § 5, permitting a retrial of such action "upon payment of all costs and damages," etc.—Davidson v. Lamprey, 16 Minn. 445, (Gil. 402.)

103. An entry by the clerk in the record, after judgment in an action for the recovery of real property, that plaintiff had paid into court the judgment in favor of defendant for costs, if unauthorized by any rule or order of the court, is insufficient to show a payment of such costs into court, in a direct proceeding in the same action for a retrial, based on the payment of costs as a condition precedent to the right to such retrial. —Davidson v. Lamprey, 16 Minn. 445, (Gil. 402.)

104. The payment and receipt of costs of the first trial of an action for the recovery of real property will not estop the party in whose favor judgment is rendered on such trial from opposing an application for a second trial, claimed under Gen. St. Minn. c. 75, § 5, even if such costs were paid for the avowed purpose of obtaining such second trial.— Whitaker v. McClung, 14 Minn. 170, (Gil. 131.)

Distinguished in Lamprey v. Henk, 16 Minn. 407, (Gil. 364.)

Waiver.

105. Under Gen. St. Minn. 1878, c. 75, § 11, allowing a new trial in an action for the recovery of real property upon payment of all costs of the former trial, the statutory requirement of payment of costs is not waived by noticing the cause for retrial, and entering it on the calendar, after payment of part of such costs only, although both parties supposed the whole costs to have been paid. And after the six months limited for such payment by the statute have expired, the court has no power to relieve from the default.—Dawson v. Shillock, 12 N. W. 526, 29 Minn. 189.

106. Under Gen. St. Minn. 1878, c. 88, § 9, authorizing an attorney to bind his client in any of the proceedings, in an action or special proceeding, an attorney for defendant, in ejectment, may bind his client by a stipulation to dismiss a demand by defendant, under the statute, for a second trial.— Bray v. Doheny, (Minn.) 40 N. W 262.*

39 Minn. 355.

Effect.

107. Under the provision of Comp. St. Minn. c. 64, § 7, that a judgment on a second trial of an action for recovery of specific real property shall be the final determination of the rights of the parties, a second verdict for the same party does not prevent a review by appeal or writ of error, but is final only so far as it bars another action for the same cause between the same parties.—Baze v. Arper, 6 Minn. 220, (Gil. 142.)

Next of Kin.

See *Descent and Distribution.*

Non-Joinder.

Of parties, see *Pleading*, 123, 127.

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Non-Resident.

Defendants, service of summons, see *Summons*, 16-18, 21, 29-52.
Taxation of property, see *Taxation*, 32-34.
Validity of insolvent law, see *Insolvency*, 3, 4.
Will of, see *Wills*, 33.

Nonsuit.

See *Practice in Civil Cases*, 1-20.

Northern Pacific Railroad Company.

Exemption from taxation, see *Railroad Companies*, 110, 111.

Northfield, City of.

Incorporation, see *Municipal Corporations*, 1.

NOTARY PUBLIC.

Power to take affidavit, see *Affidavit*, 2-4.
Protests, see *Negotiable Instruments*, 129-140.

Certificate of acknowledgment—Seal.

1. A notary's certificate of the acknowledgment of an assignment for the benefit of creditors by the assignor was signed by the notary, but had no notarial seal attached. Below this certificate, and on the same page, was another certificate by the same notary, with his seal attached, that the assignee had accepted the trust. *Held* that the seal attached to the second certificate did not apply to the first certificate also, and such first certificate was void for want of a notarial seal under Gen. St. Minn. 1878, c. 26, § 3.—De Graw v. King, 9 N. W. 636, 28 Minn. 118.

Distinguished in Osgood v. Sutherland, 31 N. W. 213, 36 Minn. 245, and Rachac v. Spencer, 51 N. W. 920.

2. Where a chattel mortgage purports to have been acknowledged before a notary, but the certificate is not authenticated by a notarial seal, the filing of the instrument is no notice to subsequent purchasers or mortgagees in good faith, under Gen. St. Minn. 1878, c. 39, § 3, requiring mortgages, in order to constitute such notice, to be acknowledged before some officer authorized to take the acknowledgment of deeds, and chapter 26, § 3, providing that each notary shall provide himself with an official seal, with which he shall authenticate his official acts.—Thompson v Scheid, (Minn.) 38 N. W. 801.

39 Minn. 102.

Notice.

Constructive notice, see *Vendor and Purchaser*, 138, 139.
Of accounting by guardian, see *Guardian and Ward*, 16, 17.
appeal, see *Appeal and Error*, 143-151, 701-706; *Criminal Law*, 153, 154; *Eminent Domain*, 165; *Highways*, 38, 39.
Of application for appointment of guardian, see *Guardian and Ward*, 4.
—— for license to sell decedent's real estate, see *Executors and Administrators*, 102, 103.
—— for *mandamus*, see *Mandamus*, 42-48.
argument of appeal, see *Appeal and Error*, 206-208.
arrival of goods, by carrier, see *Carriers*, 22-24.
breach of warranty, see *Sale*, 73-76.
claim against municipal corporation, before action, see *Municipal Corporations*, 321-325.
—— of homestead, on removal therefrom, see *Homestead*, 54-59.
—— to property levied upon, see *Execution*, 52-55.
condemnation proceedings, see *Eminent Domain*, 128-134.
contest of election, see *Elections and Voters*, 40-44.
defects in fence of railroad, see *Railroad Companies*, 242-245.
—— in highway, see *Municipal Corporations*, 168-175.
—— in tools and appliances furnished for use of servant, see *Master and Servant*, 54-57.
defenses to negotiable instrument, see *Negotiable Instruments*, 95-102.
election, see *Elections and Voters*, 9-13.
execution sale, see *Execution*, 64-66.
expiration of time of redemption from tax sale, see *Taxation*, 182-202.
foreclosure of mortgage by advertisement, see *Mortgages*, 197-242.
fraud, as affecting running of statute of limitations, see *Limitation of Actions*, 35-37.
guardian's sale, see *Guardian and Ward*, 30-34.
lis pendens, see *Lis Pendens*, 1-3.
motion, see *Attachment*, 90; *Practice in Civil Cases*, 27; *Venue in Civil Cases*, 15.
prior mortgage, see *Chattel Mortgages*, 86, 87.
proceedings for distribution of intestate's estate, see *Descent and Distribution*, 8-10.
protest, see *Constitutional Law*, 93; *Negotiable Instruments*, 122-149.
sale of lands of decedent for payment of debts, see *Executors and Administrators*, 109-113.
taking deposition, see *Deposition*, 3, 4.
tax sale, see *Taxation*, 158-165.
trial, see *Appeal and Error*, 721; *Practice in Civil Cases*, 21-25.
To abate nuisance, see *Nuisance*, 6, 7.
agent, see *Principal and Agent*, 78-81.
assignee, of contracts of assignor, see *Assignment for Benefit of Creditors*, 98.
attorney, binding on client, see *Attorney and Client*, 15.
bank officers, see *Banks and Banking*, 24.
limit liability of innkeeper, see *Innkeepers*, 6-8.
mortgagee, by occupancy of premises, see *Mortgages*, 44, 45.
redeem from execution sale, see *Execution* 119.
—— from foreclosure, see *Mortgages*, 412, 413
retract, before action for libel, see *Libel and Slander*, 55.
purchasers, see *Vendor and Purchaser*, 132-136.
quit, see *Landlord and Tenant*, 55.
terminate tenancy from year to year, see *Landlord and Tenant*, 54.

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NOVATION.

What constitutes.

1. A complaint alleged that after plaintiff had paid a draft drawn on him by one T. it was agreed between plaintiff, defendant, and T. that the amount so paid should be charged to defendant, who, in consideration of the payment to T., agreed to repay plaintiff, and that plaintiff, in consideration of such agreement, discharged T. Plaintiff testified that when he paid T.'s draft he understood from T. that the amount was to be charged to defendant; that he did not make any charge on his books until four months later, when he saw defendant, and asked him if it was all right; that defendant replied that it was, and that plaintiff could charge the draft to him, whereupon plaintiff made the charge. The draft was never returned to T. Plaintiff, defendant, and T. never had any conversation together about the matter, and nothing was ever said to T. after the payment of the money, until plaintiff brought his action. *Held*, that the evidence did not show a novation of the debt from T. to plaintiff such as would furnish a consideration for defendant's promise to pay plaintiff.—Johnson v. Rumsey, 11 N. W. 69, 28 Minn. 531.

Effect.

2. There must be an extinguishment of the old debt by a mutual agreement between all parties, whereby it becomes the obligation of the new debtor. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor.—Cornwell v. Megins, 40 N. W. 610, 39 Minn. 407.

3. An agreement by a mortgagee in a chattel mortgage, in consideration of a surrender and delivery to him of the mortgaged property, to pay the amount due upon a second mortgage to the holder thereof, is a valid agreement, which may be enforced by such second mortgagee.—Pulliam v. Adamson, (Minn.) 45 N. W. 1132.

43 Minn. 511.

4. Where the purchaser of a stock of goods of a partnership agrees, as part of the consideration, to assume and pay the existing firm debts, the creditors of the firm may enforce the contract by actions against the purchaser, though they were not specifically named or designated in the contract of sale.—Maxfield v. Schwartz, (Minn.) 45 N. W. 429.

43 Minn. 231.

NUISANCE.

I. Civil Actions, 1-29.
II. Criminal Prosecutions, 30-36.

Abatement by municipal corporation, see *Municipal Corporations*, 318.

I. Civil Actions.

What constitutes a nuisance.

1. The erection of a dam by one, either upon his own land or that of another, the effect of which is to overflow lands of plaintiff without his consent, is a nuisance, both at common law and under the Minnesota statute.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

2. Where a natural water-course exists on the lands of a person, the construction of a sewer which conducts to and empties upon the land of such owner a greater body of water than the natural drainage and flow through the water-course, thereby injuring the premises, is *prima facie* wrongful, and is a nuisance.—O'Brien v. City of St. Paul, 18 Minn. 176, (Gil. 163.)

Distinguished in O'Brien v. City of St. Paul, 25 Minn. 333.

3. A wooden flouring-mill, operated by water-power, is not, *per se*, a nuisance, within the meaning of a clause of a lease of a mill-site and water-power forbidding the erection and operation of any powder mill, chemical laboratory, or other "nuisance" on such site.—Minneapolis Mill Co. v. Tiffany, 22 Minn. 463.

Public nuisance—Legislative authority.

4. A canal, which is constructed by or under the authority of the sovereign power of the state, unless improperly constructed or maintained, cannot be treated as a public nuisance.—Patterson v. City of Duluth, 21 Minn. 493.

5. It is no defense to a suit to abate a nuisance in maintaining a dam that it was erected by legislative authority, where the erection does not necessarily create the nuisance, but it arises from the manner of its construction.—Village of Pine City v. Munch, (Minn.) 44 N. W. 197.

42 Minn. 342.

Notice to abate.

6. One who merely continues a nuisance is entitled to notice to abate it before an action for its abatement can be brought.—Thornton v. Smith, 11 Minn. 15, (Gil. 1;) Bartlett v. Siman, 24 Minn. 448.

7. A continuer of a nuisance, sued with the person creating the same, by resting his defense on the same grounds as the other defendant, and making no objection until after the trial is concluded, waives his right to notice before suit to abate the nuisance.—Bartlett v. Siman, 24 Minn. 448.

Action for abatement.

8. An action to abate a nuisance, consisting of the construction and maintenance of a stairway and a railing to guard it in the sidewalk in front of premises occupied by plaintiff under a lease, cannot be maintained where it is not shown that the rental value of plaintiff's premises is depreciated or his trade affected thereby, or that he has sustained any damage special or peculiar to himself.—Ofstie v. Kelly, 23 N. W. 863, 33 Minn. 440.

9. In action to abate a dam as a nuisance, it is not error to charge that if no damages have or must necessarily accrue to plaintiff's premises by reason of its erection, the action cannot be maintained.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

10. Injuries merely theoretical, such as those from the insensible evaporation and decrease of water caused by dams, the occasional increase or

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decrease in the velocity of the current and quantum of water below, furnish no ground for abatement of a dam.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

11. In an action for the abatement of a dam the plaintiff can properly show damages suffered after the commencement of the suit, for the purpose of showing a continuing injury.—Hayden v. Albee, 20 Minn. 159, (Gil. 143.)

12. Mere delay in commencing a suit, or even acquiescence in the act of the defendant, (unless under circumstances that would create an equitable estoppel,) short of the period of 20 years necessary to give defendant a right by prescription to flow plaintiff's land, will not bar his right of action to abate a dam, causing the overflow, as an *existing* nuisance.—Mueller v. Fruen, (Minn.) 30 N. W. 886.

36 Minn. 273.

Action for abatement — Finding and judgment.

13. In order to lay the foundation for the abatement of a dam causing damage by overflow on account of its height, and for injunction against the same, there should be a specific finding by the jury as to how much of the dam should be abated, and if not so found it must be ascertained by the court.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

14. In an action under Gen. St. Minn. 1866, c. 75, § 25, admitting the recovery of damages and the award of an injunction against a nuisance in one action, the abatement of a dam and injunction against its maintenance, prayed, do not follow the recovery of damages as a matter of course, but are matters discretionary with the court; and the failure of the jury to answer fully questions submitted to it, the only object of which is to aid the court in the exercise of this discretion, is error that neither party can complain of, and is not the subject of exception.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

15. In an action by a riparian owner to abate a dam, by which water was set back on his land, the court may direct the sheriff to cut down the dam; Gen. St. Minn. 1878, c. 75, § 44, providing that "by the judgment the nuisance may be enjoined or abated, as well as damages recovered." —Ames v. Cannon River Manuf'g Co., 6 N. W. 787, 27 Minn. 245.

Action for damages.

16. Plaintiff complained of an obstruction in the streets, which, if a nuisance at all, was a public one, and the injury sustained by him was only that in common with the general public, differing only in degree and not in kind. *Held*, that he could not maintain an action for private damages, but the remedy was by a proceeding by the public or its proper representative.—Shaubut v. St. Paul & S. C. R. Co., 21 Minn. 502.

17. In an action for damages, for the erection of a nuisance, it is not necessary that the person charged be the owner of the freehold. It is sufficient if he is a party to the erection of such nuisance. His subsequent disposition of his interest therein will not relieve him from liability for its erection.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

Action for damages — Continuing nuisances.

18. Where a nuisance is continuing, the fact that it was erected and continuously maintained upon the land without objection from the owner is no defense to an action by a subsequent purchaser, who bought with knowledge thereof, unless it has been maintained for a sufficient length of time to bar his rights.—O'Brien v. City of St. Paul, 18 Minn. 176, (Gil. 163.)

19. Where lands are injured by the erection and maintenance of a nuisance on the land of an adjoining owner, the latter is liable to successive actions for damages caused by continuance of the nuisance.—Sloggy v. Dilworth, (Minn.) 36 N. W. 451.*

38 Minn. 179.

20. The heirs or personal representatives of the originator of a nuisance are not liable for damages resulting from its continuance after his death, except on neglect to abate it after notice.—Sloggy v. Dilworth, (Minn.) 36 N. W. 451.

38 Minn. 179.

21. A recovery for a nuisance does not bar a subsequent recovery for its continuance.—Byrne v. Minneapolis & St. L. Ry. Co. (Minn.) 36 N. W. 339. 38 Minn. 212.

Parties.

22. All persons whose property is affected by a nuisance may join in an action to abate such nuisance, and recover damages therefor, though their property is owned severally, and not jointly; but a separate judgment cannot be entered in favor of each plaintiff for the separate damages by him sustained.—Grant v. Schmidt, 22 Minn. 1.

23. In an action to remove a dam the complaint, as to one of the defendants, averred that he had, or pretended to have, some title or interest in the land on one side of the river, at the point where the dam abutted upon the shore. *Held*, that as it might be necessary, in order to remove such dam, to enter upon such defendant's land, and as his title to the land might also give him title to or control over the dam to the thread of the stream, he was a proper party defendant. —Eastman v. St. Anthony Falls Water-Power Co., 12 Minn. 137, (Gil. 77.)

24. Where lands are unlawfully flooded with surface water, as the result of the joint act of several persons, each may be sued for the entire damage; but where the damage is the result of the acts of several, acting independently, each is liable for his proportion only.—Sloggy v. Dilworth, (Minn.) 36 N. W. 451.

38 Minn. 179.

Pleading and proof.

25. Under a complaint stating facts constituting a nuisance of one kind, it is not permissible to prove a nuisance of an entirely different character.—O'Brien v. City of St. Paul, 18 Minn. 176, (Gil. 163.)

Evidence.

26. Where there is no claim made that a nuisance is willfully maintained, it is not error to reject evidence offered on behalf of defendant,

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that the same is not willful.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

Damages.

27. In an action for damages for a private nuisance, affecting injuriously the health and comfort of plaintiff and his family, he may recover damages for such injuries suffered by his family, as well as for that suffered by himself personally. —Pierce v. Wagner, 13 N. W. 170, 29 Minn. 355.

28. In an action for damages for a nuisance it appeared that such nuisance had been maintained two months before the action was brought, greatly affecting the comfort of plaintiff and his family, and causing serious illness to his wife and several of his children. The jury found for plaintiff in the sum of $800. A motion by defendant for a new trial was granted, unless plaintiff should stipulate that the damages be reduced to $500, and he did so stipulate. *Held*, that the order should not be reversed on appeal on the ground that the damages were excessive.—Pierce v. Wagner, 13 N. W. 170, 29 Minn. 355.

29. Under Gen. St. Minn. 1878, c. 75, § 44, which defines a nuisance, and provides that, in an action therefor, "the nuisance may be enjoined or abated, as well as damages recovered," as the statute gives the right to recover damages generally, any damages resulting from the nuisance, whether direct or consequential, may properly be recovered in the action; and, if necessary to a complete and effectual abatement of the nuisance, an injunction against its continuance may properly be adjudged.—Colstrum v. Minneapolis & St. L. Ry. Co., 24 N. W. 255, 33 Minn. 516.

II. Criminal Prosecutions.

Complaint.

30. Under a criminal statute, relating to buildings which are unsafe, "so as to endanger life," a complaint in a criminal proceeding, alleging a building to be "dangerous, having been heretofore damaged by fire," is insufficient.—State v. Municipal Court of St. Paul, (City of St. Paul v. Hennessy,) 35 N. W. 576, 38 Minn. 94.

31. Neither is such a complaint sufficient under a statute relating to buildings which are "specially dangerous in case of fire."—State v. Municipal Court of St. Paul, (City of St. Paul v. Hennessy,) 35 N. W. 576, 38 Minn. 94.

Variance.

32. An indictment for maintaining an unsafe building charged that the same was maintained on lots 1 and 2. The evidence showed that it extended over onto lot 3. *Held* not a variance, but mere redundancy of proof.—Chute v. State, 19 Minn. 271, (Gil. 230.)

Evidence.

33. Defendant was indicted for maintaining a high stone building, overhanging the street, and endangering the lives of passers-by. *Held*, that it was not error to refuse to allow defendant to show that he had consulted competent builders, and they advised him that it was safe.—Chute v. State, 19 Minn. 271, (Gil. 230.)

34. Defendant was indicted for maintaining a dangerous building, overhanging the street, and liable to fall upon passers-by. On the trial the prosecution offered the records of a meeting of the council of the city where the building was situated, at which defendant was present as alderman, and at which a resolution was adopted declaring such building unsafe and a public nuisance, and requiring defendant to remove the same. *Held* that, as the defense was not excusable ignorance of the facts, but that they did not constitute the building a nuisance, such record was incompetent, and its admission erroneous. —Chute v. State, 19 Minn. 271, (Gil. 230.)

View.

35. The matter of ordering a view by the jury on indictment for maintaining a nuisance, is, under Gen. St. Minn. 1866, c. 114, § 10, discretionary with the court.—Chute v. State, 19 Minn. 271, (Gil. 230.)

36. On the trial of an indictment for nuisance, in maintaining a dangerous building, the jury were instructed to examine and view the building. The proper purpose of such view was not stated. *Held*, that it would be presumed the jury knew their duty, and, if more definite instructions were required by the defendant, he should have so requested the court.—Chute v. State, 19 Minn. 271, (Gil. 230.)

Nullity of Marriage.

See *Marriage*, 9, 10.

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O.

Oath.

See *Affidavit: Perjury.*
Of commissioners on laying out highway, see *Highways*, 17.
guardian on sale of ward's real estate, see *Guardian and Ward*, 27-29.
Swearing jurors, see *Jury*, 21, 22.

Obligation of Contracts.

See *Constitutional Law*, 93-118.

Obstructions.

Of highways, see *Highways*, 61-76.
navigable stream, see *Navigable Waters*, 8, 9.

Obtaining Goods under False Pretenses.

See *False Pretenses.*

Occupation.

See *Use and Occupation.*
Adverse, see *Adverse Possession.*
Notice by occupancy, see *Mortgages*, 44, 45; *Vendor and Purchaser*, 140-149.
—— of foreclosure to occupants of mortgaged premises, see *Mortgages*, 224-229.
Regulation and licensing of occupations, see *License; Municipal Corporations*, 10-13.

Occupying Claimants.

Improvements and payment of taxes, see *Adverse Claim*, 39, 48; *Constitutional Law*, 122, 161-163; *Ejectment*, 39-49; *Partition*, 12-14; *Taxation*, 275-304.

Offer.

Of evidence, see *Trial*, 6-10.
judgment, see *Costs*, 7.
reward, see *Reward.*

OFFICE AND OFFICER.

See, also, *Clerk of Court; Court Commissioners; District and Prosecuting Attorneys; Jail and Jailer; Judge; Justices of the Peace; Notary Public; Receivers; Register of Deeds; Sheriffs and Constables.*

Bank officers, see *Banks and Banking*, 21-24.
Church officers, see *Religious Societies*, 8, 9.
City and village officers, see *Municipal Corporations*, 72-97.
Constitutional provisions fixing terms of office, see *Elections and Voters*, 6.
—— right to public office, see *Civil Rights*, 2.
Contracts by state officers, see *States and State Officers*, 4-8.
Corporate officers, see *Corporations*, 31-54.
County officers, see *Counties*, 29-63.
Election officers, see *Elections and Voters*, 14-16.
Mandamus to obtain possession of office, books, records, etc., see *Mandamus*, 13-19.
Powers of executive officers, see *Constitutional Law*, 15-28.
Questioning title to office, see *Quo Warranto.*
Review of official acts by *certiorari*, see *Certiorari*, 30-32.
Reward to officer for performance of official duty, see *Reward.*
School officers, see *Schools and School-Districts*, 16-20.
State officers, see *States and State Officers.*
Town officers, see *Towns*, 5.
Venue in actions against officers, see *Venue in Civil Cases*, 3.

Eligibility.

1. Under Const. Minn. art. 7, § 7, providing that every person entitled to vote at any election shall be "eligible" to office, a person of foreign birth cannot hold office who first declares his intention to become a citizen of the United States after his election, but before the commencement of the term for which he has been elected.—State v. Sullivan, (Minn.) 47 N. W. 802.

45 Minn. 309.

Distinguishing Territory v. Smith, 3 Minn. 240, (Gil. 164;) In re Barnum, 8 N. W. 375, 27 Minn. 466; Scott County v. Ring, 13 N. W. 181, 29 Minn. 398.

Incompatible offices.

2. In Minnesota the offices of clerk of the district court and of court commissioner are not incompatible, and the acceptance of one by the incumbent of the other will not operate to vacate the latter; and a writ of attachment issued by the same person as deputy-clerk, who allowed it as court commissioner, is not void.—Kenney v. Goergen, (Minn.) 31 N. W. 210.

36 Minn. 190.

Giving bond.

3. The appointment of a county treasurer by resolution of the county commissioners was "upon the express condition" that he should give bond and qualify within two days. His bond was not presented to the board until three days afterwards, but was then accepted and approved. *Held*, that this was a modification of the resolution, and the appointment was valid. —State v. Ring, 11 N. W. 233, 29 Minn. 78.

Term.

4. The register of deeds for a county, elected at the annual election in the year 1868 for the term commencing January, 1869, died before

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qualifying or entering on the duties of his office. *Held* that, under Gen. St. Minn. 1866, c. 9, § 2, providing that the term of office of such register should be two years, and until his successor is elected and qualified, the incumbent was entitled to hold the office until January, 1871, and until his successor was elected and qualified. Gen. St. Minn. c. 8, § 125.—State v. Benedict, 15 Minn. 198, (Gil. 153.)

Vacancies.

5. Under Gen. St. Minn. 1866, c. 9, § 2, declaring that every office shall become vacant by "the death of the incumbent" before the expiration of the term, no vacancy is created by the death of an officer elect who has not qualified and taken possession of the office.—State v. Benedict, 15 Minn. 198, (Gil. 153.)

6. A register of deeds elect died before qualification and entry into the office. The successor of the incumbent of the office could not be legally elected until the annual election of 1870, and therefore the legislature declared the office vacant, and authorized the county commissioners to fill the vacancy, (Sp. Laws Minn. 1869, c. 83;) but relator was illegally elected to the office at the annual election of 1869. *Held*, that the question whether or not the special act declaring a vacancy in the office, and authorizing the county commissioners to fill the same, was unconstitutional, was immaterial to relator, his election being illegal, and that he was not entitled to a certificate of election.—State v. Benedict, 15 Minn. 198, (Gil. 153.)

Right to office and its records.

7. Where the term of office of the judge of a county court of probate has expired, the person to whom the certificate of election as his successor is issued, having qualified, is *prima facie* entitled to the possession of the books and records of such office, although a contest of the election may be pending.—Crowell v. Lambert, 10 Minn. 369, (Gil. 295.)

Compensation.

8. One claiming to be elected district attorney entered in office and received the salary until ousted by judgment. Thereafter the rightful officer sued the board of supervisors for the salary of the office while occupied by the intruder. *Held* that, in the absence of any notice to the board of his claims, he could not recover.—Parker v. Board Sup'rs Dakota County, 4 Minn. 59, (Gil. 30.)

9. Where the official term of an officer whose salary is fixed at an annual sum is shortened by a constitutional amendment, his salary ceases with his term, and he is only entitled to compensation *pro rata* to that time.—State v. Frizzell, 18 N. W. 316, 31 Minn. 460.

Distinguished in Beatty v. Sibley County, 21 N. W. 549, 32 Minn. 471.

10. The emoluments of public offices, when not otherwise provided by the constitution, may be increased, reduced, or regulated by law during the term of office, at the will of the legislature, and it cannot be objected by a county treasurer that his office is singled out for reduction.—County Com'rs Hennepin County v. Jones, 18 Minn. 199, (Gil. 182.)

Posting statutory fee-bill.

11. Comp. St. Minn. c. 63, § 33, requiring certain officers, including justices of the peace, to set up the statutory fee-bill in their offices within six months after the passage thereof, applied only to those in office at the time of its passage, or coming into office within six months thereafter.—Kennedy v. Raught, 6 Minn. 235, (Gil. 155.)

Powers.

12. Persons dealing with public officers, acting under statutory authority, are chargeable with notice of the extent of, and limitation upon, such authority.—Mitchell v. Board County Com'rs St. Louis County, 24 Minn. 459.

Personal liability.

13. The contracts of a public agent, acting in the line of his duty, are binding on his principal or government, and not on himself.—Balcombe v. Northup, 9 Minn. 172, (Gil. 159.)

14. Where public agents, in good faith, contract with parties having full knowledge of the extent of their powers and authority, or equal means of knowledge with themselves, and, through ignorance of the law, exceed their authority, they will not become personally liable unless the intent to incur such liability is clearly expressed.—Sanborn v. Neal, 4 Minn. 126, (Gil. 83.)

Misconduct—Indictment.

15. Where an officer, assuming to act officially under his official designation, and in such manner as to deceive and mislead others, corruptly does an act beyond his authority, he is guilty of misbehavior in office, for which he may be indicted.—State v. Wedge, 24 Minn. 150.

16. An indictment of an officer for neglect of an official act must show that it was his duty to perform such act.—State v. Coon, 14 Minn. 456, (Gil. 340.)

Oils.

Inspection of illuminating oils, see *Inspection*.

Opinion Evidence.

See *Criminal Law*, 79; *Eminent Domain*, 203-211; *Evidence*, 115-183; *Homicide*, 70-74.

Option.

To purchase, see *Sale*, 8.

ORDERS.

County orders, see *Counties*, 75, 76.
Of court or judge, see *Appeal and Error*, 24-133; *Practice in Civil Cases*, 40-48, 60; *Summons*, 46, 47.

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Construction and effect.

1. An order directed to and accepted by defendants to pay plaintiff "$250 out of the avails, when received, from the sale of logs in your [defendants'] hands belonging to" the drawer, being payable out of a particular fund, is not a bill of exchange, and to recover thereon plaintiff must show what "the avails" are, and that they have been received by defendants.—Kelly v. Bronson, 4 N. W. 607, 26 Minn. 359.

2. A., being indebted to defendants in a certain sum, gave them a bill of sale of certain logs on the agreement that defendants should sell the logs, retain the amount of their debt and expenses, and pay the residue, if any, to A. Afterwards, A. gave plaintiff an order on defendants, which they accepted, for $250, payable "out of the avails when received from the sale of logs in your [defendants'] hands belonging to me [A.]" *Held*, that the words "belonging to me" referred to "avails," and not to "logs."—Kelly v. Bronson, 4 N. W. 607, 26 Minn. 359.

3. T. J. C. gave plaintiff a written order on defendants in these words: "Please pay to the bearer, J. R. E., ninety-five dollars, on delivery of Dakota maps per agreement," which they accepted by indorsing on it: "We hereby agree to pay the within when due T. J. C. on the delivery of the Dakota maps." *Held*, that no other claims except what pertained to the matter of the maps mentioned can be taken into account to determine defendant's liability.—Everard v. Warner, (Minn.) 31 N. W. 353.

36 Minn. 383.

Ordinance.

See *Municipal Corporations*, 15-71.

Ortonville, City of.

Assessor, see *Municipal Corporations*, 76.

Ouster.

Of cotenant, see *Tenancy in Common and Joint Tenancy*, 1-3.

Owatonna, City of.

City justice, see *Courts*, 22.

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P.

Paper-Books.

On appeal, see *Appeal and Error*, 190-193.

Pardon.

Contract to secure, see *Attorney and Client*, 25, 26.

PARENT AND CHILD.

See, also, *Bastardy; Guardian and Ward; Infancy.*

Earnings of child, see *Infancy*, 5, 6.

Support of child — Liability of mother.

1. A widow after marriage to a second husband is not liable for the support of her minor child by her former husband, where such child has property of his own. She is entitled to have the income of the child's property applied to his support.—In re Besondy, 20 N. W. 366, 32 Minn. 385.

—— Liability of stepfather.

2. A stepfather is not bound to maintain the children of his wife by her former husband, unless he voluntarily assumes the parental relation, and receives them into his family under circumstances such as to raise a presumption that he has undertaken to support them gratuitously.—In re Besondy, 20 N. W. 366, 32 Minn. 385.

Right of child to use of family property.

3. The relation of parent and child gives the latter the right, subject to such regulations as the parent may adopt, to use in a careful and proper manner the family property.—Bennett v. Gillette, 3 Minn. 423, (Gil. 309.)

4. In an action to recover the value of a carriage and team of horses, it appeared that defendant, at the request of plaintiff's daughter, undertook to drive her to a certain place, and that the horses ran away and were killed, and the carriage destroyed. *Held*, that the daughter had a right to use plaintiff's property, customarily applicable to family purposes, and that defendant had no possession, but was a mere passenger on the daughter's invitation, and not liable.—Bennett v. Gillette, 3 Minn. 423, (Gil. 309.)

Action for injury to child.

5. Under Gen. St. Minn. 1866, c. 66, § 33, which provides that "a father * * * may maintain an action for the injury of the child," a father may maintain an action for injury to his minor child in all cases where at common law an action might have been maintained on behalf of such minor.—Gardner v. Kellogg, 23 Minn. 463.

6. In an action brought by a parent for injuries to a minor child under Gen. St. Minn. 1866, c. 66, § 33, which provides that "a father * * * may maintain an action for the injury of the child," the damages recoverable are those sustained by the minor only, and do not include those resulting to the parent from loss of services.—Gardner v. Kellogg, 23 Minn. 463.

Protection of child in commission of crime.

7. A parent has no right to protect his child in the commission of crime, though he may defend the child as the child itself might do.—State v. Herdina, 25 Minn. 161.

Parks.

City, see *Municipal Corporations*, 202-210.

Parol Agreement.

See *Frauds, Statute of; Insurance*, 12-15; *Work and Labor*, 1, 2.

Parol Evidence.

See *Evidence*, 256-350.

Parol Trusts.

See *Trusts*, 13-33.

PARTIES.

Absence, see *Limitation of Actions*, 48-55; *New Trial*, 40-42.
Aliens as parties, see *Aliens*, 1, 2.
Counterclaims, see *Counterclaim and Set-Off.*
Death, see *Abatement and Revival*, 14-28; *Judgment*, 2, 3; *Limitation of Actions*, 47.
Deposition of party as witness, see *Deposition*, 1, 2.
Designation in pleading, see *Pleading*, 38.

In actions by
- Agent as trustee of express trust, see *Principal and Agent*, 101, 102.
- Assignee, see *Assignment*, 27, 28.
- Stockholders on behalf of corporations, see *Corporations*, 122-129.

In actions by or against
- Husband or wife, see *Husband and Wife*, 76.

In actions for
- Causing death, see *Death by Wrongful Act*, 5-7.
- Conversion, see *Conversion of Personal Property*, 10-12.
- Deceit, see *Deceit*, 26-30.
- Forcible entry and detainer, see *Forcible Entry and Detainer*, 6.
- Foreclosure, see *Mortgages*, 336-339.
- Nuisance, see *Nuisance*, 22-24.

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In actions for
Specific performance, see *Specific Performance*, 78-80.
Trespass, see *Trespass*, 10.
Wrongful attachment, see *Attachment*, 107.
In actions on
Contracts, see *Contracts*, 138.
Negotiable instruments, see *Negotiable Instruments*, 160-166, 172, 173.
Policies of insurance, see *Insurance*, 125-127.
Replevin bonds, see *Replevin*, 96.
In actions to
Enforce mechanics' liens, see *Mechanics' Liens*, 141-144.
Quiet title, see *Quieting Title*, 20, 21.
Set aside fraudulent conveyances, see *Fraudulent Conveyances*, 79-85.
Try tax title, see *Taxation*, 257, 258.
In bankruptcy proceedings, see *Bankruptcy*, 3-5.
condemnation proceedings, see *Eminent Domain*, 125-127.
mandamus proceeding, see *Mandamus*, 26-29.
proceedings by *quo warranto*, see *Quo Warranto*, 8-12.
—— to enforce liability of stockholders for corporate debts, see *Corporations*, 158-165.
—— to recover possession of demised premises, see *Landlord and Tenant*, 87, 88.
Interpleader, see *Interpleader*.
Intervention in garnishment proceedings, see *Garnishment*, 62-73.
New trial as to portion of defendants, see *New Trial*, 80-82.
On appeal, see *Appeal and Error*, 17-23, 151-160, 683.
Parol evidence as to parties to written instrument, see *Evidence*, 323-328.
Presumptions as to, on appeal, see *Appeal and Error*, 408, 409.
Privilege from service of process, see *Summons*, 23, 24.
Requiring performance of physical act by party, see *Trial*, 1, 2.
Right to fees as witnesses, see *Witness*, 113.
Substitution of indemnitors of sheriff, see *Sheriffs and Constables*, 46.
To contract, see *Contracts*, 56-65; *Frauds, Statute of*, 58, 59; *Specific Performance*, 7-10.
covenant, see *Covenants*, 1, 2.
deed, see *Deed*, 3-6.
judgment, see *Judgment*, 115-131.

Who may sue—Party in interest.

1. One to whom a note and accompanying mortgage are given may enforce the same in his own name, though a third person has an interest in the debt.—Lundburg v. Northwestern Elevator Co., 43 N. W. 685, 42 Minn. 37.

Proper or necessary parties—Plaintiffs.

2. In an equitable action brought to cancel a contract by which three persons—A. and B. as copartners, and C.—became agents for several other persons in the purchase and management of real property, and to recover a stated sum of money which, it was claimed, had been made and kept by the copartners in buying the property for less than the amount represented by them to the principals as the purchase price, the fact being unknown to C., C. is a proper party plaintiff to the action.—Crump v. Ingersoll, (Minn.) 46 N. W. 141.

44 Minn. 84.

3. The entire legal title being in the plaintiff, he could maintain an action for the cancellation of deeds in his own name, although other parties had some equitable interest in the property with him.—Triggs v. Jones, (Minn.) 48 N. W. 1113.

46 Minn. 277.

4. Defendants executed to plaintiff and two others in form, jointly, a bond in the penal sum of $3,000, reciting that the principal obligor had borrowed a certain sum from plaintiff, and to secure the same had given him a mortgage on her land; that she had also borrowed a certain sum from the other obligors, and to secure the same had given them a second mortgage; and that she was about to erect a house on the land. The conditions were that the bond should be void if she erected the house according to certain specifications, and that in case of her default plaintiff should have the right to complete the house, and recover on the bond the sum expended by him in doing so; that the bond should first apply to the payment of any claim plaintiff might have by reason of the principal obligor's default in its conditions; and that the liability to the other obligees, in case of such default, should be limited to the deficiency, if any, after foreclosure and sale of the premises under their second mortgage. *Held* that, on default, plaintiff could sue on the bond without joining his co-obligees, since it is apparent that distinct obligations were assumed in favor of plaintiff from those in favor of his co-obligees.—Sprague v. Wells, (Minn.) 50 N. W. 535.

47 Minn. 504.

—— Defendants.

5. In an action by a stockholder of a bank, praying the dissolution of the corporation, the vacation of an assignment made by the president and cashier, alleged to have been made without the knowledge of the stockholders, and with intent to defraud them, removal of the assignee, and appointment of a receiver, the bank, the president, and the cashier and assignee, are all proper parties defendant.—Mitchell v. Bank of St. Paul, 7 Minn. 252, (Gil. 192.)

6. The cashier is a proper party, though no fraud on his part is shown, nor relief as to him asked. ATWATER, J., dissenting.—Mitchell v. Bank of St. Paul, 7 Minn. 252, (Gil. 192.)

7. Plaintiff was owner, and S. & J. M. pledgees, of certain personal property, which they, with S. & E. L., as parties of the first part, transferred to B. and others, as parties of the second part, and B. was constituted agent and trustee of the other parties of the second part, and given power to sell certain of the property, and apply the proceeds to the payment of certain debts, the remainder of the property being leased by the parties of the second part to S. & E. L.; and it was agreed that plaintiff, on paying the balance of the debts, should have a reconveyance of such remainder of the property, and that, on his default, B. should have power, after a certain time, to sell the same. *Held*, in an action against the trustee and some of the *cestuis que trustent* for an accounting, that S. & E. L., as lessees of the parties of the second part, were not proper parties defendant, nor was one of the pledgees whose debt had been paid, but that the other pledgee and S. L. were proper defendants, as debt-

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ors in one of the unpaid debts.—Fish v. Berkey, 10 Minn. 199, (Gil. 161.)

8. A complaint against J. and W. alleged that defendants were partners under a certain firm name. The answer alleged that the firm was composed of defendants and one R. On plaintiff's motion, it was ordered that R. be made a party defendant, and that he answer the complaint. The complaint stated no cause of action against R., and was not amended so as to cure the defect. *Held*, that the order making R. a defendant to the action was erroneous, and should have been vacated.—Penfield v. Wheeler, 7 N. W. 364, 27 Minn. 358.

9. In a suit to enjoin the foreclosure of a mortgage on the ground that it has already been satisfied, the person to whom the notes secured by the mortgage are payable is not a necessary party.—Redin v. Branhan, (Minn.) 45 N. W. 445.
43 Minn. 283.

10. The assignor of a mortgage, who covenants that it is unpaid, is not a necessary party to a suit against the assignee to enjoin the foreclosure of the mortgage on the ground that it had been satisfied prior to the assignment.—Redin v. Branhan, (Minn.) 45 N. W. 445.
43 Minn. 283.

11. A deed conveying real estate cannot be reformed in an action to which the owners are not parties.—Watson v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 1129.
46 Minn. 321.

12. A bill alleged that defendant had an equitable interest in land under a contract with the holder of the legal title, one P., and that he assigned such interest to plaintiff; that, after P. died, defendant procured his successor to sell all the land to third persons, having no notice of either contract or assignment, thereby divesting plaintiff's interest; that defendant did this to defraud plaintiff, and that he received the profits of the transaction; and it prayed an accounting, etc., against him. *Held*, that P.'s successor was not a necessary party where it appeared that P.'s claims had been satisfied out of the proceeds of the sale.—Smith v. Glover, (Minn.) 46 N. W. 406.
44 Minn. 260.

13. In an action against a city to enjoin the payment of a certificate of indebtedness, the complaint alleged that the certificate was for money advanced for grading a street in the ninth ward, and was issued and held by D. as a claim against the city, to be charged in account against the ninth ward funds; that said certificate was for value received assigned to D.; and that he was the owner thereof, and the same was wholly unpaid; and, by reason of further allegations in the complaint, plaintiff insisted that the claim was invalid, and prayed that the city be enjoined from taking any steps for its payment. *Held* that, as the complaint showed on its face that D. was the owner of the claim, he was a necessary party.—Graham v. City of Minneapolis, 42 N. W. 291, 40 Minn. 436.

Joinder of defendants.

14. In an action by a creditor to subject property fraudulently conveyed to the payment of his claim, different parties, holding under several fraudulent conveyances from the debtor, may be joined in one action as defendants.—North v. Bradway, 9 Minn. 183, (Gil. 169.)

15. Where property in dispute between parties claiming title thereto is sold, and proceeds paid into court to abide the event of the action, an action by the real owner, who is not a party to the former proceedings, may be maintained against all such claimants for the recovery of the fund so in the hands of the court, and his cause of action is single, though defendants thereto claim through different titles.—Mann v. Flower, 25 Minn. 500.

16. The complaint in an action for damages for negligence and unskillfulness of defendant as a physician and surgeon alleged, in substance, that defendant and G. were copartners as practicing physicians and surgeons; that plaintiff employed the firm to treat him professionally; that part of the time G. attended him, and did his work skillfully; that the remainder of the time defendant attended him, and performed his duties negligently and unskillfully, causing the injuries complained of. *Held*, that this was an action on the contract, the gist and *gravamen* of which was the breach of contract, and that both copartners should be joined as defendants.—Whittaker v. Collins, 25 N. W. 632, 34 Minn. 299.

17. Under Gen. St. Minn. 1878, c. 66, § 36, providing that "persons severally liable upon the same obligation or instrument * * * may all or any of them be included in the same action," in an action on a contractor's bond, given to plaintiff conditioned that the contractor should pay all claims, and prevent a lien from attaching, plaintiff may join all, or one or more, of the persons severally liable.—Steffes v. Lemke, (Minn.) 41 N. W. 302.
40 Minn. 27.

18. An order improperly allowing persons to be made parties defendant to an action for the specific performance of a contract to convey may be vacated on motion as matter of right, and a petition for that purpose is unnecessary.—Steele v. Taylor, 1 Minn. 274, (Gil. 210.)

19. Excess of parties defendant is not a ground of demurrer by a party properly sued.—Lewis v. Williams, 3 Minn. 151, (Gil. 95;) Nichols v. Randall, 5 Minn. 304, (Gil. 240.)

Defect of parties.

20. Where there is a clear defect of necessary parties, it may be allowable for the court to suggest the defect and continue the cause until they are added; but the court will not, when such defect is first suggested or becomes apparent at the hearing, for that cause absolutely dismiss the complaint.—Cover v. Town of Baytown, 12 Minn. 124, (Gil. 71.)

Misnomer.

21. The full names of the parties should be used in the title of a cause, not the initials merely.—Knox v. Starks, 4 Minn. 20, (Gil. 7;) Gardner v. McClure, 6 Minn. 250, (Gil. 167.)

22. The use of initials in designating either plaintiff or defendant in judicial proceedings is

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bad practice, but not ground for demurrer.—Gardner v. McClure, 6 Minn. 250, (Gil. 167.)

23. The fact that the parties to an action are designated by the initials of their Christian names is no ground for the dismissal of the complaint, the proper remedy being a motion to require the complaint to be amended in that respect.—Kenyon v. Semon, (Minn.) 45 N. W. 10.

43 Minn. 180.

24. The word "junior" is no part of a man's name, and need not be used in legal proceedings. —Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

25. A judgment entered by default against one who is sued by a wrong name, there being no suggestion that his real name is unknown, or that he is known by one name as well as the other, is rendered without jurisdiction of defendant's person, and is void.—Atwood v. Landis, 22 Minn. 558.

26. Defendant, William H. Landis, was sued as "William A. Landers," without any suggestion that the latter was not his right name. Summons was personally served, and judgment by default duly entered *Held*, that the court acquired no jurisdiction, and that the judgment and subsequent order, made on notice, amending the proceedings by substituting the true name, were void.—Atwood v. Landis, 22 Minn. 558.

Distinguished in Morse v. Barrows, 33 N. W. 707, 37 Minn. 240.

27. In an action commenced by attachment before a justice of the peace, the justice, under section 10, c. 65, Gen. St. 1878, may, upon a plea in abatement for misnomer of the defendant, order the process and proceedings corrected by inserting the true name. To justify that, it is not necessary that the process should state that the defendant's true name is unknown.—Morse v. Barrows, (Minn.) 33 N. W. 706.

37 Minn. 239.

Distinguishing Atwood v. Landis, 22 Minn. 558.

28. In a service of summons by publication under Gen. St. Minn. c. 66, § 64, a mistake in printing the name of the defendant "Berlah M. P." instead of "Beulah M. P.," the true name, is not so misleading as to affect the validity of the service. —Lane v. Innes, (Minn.) 45 N. W. 4.

43 Minn. 137.

29. One who accepts and places on record a conveyance of land to himself, wherein his name as grantee is erroneously written, knowing of the misnomer, will be deemed to have adopted such name for the purpose of acquiring and holding the land, and cannot complain if, in judicial proceedings against him with respect to such title, service by publication of a summons is addressed to him by such name, and a judgment thereon is effectual as against him.—Blinn v. Chessman, (Minn.) 51 N. W. 666.

Idem sonans.

30. The similarity between the names "William H. Landis" and "William A. Landers" is not such as to constitute a case of *idem sonans*. —Atwood v. Landis, 22 Minn. 558.

Intervention and substitution.

31. On an application by purchasers of land at execution sale to be made parties to a suit in regard to the same, the failure of plaintiff to appear is no evidence of consent that such purchasers may be made parties.—Steele v. Taylor, 1 Minn. 274, (Gil. 210.)

32. Gen. St. Minn. 1878, c. 66, § 131, provides that "any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons." *Held* that, to entitle a party to intervene, he must have an interest in the matter in litigation of such direct and immediate character that he will either gain or lose by the direct legal effect and operation of the judgment therein.—Bennett v. Whitcomb, 25 Minn. 148.

33. In an action to reform certain conveyances, and the power under which they were made, with reference to the description of the land, a party claiming under an adverse tax-title has not such an interest as will entitle him to intervene. —Bennett v. Whitcomb, 25 Minn. 148.

34. The holder of a chattel mortgage whose debt is due, unpaid, and exceeds in amount the value of mortgaged property alleged to have been destroyed by the negligence of a third person, has an interest of such direct and immediate character, in the result of an action brought by the mortgagor against such third person to recover the value of said property, as will entitle him to intervene and participate in the litigation.—Wohlwend v. J. I. Case Threshing-Machine Co., (Minn.) 44 N. W. 517.

42 Minn. 500.

35. Under Gen. St. Minn. 1878, c. 66, § 41, which provides that an action may be prosecuted to the end in the name of the original party notwithstanding any transfer of interest, plaintiff in a suit against a railroad company for negligently setting fire to his buildings may continue the action, although the insurance company has paid him the full amount of his insurance on the buildings.—Nichols v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 32 N. W. 176.

36 Minn. 452.

36. After an action had been brought against a sheriff for wrongful levy of attachments, the sheriff's indemnitors were brought in as defendants. *Held* that, although the facts as to the giving of the indemnity and showing that the indemnitors were chargeable were not pleaded either in the complaint or in the answer of the sheriff, the defect was cured by the answer of the indemnitors, setting forth those facts.—Lesher v. Getman, 15 N. W. 309, 30 Minn. 321.

37. In Minnesota, a stranger to an action cannot make any motion or application therein except to be made a party.—Mann v. Flower, 5 N. W. 365, 26 Minn. 479.

38. Where application is made to the court for leave to intervene, though no such leave is required by Gen. St. Minn. 1878, c. 66, § 131, relating to interventions, it is not improper practice for the court, on such motion, all parties

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being before it, to consider questions in reference thereto, the same as if raised on motion to strike out the intervener's complaint.—Bennett v. Whitcomb, 25 Minn. 148.

39. Under Gen. St. 1878, c. 66, § 124, providing that the court may, before or after judgment, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, the court may amend the record in an action brought by a guardian in his own name, instead of his ward's, to recover insurance due the ward, by inserting the ward's name as plaintiff.—Perine v. Grand Lodge A. O. U. W., (Minn.) 50 N. W. 1022.

40. Where an appeal is from an order bringing up only a portion of the record, a motion for substitution pending appeal should be in the court below; but, if the appeal brings up the entire case, it should be in the appellate court.—Keough v. McNitt, 7 Minn. 29, (Gil. 15.)

PARTITION.

Jurisdiction.

1. The power to make partition, conferred upon the probate court by Gen. St. Minn. c. 55, is only given as an incident of settling the estates of deceased persons, and as a part of the final step of administration,—viz., the decree of distribution,—and can only be exercised while the land is still in the possession of the court for the purposes of administration. After the administration is closed, and the land assigned to the heirs by a decree of distribution in common or undivided shares, no subsequent proceeding for partition can be instituted in the probate court.—Hurley v. Hamilton, (Minn.) 33 N. W. 912.

37 Minn. 160.

When action lies—Possession of plaintiff.

2. Where the purchaser at a foreclosure sale under a mortgage executed by tenants in common afterwards purchases the right of one of the co-tenants to redeem, the estate so acquired is not merged in his previous equitable estate, and he has a right to partition as against the other co-tenant, who paid redemption money to the sheriff in full of the mortgage both as to himself and co-tenant, after the transfer of the co-tenant's right to redeem.—Horton v. Maffitt, 14 Minn. 289, (Gil. 216.)

3. Actual possession of premises, or right to the actual possession thereof, is not necessary to enable one tenant in common to maintain an action for partition, under Gen. St. Minn. 1866, c. 74, which provides that partition may be had by any one who has an estate of inheritance, or for life or for years, as joint tenant or tenant in common of land.—Cook v. Webb, 19 Minn. 167, (Gil. 129.)

4. Where lands leased for a term of years are in the actual possession of the lessee, and owned by several persons as tenants in common, both of the rents and the reversionary estate, they may be partitioned, under Gen. St. Minn. 1866, c. 74, in an action brought by one of such owners and tenants in common, for that chapter does not require that the party seeking partition should be in actual possession of the land.—Cook v. Webb, 19 Minn. 167, (Gil. 129.)

5. The whole matter of title, and of the rights of the parties in the premises, may be determined, and a partition ordered, whenever the plaintiff shows himself seised of the requisite title, whether the land is held or claimed adversely to him or not.—Bonham v. Weymouth, (Minn.) 38 N. W. 805. 39 Minn. 92.

6. The action for partition will not lie against, and the judgment and partition will not affect the estate of, one who is only tenant for life of the whole property of which partition is sought.—Smalley v. Isaacson, (Minn.) 42 N. W. 352.

40 Minn. 450.

7. It will lie for partition of the reversion, although the land be in possession, under an outstanding particular estate. Following Cook v. Webb, 19 Minn. 167, (Gil. 129.)—Smalley v. Isaacson, (Minn.) 42 N. W. 352.

40 Minn. 450.

Summons.

8. Gen. St. Minn. 1866, c. 74, § 2, provides that a summons in partition "shall be addressed by name to all owners and lienholders who are known, and generally to all persons unknown, having or claiming an interest in the property." *Held*, where the complaint shows that the only persons having or claiming an interest in the property are plaintiffs and defendants, the summons is sufficient, the title of the action being given, if addressed "to the above-named defendants."—Martin v. Parker, 14 Minn. 13, (Gil. 1.)

Pleading—Complaint.

9. Where the complaint in an action for partition, in alleging plaintiff's title to the land in controversy, avers that such title was acquired through a deed from the city in proceedings to enforce an assessment for local improvements, and alleges the execution of the certificate of sale and deed, but does not allege the rendition of the judgment in such proceedings, the complaint is insufficient, since it does not show any authority in the city to execute the deed.—Bell v. Dangerfield, 3 N. W. 698, 26 Minn. 307.

Judgment for sale—Motion to vacate.

10. Non-resident defendants were served by publication only. For want of an answer, judgment was rendered, and the lands sold to plaintiff by a referee; it having been found by the court that partition could not be made without great prejudice to the owners. Sale was confirmed, and the lands afterwards conveyed by plaintiff to alleged *bona fide* purchasers. A part of defendants seasonably and properly moved, on affidavits and answers, to vacate the judgment, and set aside all proceedings subsequent thereto, and allow defenses on the merits. The affidavits and answers were ample in form and substance, and were confessedly true. *Held*, that it was not necessary to make the alleged *bona fide* purchasers parties to said motion, nor need they be notified of its pendency; and that the court erred in refusing to permit the interposition of the proposed answers, and

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in denying a trial on the merits.—Welch v. Marks, (Minn.) 40 N. W. 611.

39 Minn. 481.

Appeal.

11. Gen. St. Minn. 1878, c. 74, § 6, provides that in suit for partition, where the titles of the parties have been duly proved or admitted, the court shall render judgment that partition be made, and shall appoint three referees to make it according to the respective rights of the parties as determined by the action. Section 8 provides that upon the confirmation of the report of these referees judgment shall be rendered that such partition shall be effectual forever, etc. *Held*, that the judgment provided for by section 8 is the final judgment in the suit, and, on appeal from that, the judgment prescribed in section 6 may be reviewed.—Doberstein v. Murphy, (Minn.) 47 N. W. 171.

44 Minn. 526.

Occupying claimants — Improvements and taxes.

12. The provisions of the occupying claimants law, (Gen. St. Minn. c. 75, §§ 15-24,) by which one, who goes into possession of land under color of title in good faith has a lien for improvements made, and taxes paid, by him without regard to the consent of the real owner, apply to the action for partition.—Smalley v. Isaacson, (Minn.) 42 N. W 352.

40 Minn. 450.

13. A tenant for life, making improvements and paying taxes during the continuance of the life-estate, is not entitled to the benefits of the occupying claimants law. — Smalley v. Isaacson, (Minn.) 42 N. W. 352.

40 Minn. 450.

14. The value of improvements belonging to tenant for years of lands partitioned, and which do not form a part of the realty to be divided, is immaterial in a suit for partition.—Cook v. Webb, 19 Minn. 167, (Gil. 129.)

PARTNERSHIP.

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Suretyship between partners, see *Principal and Surety*, 1, 2.

I. The Contract.

What constitutes as between the parties.

1. Tenants in common of certain real estate entered into a contract for the construction of certain mills thereon, each to contribute a certain proportion of the expense, and after the construction to run the same, sharing profits in a certain proportion. *Held*, that they were not thereby partners in the ownership of the mills, and a claim of one against the other for failure to perform was a personal claim, and not one against the real estate.—Moody v. Rathburn, 7 Minn. 89, (Gil. 58.)

2. Plaintiffs and defendant entered into articles of a copartnership for a certain time; defendant to have the privilege at the end of that period of receiving, instead of a share of the profits, a certain sum as salary for his services. At the end of the time specified, he took the gross amount, instead of a share of the profits. *Held* that, as between themselves, they were partners, with the privilege on the part of defendant to be a partner or salaried employe, and that at his choice to be an employe the plaintiffs remained partners.—Bidwell v. Madison, 10 Minn. 13, (Gil. 1.)

3. By a contract between plaintiffs and defendants for the purchase of eggs during a certain period, and for the storage and sale of the eggs on joint account, the funds required were to be furnished in equal proportions. Either party was to have the right to make sales. No compensation was to be charged by either for services, and the profit or loss was to be equally divided. *Held*, that this created a copartnership between them, which was dissolved by the completion of the business contemplated.—Bohrer v. Drake, 23 N. W. 840, 33 Minn. 408.

4. Where a complaint alleges that plaintiff was entitled to a share in the profits of a transaction set out in the complaint, that he was to contribute more or less of his time, and was to repay to defendants money advanced by them for his interest, without regard to profit or loss, it alleges facts constituting him a partner, and when the business is at an end, and the assets reduced to money, he is entitled to an accounting.—Stern v. Harris, (Minn.) 41 N. W. 1036.

40 Minn. 209.

5. J., without authority, but assuming to act as a guardian for his infant son T., entered into a partnership agreement with one V. The money

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required to be contributed was paid by J. from his own means, and by the agreement he was authorized to act in all firm matters for T. The share of the profits coming to T. was drawn by J., and mingled with his other moneys, and no account thereof was ever given to T. The transaction was never ratified by T. *Held*, that the evidence showed a partnership between J. and V. only.—Miles v. Von Deyn, 6 N. W. 417, 27 Minn. 56.

What constitutes as to third persons—Holding out as partners.

6. Where two persons engage in carrying on a business, one furnishing the capital and the other the labor and skill, and they share the profits, they are partners, at least as to third persons.—Wright v. Davidson, 13 Minn. 449, (Gil. 415;) Warner v. Myrick, 16 Minn. 91, (Gil. 81.)

7. An agreement to share the profits of a business, nothing being said about the losses, will constitute a partnership as to third persons.—Warner v. Myrick, 16 Minn. 91, (Gil. 81.)

8. An agreement between a surviving partner and the widow and next of kin provided that such surviving partner should continue the business, and, among other things, that the profits should be divided according to the respective interests of the parties; the same to be divided and apportioned annually, by taking an inventory, keeping accounts, etc. *Held*, that such agreement created a partnership as to third parties.—Delaney v. Dutcher, 23 Minn. 373.

9. An agreement by which a debt due from one is charged to and assumed by another, to be paid out of the profits of a partnership of which the latter is a member, does not have the effect to make the former a member of such partnership.—Delaney v. Timberlake, 23 Minn. 383.

10. Although articles of partnership may be in writing, still one who has been held out as a partner, or is, in fact, a dormant partner, and who has not signed the articles, may be sued and held liable jointly with those who did sign.—Wood v. Cullen, 13 Minn. 394, (Gil. 365.)

11. Defendants entered into articles of association for the purpose of securing the extension and improvement of a public street, not for any purpose of gain or profit, intending to become incorporated; but they failed to perfect the proposed incorporation. *Held*, that the prosecution of the contemplated work by the incorporated association did not constitute the association a partnership, nor make defendants copartners, with authority in each to bind all by acts within the scope of the business undertaken.—Johnson v. Corser, 25 N. W. 799, 34 Minn. 355; Upton v. Same, 25 N. W. 801, 34 Minn. 355.

12. The mere stating of an account between the actually contracting parties does not impose a liability upon another, who, after the dealings in question, may be discovered to have been held out as a partner of one of the contracting parties.—Brown v. Grant, (Minn.) 40 N. W. 368.
39 Minn. 404.

13. Persons not partners *inter se* may render themselves liable as such, as to third persons, by holding themselves out to be partners; and, upon the principle of estoppel, this may be by words spoken or written, or by conduct leading to the belief that they are partners.—Cirkel v. Ellis, (Minn.) 31 N. W. 513, 36 Minn. 323.

Evidence.

14. The fact of a copartnership, and who compose it, may, at least in behalf of a third person, be proved orally, though there be written articles.—McEvoy v. Bock, (Minn.) 34 N. W. 740, 37 Minn. 402.

15. In an action against a firm, where one of the defendants is charged, not as an actual member of the firm, but as having held himself out as such, the testimony of the other defendant as to whether he told plaintiff at the time of the dealings sued on that the first defendant was a partner or responsible as such is admissible to establish an estoppel to deny the partnership.—Brown v. Grant, 40 N. W. 268, 39 Minn. 404.

16. A declaration of one person that another not present is his partner is not competent evidence to charge the other as partner.—McNamara v. Eustis, 48 N. W. 1123, 46 Minn. 311.

17. The fact that parties hold themselves out as partners is *prima facie* evidence that they are such.—McCarthy v. Nash, 14 Minn. 127, (Gil. 95.)

Refusal to consummate agreement.

18. An instrument embodying the terms of a proposed partnership was signed with the understanding between the parties that it should be operative only on fulfillment of certain conditions, and for that reason it was retained by the scrivener. *Held*, there having been no delivery of the instrument, that no action would lie for the refusal of one of the parties to consummate the partnership.—Hill v. Webb, 45 N. W. 1133, 43 Minn. 545.

II. Firm Property.

What constitutes.

19. Lands, although the legal title may stand in the name of one or more partners, may, in equity, become partnership property, by agreement between the parties in writing or parol, expressed or implied.—Arnold v. Wainwright, 6 Minn. 358, (Gil. 241.)

19*a*. A contract between I. and M. recited a purchase of lands by M., and provided that he should manage, sell and dispose of the land with the consent of I., who should use his best endeavors to release the lands from certain liens, and that the profits should be divided, one-third to I., and the remainder to M. *Held*, that this created a partnership, so that notice to I. of certain equitable titles in the land was binding on M.—King v. Remington, 29 N. W. 352, 36 Minn. 15.

20. Plaintiffs and C. entered into a joint undertaking as partners for the erection of certain structures on land purchased by them. Lumber was bought by plaintiffs, delivered on the ground, and there used in the building, with their knowledge, by C., who had the active control and supervision. *Held*, that his taking possession and so using the building material made the whole of it the property of the firm.—Person v. Wilson, 25 Minn. 189.

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Transfer.

21. A debt due from an individual member of the firm to the partnership for services performed by the partnership is partnership property, and may be sold and transferred to a third person, and an action at law maintained thereon by such assignee for the recovery thereof.—Russell v. Minnesota Outfit, 1 Minn. 162, (Gil. 136.)

22. Partnership real estate is in equity regarded as personalty, and is subject to the same liability, and the partners to the same restrictions in regard to its disposition, as in the case of other partnership property.—Arnold v. Wainwright, 6 Minn. 358, (Gil. 241.)

Mortgage in firm name.

23. A partnership may take a mortgage of personal property in the firm name, as security for a debt to the partnership.—Kellogg v. Olson, 24 N. W. 364, 34 Minn. 103.

24. In a mortgage of real estate the mortgagee was designated as "D. B. Dorman & Co.," which was the name of a partnership composed of one D. B. Dorman and another. *Held*, that the mortgage operated only in favor of Dorman, whose name was contained in the partnership name.—Gille v. Hunt, 29 N. W. 2, 35 Minn. 357.

Buildings and machinery on land of partner.

25. A firm composed of M. and B. erected with firm money certain buildings and machinery on land owned by M. for the purposes of the firm business, which was thereafter carried on there. No express agreement was made between M. and B. with reference to the ownership of the building and machinery, which were affixed to the land. Afterwards M. borrowed money for the purpose of paying the firm debts, and gave a mortgage on the land, buildings, etc., to secure the loan. *Held*, that the mortgage passed the rights of the firm to the buildings and machinery on the mortgaged land.—Chittenden v. German-American Bank, 6 N. W. 773, 27 Minn. 143.

Evidence.

26. Parol evidence is competent to show land held by one partner to be in fact partnership property.—Sherwood v. St. Paul & C. Ry. Co., 21 Minn. 127.

III. Power of Partners to Bind the Firm.

In general.

27. A partner is not bound by an act of his copartner unless within the general scope of the partnership business, or authorized or recognized by him.—Irvine v. Myers, 4 Minn. 229, (Gil. 164.)

28. Where a writ of attachment for the collection of a firm debt is issued by one partner without the knowledge of the other, but in the firm name, and property is wrongfully taken, both partners are liable for the conversion.—Vanderburgh v. Bassett, 4 Minn. 242, (Gil. 171.)

29. Query, where one deals with a partner, supposing him to have authority in the premises from the firm, whether the burden of showing want of authority is not on the partnership.—Bank of Commerce v. Selden, 3 Minn. 155, (Gil. 99.)

Contracts—Seal.

30. When a written contract, not required to be under seal, within the scope of the partnership business, is executed under seal by one partner in behalf of the firm, the seal may be rejected as surplusage, and the instrument treated as the parol contract of the partnership.—Sterling v. Bock, (Minn.) 41 N. W. 236.*

40 Minn. 11.

31. Where a contract in behalf of a partnership, executed under seal by one partner, is ratified by the other partners, it becomes the deed of the firm as fully as if executed under seal by all the partners.—Sterling v. Bock, (Minn.) 41 N. W. 236.

40 Minn. 11.

32. A debt due a firm is merged in a sealed contract, as to the time and conditions of payment, made by one of the partners in his own name, but authorized and ratified by the firm.—Clark v. Lindeke, (Minn.) 46 N. W. 326.

44 Minn. 112.

Guaranty.

33. The implied authority of a partner to bind his copartners in matters within the general scope of the partnership business does not extend to guarantying the debt of a third person.—Selden v. Bank of Commerce, 3 Minn. 166, (Gil. 108.)

34. Where one partner guarantied the debt of another person in the firm name, an instruction to the jury, in an action upon the guaranty, that if the party to whom it was made had reason to believe that it was made with authority to use the firm name, the firm would be liable, is improper, and ground for a new trial.—Selden v. Bank of Commerce, 3 Minn. 166, (Gil. 108.)

35. The partnership relation does not of itself authorize a partner to guaranty in the name of the firm the obligations of a third person, and the burden of showing authority in him to do so is on the person seeking to enforce such guaranty against the firm.—D. M. Osborne & Co. v. Stone, 13 N. W. 922, 30 Minn. 25.

36. The business of a partnership was the sale of farm machinery as agents, under contracts by the terms of which, whenever they sold a machine partly on credit, they were to take a note of the purchaser for the unpaid part of the purchase money, and guaranty payment thereof. *Held*, that a guaranty by one of the partners of the note given by a person who purchased such a machine from a purchaser thereof from the firm, on an arrangement that such note should be substituted for the note given to the firm by the original purchaser, was outside the business of the partnership, and merely for accommodation, and did not bind the other partner.—D. M. Osborne & Co. v. Thompson, 28 N. W. 260, 35 Minn. 229.

Negotiable instruments.

37. Where one partner draws his own draft in plaintiff's favor, and then accepts it in the name of the firm, *prima facie* the firm is not liable upon such acceptance, and plaintiff cannot recover without proving that such acceptance was

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within the general scope of the partnership business, or was made with the authority or consent of the remaining partners.—Bank of Commerce v Selden, 3 Minn. 155, (Gil. 99.)

38. Articles of copartnership provided that moneys needed for purchases for the firm should "be drawn for by the operating agent" of the firm on one of its members, and a further clause provided that "neither party, nor the agent of the parties, shall sign the firm name to any note or evidence of indebtedness, except with the concurrence of both parties." *Held*, that the second provision was not intended as a restriction on the authority conferred on the operating agent by the first provision, and that drafts drawn by the agent, and signed in the firm name "by B., agent," were authorized by the agreement.—Gaslin v. Pinney, 23 Minn. 26.

Application of payments.

39. Plaintiff sold defendant, March 7th, a bill of goods on 60 days' credit. April 1st, defendant took S. into partnership. April 16th and 17th, and May 18th, plaintiff sold to the firm, (but in the name of defendant,) three other bills of goods on 60 days' credit. May 14th, defendant paid plaintiff $50 to apply on the bill of March 7th, and June 18th, paid $100 to be applied generally on account, a statement of which was presented by plaintiff, which included the bill of March 7th. July 23d, plaintiff presented to S., in defendant's absence, an account which contained the last three bills, (but not that of March 7th,) on which was credited $150, leaving a balance which S. paid, and plaintiff receipted the account. S. then knew nothing about the bill of March 7th. All payments were made with partnership funds. Plaintiff sued for the bill of March 7th, and defendant pleaded payment of $50, May 14th, and $100, June 18th. *Held*, that the application of those payments having been made, and the credits accepted by S., defendant's partner, the latter was bound thereby.—Flarsheim v. Brestrup, (Minn.) 45 N. W. 438.
43 Minn. 298.

40. Two partners, doing business as M. & Co., had also become interested in a firm consisting of three other members, called the "P. E. Co." M. & Co. acted as the P. E. Co.'s commission house, proceeds of goods sold being deposited to M. & Co.'s account in plaintiff bank and remittances made to the P. E. Co. It being in issue whether loans made to M. were on account of M. & Co. or the P. E. Co., and there being evidence to justify a conclusion that M. & Co. had made the loans for the P. E. Co. and misappropriated the funds to their own purposes, in part at least, an instruction that, to hold the members of the P. E. Co., plaintiff must show that the business transacted by M. & Co. with plaintiff was wholly connected with the business of the P. E. Co.,—that is, that they borrowed and checked and deposited for the use of the P. E. Co.,—is error. If M. & Co. made these loans for themselves and not for the P. E. Co., and credit was only given to them, the fact that they afterwards applied the money for the benefit of the P. E. Co. would not make the latter liable.—National Bank of Commerce v. Meader, (Minn.) 41 N. W. 1043.
40 Minn. 325.

Payment of individual debt.

41. Where a partnership note is given for the private debt of one of the partners, or the partnership name used for the accommodation of, or as surety for, the partner or a third person, and such fact is known to the creditor, or is implied from the nature of the transaction, at the time the note or other instrument is received by him, the burden of proof is thrown upon the creditor to show a previous authority or subsequent consent on the part of the other partners before they can be charged.—Bank of Commerce v. Selden, 3 Minn. 155, (Gil. 99.)

42. One partner cannot, without the consent of his copartners, bind the partnership by his agreement, made in the firm name, to apply the partnership property in satisfaction of his individual debts.—Hinds v. Backus, (Minn.) 47 N. W. 655.
45 Minn. 170.

43. A partner bought goods from the firm, and gave his note therefor, payable to the firm, which it indorsed and had discounted, using the proceeds in its business. The note was afterwards renewed several times by the maker executing a new note, and procuring the indorsement of the firm to be made by one duly authorized to indorse the firm's paper. *Held*, that the firm was liable on such indorsements.—Wilson v. Richards, 9 N. W. 872, 28 Minn. 337.

44. Plaintiffs drew a draft on one H. for an individual debt due them from H. of $814, and sent the draft to a bank for collection. H. gave the bank his individual check for $500, and the check of the firm of H. & Co., which firm was composed of H. and defendant, for the balance due on the draft, $323. Both checks were drawn on the bank which held the draft. It appeared that when H. and defendant entered into the partnership agreement defendant paid H. $558 to pay the debt for which the draft was drawn. It did not appear whether H. had used the $558, or had put it in with the funds of the firm. *Held*, that the knowledge of the bank that funds of the firm had been used to pay the draft charged plaintiffs with notice thereof, and the evidence was sufficient to justify the submission to the jury of the question whether H. had authority to so use the funds of the firm.—Davis v. Smith, 7 N. W. 731, 27 Minn. 390.

45. Where one partner, without the consent of the others, delivers the note of the firm in payment of its debts, and of a debt of his own, there is a failure of consideration to the extent of the individual debt, and the creditor has the burden of proving that the other partners consented to such an application of the note.—Farwell v. St. Paul Trust Co., (Minn.) 48 N. W. 326.
45 Minn. 495.

Accounts and admissions.

46. A partner is bound by statements contained in accounts and communications sent out by his copartner, where the matters contained therein are within the scope of the ordinary and authorized business of the firm, though he had no knowledge as to the character of such statements.—Coleman v. O'Neil, 1 N. W. 846, 26 Minn. 123.

47. Where two persons undertake a joint agency, they are partners as far as concerns the principal; and an account rendered to the principal, within the scope of the business, by one of them

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will be binding upon the other, though he had no knowledge of it, and had no real interest in the business, but lent his name for the purpose of securing credit for the former.—Milwaukee Harvester Co. v. Finnegan, (Minn.) 45 N. W. 9.
43 Minn. 183.

48. After the dissolution of a partnership, an admission by one of the partners does not bind the others.—National Bank of Commerce v. Meader, 41 N. W. 1043, 40 Minn. 325.

Submission to arbitration.

49. A submission to arbitration by one member of a firm of a controversy relating to the partnership business is not binding on his copartners. —Walker v. Bean, 26 N. W. 232, 34 Minn. 427.

After dissolution.

50. After dissolution, one member of a firm cannot waive the statute of limitations upon a claim already barred, so as to affect the other.—Whitney v. Reese, 11 Minn. 138, (Gil. 87.)

51. After the dissolution of a copartnership, one partner cannot, by indorsement of a note in the firm name to one cognizant of the dissolution, bind as indorsers the other partners of the late firm, though such indorsement be in payment of a balance due from such firm to the indorsee.—Bryant v. Lord, 19 Minn. 396, (Gil. 342.)

IV. Rights and Remedies of Partners inter Se.

Funds furnished for partnership purposes.

52. By an agreement between plaintiffs and defendants in the nature of a contract of partnership the funds necessary for the business were to be furnished in equal proportions by the two parties, and were to be procured upon their respective notes for equal amounts, the notes of each party to be indorsed by the other. *Held*, that plaintiffs were entitled to be reimbursed for payments by them on such notes made by defendants.—Bohrer v. Drake, 23 N. W. 840, 33 Minn. 408.

Property purchased in fraud of partnership.

53. H., T., and R. having formed a copartnership to buy and sell land, T. advised the purchase of a certain lot offered for sale at $2,500. While H. and R. were considering the purchase, T. agreed with the owner that if T. should procure a purchaser of two-thirds of the lot for $2,500, the owner would convey to T. for his services the other one-third. T. concealed this agreement from H. and R., and by representing to them that the one-third of the lot had been sold to another person, but that the remainder could still be purchased at $2,500, procured them to agree to such purchase, and such two-thirds of the lot was conveyed to the three, and the one-third T. procured the owner to convey to C., the wife of T., for no consideration other than the agreement between the owner and T. *Held*, that C. held the title to the one-third in trust for H. and R., to the extent of their interest in the partnership.—Hodge v. Twitchell, 23 N. W. 547, 33 Minn. 389.

Negligence as to goods of firm.

54. By a partnership agreement for the purchase, storage, and sale of eggs on joint account between plaintiffs and defendants, defendants, who had a cold storage warehouse, were to store the eggs therein until disposed of. *Held*, that they were liable to plaintiffs for a failure to exercise ordinary care in keeping the eggs, through the want of which some of the eggs became spoiled.—Bohrer v. Drake, 23 N. W. 840, 33 Minn. 408.

Distribution of property.

55. Upon dissolution the property of a firm is subject first to the payment of firm liabilities. What is left is the property of the several members, and subject to distribution among them. No one but creditors have any interest in the disposition made by the firm of its property.—Pease v. Rush, 2 Minn. 107, (Gil. 89.)

Dissolution by death of partner.

56. A provision in articles of partnership for the continuance of the partnership for a fixed period does not prevent the death of a partner during that period from operating as a dissolution of the partnership.—Hoard v. Clum, 17 N. W. 275, 31 Minn. 186.

Accounting.

57. Where one partner has the exclusive control of the finances, and the custody and control of the partnership funds and books of account, and, on an accounting, it appears that the receipts have exceeded the disbursements, he is, in the absence of anything to show that the excess was applied to the use of the firm, properly chargeable with such excess.—Johnson v. Garrett, 23 Minn. 565.

58. Plaintiff's share of the profits of a firm in which he was partner was to be ⅓, with a guaranty that it would be at least $5,000 per year. For three years his share of the profits was credited to him on the books, but in each year it was less than the $5,000, and the balance was not credited to him. *Held*, that these yearly accountings were merely to ascertain the net profits and did not alter the terms of the written partnership agreement.—Broderick v. Beaupre, (Minn.) 42 N. W. 83.
40 Minn. 379.

59. Where a partner has left a portion of his accrued profits in the business, the statute of limitations does not begin to run in any event against his right to recover this interest before the dissolution of the firm.—Broderick v. Beaupre, (Minn.) 42 N. W. 83.
40 Minn. 379.

60. Though the articles of partnership between plaintiff and defendant provide that defendant shall be chargeable with all credits given to persons other than those included in a list to be furnished him, no such charge can be made against him in an accounting, where no list was ever furnished him.—Cole v. Aune, (Minn.) 49 N. W. 195.
46 Minn. 378.

61. In an action by the wife of a deceased partner against the surviving partner, upon a note

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made by the firm, the defendant cannot offset indebtedness alleged to be due him from the estate of the deceased partner, on the ground that the money loaned to the firm, for which the note was given, was advanced to her by the deceased partner when his estate was in fact insolvent; for there must first be an accounting, and the liability of the deceased partner definitely established, before assets in her hands can be reached, or she be charged as trustee of the estate of the deceased partner, or held liable to account in an action between her and the surviving partner.—Little v. Simonds, (Minn.) 49 N. W. 186.

46 Minn. 380.

Action for accounting.

62. No demand is necessary before bringing an action for an accounting between partners. —McClung v. Capehart, 24 Minn. 17.

63. The fact that a member of a firm has failed to pay the full amount agreed by him to be contributed to the capital stock of a firm will not prevent his maintaining an action against the balance of the firm for an accounting.—Palmer v. Tyler, 15 Minn. 106, (Gil. 81.)

64. In an action by one partner against the others for an accounting, a person to whom one of the partners, being insolvent, had transferred partnership property with intent to defraud the other partners, and evade payment of his share of the losses of the firm, may be properly made a defendant.—Palmer v. Tyler, 15 Minn. 106, (Gil. 81.)

65. A supplemental bill, filed in a suit between partners for a dissolution and an accounting, alleged that the settlement pleaded in bar by defendant was procured on the false inventories of defendant as to the goods on hand and claims due the concern and on the books of accounts, which were false to defendant's knowledge, but which plaintiffs believed to be correct. *Held* sufficient, although the original bill alleged as a ground of dissolution the making of "defective" inventories and keeping of "defective" accounts. —Chouteau v. Rice, 1 Minn. 106, (Gil. 83.)

66. In a supplemental bill, filed in a suit between partners for a dissolution and an accounting, praying to set aside for fraud an agreement to dismiss the suit, set up in bar by defendant, a prayer to enforce the provisions of the agreement in case the prayer to set the same aside for fraud is not granted, does not confirm the agreement.—Chouteau v. Rice, 1 Minn. 106, (Gil. 83.)

67. In a suit by a partner against his copartner for an accounting, the complaint alleged that plaintiff, a builder, and defendant, a real-estate dealer, owned lots on which they were building and had nearly completed a block of houses, and that by agreement the title was in defendant's name; that by certain specified false representations defendant induced plaintiff to part with his interest in the premises for land in another state, the deed to which, though made by a third person as grantor, was delivered to plaintiff by defendant; that the land was of no value, and that neither the grantor nor defendant had title thereto; that prior to this transaction, and without plaintiff's knowledge or consent, defendant had actually sold and conveyed the lot owned by himself and plaintiff in exchange for land in another state, and had mortgaged the land so received, and received money from the mortgagee. *Held*, that the complaint was not demurrable on the ground that the court had no jurisdiction of the land outside the state, since a personal judgment could be rendered against defendant; nor was it demurrable on the ground that several causes of action were improperly joined, or that it failed to state a cause of action. —Shackelton v. Kneisley, (Minn.) 51 N. W. 470.

Fraud or mistake in accounting.

68. In an action by a retiring partner against the continuing partners, asking a judgment against them, jointly, on the ground of an alleged fraud in their settlement with him, no separate judgment or individual relief against either being prayed, an allegation of a disposition by one of the defendants of partnership property, and failure to account for the same, is immaterial, and may be stricken out on motion.—Berkey v. Judd, 12 Minn. 52, (Gil. 23.)

69. Plaintiff being in partnership with four others, an accounting was had and sale made of his interest to three of them, who received all the assets, and continued to carry on the business. Subsequently, one of the three died. *Held*, that an action based upon fraud in the original accounting and purchase might be maintained by plaintiff against the two survivors, without joining the representatives of the deceased partners.—Berkey v. Judd, 22 Minn. 287.

70. A mistake of fact in an accounting between copartners upon dissolution of the partnership affords ground for relief in equity, irrespective of any express agreement that mistakes should be corrected.—Cobb v. Cole, (Minn.) 46 N. W. 364.

44 Minn. 278.

Action at law.

71. One who is engaged in the business of the partnership upon a specified salary, but is in fact a partner, should not be permitted to sue the firm therefor; and an amendment to the answer setting up facts showing such relation may properly be allowed.—Wood v. Cullen, 13 Minn. 394, (Gil. 365.)

V. Rights and Remedies of Firm and Private Creditors.

What are firm debts.

72. Upon a loan of money by D. to S. and B., obtained by them to enable them to enter into partnership, S., with the understanding between all parties that B. should have one-half of the money and pay one-half of the interest, gave his individual bond, secured by a mortgage on his individual property, for the amount of the loan. They entered into partnership, and the money was used in their firm business. *Held*, that the loan was not a partnership transaction, and that B. was liable to D. for one-half the debt for which S. was his surety.—Metzner v. Baldwin, 11 Minn. 150, (Gil. 92.)

Right of private creditor in firm assets.

73. A sheriff may levy upon the interest of a partner in partnership assets, and, for the purpose of making sale of such interest, take posses-

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sion of the firm property, holding it until he executes his levy by sale.—Barrett v. McKenzie, 24 Minn. 20; Wickham v. Davis, 24 Minn. 167.

74. An injunction will not be granted at the suit of one partner in an insolvent firm, to restrain the levy and sale on execution of the individual interest of another partner in such firm, at the suit of his individual creditor, although the officer and such creditor may have notice of such insolvency.—Wickham v. Davis, 24 Minn. 167.

75. A purchaser at execution sale of a partner's interest in copartnership business and assets acquires no title to any of the property entitling him to a delivery, or, as to partnership debts, a right to collect them, but only a right to an accounting.—Barrett v. McKenzie, 24 Minn. 20.

Receiver—Powers and duties.

76. In an action to wind up the affairs of a partnership the judgment appointed a receiver, and directed him to sell all the real and personal property of the firm. *Held*, that the receiver was thereby authorized to sell all the real estate of the firm, though it was not described in the complaint or judgment.—Barron v. Mullin, 21 Minn. 374.

VI. Changes of Firm—Incoming and Retiring Partners—Successive Firms.

Rights and liabilities—Of retiring partner.

77. Plaintiff sued defendants as copartners upon an account for work and labor. It appeared that defendants were in partnership till within a short time of plaintiff's engagement; that at the time of such engagement the defendant who appeared and defended the action showed him his work; that the tools and apparatus of the partnership remained unchanged; that the business was still carried on in the partnership name; and that nothing was done until after plaintiff had rendered his services, to notify third persons that the partnership was dissolved. *Held* sufficient to support a finding of a continuance of the partnership as to third persons.—Reid v. Frazer, (Minn.) 35 N. W. 269.
37 Minn. 473.

—— Of partners continuing or succeeding to business, assets, etc.

78. A partnership was dissolved by the purchase of the interest of one member of the firm by a third party, and a new firm formed in place of the old. *Held*, that the title to promissory notes of the old firm passed to the new, and that, under Rev. St. Minn. 1851, c. 70, § 27, which provides that actions shall be prosecuted in the name of the real party in interest, they were entitled to sue thereon in their own name.—Pease v. Rush, 2 Minn. 107, (Gil. 89.)

79. A contract of dissolution of partnership provided that all the personal property of the firm should be "retained by, and be the property of," one of the partners. *Held* sufficient to pass a claim for recovery of money which the partnership had been obliged to pay a third person in consequence of a breach of contract.—Blakeley v. Le Duc, 22 Minn. 476.

80. A stage passenger was drowned while crossing a ferry, through negligence of the ferryman, and a judgment was recovered by decedent's representative against the proprietors of the stage, who were partners, and they paid the judgment. *Held*, that their right to recover therefor against the ferry owner was a mere incident to their right of action for breach of his contract, and passed, on dissolution of their partnership, to one of the partners, under an agreement that he should retain all the "property" of the concern.—Blakeley v. Le Duc, 22 Minn. 476.

81. Upon the dissolution of a firm, of which plaintiff and defendant were partners, the members thereof entered into an agreement under seal, by which all the firm property and demands owing it were assigned to defendant, "in trust to sell said property," and collect all demands due the firm, and with the money thus realized to pay the firm debts; the defendant agreeing to pay the other members of the firm $100 each for their interest in the firm, and to pay all debts of the firm, and save them "harmless from any debts which stand" against the firm. *Held*, that defendant, under this agreement, was not a trustee, but a purchaser for a valuable consideration, and therefore liable to plaintiff for a debt owed by the firm, which plaintiff was compelled to pay on defendant's refusal.—Rose v. Roberts, 9 Minn. 119, (Gil. 109.)

82. A firm composed of two members was dissolved by the death of one of them, on which the survivor and another formed a new partnership, with the same name as the old firm. *Held*, in an action against the survivor of the old firm to recover a debt contracted by that firm, that a debt due to the new firm could not be attached for such liability of the old firm.—Allis v. Day, 13 Minn. 199, (Gil. 189.)

Liability of executor of deceased partner.

83. An executor of one partner, continuing the business with the survivor as directed by will, is not personally liable for debts previously contracted, and the surviving partner has no implied authority to bind him for such debts.—Mattison v. Farnham, (Minn.) 46 N. W. 347.
44 Minn. 95.

VII. Actions.

By partners—Use of firm name.

84. The right of a partnership to sue for or collect a debt due the firm is not affected by the fact of a levy upon the interest of one of the partners in the partnership.—Barrett v. McKenzie, 24 Minn. 20.

85. A purchaser at an execution sale against one partner levied on his interest in partnership property does not acquire any title to or right of possession in the property; these still remain in the partnership, and, if the purchaser take possession, the other partners have a right to use the partnership name to recover the property or its value.—Lane v. Lenfest, (Minn.) 42 N. W. 84.
40 Minn. 375.

86. On a debt due to a partnership composed of four persons, two of them sued and recovered

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judgment. *Held*, that the four partners might maintain an action to set aside a fraudulent conveyance by the judgment debtor.—Fuller v. Nelson, 28 N. W. 511, 35 Minn. 213.

87. A defendant who has obligated himself to plaintiffs in their partnership name cannot be permitted, in a suit on such obligation, to object to their capacity to constitute a partnership, for the reason that one of them is alleged to be a corporation; their organization being sufficient to establish their joint interest in the contract sued on.—Sandwich Manuf'g Co. v. Donahue, (French v. Donohue,) 12 N. W. 354, 29 Minn. 111.

88. An undertaking to indemnify a sheriff on the levy of an execution by him in an action by partners in a partnership matter may be valid, although executed in the name of the partnership.—Schoregge v. Bishop, (Schoregge v. Gordon,) 13 N. W. 194, 29 Minn. 367.

89. The want of an allegation of partnership in a complaint, in the title to which the plaintiffs are described as partners, is no ground of demurrer. — Jaeger v. Hartman, 13 Minn. 55, (Gil. 50.)

Against partners—Judgment.

90. In an action upon a joint promise of defendants as partners, plaintiff must prove the joint contract and recover against both defendants or neither of them.—Whitney v. Reese, 11 Minn. 138, (Gil. 87.)

Distinguished in Town v. Washburn, 14 Minn. 272, (Gil. 202.)

91. In an action against two late partners on a joint contract, several judgments cannot be recovered, where each answer admits a "joint contract," but there is no evidence of a "several liability." The action is not one in which one joint associate is "sued for the obligations of all," and therefore Pub. St. Minn. c. 60, § 38, does not apply.—Beatty v. Ambs, 11 Minn. 331, (Gil. 234.)

92. In an action against two late partners for goods alleged to have been sold them jointly, the answer of one denied the sale, but admitted goods placed in the hands of the late firm to be sold on commission, a sale thereof, and an indebtedness on account thereof in a certain sum. The answer of the other admitted a sale and delivery to the firm of goods to a less amount. The allegations in both answers were denied by a reply. *Held*, that plaintiff was not entitled to a judgment upon the pleadings for either amount.—Beatty v. Ambs, 11 Minn. 331, (Gil. 234.)

93. Gen. St. Minn. 1878, c. 66, § 266, provides that whenever two or more persons are sued as joint defendants, and on the trial the plaintiff fails to prove a joint cause of action against one or more of the defendants, judgment may be rendered against him or them against whom the cause of action is proved. *Held*, that where it appears, in an action against three persons as a partnership, that the partnership exists as to only two of such defendants, judgment may be given against the two constituting the firm.—Miles v. Von Deyn, 6 N. W. 417, 27 Minn. 56.

Overruling Fetz v. Clark, 7 Minn. 217, (Gil. 159.)

94. A lien by attachment, in a suit against non-resident partners, may be acquired on the individual property of one of the partners situated within the jurisdiction, and the judgment, rendered upon substituted service of the summons, though entered in form against all, may be enforced against the property so attached.—Daly v. Bradbury, (Minn.) 49 N. W. 190.

46 Minn. 396.

Pleading.

95. Where an action is brought by two or more plaintiffs, as partners, the partnership should be alleged, and, if the defendants are sued as such, a similar allegation should be made as to them.—Foerster v. Kirkpatrick, 2 Minn. 210, (Gil. 171.)

96. In an action by or against a copartnership, an allegation of partnership is material, and, if denied, must be proved.—Irvine v. Myers, 4 Minn. 229, (Gil. 164;) Fetz v. Clark, 7 Minn. 217, (Gil. 159.)

97. In an action against two or more as partners the allegation of partnership is a material one, and is put in issue by a general denial of each and every allegation in the complaint—Fetz v. Clark, 7 Minn. 217, (Gil. 159;) Id., 8 Minn. 86, (Gil. 61.)

98. In an action against a copartnership for goods sold and delivered, an answer by one partner, denying that the goods were purchased at his request or with his knowledge or consent, raises an issue for the jury.—Irvine v. Myers, 4 Minn. 229, (Gil. 164.)

VIII. Limited Partnership.

Failure to comply with statute — General partnership.

99. Where a limited partnership is attempted to be formed, but the contribution of the special partner is made in goods and not in cash, as required by the statute, the partnership must be treated as a general one so far as the liability of the partners to creditors is concerned.—In re Allen's Estate, (Minn.) 43 N. W. 382.

41 Minn. 430.

Part Payment.

As satisfaction, see *Accord and Satisfaction*, 1-6. To prevent running of limitations, see *Limitation of Actions*, 68-73.

Part Performance.

Recovery of compensation, see *Contracts*, 125-127. To take contract out of statute of frauds, see *Specific Performance*, 44-57.

PARTY-WALLS.

Party-wall agreement.

1. A party-wall agreement, by which one acquires a right of support on an adjoining lot, is a conveyance, within Gen. St. Minn. 1866, c. 40,

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§ 26, which provides that the term "conveyance" "shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created;" and where such agreement contains no express covenant on the part of any of the parties to pay for the wall, none can be implied therefrom against an assignee of any of the parties, under Gen. St. Minn. 1866, c. 40, § 6, which provides that "no covenant shall be implied in any conveyance * * * of real estate." —Warner v. Rogers, 23 Minn. 34.

2. Plaintiff, lessee of a lot, entered into a party-wall agreement with the owner of an adjoining lot, by which one-half of the wall was to rest on the adjoining lot, to be a party-wall forever, and that, when said owner, his heirs or assigns, desire to use the same, they might do so on the payment of one-half of the cost of the wall. *Held*, that plaintiff, by such agreement, acquired an easement in the adjoining lot for the support of the half of the wall resting thereon, and that a subsequent purchaser of the lot, using the party-wall with notice of the agreement, was liable to pay one-half of the cost thereof.—Warner v. Rogers, 23 Minn. 34.

3. A party-wall agreement provided that one-half the cost of the wall should be paid by an adjoining lot-owner, and that such wall should be constructed with joist holes for such lot-owner. *Held*, that an assignee of such lot-owner, having used the wall without objecting thereto, could not plead, in bar of an action to recover his half of the cost of such wall, that it was not constructed in precise accordance with the agreement.—Warner v. Rogers, 23 Minn. 34.

Passengers.

See *Carriers*, 65-146.

Patents.

For public lands, see *Public Lands*, 110, 111.

PATENTS FOR INVENTIONS.

Who entitled to.

1. Plaintiff was the patentee of certain improvements in harvesting-machines, which were adopted and manufactured and sold, in connection with such machines, by a corporation, of which plaintiff, during the time of such use, was first a director, and afterwards president, and was then appointed its "patent director." No compensation was allowed him except his salary as president, and it did not appear that that was intended as compensation for special services in making inventions or improvements or securing patents. *Held*, that his relations to the corporation were not inconsistent with his individual right to make such inventions, and secure a patent therefor as his own property, and to recover a reasonable compensation for the use thereof by the corporation, as under an implied license; nor was he precluded by the facts that the model for the patent, which was inexpensive, was made by workmen of the corporation, and that the fees of the attorney who procured the patent were advanced by the corporation; nor by the fact that he did not at the outset give notice of his intention to claim royalty.—Deane v. Hodge, 27 N. W. 917, 35 Minn. 146; In re St. Paul Harvester Works, Id.

Utility of invention.

2. On an issue as to whether a patent for weighing scales was void because useless, the only evidence was the testimony of a witness who had seen three of the scales, and who said that they would not weigh correctly. There was no evidence as to how far the scales varied from correctness, or whether the defect was in the principle of the invention or faulty construction. *Held*, that the invention was not shown to be so devoid of utility as to avoid the patent.—Wilson v. Hentges, 3 N. W. 338, 26 Minn. 288.

Sale of patent-right — State regulation.

3. Laws Minn. 1871, c. 26, which requires owners of patent-rights before a sale thereof in Minnesota to file with the clerk of the district court a true copy of the letters patent, is void, as an unauthorized attempt by the state legislature to regulate the sale of patent-rights.—Crittenden v. White, 23 Minn. 24.

Licenses—Royalties.

4. The grant of a license to sell a patented article is a sufficient consideration to support a promise to pay the price of such license, if the patent is valid, though it may not be a profitable one.—Wilson v. Hentges, 3 N. W. 338, 26 Minn. 288.

5. The owner of two patents for improvements in the same machine, suing for license fees for the use by the defendant of both patents, may recover such fees for the use of the second in so far as it contains anything new and practically useful in addition to the first. And the defendant, having enjoyed the undisturbed use of both patents, cannot raise the question of the validity of the second patent, as including claims and specifications embraced in the first patent.—Deane v. Hodge, 27 N. W. 917, 35 Minn. 146; In re St. Paul Harvester Works, Id.

6. Under a contract to pay royalty for the use of an article for which a patent has been applied, subject to be terminated by notice, the provisions concerning the time of payment being ambiguous, no royalty can be demanded until the patent is issued, although the contract has been terminated before that time, as the right to royalty is in abeyance pending the application.—Travis v. Minneapolis Sweeper Co., (Minn.) 42 N. W. 1015. 41 Minn. 176.

7. In an action for compensation for the use of a patent under an implied license, where there is no established royalty, the invention having been used by defendant only, general evidence and testimony of experts as to the value of the use of the improvement are admissible.—Deane v. Hodge, 27 N. W. 917, 35 Minn. 146; In re St. Paul Harvester Works, Id.

Paupers.

See *Poor and Poor-Laws*.

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Pawn.

See *Pledge.*

PAYMENT.

I. What Constitutes, 1-14.
II. Pleading and Evidence, 15-19.
III. Voluntary Payment, 20-34.
IV. Application, 35-43.

Application as against surety, see *Principal and Surety*, 7.
—— by partners, see *Partnership*, 39, 40.
Effect as satisfaction, see *Accord and Satisfaction*, 1-6, 8, 9.
Into court, see *Tender*, 13.
Of chattel mortgage, see *Chattel Mortgages*, 89-92.
mortgage, see *Mortgages*, 131.
negotiable instruments, see *Negotiable Instruments*, 151-156.
taxes, see *Taxation*, 64, 65.
On redemption from mortgage, see *Mortgages*, 414-423.
Partial payment, see *Accord and Satisfaction*, 1-6; *Limitation of Actions*, 68-73.
Presumption as to date, see *Evidence*, 22.
Provisions of contract, see *Contracts*, 96, 97.
Recovery of illegal interest paid, see *Usury*, 32-36.
—— of price paid for goods, see *Sale*, 177, 178.
—— of price paid for land, see *Vendor and Purchaser*, 105-114.
—— of taxes paid, see *Taxation*, 79-82, 294-301.
Right to subrogation, see *Subrogation*, 1.
Tender, see *Tender*.
To agent, see *Principal and Agent*, 83, 84.
Under contract for sale of real estate, see *Vendor and Purchaser*, 20, 21.

I. What Constitutes.

In goods.

1. A dealer in certain articles of merchandise made a note payable in those articles at his place of business one day after date. The note was not presented on the day it became due, but, some months thereafter, the payees' agent took the note to defendant's place of business, and, after inquiring the price of one of the articles in which the note was payable, presented the note and demanded payment, whereupon defendant offered to pay in that article at a certain price, to which the agent objected as too high, although that price was the market value of the article. No other presentation of the note or demand of payment was made. Defendant had always kept on hand at his place of business sufficient of the articles named in the note to pay it, and had always been ready and willing to pay it when presented. *Held*, that he was not in default, as it was not necessary that he should segregate from his general stock sufficient of the articles to pay the note, and such readiness to perform was a good defense to an action on the note; and that, even if there had been a default by which the note had become payable in money, the refusal to receive the article offered in payment, solely on the ground that the price was too high, was a waiver of such default.—Beede v. Proehl, 27 N. W. 191, 34 Minn. 497.

By check.

2. Payment by check is not absolute, but conditional, unless expressly so agreed, and where a check is returned by the creditor, and used by the debtor, the debt remains.—Good v. Singleton, (Minn.) 40 N. W. 359.*
39 Minn. 340.

3. In an action against an express company for the amount of a draft intrusted to it for collection, and returned by it as uncollected, the drawee testified that he had paid the amount of the draft to defendant's agent, who had absconded, by a check which was collected, for a sum larger than the amount of the draft, which was to have been applied upon the draft and other demands against the drawee in the agent's hands for collection; and the evidence also disclosed a reason why the draft was not taken up at the time of the payment. *Held*, that this justified a finding by the jury that the draft was paid.—Bardwell v. American Exp. Co., 28 N. W. 925, 35 Minn. 344.

By due-bill.

4. Defendants, real-estate agents, agreed to give plaintiff half of the commissions on all sales of property listed in defendants' office for which he procured purchasers. Plaintiff found a purchaser for a piece of property, on which defendants received a commission of $650. In an action for plaintiff's share of the commission, defendants did not offer any evidence to controvert the facts, but claimed that a certain due-bill for $100 was received by plaintiff in full settlement. *Held*, that it was proper to instruct the jury that the only issue was whether the due-bill had been accepted in full settlement.—Olson v. Cremer, (Minn.) 45 N. W. 616.
43 Minn. 232.

By bill of exchange or promissory note.

5. The giving of a promissory note or bill of exchange may, by agreement of the parties, operate as payment of a precedent debt.—Keough v. McNitt, 6 Minn. 513, (Gil. 357;) Goenen v. Schroeder, 18 Minn. 66, (Gil. 51.)

6. An indorsement made on a note, "Received on within interest up to date," a promissory note for the amount being given, together with testimony of the payee that it was the understanding that such note settled the interest between the parties to that date, is evidence that the note was taken in payment of such interest.—Goenen v. Schroeder, 18 Minn. 66, (Gil. 51.)

7. The mere receipt by the vendor of a draft by the vendee, accepted by the drawee, for the purchase price of goods sold, is insufficient to raise a presumption of its acceptance in absolute payment.—Devlin v. Chamblin, 6 Minn. 468, (Gil. 325.)

8. The acceptance of a note "for," or "on account of," or "in payment of," an existing debt, in the absence of an express agreement or understanding that it is taken in absolute satisfaction or discharge of the debt, will be deemed to be a conditional payment only, and the mere recital in a receipt or other writing of the fact of payment by note is not, by itself, sufficient evidence of absolute payment. Gilfillan, C. J., dissenting.—Combination Steel & Iron Co. v. St. Paul City Ry. Co., 49 N. W. 744, 47 Minn. 207.

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9. Where the purchaser of seed-wheat executes, as security for the purchase price, a "seed-grain note," and also a mortgage on personal property, the execution of a second "seed grain note" to correct a mistake in the first one in describing the land on which the crop is to be grown, does not operate as a payment of the first note, nor as a discharge of the chattel mortgage. — Miller v. McCarty, (Minn.) 50 N. W. 235.
47 Minn. 321.

10. A debt evidenced by a note, and secured by a chattel mortgage, is not shown to be paid, so as to satisfy and cancel the mortgage, by part payment in cash, and a note for the balance, in the absence of an agreement that the new note was received as full payment.—Hanson v. Tarbox, (Minn.) 50 N. W. 474.
47 Minn. 433.

11. Where the indorser of a note, after the maker has failed to pay it and it has been protested, gives his own note to the holder, and the latter accepts it, and surrenders the old note to the indorser, it will be presumed that the new note was taken as payment of the old one by the indorser.—Bausman v. Credit Guarantee Co., (Minn.) 50 N. W. 496.
47 Minn. 377.

By deposit in bank or with third person.

12. Where a note secured by mortgage is payable at a bank, and a purchaser of the property assumes the debt, and at its maturity deposits the amount in the bank, with instructions to pay it on the note, this does not operate as a payment, and the holder of the note may sue the maker, though he has brought an action against the bank to recover the money deposited.—St. Paul Nat. Bank v. Cannon, (Minn.) 48 N. W. 526.
46 Minn. 95.

13. Where money has been deposited by a debtor with a third person for the payment of his indebtedness, the assent of the creditor thereto, the arrangement being a beneficial one for him, may be presumed, when he has knowledge of such deposit; but such knowledge will not be presumed from proof, merely, of the transaction between the debtor and depositary.—Simonton v. First Nat. Bank of Minneapolis, 24 Minn. 216.

14. The delivery by a debtor to a third person of money to pay his indebtedness, until the creditor assents to such transaction, creates the relation of principal and agent only, and may be revoked by the debtor at any time before such assent is given.—Simonton v. First Nat. Bank of Minneapolis, 24 Minn. 216.

Distinguished in Trunkey v. Crosby, (Tucker v. Vaughan,) 23 N. W. 847, 33 Minn. 467.

II. Pleading and Evidence.

Pleading.

15. An allegation of payment in an answer, without showing that it was made on account of the claim sued upon, is insufficient.—Esch v. Hardy, 22 Minn. 65.

16. A complaint alleged that, prior to a certain date, defendant was indebted to plaintiff in divers sums, and at that date made his certain promissory note for an amount less than the aggregate of such indebtedness; also, that no part of the prior indebtedness had been paid. *Held*, that no presumption arose that such promissory note was given in payment and settlement of such existing indebtedness. — McArdle v. McArdle, 12 Minn. 98, (Gil. 53.)

Receipt—Admissibility under pleadings.

17. In an action to recover for a bill of lumber alleged to have been sold to the defendant, the answer consisted of a denial only, and contained no affirmative allegations of payment or otherwise. Upon the trial plaintiffs' account, introduced in evidence without objection, was receipted as paid by the acceptance of a third party, which plaintiffs' evidence in explanation showed was never paid. *Held*, that such receipt and acceptance became immaterial under the pleadings, and were not available to defendant as evidence of payment.—Farnham v. Murch, (Minn.) 31 N. W. 453.
36 Minn. 328.

—— Construction and effect.

18. A written instrument in the form of a receipt, having in the margin the figures "$1,100," acknowledged the receipt on a certain date of "eleven hundred on contract of asylum contract of fifty-five thousand dollars." *Held*, that this was a receipt for $1,100.—Butler v. Bohn, 17 N. W. 862, 31 Minn. 325.

19. A recital in an assignment of a judgment, acknowledging receipt of a sum of money as the consideration thereof, is not evidence of the fact of payment of that sum as against a third party. —Ferris v. Boxell, 25 N. W. 592, 34 Minn. 262.

III. Voluntary Payment.

Recovery of money paid—In general.

20. One who voluntarily, and with his eyes open, and under no mistake of fact, pays money to another, cannot maintain an action for its recovery.—Smith v. Schroeder, 15 Minn. 35, (Gil. 18.)

21. One having no title to land, who voluntarily pays taxes with full notice of his want of title, is not entitled to recover the amount paid from the owner of the land.—Shillock v. Gilbert, 23 Minn. 386.

—— Mistake.

22. One who, under ignorance of the rule of law that distances must yield to natural boundaries called for in a deed, pays money for a quitclaim of property which, under this rule, already belongs to him, cannot recover it, where the transaction is free from fraud or confidence, and both parties know all the facts.—Erkens v. Nicolin, (Minn.) 40 N. W. 567.*
39 Minn. 461.

23. Where a judgment creditor, accompanied by an officer, proceeds to the debtor's premises to enforce the judgment, concerning the amount of which the debtor is ignorant, and procures an excessive payment by fraudulently misrepresenting the amount of the judgment, the debtor may recover the excess, not only on the ground of fraudulent deception, but also on the ground

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that it was an overpayment by mistake of fact.—Lund v. Davies, (Minn.) 50 N. W. 79
47 Minn. 290.

—— Duress.

24. A notice of foreclosure under a power of sale claimed as due a sum largely in excess of what was due, and the property was sold to the mortgagee for the amount claimed, which a subsequent incumbrancer was obliged to pay, and did pay, under protest, before the purchaser would allow him to redeem. *Held*, that the amount so paid, in excess of what was actually due on the first mortgage, might be recovered back.—Bennett v. Healey, 6 Minn. 240, (Gil. 158.)

Distinguishing Bidwell v. Whitney, 4 Minn. 76, (Gil. 45;) Banker v. Brent, 4 Minn. 521, (Gil. 408.)

25. Plaintiff chartered a vessel from defendant for the transportation of a cargo of wheat to B., no special agreement being made as to the time of delivering or receiving the cargo. By reason of other vessels waiting to be loaded, the vessel chartered did not receive her cargo until six days after plaintiff was advised that she was ready, although he had wheat in elevators for delivery, and ordered it delivered; he having no control over the management of the elevators. After the vessel arrived at B., the cargo was detained and delivery refused until plaintiff should pay demurrage claimed; and, to release the grain from such detention, he paid the sum claimed, under protest. *Held*, that defendant, not being in fact entitled to demurrage, had no right to detain the cargo on a claim therefor, although asserted in good faith, and that the detention of the grain constituted such duress of property that the payment was not voluntary, and plaintiff was entitled to recover it.—Fargusson v. Winslow, 25 N. W. 942, 34 Minn. 384.

Distinguished in Cable v. Foley, 47 N. W. 1136, 45 Minn. 423.

26. Plaintiffs, as administrators, returned and filed an inventory of their intestate's property in the probate court, and the judge of that court refused to allow the administration to proceed until the administrators had paid into the county treasury the amount prescribed by Laws Minn. 1885, c. 103, "in lieu of fees, costs," etc. A large part of the estate was such as to require immediate administration, and plaintiffs therefore paid the tax under protest. The law was afterwards declared unconstitutional. *Held*, that plaintiff may recover the illegal tax so paid.—Mearkle v. Board of County Com'rs, (Minn.) 47 N. W. 165.
44 Minn. 546.

27. An executor, without objection, paid a certain sum into the county treasury, because of the provisions of a statute afterwards declared to be unconstitutional, and because the probate judge informed him that it would be necessary, before proceeding further with the administration, to pay said sum. The evidence was not such as to require a finding that the estate would have suffered, if the executor, instead of paying said sum, had enforced his legal remedy against a judge refusing to perform his duties in the administration of an estate. *Held*, that the evidence justified a finding that the payment was voluntary.—De Graff v. Board County Com'rs Ramsey County, (Minn.) 48 N. W. 1135.
46 Minn. 319.

Recovery of money paid—Void tax or assessment.

28. A payment of illegal taxes made upon demand by the tax collector, with a warrant in his hand for their collection, is not such a voluntary payment as will prevent a recovery of the money so paid.—Board of County Com'rs Dakota County v. Parker, 7 Minn. 267, (Gil. 207.)

29. Money paid to the county treasurer to redeem from taxes claimed to be illegal, under protest, and to enable a party to have a deed recorded, cannot be recovered back from the treasurer; the register of deeds having no power to require a certificate of such payment of taxes as a condition precedent to registry.—Smith v. Schroeder, 15 Minn. 35, (Gil. 18.)

Distinguished in State v. Nelson, 42 N. W. 548, 41 Minn. 25.

30. One who by force of the statute is unable to place on record a deed of conveyance by which he has acquired title to real estate, by reason of illegal taxes being charged on the land, may pay such taxes, in order to secure the recording of his deed. Such payment is not voluntary, and may be recovered back.—State v. Nelson, (Minn.) 42 N. W. 548. 41 Minn. 25.

Distinguishing Smith v. Schroeder, 15 Minn. 35, (Gil. 18.)

31. Plaintiff's land having been sold under a judgment for an assessment levied thereon for opening a street, he redeemed the land by paying to the city the amount with which it was charged by the judgment and sale. The street was never opened, the project of opening it having been abandoned by the city. *Held*, that plaintiff was entitled to recover the amount so paid, as upon a failure of the consideration for which it was paid, even though the abandonment took place before such payment was made by him; his payment not being voluntary, but by coercion of law.—Valentine v. City of St. Paul, 26 N. W. 457, 34 Minn. 446.

32. Plaintiff's land was sold under a judgment for the amount of an assessment against it for a local improvement, and a certificate of sale was given to the purchaser. The certificate of sale and the assessment were void, and plaintiff, with knowledge of the facts affecting their validity, paid to the city treasurer the amount claimed to be due by virtue of the sale, to redeem the land therefrom. Plaintiff was in possession of the land at the time, and there was no evidence that the city contemplated interfering with his possession. The only coercion alleged was a threat on the part of the city treasurer to give to the holder of the certificate of sale a deed of the land if it was not redeemed within the time limited by law. *Held*, that the payment was voluntary, and the amount thereof could not be recovered from the city.—Shane v. City of St. Paul, 6 N. W. 349, 26 Minn. 543.

33. Where after lots have been assessed for improving a street, and sold under a regularly entered judgment therefor, the agent of the owner redeems them from the sale, and pays the necessary money to the city treasurer, the owner cannot recover the money so paid from the city because he and the city authorities were mutually mistak-

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en in believing that one of the lots belonged to him, and that the others fronted on the street, and were liable to assessment, since, even if the lots were not liable to the assessment, the judgment was not void, and the city was bound to receive the redemption money, and the owner had the right to pay it, so that the rights and obligations in respect to the payment were not affected by the facts erroneously supposed to exist.—Langevin v. City of St. Paul, (Minn.) 51 N. W. 817.

Recovery of money paid—Demand.

34. F., being convicted on a criminal charge before a justice of the peace, for the purpose of appeal, voluntarily, in ignorance of his legal rights, paid to the justice the costs of the prosecution and a fee for making return. *Held*, that F. could not, without a previous demand, recover any part of the money.—Ford v. Brownell, 13 Minn. 184, (Gil. 174.)

IV. APPLICATION.

In general.

35. Where a person has two demands against another, one arising out of a lawful contract, and the other out of a contract prohibited by law, a payment, without direction as to its application, will be applied upon the lawful claim, to the exclusion of the unlawful one.—Solomon v. Dreschler, 4 Minn. 278, (Gil. 197.)

Distinguished in Hersey v. Bennett, 9 N. W. 593, 28 Minn. 91.

36. Where payment is made generally upon indebtedness, part of which is secured, and part of which is unsecured, and no direction given as to the application, it will be applied, in the first instance, to the payment of the unsecured indebtedness; and where the indebtedness consists of the principal and interest, payment will be first applied to the payment of interest.—Lash v. Edgerton, 13 Minn. 210, (Gil. 197.)

37. In a stumpage contract A. contracted with B. to pay a specified sum per thousand for all logs cut upon certain pieces of land, and a payment was made upon the contract. One of the pieces of land from which logs were cut did not belong to B., and he had no rights therein. *Held*, that he could not recover for logs cut from that piece of land, and the payment must be applied upon the logs cut from land in which he had an interest.—Scheffer v. Tozier, 25 Minn. 478.

38. Defendant, while indebted to plaintiff on an open, running account for goods sold and delivered, purchased and paid for property and had the same conveyed to his (defendant's) wife. After such purchase and conveyance, other sales and deliveries were made by plaintiff to defendant, and were charged in the account, and payments were made by defendant to plaintiff, but were not applied by either party to any specific items of the account. *Held*, that the payments would be applied to the items of the account in the order of their priority of date, though the effect thereof was to extinguish all the items prior to the conveyance to defendant's wife, so that as to the unpaid balance of the account plaintiff was a subsequent creditor to such conveyance, and could not subject the property so conveyed to his debt, under Gen. St. Minn. 1878, c. 43, § 8, which provides that when a grant for a valuable consideration is made to one person, and the consideration is paid by another, "such conveyance shall be presumed fraudulent as against creditors, at that time, of the person paying the consideration."—Hersey v. Bennett, 9 N. W. 590, 28 Minn. 86.

Distinguishing **Solomon v. Dreschler**, 4 Minn. 278, (Gil. 197.)

39. On the taking of an account under a judgment declaring a deed absolute in its terms to be a mortgage, a large balance was found due to the grantee for various debts, but the court made no appropriation of moneys received from sales of timber on the land to any specific debts. *Held*, that they should be applied as received to the debts first due.—Wolford v. Andrews, 13 N. W. 167, 29 Minn. 250.

Right of parties to make application.

40. Where a debtor owes several accounts, and makes payments generally, without direction as to application, the creditor may apply them as he sees fit.—Newell v. Houlton, 22 Minn. 19.

41. Where a contractor for the erection of a building, including materials therefor, pays over money received on his contract to parties who have furnished him materials, upon that and other contracts, with directions to apply the same on his account, generally they are at liberty so to apply it, and, in the absence of more particular instructions at the time, the law will apply it to the oldest items of his account.—Jefferson v. Church of St. Matthew, (Minn.) 43 N. W. 74.

41 Minn. 392.

42. Nor can they be compelled to change the application to the particular account for materials furnished for the building referred to, on the ground that they knew that the money was received by the contractor from the owner thereof. To bind them to make such special application, the parties interested must see that such application is made or directed at the time, or, if the money is paid to the contractor under an agreement that it should be so applied, such understanding or agreement should be seasonably communicated to the material-men.—Jefferson v. Church of St. Matthew, (Minn.) 43 N. W. 74.

41 Minn. 392.

43. After acquiescing in the application of a payment in extinguishing one demand and accepting the benefit of it for that purpose, a debtor cannot avail himself of the same payment to extinguish another demand, although when he made the payment he directed its application on the latter.—Flarsheim v. Brestrup, (Minn.) 45 N. W 438

43 Minn. 298.

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PERJURY.

What constitutes—Unauthorized oath.

1. An oath made on application to a money lender for a loan not administered pursuant to, nor required nor authorized by, any law, cannot be made the basis for a charge of perjury.—State v. McCarthy, (Minn.) 42 N. W. 599.
41 Minn. 59.

Indictment.

2. An indictment for perjury, in the form prescribed by Gen. St. Minn. 1866, c. 108, § 2, No. 24, is sufficient.—State v. Thomas, 19 Minn. 484, (Gil. 418.)

3. An indictment for perjury, alleging that the offense was committed in a certain town and county of this state, in the court of a certain named justice of the peace, which court had authority to administer an oath, sufficiently describes the court.—State v. Stein, (Minn.) 51 N. W. 474.

4. An indictment for perjury alleging that defendant's testimony (the same being particularly specified) was willfully and corruptly false, is equivalent to alleging that he willfully and knowingly testified falsely.—State v. Stein, (Minn.) 51 N. W. 474.

Qualification of jurors.

5. Defendant was indicted and convicted of perjury, committed on the trial in the district court of an appeal from a justice of the peace. One of the jurors on the trial of the indictment had been a juror on the trial of the cause in the justice court, upon the appeal in which the perjury was subsequently committed, which was unknown to defendant or counsel on either side. *Held*, that such fact was not ground for challenge, within Gen. St. Minn. 1866, c. 116, §§ 17-19, and not available in arrest of judgment.—State v. Thomas, 19 Minn. 484, (Gil. 418.)

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PHOTOGRAPHERS.

Improper use of negative—Action.

There is an implied contract between a photographer and his customer that the negative for which the customer sits shall only be used for the printing of such photographic portraits as the customer may order or authorize, and an action will lie for its breach.—Moore v. Rugg, (Minn.) 46 N. W. 141, 44 Minn. 28.

Physical Examination.

See *Trial*, 1.

PHYSICIANS AND SURGEONS.

See, also, *Malpractice*.
Privileged communications, see *Witness*, 15.
Right to practice medicine, see *Constitutional Law*, 173.

Certificate of qualification to practice medicine—Powers of medical examiners.

1. Under Laws Minn. 1883, c. 125, requiring as a condition of the right to practice medicine a certificate of qualification from the board of medical examiners, and providing that the board may refuse certificates to individuals guilty of unprofessional or dishonorable conduct, the action of the board in determining whether it should grant such a certificate partakes of a judicial character, and an applicant cannot compel by

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mandamus the issuing of a certificate to him.—State v. State Medical Examining Board, 20 N. W. 238, 32 Minn. 324.

2. Laws Minn. 1883, c. 125, § 9, providing that the board of medical examiners may refuse certificates for the practice of medicine to individuals "guilty of unprofessional or dishonorable conduct," does not contemplate matters of mere professional ethics, but the term "unprofessional" is used convertibly with "dishonorable."—State v. State Medical Examining Board, 20 N. W. 238, 32 Minn. 324.

3. Gen. Laws Minn. 1887, c. 9, which provides that a license to physicians and surgeons shall only be granted "by the consent of not less than seven members" of the board of examiners, does not confer upon said board the right or power to absolutely disregard the learning and qualifications of an applicant; or to unreasonably or arbitrarily reject his claims; or, at will, grant or refuse its certificate or license; and hence the statute is not, for that reason, unconstitutional and void.—State v. Fleischer, (Minn.) 42 N. W. 696.

41 Minn. 69.

Certificate of qualification to practice medicine—Revocation.

4. Under Laws Minn. 1883, c. 125, § 9, providing that the board of medical examiners may refuse certificates for the practice of medicine "to individuals guilty of unprofessional or dishonorable conduct, and may revoke certificates for like causes," the power to revoke such certificates is not a judicial power, which cannot, under the state constitution, be vested in the board of examiners.—State v. State Board of Medical Examiners, 26 N. W. 123, 34 Minn. 387.

5. The publication by a physician of an advertisement containing false statements as to his ability to cure disease, he knowing such statements to be false when he makes them, and intending thereby to deceive and impose on the public, is "unprofessional and dishonorable conduct," within Laws Minn. 1883, c. 125, § 9, authorizing the state board of medical examiners to revoke certificates granted for the practice of medicine for such conduct.—State v. State Board of Medical Examiners, 26 N. W. 125, 34 Minn. 391.

Certificate of qualification to practice dentistry.

6. Laws Minn. 1889, c. 19, which provides, by section 5, that no one shall have the absolute right to be examined for a certificate to practice dentistry who is not possessed of a diploma from some dental college in good standing, the examining board to have the power to determine the standing of colleges granting diplomas, is not unconstitutional, as discriminating against a class who may not have been able to attend a dental college.—State v. Vandersluis, (Minn.) 43 N. W. 789.

42 Minn. 129.

7. Section 7 of the act, which provides that all persons shall be said to practice dentistry, within the meaning of the act, who, for compensation, treat diseases or lesions of the human teeth or jaws, or correct malpositions thereof, does not prevent a licensed surgeon from treating diseases of the jaws, which may come within the scope both of general surgery and dentistry.—State v. Vandersluis, (Minn.) 43 N. W. 789.

42 Minn. 129.

8. The provision of the act that it shall not apply to acts of *bona fide* students of dentistry done in the pursuance of clinical advantages under the direct supervision of a preceptor or a licensed dentist in the state, during the period of their enrollment in a dental college and attendance upon a regular, uninterrupted course in such college, is not unconstitutional as discriminating between students of dentistry, or against schools of dentistry of other states.—State v. Vandersluis, (Minn.) 43 N. W. 789.

42 Minn. 129.

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I. General Principles.

Alleging facts or conclusions.

1. In an action against a city, the gist of which was the worthlessness of certain certificates delivered to plaintiff in payment for work done, the complaint alleged that, by reason of gross negligence of defendant's agents in not causing the estimate of the expense of the whole work, and of the excavations in front of each lot, and of the proportion to be assessed upon each lot, to be filed with the then city comptroller, each and all of the certificates were worthless, and no lien upon nor collectible out of the lots therein described. *Held*, that it did not allege traversable facts, but only conclusions of law.—Griggs v. City of St. Paul, 9 Minn. 246, (Gil. 231.)

2. In alleging a levy on execution it is sufficient to aver in general terms that the levy was made, without stating the specific facts constituting such levy.—First Nat. Bank of Hastings v. Rogers, 13 Minn. 407, (Gil. 376.)

3. An allegation in a pleading that certain acts done, not wrongful in themselves, were against the provisions of an act of congress, and in fraud of the plaintiff, is a mere legal conclusion, and not an allegation that defendant acted fraudulently.—Kelley v. Wallace, 14 Minn. 236, (Gil. 173.)

4. In an action to set aside a deed alleged to have been fraudulently procured, plaintiff alleged that certain lands inherited by her were conveyed in such deed, and in a subsequent clause of the complaint averred that she was seised in fee-simple of the property conveyed, without showing how she acquired the same,—whether by descent or purchase. *Held*, a sufficient averment of title.—Buckholz v. Grant, 15 Minn. 406, (Gil. 329;) Id., 16 Minn. 158, (Gil. 141.)

5. The allegation in a complaint that plaintiff is the actual, legal, and *bona fide* holder of a promissory note described, is a mere conclusion of law, and a denial of such allegation is immaterial.—Downer v. Read, 17 Minn. 493, (Gil. 470.)

6. A complaint alleged that a promissory note was "duly assigned" to the defendant. *Held*,

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that the words imported a delivery of the note by the plaintiff, actual or constructive, and an acceptance by the defendant, and are not the allegation of a mere conclusion of law.—Hoag v. Mendenhall, 19 Minn. 335, (Gil. 289.)

7. An allegation in a complaint that plaintiff was obliged to pay the amount of a lien claimed on his property, in order to discharge the lien, the facts not appearing, is a statement of a mere conclusion. — Price v. Doyle, 26 N. W. 14, 34 Minn. 400.

8. A complaint alleged the filing of a lien account under the mechanics' lien law on a certain day, and that "said account and lien so filed * * * constituted and was a valid and specific lien upon the premises." *Held* that, as it did not appear that the lien account was filed within the period limited by statute therefor, the statement of the creation and existence of the lien was only a legal conclusion.—Price v. Doyle, 26 N. W. 14, 34 Minn. 400.

9. As against a demurrer an allegation of an ultimate fact or conclusion of fact is sufficient. Thus, after the creation of a life-estate had been stated, an allegation that "the defendants succeeded to and became possessed of said life interest and estate" is, as against a demurrer, a sufficient allegation of a transfer to defendants.—Curtiss v. Livingston, (Minn.) 31 N. W. 357.

36 Minn. 380.

10. A complaint in an action against a railroad company, which alleges that defendants "by the culpable carelessness, negligence, unskillfulness, and mismanagement of said defendants and their employes, wrongfully ran a locomotive, with a train of cars thereto attached," against plaintiff's horses and wagon while lawfully traveling along a public highway, is not objectionable as stating merely conclusions of law.—Clark v. Chicago, M. & St. P. Ry. Co., 9 N. W. 75, 28 Minn. 69.

Distinguishing Brown v. Milwaukee & St. P. Ry. Co., 22 Minn. 165.

11. Where a complaint alleges a general result, as that a mortgage was "duly foreclosed," and also the special facts upon which such result depends, the facts, and not the conclusion, will control.—Pinney v. Fridley, 9 Minn. 34, (Gil. 23.)

Certainty.

12. An allegation in a pleading that a party "charged" a certain sum for services, without any averment that the charge was an agreed or correct one, or that the services were worth that or any sum, is insufficient to authorize a recovery thereon.—Farrington v. Wright, 1 Minn. 241, (Gil. 191.)

13. A complaint, in an action to vacate a tax-sale, which alleges that plaintiff was "lawfully seised and in possession of block 23, in the town of Kasota, Le Sueur county, composed and comprising ten distinct and separate lots, numbered from 1 to 10, inclusive," and subsequently mentions the block as "being subdivided, as hereinbefore set forth, into lots," does not allege in a traversable form that the block was subdivided into lots, which, therefore, is not admitted by a failure to deny.—Moulton v. Doran, 10 Minn. 67, (Gil. 49.)

14. Under the rule that facts essential to a cause of action should be "positively alleged," and not by way of recital, argument, or inference, an allegation in the complaint, in an action for property claimed to have been obtained by duress of imprisonment, that the defendant "well knew" that the warrant was issued by an officer who had no jurisdiction, is merely an allegation of "knowledge," and therefore insufficient, and such facts are not admitted by a demurrer to the complaint. —Taylor v. Blake, 11 Minn. 255, (Gil. 170.)

15. The complaint in an action for negligently setting fire to and destroying plaintiff's house, and grain therein stored, alleged ownership and possession of the premises by plaintiff on a certain day, and the storing of grain therein on a certain other day, and that, said plaintiff still remaining in possession, and said grain being stored, as aforesaid, on a certain day the defendant, etc. *Held*, that the complaint sufficiently showed ownership and possession at the time of the injury. —Gould v. Eagle Creek School-Dist., 7 Minn. 203, (Gil. 145.)

16. A complaint averring that on April 15, 1865, plaintiff leased certain premises to defendants by written lease, duly executed, bearing date on such day, for a certain term, commencing on such day, and that said lease was duly delivered to defendants, and they took possession thereunder, sufficiently avers delivery of the lease and possession of the premises April 15th.—Rhone v. Gale, 12 Minn. 54, (Gil. 25.)

17. Under the rule of pleading that facts essential to a plaintiff's rights, and necessarily within his knowledge, should be alleged positively, an averment in his complaint that a contract was made "on or about" a day named is insufficient, where the time of making such contract is material and essential to plaintiff's title.—Lockwood v. Bigelow, 11 Minn. 113, (Gil. 70.)

Distinguished in Dodge v. Chandler, 13 Minn. 117, (Gil. 109.)

18. The complaint in an action by a judgment creditor to remove, as a cloud upon the title, a conveyance by the debtor, showed that by the record the conveyance was filed one hour prior to the docketing of the judgment, but alleged that the docketing of the judgment was prior in point of time. *Held*, that it was not demurrable.—Banning v. Armstrong, 7 Minn. 40, (Gil. 24.)

19. A complaint alleged that the P. Bank, at the time of defendant's promise, was about to be established under the laws of the state, by said defendant, or under his control, and that the first issue of bank-notes of that bank was made on a certain day. *Held* a sufficient averment of the incorporation of the bank in question.—Yale v. Edgerton, 14 Minn. 194, (Gil. 144.)

Matters of presumption or inference.

20. An answer alleged the docketing of a judgment December 1, 1862, and that execution was issued thereon "on or about the 28th day of November, 1862." *Held*, under the presumption in favor of the regularity of proceedings in a court of general jurisdiction, that it would be presumed that the execution did not issue till after the docketing of the judgment, and that the answer was not

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fatally defective for want of certainty. Lockwood v. Bigelow, 11 Minn. 113, (Gil. 70,) distinguished.—Dodge v. Chandler, 13 Minn. 114, (Gil. 105.)

21. In pleading a promise to answer for the debt, default, or miscarriage of another, it is not necessary to allege that such promise was in writing. It will be presumed to have been in writing unless the contrary appears.—Wentworth v. Wentworth, 2 Minn. 277, (Gil. 238;) Walsh v. Kattenburgh, 8 Minn. 127, (Gil. 99.)

22. The complaint in an action for damages to plaintiff's land described it as lots fronting on "First street," and referred to said First street as a street existing in the town of M., to the establishing of a grade thereon, and the situation of the property with reference to such street. *Held*, that it should be inferred that First street was a public thoroughfare or highway.—Farrant v. First Div. St. P. & P. R. Co., 13 Minn. 311, (Gil. 286.)

Construction of allegations.

23. Where a request to pay is required to be alleged, the general averment, "though often requested," is sufficient on demurrer.—Hall v. Williams, 13 Minn. 260, (Gil. 242.)

24. A promise to pay money, no time being expressed, being in law a promise to pay on demand, such a promise may be pleaded as made, without expressly alleging a promise to pay on demand.—Chamberlain v. Tyner, 18 N. W. 97, 31 Minn. 371.

25. Where a contract alleged as that of a party is in issue, it is proper to show that the same was executed by a duly-authorized agent, though execution by an agent was not averred.—Weide v. Porter, 22 Minn. 429.

26. An allegation in a complaint that by a lease, a copy of which is attached, plaintiffs demised, leased, and let the premises, includes the authority of an agent by whom the lease appears to have been executed on the part of some of the plaintiffs.—Stees v. Kranz, 20 N. W. 241, 32 Minn. 313.

27. A complaint need not state the names of officers or agents of the defendant who did the act constituting plaintiff's cause of action, but such acts may be pleaded generally as done by defendant.—Todd v. Minneapolis & St. L. Ry. Co., (Minn.) 35 N. W. 5.

37 Minn. 358.

28. In an action to quiet title by setting aside a deed alleged to have been executed by the grantor with intent to defraud subsequent *bona fide* purchasers, it was not expressly alleged in the complaint that the deed in question was never delivered, though plaintiff claimed such to be the fact. *Held*, that allegations in the complaint that the deed was "made and executed" without the knowledge of the grantee, and that the grantee was never at any time seised of the premises conveyed, amounted to an allegation that the deed was never delivered.—Smith v. Dennett, 15 Minn. 81, (Gil. 59.)

29. An averment that a written agreement was "made and entered into" includes its delivery.—Romans v. Langevin, 25 N. W. 638, 34 Minn. 312.

30. An allegation that a person executed a mortgage "whereby he mortgaged" certain property, implies that he owned it, or at least had a mortgagable interest in it.—Brunswick-Balke-Collender Co. v. Brackett, (Minn.) 33 N. W. 214.

37 Minn. 58.

31. Where the intention with which a particular act was done becomes material, the intention may be directly alleged as a fact; and an answer, to be good, must deny such intention.—Wilcox v. Davis, 4 Minn. 197, (Gil. 139.)

32. In an action by a junior mortgagee against the purchaser at the foreclosure of a senior mortgage, for false and fraudulent misrepresentations as to when the time of redemption expired, the complaint averred execution of the mortgage October 14, 1865, foreclosure by advertisement, and sale on January 27, 1872, and that the year allowed by law for redemption expired January 27, 1873. *Held*, as against a general objection to the complaint made for the first time at the trial, that such allegation was a sufficient though inferential and argumentative averment that two of the three years allowed for redemption by Laws 1860, c. 87, in force at the execution of the mortgage, had been waived, as prescribed in such statute, especially as the answer admitted that defendant, in February, 1873, had sold the premises in question.—Kelly v. Rogers, 21 Minn. 146.

33. In an action of ejectment for land claimed by plaintiff under an execution sale, and which appeared by the pleadings to be in one body, the answer alleged that at the time of the sale two separate dwelling-houses stood upon the property, each being upon portions of different lots in the block, and that they were occupied by two distinct tenants of defendant, each of whom was independent of the other, and stated the value of each of the portions of such lot as being more than the amount of the judgment for which the property was sold, and that the whole was sold as an entire tract. *Held*, that the answer could not be construed as pleading the fact that the property sold consisted of several parcels, as, while that might be inferred, the facts stated were not inconsistent with the land being one tract or parcel.—Coolbough v. Roemer, 15 N. W. 869, 30 Minn. 424.

Exhibits.

34. The recitals in a penal bond, which is annexed to the complaint in an action thereon, do not, as a matter of pleading, serve the purpose of an allegation that the facts are as recited.—Sprague v. Wells, (Minn.) 50 N. W. 535.

47 Minn. 504.

II. Complaint.

Entitling.

35. Where several counties are attached to another for judicial purposes, the entitling a complaint in the court for all said attached counties, containing the name of the county in which action is brought, is a compliance with Gen. St. Minn. 1866, c. 62, § 11, providing that the complaint shall contain the name of the court in which the action is brought.—Young v. Young, 18 Minn. 90, (Gil. 72.)

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Statement of separate causes of action.

36. The mere fact that separate paragraphs of a pleading are separately numbered is of itself insufficient to determine their character as separate and distinct counts or causes of action.—Merrill v. Dearing, 22 Minn. 376.

Duplicity.

37. In an action by several plaintiffs, the complaint is not objectionable on the ground of duplicity merely because, while alleging a cause of action in favor of all the plaintiffs, it states facts which might sustain an action brought by only one of them.—Whelan v. Board of County Commissioners of Sibley County, 9 N. W. 175, 28 Minn. 80.

Designation of parties.

38. An action against P. and S., "supervisors of the town of Newport," for trespass, committed under color of office, in laying out a road, is an action against them as private persons, and not an action against the town, and the addition of the words "supervisors," etc., is merely descriptive of the person.—Holton v. Parker, 13 Minn. 383, (Gil. 355.)

Statement of cause of action.

39. Where the complaint shows a liability on the part of defendant it is not necessary to inquire in what character his liability originated. —Pierse v. Irvine, 1 Minn. 369, (Gil. 272;) Rey v. Simpson, 1 Minn. 380, (Gil. 282;) Winslow v. Boyden, 1 Minn. 383, (Gil. 285.)

40. Every fact necessary to make out plaintiff's cause of action, or which defendant has a right to controvert, must be alleged, and conclusions of law not justified by the facts are irrelevant and nugatory.—Griggs v. City of St. Paul, 9 Minn. 246, (Gil. 231.)

41. In an action for damages for injuries caused by the upsetting of a carriage, the complaint alleged that defendant drove in front of plaintiff's carriage, thereby causing a collision, and, to avoid running into a house, plaintiff had to turn suddenly down a certain street, and that while thus "turning and driving as aforesaid, with all care and skill possible under the circumstances, the plaintiff's carriage upset," and then stated the injuries resulting from the upset. *Held*, that the complaint failed to allege facts sufficient to constitute a cause of action; for there was nothing alleged to show that defendant was the cause of the upset, which was the gist of the action.—Lee v. Emery, 10 Minn. 187, (Gil. 151.)

42. The statute authorizing street commissioners of a city to let contracts for grading, etc., after advertising for proposals, provided that "due notice shall be given of the time and place of letting such contract." *Held*, that an allegation in the complaint, in an action on such a contract, that the commissioners advertised for bids for doing the work, was not a sufficient allegation that they gave the notice required, and that, defendant having set up affirmatively in the answer the fact that no such notice was given, and that allegation not having been controverted, judgment was properly ordered for defendant on the pleadings.—Nash v. City of St. Paul, 11 Minn. 174, (Gil. 110.)

43. Where in action on a contract to pay plaintiffs $5,000, if they "consummate a sale" of land to a third party, when defendants receive their share ($23,000) of the purchase money, the complaint alleges that defendants have received their share in money and notes amounting to more than $12,000, it states a cause of action, and is an allegation that defendants have received their share, and not that they have only received $12,000.—Olson v. Jodon, (Minn.) 38 N. W. 485.

38 Minn. 466.

44. Plaintiff and defendant entered into an agreement that they should buy land from a third person; that the deed therefor should be made to defendant; and that he should then convey a part of it to plaintiff. The purchase was made, but defendant refused to convey to plaintiff. The latter filed a complaint setting out the above facts, and defendant moved to dismiss it as stating no cause of action, as the agreement was oral, though for the conveyance of land. *Held*, that this motion was properly overruled, as the complaint at least states a cause of action for the recovery of the money paid by plaintiff.—Pressnell v. Lundin, (Minn.) 47 N. W. 161.

44 Minn. 551.

45. Under a statute prescribing specified conditions, to be performed before a right of action shall accrue, a complaint is insufficient which merely alleges that the plaintiff has performed all of the acts required by the statute. The facts showing compliance with the law should be set forth.—Biron v. Board of Water Com'rs, (Minn.) 43 N. W. 482. 41 Minn. 519.

46. A complaint does not state facts sufficient to constitute a cause of action, where it shows on its face that the cause of action is barred by limitation.—Millette v. Mehmke, 3 N. W. 700, 26 Minn. 306.

47. A statement of facts in one cause of action will not help the statement in another cause of action in the same complaint, except so far as it is referred to in, and by such reference made part of, the statement in such other cause of action.—Gertler v. Linscott, 1 N. W. 579, 26 Minn. 82.

48. A party may allege and prove as many promises as he may have, to pay the debt sued for, if they are valid, separate, and distinct undertakings. —Walsh v. Kattenburgh, 8 Minn. 127, (Gil. 99.)

49. A complaint alleged that defendant, during a certain time, leased, hired, and rented from plaintiff, and was in the possession and occupancy, as tenant of plaintiff, of, certain premises, and that "said premises were worth and of the value of the sum and agreed price of $25 per month." *Held* that, no objection to the form of pleading having been made by defendant, plaintiff might recover upon proof of a tenancy either under a lease or by permission.—Dean v. Leonard, 9 Minn. 190, (Gil. 176.)

50. *Query*, whether a complaint can be properly drawn, so as to permit a recovery for false warranty or for deceit, as the evidence may establish. —Marsh v. Webber, 13 Minn. 109, (Gil. 99.)

Anticipating defenses.

51. If the complaint show, *prima facie*, a right in plaintiff to recover, it is sufficient, and need not negative a possible defense, nor state matter

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more properly coming from the other side.—Jones v. Ewing, 22 Minn. 157.

Filing copy of account.

52. Under Gen. St. Minn. c. 66, § 105, the failure of plaintiff to file a copy of his account in an action thereon, can only be taken advantage of by objection to proof of the account at the trial, and not by answer.—Henry v. Bruns, 45 N. W. 444, 43 Minn. 295; Butts v. Moorhead Manuf'g Co., 45 N. W. 444, 43 Minn. 296; Woolfolk v. Bruns, Id.

Allegation of damage.

53. In an action for damages for the wrongful conversion of personal property it is not necessary that the complaint allege the value of the property, if it contain a proper allegation as to the amount of plaintiff's damages.—Brunswick-Balke-Collender Co. v. Brackett, (Minn.) 33 N. W. 214.

37 Minn. 58.

Prayer for relief.

54. If a complaint is otherwise sufficient, the mere fact that relief is asked on a wrong ground, and claim is made for more than the party is entitled to, will not defeat a recovery.—Cressey v. Gierman, 7 Minn. 398, (Gil. 316.)

55. A complaint setting up a single state of facts, although it asks alternative relief thereon, is sufficient, if the facts entitle the plaintiff to any relief. That it does not ask for the proper relief, or asks for inconsistent relief, is not ground for demurrer.—Connor v. Board of Education of City of St. Anthony, 10 Minn. 439, (Gil. 352.)

56. It is not ground for demurrer to a complaint, which shows that plaintiff is entitled to certain relief, that it does not ask for the proper relief, or asks for inconsistent relief.—Metzner v. Baldwin, 11 Minn. 150, (Gil. 92.)

57. The complaint alleged that plaintiff was a railroad company, and as such had been in the possession and enjoyment of certain lines of railroad, the necessary equipments for operating the same, and a sum of money arising from the tolls and income of such lines; that defendants had unlawfully dispossessed it of all of this property, and had refused to surrender it; and that they were operating the roads and receiving the tolls, and were allowing the value of the property to depreciate for want of repairs. It prayed that defendants be compelled to surrender to plaintiff the roads with their appurtenances, and the sum of money mentioned; to account for the tolls received by them; and to pay the balance, after deducting operating expenses; and that a receiver be appointed to take charge of the property pending the suit. *Held* that, though the complaint demands more extensive relief than the facts warrant, this does not render it demurrable as failing to state facts sufficient to constitute a cause of action.—First Division St. P. & P. R. Co. v. Rice, 25 Minn. 278.

III. Answer.

Matters in abatement.

58. Pleading to the merits waives a plea in abatement of an unpaid judgment for costs. Per Flandrau, J.—Gerrish v. Pratt, 6 Minn. 53, (Gil. 14.)

59. Pendency of former action is matter in abatement, and is waived if not pleaded.—Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

60. Matters in abatement may be united with other defenses in the same answer.—Page v. Mitchell, (Minn.) 34 N. W. 896.

37 Minn. 368.

61. In an action for the conversion of a building, defendant pleaded in abatement that the conversion was caused by the alleged obstruction of a drain, and that, at the commencement of this action, another was pending between the same parties "in which the claim for recovery is based upon the same alleged obstruction," and that the conversion for which this action was brought "grew out of and was part and parcel of the injury resulting from" the obstruction complained of in the prior action. *Held*, that the plea was demurrable as failing to allege the character of the prior cause of action, and that it was identical with the second.—Wilson v. St. Paul, M. & M. Ry. Co., (Minn.) 46 N. W. 909.

44 Minn. 445.

62. An answer pleading as a defense a defect of parties plaintiff must distinctly set up such defense, and specifically show wherein the defect consists, and who should have been joined as parties.—Davis v. Chouteau, 21 N. W. 748, 32 Minn. 548.

Sufficiency of denial.

63. An answer which alleges that defendant "states and shows" that he denies each and every allegation, etc., is sufficient as a denial, though expressed in superfluous terms.—Moen v. Eldred, 22 Minn. 538.

64. A denial of "each and every allegation in the complaint, except so far as the court may construe the statements in the answer as admissions," is bad, as being indefinite and uncertain.—Starbuck v. Dunklee, 10 Minn. 168, (Gil. 136.)

Distinguished in Kingsley v. Gilman, 12 Minn. 518, (Gil. 427.)

65. A denial of "each and every statement and averment, and every part of the same, in said amended complaint contained, as therein stated or otherwise, save as hereinafter admitted or qualified," where what is afterwards stated, admitted, or qualified is unambiguous, is sufficient, and cannot be stricken out as indefinite and uncertain. Wilson, C. J., dissenting.—Kingsley v. Gilman, 12 Minn. 515, (Gil. 425.)

Distinguishing Dean v. Leonard, 9 Minn. 190, (Gil. 176;) Starbuck v. Dunklee, 10 Minn. 168, (Gil. 136.)

66. A denial in an answer of each and every "material" allegation of a complaint is insufficient.—Montour v. Purdy, 11 Minn. 384, (Gil. 278;) Dodge v. Chandler, 13 Minn. 114, (Gil. 105.)

67. In an action on a promissory note plaintiff alleged that the same had been sold, indorsed, and delivered to him. Defendant merely denied that plaintiff was the owner of the note. *Held* a denial of a conclusion of law averred in the complaint, and therefore insufficient to raise an issue.—Frasier v. Williams, 15 Minn. 288, (Gil. 219;) Downer v. Read, 17 Minn. 493, (Gil. 470.)

But compare Nunnemacker v. Johnson, 38 N. W. 352, 38 Minn. 392.

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68. A general denial of all matters alleged touching the transfer and ownership of the note sued on, is sufficient to put in issue the transfer thereof to plaintiff, and his title thereto.—Nunnemacker v. Johnson, (Minn.) 38 N. W. 351.

38 Minn. 390.

Overruling Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

69. A complaint upon a promissory note alleged that, by such note, defendants promised to pay to the plaintiff or order, etc. Two of the defendants, answering separately, denied that "by the promissory note in the complaint mentioned the defendants in the action, or either of them, ever promised to pay the plaintiffs or their order the sum alleged in the complaint, or any sum whatever." *Held*, that the denial included all the defendants, and raised a material issue.—Bennett v. Crowell, 7 Minn. 385, (Gil. 306.)

70. Where the time of delivery of notes sued on is immaterial, an allegation in the answer that they were not delivered till after the time stated in the complaint raises no material issue. —McMurphy v. Walker, 20 Minn. 382, (Gil. 334.)

71. The complaint in an action to cancel a bond executed by B. for a conveyance of land showed title in B., and alleged a sale by B. to plaintiff. The answer denied the sale by B. to plaintiff, and denied that plaintiff became the purchaser. *Held*, that the title was put in issue.—Hill v. Edwards, 11 Minn. 22, (Gil. 5.)

72. In an action upon a contract plaintiff averred, as consideration therefor, the performance of certain valuable and meritorious services The answer set up a different contract, admitted the performance of nominal services thereunder, but denied the services set up in the complaint. *Held* sufficient to raise a substantial issue, requiring proof of the services alleged in the complaint.—Becker v. Sweetzer, 15 Minn. 427, (Gil. 346.)

General and specific denials.

73. A general denial, inconsistent with special matters alleged, will be considered as qualified thereby.—McClung v. Bergfeld, 4 Minn. 148, (Gil. 99;) Derby v. Gallup, 5 Minn. 119, (Gil. 85;) Scott v. King, 7 Minn. 494, (Gil. 401.)

74. A general denial, of all allegations not expressly admitted or qualified, is inapplicable where specific answers are also made.—Davenport v. Ladd, (Minn.) 38 N. W. 622.

38 Minn. 545.

75. A complaint charged that the two defendants, as partners, had received certain money. The separate answer of one of the defendants contained a general denial. It also contained, in connection with allegations of a certain transaction between him individually and the plaintiff, a specific denial that "he" had received such money. *Held*, that the latter denial did not modify the effect of the general denial.—Brandt v. Shepard, (Minn.) 40 N. W. 521.

39 Minn. 454.

Negative pregnant.

76. In an action where the value of property is material and is alleged, a denial in the answer that the property is of the value as alleged is a mere negative pregnant.—Burt v. McKinstry, 4 Minn. 204, (Gil. 146;) Lynd v. Picket, 7 Minn. 184, (Gil. 128;) Dean v. Leonard, 9 Minn. 190, (Gil. 176.)

The case of Dean v. Leonard, 9 Minn. 190, (Gil. 176,) was disapproved by MITCHELL, J., in Stone v. Quaal, 29 N. W. 327, 36 Minn. 49, and overruled in German-American Bank v. White, 38 N. W. 362, 38 Minn. 472.

77. In an action where the value of property is material and is alleged, a denial of "each and every allegation" in the complaint is a mere negative pregnant, and admits the value as alleged. —Hecklin v. Ess, 16 Minn. 51, (Gil. 38;) Pottgieser v. Dorn, 16 Minn. 204, (Gil. 180;) Moulton v. Thompson, 1 N. W. 836, 26 Minn. 120; Coleman v. O'Neil, 1 N. W. 846, 26 Minn. 123.

Overruled in German-American Bank v. White, 38 N. W. 361, 38 Minn. 471.

78. In an action on a promissory note the complaint averred that before maturity the note was transferred, etc., to plaintiff. The answer denied that before maturity such note was sold, transferred, and delivered to plaintiff. *Held*, a mere negative pregnant, raising no issue as to the fact of transfer.—Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

See Nunnemacker v. Johnson, 38 N. W. 352, 38 Minn. 392.

79. A general denial is the same in effect as a specific denial of each of the allegations in the whole or in the part of the pleading so denied, and is a negative pregnant only where a mere specific denial would be.—Stone v. Quaale, 29 N. W. 326, 36 Minn. 46.

Disapproving (MITCHELL, J.) Dean v. Leonard, 9 Minn. 190, (Gil. 176.)

Declared in Nunnemacker v. Johnson, 38 N. W. 352, 38 Minn. 392, to overrule Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

80. A general denial is a negative pregnant, as applied to an allegation that the use of premises "was and is reasonably worth the sum of $100 per month," and therefore amounts to an admission of such an allegation.—Steele v. Thayer, 30 N. W. 758, 36 Minn. 174.

But see German-American Bank v. White, 38 N. W. 361, 38 Minn. 471.

81. In an action for unliquidated damages, an allegation of their amount is not traversable. A general denial puts in issue every allegation in the pleading which it denies and can never be construed as a negative pregnant. Overruling Dean v. Leonard, 9 Minn. 190, (Gil. 176,) and cases following it.—German-American Bank v. White, (Minn.) 38 N. W. 361.

38 Minn. 471.

Denial of knowledge or information.

82. A denial of knowledge or information sufficient to form a belief as to an averment in the complaint alleging plaintiff's copartnership raises an issue for the consideration of a jury.—Irvine v. Myers, 4 Minn. 229, (Gil. 164.)

83. Where a judgment is pleaded, a denial of any knowledge or information sufficient to form a belief as to such judgment, made by one not a party thereto, is good.—Mower v. Stickney, 5

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Minn. 397, (Gil. 321;) Same v Same, 5 Minn. 407, (Gil. 330.)

84. The complaint charged defendant with receiving a certain quantity of wood for transportation, and the answer admitted receiving a large quantity, but denied knowledge or information sufficient to form a belief as to the quantity so received. *Held*, that this denial was insufficient, as it failed to show any reason for a want of such knowledge, which defendant must be presumed to possess.—Starbuck v. Dunklee, 10 Minn. 168, (Gil. 136.)

85. In an action against a carrier to recover for goods lost while in defendant's care, a specific denial of any knowledge or information sufficient to form a belief as to the value of all or any of the said goods raises an issue as to value.—Ames v. First Div. St. P. & P. R. Co., 12 Minn. 412, (Gil. 295.)

86. A denial of any knowledge or information sufficient to form a belief, makes an issue while it remains in the answer, even though, because the matter is of record, easily accessible to the party, it might be struck out as sham upon motion.—Smalley v. Isaacson, (Minn.) 42 N. W. 352.
40 Minn. 450.

Admissions.

87. Where the complaint avers a fact qualified by a particular intention the answer may admit the fact and deny the intention.—Kingsley v. Gilman, 12 Minn. 515, (Gil. 425.

88. In an action against a railroad company the complaint averred that the defendant was a corporation, etc., and was the owner of a certain railroad, etc. The answer admitted the ownership of the road, and denied all other allegations. *Held* an admission of the corporate character.—Woodson v. Milwaukee & St. P. Ry. Co., 21 Minn. 60.

89. An averment in an answer that an agent had no authority to employ an attorney except in case of vacancy is an admission of authority to employ in case a vacancy occurred.—Horn v. Western Land Ass'n, 22 Minn. 233.

90. Pleading a license in an action for injury to realty, where there is also a denial of plaintiff's title, is not an admission of such title.—Booth v. Sherwood, 12 Minn. 426, (Gil. 310.)

Special defenses.

91. A special defense is something in the nature of release, accord, or offset; something which does not deny wholly the transaction alleged, but seeks to avoid it by what took place subsequently, or by some legal difficulty which exists to a recovery.—Bond v. Corbett, 2 Minn. 248, (Gil. 209.)

Several defenses.

92. Under Gen. St. Minn. 1866, c. 66, § 81, which provides that the "defendant may set forth by answer as many defenses as he has," defendant may plead more than one separate defense to the same cause of action; the only restriction being that they shall be consistent.—Booth v. Sherwood, 12 Minn. 426, (Gil. 310;) Conway v. Wharton, 13 Minn. 158, (Gil. 145.)

Inconsistent defenses.

93. A plea of license from plaintiff to do the act complained of as an injury to land is not inconsistent with a denial of plaintiff's title.—Booth v. Sherwood, 12 Minn. 426, (Gil. 310.)

94. In an action for the price of fruit trees, defenses that the trees were never delivered, and that the order therefor was obtained by plaintiff from defendant by fraudulent representations that the trees were raised in Mankato, whereas they were in fact raised in Lake City, on which account they were less valuable, etc., are not inconsistent.—Roblee v. Secrist, 8 N. W. 904, 28 Minn. 43; Same v. Moses, 8 N. W. 904, 28 Minn. 44.

Separate answer by codefendant.

95. A defendant who answers in a case cannot assert the rights of one who does not answer, where he fails to show that he has any interest in sustaining the rights of such non-answering defendant.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

Prayer for relief.

96. An answer, good as to plaintiff, is not vitiated by asking relief which cannot be granted for want of proper parties.—Campbell v. Jones, 25 Minn. 155.

IV. Reply.

When requisite — New matter in answer.

97. When the complaint in an action upon a promissory note alleges that it has not been paid, an averment of payment in the answer is not a statement of new matter, necessitating a reply.—McArdle v. McArdle, 12 Minn. 98, (Gil. 53.)

98. Laws Minn. 1879, c. 15, requiring a reply to an answer containing new matter, does not apply to the municipal court of St. Paul; the rule for that court being specially prescribed by Gen. St. Minn. 1878, c. 64, § 90, which require a reply only where the answer sets up a counter-claim.—Webb v. O'Donnell, 10 N. W. 140, 28 Minn. 368.

99. A complaint alleged that on a certain day plaintiff was lawfully and peaceably in possession of a certain hotel building, and that on that day defendant entered the house and forcibly and unlawfully ejected her therefrom, and beat her, and threw her goods into the street. The answer denied all the allegations of the complaint, and alleged that defendant was, at the time referred to, the owner and in the actual possession of the premises described in the complaint; that plaintiff was in the house by permission of plaintiff as a lodger only; that, at the time mentioned in this complaint, plaintiff forcibly and unlawfully attempted to evict defendant from his premises, and to take possession thereof, and in so doing plaintiff committed an assault and battery on defendant, who in defending himself therefrom used no more force than was necessary for that purpose. *Held*, that the new matter in this answer did not constitute a complete defense to the action, so as to entitle defendant to a judgment on the pleadings for want of a reply.—Craig v. Cook, 9 N. W. 712, 28 Minn. 232.

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100. Where the complaint alleges that plaintiff signed and gave to her husband a blank mortgage on his representations that it should be filled out, and used only if he could compromise with all his creditors, which, with defendants' knowledge, and in their interest, was unlawfully and fraudulently diverted, an answer alleging the husband's indebtedness to certain of the defendants, its assignment to another of them, and the giving of certain notes, and denying the allegation of the complaint, states no new matter requiring a reply.—Conway v. Elgin, (Minn.) 38 N. W. 370.

38 Minn. 469.

101. In an action to recover commissions earned by plaintiff as agent in the sale of defendant's land, the complaint set out that defendant gave plaintiff exclusive sale of a tract of land, and agreed to give him certain commission in case of sale. Defendant answered that he had signed a written instrument relying on plaintiff's representations that it was a mere memorandum containing a description of the land, and the price; and that, if the instrument was in fact a contract, it had been obtained fraudulently. On the trial defendant moved for judgment on the pleadings for failure of plaintiff to reply to the new matter relating to fraud. *Held*, that the motion was properly denied, because the allegations of the answer were insufficient to connect that instrument with anything alleged in the complaint.—McAllister v. Welker, (Minn.) 41 N. W. 107.

39 Minn. 535.

102. A complaint alleged that a certain assignment of a note and mortgage was without consideration and for the purpose of collection. The answer alleged that it was upon a sale for a valuable consideration. *Held*, that the allegation in the answer was not new matter requiring a reply.—Engel v. Bugbee, (Minn.) 42 N. W 351.

40 Minn. 492.

Sufficiency of denials.

103. A pleading alleged that a certain conveyance conveyed all the property of the grantor not exempt from execution. The reply denied that such conveyance conveyed the grantor's property not exempt from execution. *Held*, that such denial was too broad to be available.—Truitt v. Caldwell, 3 Minn. 364, (Gil. 257.)

104. The complaint in an action for goods sold and delivered alleged several sales in separate counts. The answer admitted the several sales, and alleged that they were made on an open running account, and that plaintiff had recovered judgment for an indivisible part of the same cause of action, and that the whole of the account was due when the former action was brought. The reply admitted the recovery in another action of a judgment for the amount stated in the answer; that the debts on which the present action was brought were due when the former action was commenced; and denied generally, except as admitted, the allegations of the answer. *Held*, the answer was in the nature of a confession and avoidance, the matter of which was put in issue by the reply, and the court properly refused defendant's motion for a nonsuit.—American Button-Hole, Overseaming & Sewing Machine Co. v. Thornton, 10 N. W. 425, 28 Minn. 418.

105. In an action on a promissory note for the price of a stock of goods the answer set up a counter-claim for a breach of warranty of the goods, including certain articles specifically mentioned. *Held*, that a denial in the reply that plaintiff warranted all of the several articles mentioned in the words of the allegations in the answer, stated conjunctively, was bad, and raised no issue.—Pullen v. Wright, 26 N. W. 394, 34 Minn. 314.

106. A reply, in terms denying specifically each and every allegation of new matter in the answer, is not so uncertain as to warrant the court in disregarding it at the trial.—Peterson v. Ruhnke, (Minn.) 48 N. W. 768.

46 Minn. 115.

Construction of allegations.

107. In an action between two who had been copartners, defendant offered in evidence the ledger of the firm, testifying that certain accounts were in plaintiff's handwriting, and that defendant received none of the money from them, or, if he did, he turned it over to plaintiff. *Held*, that the fact that plaintiff's reply alleged that "this book and others" showed the money received by plaintiff was not equivalent to an admission that "such ledger" showed the money received by the plaintiff, or of the fact that entries were in plaintiff's handwriting, and that it was error to refuse to allow plaintiff to cross-examine defendant as to such matters.—Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

108. The want of material averments in the complaint cannot be cured by the reply.—Bernheimer v. Marshall, 2 Minn. 78, (Gil. 61;) Tullis v. Orthwein, 5 Minn. 377, (Gil. 305;) Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

Departure from complaint.

109. To constitute a departure in pleading the party must quit or depart from the case he has first made, and have recourse to another. It is the legal and not the natural identity that is to be preserved.—Estes v. Farnham, 11 Minn. 423, (Gil. 312.)

110. A complaint alleged a cause of action for the agreed price of logs sold defendants in the fall of 1860 at $3 per 1,000, and 25 per cent. additional if the lumber from them netted over $7 per 1,000 at the mill; the amount to be paid in full before the spring of 1863. The answer alleged—*First*, an absolute bill of sale of the logs for $2,000, the receipt whereof was acknowledged in it; *second*, a written agreement reciting a sale of the logs in the fall of 1860, and containing stipulations by which F. (defendant) agreed to pay $3 per 1,000 for the logs, and, in case the lumber manufactured should net over $7 per 1,000 at the mills, $3.25 per 1,000; and, out of the amount the said logs should come to, to pay A., B. & Co. a certain sum; the balance, after deducting the amount due defendant and F. & Co., to be paid plaintiff in the summer, fall, and winter after the date of the contract; defendant to pay for scaling the logs, and all expenses on the logs up to March to be borne by plaintiff. The plaintiff, in reply, admitted the contracts as set out, and alleged the second was a memorandum of the terms of sale alleged in the complaint. *Held*, that there was no departure in the pleading.—Estes v. Farnham, 11 Minn. 423, (Gil. 312.)

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111. The complaint in an action on contract alleged full performance of the contract according to its terms. The answer pleaded a counter-claim upon an alleged failure to perform in time. The reply alleged matter of excuse for such failure. *Held*, that such allegations in the reply, being a departure from the complaint, could not, if objected to, aid plaintiff to recover, but he might plead and prove such matter of excuse as a defense to the counter-claim.—Trainor v. Wouman, 25 N. W. 401, 34 Minn. 237.

112. In an action for damages for breach of contract, the answer set up as the contract between the parties a writing signed by plaintiff, which differed in its terms from the contract alleged in the complaint. The plaintiff in reply admitted signing this writing, but alleged that it was not the actual agreement between the parties; that it was drawn up by the defendant, who induced plaintiff, who could not read, to sign it, by false and fraudulent representations that it was such a contract as they had agreed on, and such as alleged in the complaint. *Held*, that this reply was not a departure from the complaint, but supported it by avoiding the new matter set up in the answer.—Rosby v. St. Paul, M. & M. Ry. Co., (Minn.) 33 N. W. 698.

37 Minn. 171.

V. Demurrer.

To whole or part of pleading.

113. In an action of replevin the answer alleged that defendant had a lien for carrier's charges, and also a lien for warehouse charges for receiving and storing the goods replevied. *Held*, that the claims for the two liens were distinct defenses, and, though not separately stated, as required by Rev. St. Minn. c. 70, § 69, plaintiff might reply as to one and demur to the other, under the amendment of section 75 by Laws 1852, § 26, allowing a plaintiff to demur to one or more of several defenses, and reply to the residue.—Bass v. Upton, 1 Minn. 408, (Gil. 292.)

114. A demurrer will only lie to a whole pleading, and not to a portion of a single cause of action or defense.—Daniels v. Bradley, 4 Minn. 158, (Gil. 105;) Armstrong v. Hinds, 9 Minn. 356, (Gil. 341;) Knoblauch v. Foglesong, 38 N. W. 366, 38 Minn. 459.

Who may demur—Joint demurrer.

115. The fact that the summons in an action had not been served upon one of several co-defendants affords no ground for another defendant to demur to the complaint.—St. Paul Land Co. v. Dayton, (Minn.) 34 N. W. 335.

37 Minn. 364.

116. A joint demurrer by several defendants to a complaint for insufficiency is bad, where the complaint states a cause of action against any one of the defendants.—Clark v. Lovering, (Minn.) 33 N. W. 776.

37 Minn. 120.

117. Where a complaint states a good cause of action against one of several defendants, a common demurrer alleging such defect must be overruled.—Petsch v. St. Paul Dispatch Printing Co., 41 N. W. 1034, 40 Minn. 291; Prendergast v. Same, 41 N. W. 1036, 40 Minn. 295.

Grounds of, generally.

118. The rule that a demurrer puts to the test of legal sufficiency all prior pleadings in the cause, is retained under Minn. Code, but its strictness as to form is relaxed; and if a pleading set forth a valid cause of action or defense, the fact that it also contains unnecessary, immaterial, or redundant statements will not make it demurrable, but the proper course is by motion to strike out the improper or insufficient matter.—Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

119. Indefiniteness in pleading cannot be reached by general demurrer.—Dewey v. Leonard, 14 Minn. 153, (Gil. 120.)

To complaint—For want of jurisdiction.

120. To justify a demurrer to a complaint on the ground that the court has not jurisdiction of the subject-matter, such want of jurisdiction must affirmatively appear; otherwise, the objection must be taken by answer.—Powers v. Ames, 9 Minn. 178, (Gil. 164;) Dorman v. Ames, 9 Minn. 180, (Gil. 164.)

121. The fact that an action is commenced in a wrong county is not fatal to the jurisdiction, and cannot be reached by demurrer.—Nininger v. Board of County Com'rs Carver County, 10 Minn. 133, (Gil. 106.)

122. An objection that the county designated is not the proper place of trial cannot be taken by a demurrer.—Gill v. Bradley, 21 Minn. 15.

—— For want of legal capacity to sue.

123. Want of legal capacity in a plaintiff to sue must appear affirmatively in the complaint, to authorize a demurrer upon that ground.—State of Wisconsin v. Torinus, 22 Minn. 272; Minneapolis Harvester-Works v. Libby, 24 Minn. 327.

124. In an action for a penalty authorized by statute to be brought by the director of a school-district, or by any freeholder in the district, the objection that the person prosecuting the action has not the legal capacity to sue cannot be raised by general demurrer, as the objection does not affect the cause of action.—Soule v. Thealander, 17 N. W. 373, 31 Minn. 227.

—— For want of leave to sue.

125. Omission to obtain leave to sue an assignee for benefit of creditors is not ground of demurrer to the complaint in the action against him.—Lenthold v. Young, 19 N. W. 652, 32 Minn. 122.

—— For duplicity or improper joinder of causes of action.

126. A general demurrer will not reach duplicity or improper joinder of causes of action. It can only be sustained where the pleading does not state any cause of action.—Smith v. Jordan, 13 Minn. 264, (Gil. 246.)

127. Where the facts stated in a complaint constitute a single cause of action, a prayer for inconsistent forms of relief will not render the

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pleading demurrable for misjoinder of causes of action. The remedy is by motion.—Caulstrom v. Minneapolis & St. L. Ry. Co., 18 N. W. 94, 31 Minn. 367.

To complaint—For defect or misjoinder of parties.

128. Demurrer for defect of parties under the Minnesota statutes is not a substitute for the common-law plea in abatement.—Porter v. Fletcher, 25 Minn. 493.

129. Where a complaint in an action brought by one shows a cause of action belonging to himself and others jointly, demurrer for non-joinder will lie, although it does not appear from the complaint that the others are alive.—Porter v. Fletcher, 25 Minn. 493.

130. Where there is an improper joinder of parties defendant the objection may be raised by demurrer by the party improperly joined; but the remedy, if any, by one who is a proper party defendant, is by motion to purge the record.—Lewis v Williams, 3 Minn. 151, (Gil. 95.)

131. Improper joinder of defendants cannot be taken advantage of by a general demurrer on the part of all.—Goncelier v. Foret, 4 Minn. 13, (Gil. 1.)

132. Mere excess of parties is no ground of demurrer by those properly joined.—Mitchell v. Bank of St. Paul, 7 Minn. 252, (Gil. 192.)

133. An excess of parties is not a ground of demurrer for "defect of parties," under Gen. St. Minn. 1878, c. 66, § 92, subd. 4.—Hoard v Clum, 17 N. W. 275, 31 Minn. 186.

—— For failure to state cause of action.

134. The fact that the complaint shows that the subject-matter of the action has been previously conclusively adjudicated may be taken advantage of by demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.—Monette v. Cratt, 7 Minn. 234, (Gil. 176.)

135. A general demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, need not specify the particular defects.—Monette v. Cratt, 7 Minn. 234, (Gil. 176.)

136. Where a complaint shows a party entitled to some relief, a general demurrer to the pleading, as a whole, will be overruled.—Lockwood v. Bigelow, 11 Minn. 113, (Gil. 70.)

137. A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action cannot be sustained merely because the action is in its nature equitable, while an adequate remedy of a legal kind is open to plaintiff.—Canty v. Latternar, 17 N. W. 385, 31 Minn. 239.

—— For failure to ask proper relief.

138. If the complaint shows a plaintiff entitled to some relief, the fact that he claims more relief than he shows himself entitled to will not make it demurrable, as not stating facts sufficient to constitute a cause of action.—First Division St. P. & P. R. Co. v. Rice, 25 Minn. 278.

139. Where the facts alleged in a complaint show a cause of action for the possession of certain personal property without an accounting, the fact that an accounting is prayed for is not ground for a general demurrer.—Lenthold v. Young, 19 N. W. 652, 32 Minn. 122.

140. In an action to compel specific performance of a contract by which defendant employed plaintiff to act as her agent, a general demurrer is properly overruled, where the complaint states facts entitling plaintiff to recover for services performed and money expended for defendant, and the fact that the wrong relief is asked is no ground of demurrer. — Alworth v. Seymour, (Minn.) 44 N. W. 1030.

42 Minn. 526.

141. On demurrer to a complaint in an action to enforce a mechanic's lien it appeared that, although the complaint failed to show a valid lien, it stated a cause of action for specific performance of a contract. *Held*, that the demurrer should be overruled.—Dye v. Forbes, 24 N. W. 309, 34 Minn. 13.

To complaint of intervener.

142. Under Gen. St. Minn. 1878, c. 66, § 131, providing that "an intervention shall be by complaint, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings," the complaint of an intervener may be demurred to for its failure to state a cause of action or ground of intervention.—Shepard v. Malhoit, (Shepard v. Murray County,) 24 N. W. 291, 33 Minn. 519.

To answer.

143. Where an answer denies all the allegations in a complaint, except such as it admits, which allegations admitted are insufficient to constitute a cause of action, and then sets up special defenses, a general demurrer to the answer will be overruled, though the special defenses are insufficient, since the denials alone constitute a good defense.—First Nat. Bank v. Nathan, 9 N. W. 626, 28 Minn. 150.

144. Under Gen. St. Minn. 1878, c. 66, § 100, which only authorizes a demurrer to "an answer containing new matter," an answer consisting only of a denial of a portion of the complaint is not subject to demurrer.—C. N. Nelson Lumber Co. v. Carney, (C. N. Nelson Lumber Co. v. Pelan,) 25 N. W. 406, 34 Minn. 243.

145. The objection that an answer does not, for want of proper parties, contain a counter-claim, may be raised by demurrer.—Campbell v. Jones, 25 Minn. 155.

146. Upon demurrer to an answer the defendant may attack the complaint, and, if the complaint is so defective that it would not be aided by the verdict, he is entitled to judgment in his favor, and the same rule is applicable on motion to strike out an answer.—Smith v. Mulliken, 2 Minn. 319, (Gil. 273;) Yoss v. De Freudenrich, 6 Minn. 95, (Gil. 45.)

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147. On a demurrer to the answer, the sufficiency of the complaint will be considered, and, if the complaint is insufficient, judgment will be given for defendant, though the answer is also defective. —First Nat. Bank v. Nathan, 9 N. W. 626, 28 Minn. 150.

To reply.

148. Upon a demurrer to a reply the complaint may be attacked for failure to state facts sufficient to constitute a cause of action.—Lockwood v. Bigelow, 11 Minn. 113, (Gil. 70;) Bausman v. Woodman, 24 N. W. 198, 33 Minn. 512.

149. Under Laws Minn. 1881, c. 44, § 2, providing that "if a reply to any new matter set up in the answer is insufficient, the defendant may demur thereto," it is no objection to such a demurrer that the reply might have been stricken out on motion.—Bausman v. Woodman, 24 N. W. 198, 33 Minn. 512.

150. A reply which is not responsive to the answer, but merely attempts to aid the complaint, is demurrable.—Bausman v. Woodman, 24 N. W. 198, 33 Minn. 512.

Effect.

151. Where, in an action on a promissory note, defendant demands an assessment of damages, and then afterwards demurs to that part of the complaint alleging the damages to be assessed, such demurrer is an abandonment of his demand for such assessment.—Daniels v. Bradley, 4 Minn. 158, (Gil. 105.)

152. A general demurrer only admits traversable facts, not mere inferences or conclusions of law.—Griggs v. City of St. Paul, 9 Minn. 246, (Gil. 231.)

Judgment on demurrer—Pleading over.

153. In equitable actions, where the nature of the case is such that proof should be made of facts alleged in the complaint, it is error for the court to require, upon demurrer to the complaint being overruled, that final judgment be entered thereon without such proof.—Deuel v. Hawke, 2 Minn. 50, (Gil. 37.)

154. Where a demurrer to an answer is overruled, and no time allowed to answer over, the case stands as if no answer had been interposed, and the plaintiff is entitled to enter judgment on his complaint.—Daniels v. Bradley, 4 Minn. 158, (Gil. 105.)

155. In its decision on demurrer the court need not find the facts admitted by the pleadings. —Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.)

156. After a demurrer to a complaint was sustained, it was stipulated that plaintiffs might have 30 days to amend; but, before its expiration, plaintiffs informed defendant they did not wish to amend, and requested him to enter judgment. *Held* a waiver of their right to amend, and a notice of entry of judgment, served before the expiration of the 30 days, for the entry of judgment thereafter, was not improper, and the judgment entered in pursuance thereof was regular.—Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

157. Where a party, after his demurrer is overruled by the court below, pleads issuably, he thereby waives the error, if any, committed in overruling such demurrer.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

158. Error in sustaining a demurrer to an original answer is waived by putting in an amended answer.—Becker v. Sandusky City Bank, 1 Minn. 311, (Gil 243.)

VI. Verification.

Of complaint.

159. Gen. St. Minn. 1878, c. 64, § 90, provides that in actions brought in the municipal court of St. Paul, "no summons shall issue until the complaint in the action shall be made and filed," and that pleadings in said court shall be verified as in justices' courts. *Held*, that failure to verify the complaint is not a jurisdictional defect, for which the action will be dismissed after the summons is issued thereon and duly served.— McMath v. Parsons, 2 N. W. 703, 26 Minn. 246.

Of denial of execution of written instrument.

160. The provision of Gen. St. Minn. 1878, c. 73, § 89, that "every written instrument, purporting to have been signed or executed by any person, shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit," applies only to an instrument on which an action is brought against the maker thereof, or upon which a counter-claim or defense against the maker thereof is founded.—Mast v. Matthews, 16 N. W. 155, 30 Minn. 441.

161. A general denial in the answer, though it be verified, is not such a denial of the signature or execution of a written contract, the execution of which is alleged in the complaint, as is required by the statute. The denial must be specific, to make proof of the execution necessary at the trial.—Johnston Harvester Co. v. Clark, 15 N. W. 252, 30 Minn. 308; Cowing v. Peterson, 30 N. W. 461, 36 Minn. 130.

By attorney or agent.

162. Under Rev. St. Minn. c. 70, § 73, as amended by Laws 1856-57, pp. 6, 7, which provides that, where a pleading is verified by a person other than a party, the affiant's knowledge or ground of belief, and the reason why the verification is not made by a party, shall be set forth; and that when the cause of action or defense is founded on a written instrument for the payment of money only, in the possession of the agent or attorney, affidavit of the fact of such possession shall be sufficient,—the written instrument referred to is some instrument, the creature of the contracting parties, containing stipulations for payment of money, and does not include judgments.—Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

163. An affidavit of merits may be made by the attorney for the party, if he have personal knowledge of the facts.—Frankoviz v. Ireland, (Frankoviz v. Smith,) 28 N. W. 508, 35 Minn. 278.

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Effect.

164. A verification of an insufficient pleading will not aid it.—Farrington v. Wright, 1 Minn. 241, (Gil. 191.)

Defective verification.

165. Under Rev. St. Minn. c. 70, § 73, as amended by Laws 1856-57, pp. 6, 7, which provides that when a pleading in a case is verified all subsequent pleadings must be verified, a pleading that is defectively verified may be treated as entirely unverified.—Smith v. Mulliken. 2 Minn. 319, (Gil. 273.)

VII. Amended and Supplemental Pleadings.

Amendment—To conform to statutory requirements.

166. Gen. St. Minn. 1866, c. 66, §105, permitting the amendment of a proceeding which fails to conform to statutory requirements, does not apply to a proceeding taken under no statute whatever, as in replevin where plaintiff proceeds by writ issued under Gen. St. 1866, c. 66, §§ 114-117, repealed by Laws 1868, c. 76, which requires the request of plaintiff's attorney to take the property to be indorsed on the affidavit.—Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

—— Of complaint.

167. The trial court may, in its discretion, permit an amendment to a complaint at the trial, and allow further testimony to be given under the amendment after a party has rested.—Caldwell v. Bruggerman, 8 Minn. 286, (Gil. 252.)

168. In an action for injury to a city lot, described in the complaint by number, the court may allow an amendment, at trial, correcting a mistake in the number, if defendant is not misled by it.—Rau v. Minnesota Val. R. Co., 13 Minn. 442, (Gil. 407.)

169. A complaint averred that plaintiffs owned an interest in a certain judgment, which defendant undertook to collect; that defendant had acknowledged satisfaction of such judgment, and directed his attorneys to satisfy the same; and that it was satisfied of record. The evidence showed that defendant had given his attorneys a writing stating that the judgment was paid, and requesting them to satisfy the same, but failed to show that it was satisfied. At the close of his case the plaintiff moved to amend, to make the pleadings conform to the proof. *Held*, that this was a case of failure of proof, and not of variance, and therefore the motion to amend was made to the discretion of the court, under Pub. St. Minn. c. 60, § 94, and its denial, and the dismissal of the action, were no abuse of such discretion, and were not subject to review. —White v. Culver, 10 Minn. 192, (Gil. 155.)

170. The Minnesota statutes have abolished the formal distinction between proceedings at law and proceedings in equity, and in furtherance of justice a court may allow an amendment of a complaint praying pecuniary damages by substituting a prayer for equitable relief which the facts alleged show that complainant is entitled to.—Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

171. In an action of foreclosure, about nine years after judgment, over eight years and a half after the judgment was satisfied by the sale of the mortgaged premises, and over eight years after the sale had been confirmed, an order was made on plaintiff's motion, (no sufficient excuse being given for her delay in making application,) allowing her to amend the allegation of her complaint as to the date of the delivery of the mortgage, and directing that the question as to the date of such delivery be deemed at issue between the parties, and that issue be placed on the calendar for trial; and that, if it should be decided in favor of defendants, they should have the right to apply to the court to have the judgment, and all proceedings thereunder, and the final decree, vacated. *Held*, that the making of such an order was, under the circumstances, an abuse of discretion, both because the proceedings proposed to be had under the order were useless and frivolous, and because an amendment to a pleading, so long after judgment, ought not, under the circumstances, to have been allowed.—North v. Webster, 30 N. W. 429, 36 Minn. 99.

172. At the trial of an action against a corporation organized and existing under the laws of the United States, an amendment of the complaint was allowed at the trial, by which the claim for damages was increased from an amount less to an amount greater than $500. *Held*, that the amendment would not be regarded as an abuse of the discretion of the trial court, as compelling defendant to submit to a trial in the state court in a case where the amount was sufficient for a removal to a United States court, without his having an opportunity to remove the cause; there being nothing to indicate that the proceeding was a device or artifice to prevent such removal. —Austin v. Northern Pac., F. F. & B. H. R. Co., 26 N. W. 607, 34 Minn. 473. Affirmed in United States supreme court, 10 S. Ct. 758, 135 U. S. 315.

—— Of answer.

173. On the trial of an action for the price of a wagon, the court properly exercised its discretion in refusing to allow the answer, which set up a counter-claim for a breach of warranty of the wagon, to be amended so as to apply to a wagon sold before the one in suit.—Iverson v. Dubay, (Minn.) 40 N. W. 159.

39 Minn. 325.

174. An amendment to an answer proposed on the second day of a trial, withdrawing an admission in the original answer in favor of the plaintiff, is addressed to the discretion of the court, and its refusal is not error.—Iltis v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 1040.

40 Minn. 273.

175. The denial of an application, made at the trial, to amend the answer so as to lay a foundation for a reformation of the written contract sued on, in respect of matters alleged to have been omitted therefrom by mistake, is within the discretion of the court.—Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.)

Proceedings for leave to amend.

176. A party asking leave of court to amend his pleadings must inform the court in what particular he desires an amendment, otherwise there is

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nothing for the court to exercise its discretion upon.—Barker v. Walbridge, 14 Minn. 469, (Gil. 351.

177. It is not necessary that an order granting leave to amend a complaint should be served on the adverse party. — Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

178. The refusal of the court to strike out an amended pleading, which was allowed on default of the adverse party to appear and oppose its allowance, is not error. — Bruns v. Schreiber, (Minn.) 51 N. W. 120.

Imposing conditions.

179. It is not an abuse of discretion for the court, on allowing an amended answer to be put in, containing two inconsistent defenses, to compel the party to elect upon which he will rely, or to impose a condition that the same should be considered at issue without service of a written reply.—Caldwell v. Bruggerman, 8 Minn. 286, (Gil. 252.)

Effect of amendment.

180. The effect of amendments to an answer cannot be confined to the parts of the original answer amended, but must be considered in connection with the whole of the original answer. —Hanscom v. Herrick, 21 Minn. 9.

181. An amended answer, after it has been allowed to be filed, is a substitute for the original, and the only answer in the case.—Oleson v. Newell, 12 Minn. 186, (Gil. 114.)

Supplemental complaint.

182. If the original complaint is wholly defective, it cannot be sustained by a supplemental one; but if sustainable, and the supplemental complaint only enlarges its extent and changes the kind of relief, the latter may be sustained.—Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

183. Where an original complaint is wholly defective, but a supplemental complaint sets up matter accruing subsequent to the commencement of the action, so that the two establish a valid cause of action, objection to such supplemental bill cannot be taken for the first time at the trial, by objecting to evidence thereunder.—Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

184. A proposed supplemental complaint set forth facts going to show that a prior settlement and dismissal of the cause was made under a mistake of fact, praying that it might be abrogated, and the relief originally prayed be granted. *Held*, that it stated a new cause of action, and leave to file it in the original suit was properly denied.—Eastman v. St. Anthony Falls Water-Power Co., 17 Minn. 48, (Gil. 31.)

185. If a complaint states no cause of action, it cannot be sustained by a supplemental pleading setting up matters that have occurred after the commencement of the suit. The office of a supplemental complaint is merely to enlarge or change the relief to which a party may be entitled upon a cause of action existing at the time of the commencement of the suit.—Meyer v. Berlandi, (Minn.) 40 N. W. 513.

VIII. Motions Relating to Pleadings.

Motion to strike out—In general.

186. A motion to strike out an answer and for judgment need not be made within 20 days from its service. If the answer is entirely bad, such motion may be made even after trial.—Freeman v. Curran, 1 Minn. 169, (Gil. 144.)

187. In an action to set aside a conveyance of land entered as a town-site under Act Cong. May 23, 1844, the answer recited that "these defendants deny all that part of the complaint included in the following words: 'That neither of the defendants nor any of them occupied or improved the said blocks, * * * and the said plaintiff alleges that neither of the said defendants has any right, title, or interest in or to the said lots, * * * or any one thereof.'" *Held*, that this portion of the answer was properly stricken out, as being too large as a traverse and a denial of a negative allegation.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

188. In an action upon a justice's judgment, rendered in another state, even though the law be that the recital in the record that defendant was personally served with process could not be controverted, that fact is no justification for striking out, before trial, an allegation in defendant's answer "that he never was served with process, and never appeared in said action in any way whatever."—Bryan v. Farnsworth, 19 Minn. 239, (Gil. 198.)

189. A party is not deprived of his right to have matter stricken out of a defense in which it is badly pleaded, because it is made part of a subsequent defense by reference to the former.—Palmer v. Smith, 21 Minn. 419.

—— As indefinite or uncertain.

190. Defendants, who have answered a complaint without objection, cannot afterwards attack it for indefiniteness or uncertainty.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

191. Under Rev. St. c. 70, § 76, as amended by Laws 1852, p. 9, providing that the court may strike out a pleading for indefiniteness or uncertainty, or require it to be amended, the moving party may produce proof outside of the pleading itself to show that the allegations are intended to evade a direct averment, which the pleader cannot in conscience make.—Colter v. Greenhagen, 3 Minn. 126, (Gil. 74.)

192. A motion to strike out certain portions of a complaint as indefinite and uncertain, or to have the same made more definite and certain, may properly be denied where the general allegations objected to are narrowed and made more specific and definite by subsequent averments, so that the complaint is thereby made as definite as could reasonably be expected, and sufficient to inform defendant with reasonable certainty of what plaintiff complains.—Fraker v. St. Paul, M. & M. Ry. Co., 14 N. W. 366, 30 Minn. 103.

193. On a motion to strike out a pleading, or to require it to be made more definite and certain, the particular allegations objected to should be specifically pointed out in the motion papers.—Truesdell v. Hall, 29 N. W. 72, 35 Minn. 468.

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Motion to strike out—As irrelevant, redundant, etc.

194. An irrelevant pleading is one which has no substantial relation to the controversy between the parties to the suit.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

195. Allegations which simply plead matters of evidence, or deny immaterial matter, legal conclusions, or negative averments, are bad, and may be stricken out.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

196. Plaintiffs alleged that they had, as attorneys at law, recovered a judgment for a client against defendant, and that, pending an appeal from that judgment, defendant had settled with the client, and thereby deprived plaintiffs of any means of compensation for their labor. Defendant answered, setting up matters going to show that the original judgment was fraudulently obtained against it. *Held*, that such matter was properly stricken from the answer as irrelevant and immaterial.—Brisbin v. American Exp. Co., 15 Minn. 43, (Gil. 25.)

197. The complaint, in an action for injuries received by plaintiff while coupling cars in defendant's employ, alleged as negligence on defendant's part that the draw-bars of the coupling appliances "were not properly fastened, and were loose, defective, and insufficient, and, on account thereof, would not and did not remain in their proper places when the cars were driven together, as usual and necessary in making said coupling." *Held*, that a motion to strike out the words "defective and insufficient" as irrelevant and redundant, or that as to them the complaint be made more definite and certain, was properly overruled.—Tierney v. Burlington, C. R. & N. Ry. Co., (Tierney v. Minneapolis & St. L. Ry. Co.,) 17 N. W. 377, 31 Minn. 234.

198. Upon a motion to strike out allegations as redundant, etc., the sufficiency of the complaint is not in question.—Brisbin v. American Exp. Co., 15 Minn. 43, (Gil. 25.)

—— Answer or defense as sham.

199. A motion to strike out an answer or defense as sham may be entertained by the court, in its discretion, at any time before trial.—Barker v. Foster, 12 N. W. 460, 29 Minn. 166.

200. A sham answer is one setting up new matter, the falsity of which is clear and indisputable.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

201. An answer consisting only of a general denial, setting up no new matter, and verified, cannot be stricken out as sham.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

Overruled in C. N. Nelson Lumber Co. v. Richardson, 17 N. W. 388, 31 Minn. 267.

202. Where inconsistent defenses are set up, the answer cannot, for that cause, be stricken out; the proper course is to require defendant to elect upon which defense he will rely.—Conway v. Wharton, 13 Minn. 158, (Gil. 145.)

203. In an action upon a negotiable promissory note, the answer admitted facts constituting in law a delivery of the note, but denied a delivery in fact. *Held*, that the admission should prevail, and the denial be stricken out as a sham, or as irrelevant. WILSON, C. J., dissenting.—Hayward v. Grant, 13 Minn. 165 (Gil. 154.)

204. The fact that an answer is verified will not prevent its being stricken out as a sham.—Conway v. Wharton, 13 Minn. 158, (Gil. 145;) Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

205. An answer or defense consisting of new matter affirmatively pleaded may be stricken out upon satisfactory evidence clearly establishing its falsity, although it be verified.—Barker v. Foster, 12 N. W. 460, 29 Minn. 166.

206. Under Gen. St. Minn. 1878, c. 66, § 99, which provides that sham answers and defenses may be stricken out, an answer may be so stricken out, although it contains only a general denial, and notwithstanding it is verified.—C. N. Nelson Lumber Co. v. Richardson, 17 N. W. 388, 31 Minn. 267.

Overruling Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

207. Although part of an answer is sham and frivolous, if it contains a general denial not shown to be sham, and allegations of the complaint material to the relief sought by plaintiff are not specifically admitted, the whole answer cannot be stricken out.—Schmitt v. Cassilius, 16 N. W. 453, 31 Minn. 7.

208. A verified answer should not be stricken out as sham merely on the affidavit of the plaintiff denying the fact alleged as a defense, although the averment is not supported by additional affidavits on the part of the defendant.—City Bank v. Doll, 24 N. W. 300, 33 Minn. 507.

209. When the allegations of an answer or defense are fairly supported by the affidavits of the defendant and others against affidavits on behalf of plaintiff, such answer or defense should not be stricken out as sham, unless under very extraordinary circumstances.—Jewell v. Wright, 24 N. W. 299, 33 Minn. 505.

210. On a motion to strike out an answer as sham, affidavits on behalf of defendants fairly supported the answer, and negatived the charge of bad faith in interposing it. *Held*, that the motion should be denied.—Smith v. Betcher, 25 N. W. 347, 34 Minn. 255.

211. Where, on a motion to strike out an answer as sham, the affidavits on the part of plaintiff make out a clear *prima facie* case, calling for some explanation by defendants not afforded by the answer, and no affidavits or other proof are supplied by defendant in support of the answer, the motion should be granted.—Van Loon v. Griffin, 26 N. W. 601, 34 Minn. 444.

212. In an action by a mortgagee of personal property to recover the same, the defendant answered by general denial. On motion to strike out as sham, defendant made affidavit that she had purchased the property with actual notice of the existence of the mortgage, but on the representation by the mortgagor that the mortgage would never be enforced. *Held*, that a motion to strike out the answer as sham was properly sus-

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tained.—Stevens v. McMillan, (Minn.) 35 N. W. 372.

37 Minn. 509.

213. A complaint on a promissory note alleged that defendant, for value, executed a contract in writing to pay the note previously made by a third person, and the answer was a general denial. On a motion to strike out the answer as sham, it appeared that the contract was not a specific agreement to pay the note, but the partnership and individual debts of the maker thereof, not exceeding a sum certain. *Held*, that defendant, under the general denial, might show that the agreement had already been otherwise satisfied, and did not include plaintiffs' claim, and hence it did not indisputably appear that answer was sham or interposed in bad faith.—McDermott v. Deither, (Minn.) 41 N. W. 544.

40 Minn. 86.

—— Frivolous defense or demurrer.

214. Under Rev. St. Minn. 1851, § 76, as amended by Laws 1852, p. 9, § 70, which authorizes the striking out of sham answers and defenses, and frivolous demurrers, an answer may be stricken out as frivolous.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

215. A frivolous answer is one which, if true, does not contain any defense, and the insufficiency of which is so glaring that the court can determine it upon a bare inspection without argument.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

216. The frivolousness of a demurrer is to be determined from the pleading and demurrer alone, and if from a mere inspection it can be determined that the pleading is good, the demurrer will be stricken out as frivolous.—Hurlburt v. Schulenburg, 17 Minn. 22, (Gil. 5;) Perry v. Reynolds, 42 N. W. 471, 40 Minn. 499.

217. In an action for the price of fruit trees alleged to have been sold and delivered by plaintiff to defendant, a defense that plaintiff obtained the order for the trees by fraudulent representations that they were raised in Mankato, whereas they were in fact raised in Lake City, on which account they were less valuable, etc., is not frivolous.—Roblee v. Secrist, 8 N. W. 904, 28 Minn. 43; Same v. Moses, 8 N. W. 904, 28 Minn. 44.

218. A demurrer should not be stricken out as frivolous unless it be manifest from mere inspection, and without argument, that there was no reasonable ground for interposing it, and hence that it was presumably put in in bad faith, for mere purposes of delay. It should not be struck out where there is such room for debate, as to the sufficiency of the pleading demurred to, that an attorney of ordinary intelligence might have interposed a demurrer in entire good faith.—Hatch & Essendrup Co. v. Shusler, (Minn.) 48 N. W. 782. 46 Minn. 207.

Making complaint more definite and certain.

219. In an action by the board of county commissioners against a defaulting county treasurer, for the funds converted by such treasurer, the defendant is not entitled to a bill of particulars under Gen. St. 1866, c. 66, § 88, which provides for a bill of particulars only in an action on an account; and, if the allegations in the complaint are not sufficiently specific, defendant's remedy is by motion to make the complaint more definite and certain.—Board County Com'rs Mower County v. Smith, 22 Minn. 97.

220. On a motion that a complaint be made more definite and certain as to certain general allegations contained therein, it appeared that plaintiff had pleaded specifically the facts within his knowledge, and that he possessed no knowledge or information of additional facts to sustain the general allegations objected to. *Held*, that such allegations should be stricken out.—Pugh v. Winona & St. P. R. Co., 13 N. W. 189, 29 Minn. 390.

221. The complaint, in an action for damages for personal injuries to plaintiff while in the employ of defendant as brakeman on a railway train, in setting out defendant's negligence, mingled specific and general charges of the defective condition of defendant's track from which the train was thrown, causing plaintiff's injuries. *Held*, that an order directing such general allegations to be made more definite and certain, and, in default thereof, to be stricken out, being within the reasonable discretion of the court, would be sustained on appeal, although several of such allegations did not appear to be especially objectionable; it not appearing that the complaint could not be so corrected without injustice or embarrassment to plaintiff.—Madden v. Minneapolis & St. L. Ry. Co., 15 N. W. 203, 30 Minn. 453.

222. The complaint in an action against a railway company charged, in substance, that at a certain highway crossing defendant's railroad was so located and constructed that a train or engine approaching thereon could not be seen by a person on the highway until so near that it was difficult or impossible to avoid being struck, and that it was negligent in defendant to so locate and construct it; also, that at the crossing the railroad was insufficiently constructed, in bad order, in ruinous condition, difficult, unsafe, and dangerous for teams and vehicles to cross, and that defendant was negligent in running an engine and train of cars across the highway with great velocity, and without warning of its approach. *Held*, that a motion to make these allegations more definite and certain should not be granted.—Lehnerttz v. Minneapolis & St. L. Ry. Co., 17 N. W. 376, 31 Minn. 219.

223. The complaint in an action against a corporation alleged that, at a specified date, plaintiff was injured through the negligence of defendant in leaving unguarded in its yard a receptacle for boiling water, into which plaintiff fell while he was lawfully upon the premises, by invitation of defendant, to obtain employment. *Held*, that a motion to make the complaint more definite and certain by stating how such invitation was extended to plaintiff, and the name and occupation of the person representing the defendant who extended it, was properly denied; there being no uncertainty as to what was alleged, but only as to the particular evidence which plaintiff would produce to sustain it.—Lee v.

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Minneapolis & St. L. Ry. Co., 25 N. W. 399, 34 Minn. 225.

224. The indefiniteness or uncertainty to be relieved against on motion, is only such as appears on the face of the pleading itself, and not an uncertainty arising from extrinsic facts as to what particular evidence may be produced to support it; following Lee v. Railway, 34 Minn. 225, 25 N. W. 399.—Todd v. Minneapolis & St. L. Ry. Co., (Minn.) 35 N. W. 5.

37 Minn. 358.

225. In an action by a locomotive fireman against a railroad company, the complaint alleged that the locomotive was so defective and the engineer managed it so carelessly that the smoke-stack became choked so that quantities of steam, smoke, and fire were forced into the cab, where plaintiff was at work, and injured him. *Held*, that the allegations were sufficient to inform defendant, with reasonable certainty, of what plaintiff complains and a motion to make the complaint more definite was properly denied.—Orth v. St. Paul, M. & M. Ry. Co., (Minn.) 45 N. W. 151.

43 Minn. 208.

Compelling election.

226. Where, in an action for services, a special contract price is alleged, and also the value of such services, the court may, in its discretion, compel the party to elect on which allegation he will proceed. Hawley v. Wilkinson, 18 Minn. 525, (Gil. 468,) followed.—Plummer v. Mold, 22 Minn. 15.

227. In an action for work and labor done, etc., in grading a certain street, the answer averred a partnership between plaintiff and defendant in such grading, and that the labor, etc., were for such partnership. It also set up various counterclaims growing out of other matters not affected by the partnership, which were denied by the reply. *Held*, that a motion to compel defendant to elect between the counter-claims and partnership theory was properly denied.—Clonan v. Thornton, 21 Minn. 380.

228. Where a complaint unites several causes of action which may properly be joined, but fails to state them separately, a motion will not lie to compel plaintiff to elect on which cause of action he will rely; but the remedy is by motion to make more definite and certain, or to compel a separate statement of the several causes of action.—Craig v. Cook, 9 N. W. 712, 28 Minn. 232.

229. In a suit to recover the price of a harvester, a defense that plaintiff warranted the machine to be equal to the sample, and to do good work, and that it failed to do so, is not inconsistent with another defense that plaintiff warranted the machine to be made of good material, and to work in any grain, and alleging breach of this warranty, and defendant will not be compelled to elect between them.—Gammon v. Ganfield, (Minn.) 44 N. W. 125. 42 Minn. 368.

Motion for judgment on pleadings.

230. Upon a motion for judgment, notwithstanding the answer, plaintiff is, on default of defendant, entitled to have the motion granted; but he takes it at his peril, and must see that his proceedings are regular, and that he takes no more than the law and practice entitle him to. If such order is a final one, it may be corrected by writ of error.—Farrington v. Wright, 1 Minn. 241, (Gil. 191.)

231. A plaintiff's motion for judgment on the pleadings admits whatever is well pleaded in the answer.—Stewart v. Erie & Western Transp. Co., 17 Minn. 372, (Gil. 348.)

232. On plaintiff's motion for judgment on the pleading, the answer cannot be attacked for mere indefiniteness and uncertainty.—Stewart v. Erie & Western Transp. Co., 17 Minn. 372, (Gil. 348.)

233. Upon a motion for judgment on the pleadings by defendant at the trial and after answering, the complaint will be liberally construed. Following Kelly v. Rogers, 21 Minn. 146; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402; Malone v. Stone, 36 Minn. 325, 31 N. W. 170.—McAllister v. Welker, (Minn.) 41 N. W. 107.

39 Minn. 535.

234. A motion by defendant for judgment on the pleadings, on the ground that the complaint assumes to set forth an equitable cause of action, but fails to state some facts essential thereto, should not be granted if a cause of action of any character is set forth.—Greenleaf v. Egan, 15 N. W. 254, 30 Minn. 316.

IX. Pleading and Proof—Variance.

Issues—Admissions and denials.

235. The fact that defendant's denial was insufficient to raise an issue cannot be taken advantage of by him to exclude evidence offered by plaintiff on such issue.—Lynd v. Picket, 7 Minn. 184, (Gil. 128.)

236. In an action for the conversion of a promissory note, plaintiff alleged that the note set out in the complaint was given by H. to S., and by S. assigned to plaintiff. The answer denied ownership by S., and alleged that defendant came into possession "of said note" on a certain day from H., who had title thereto. *Held*, that the identity of the note was admitted by the answer.—Nininger v. Banning, 7 Minn. 274, (Gil. 210.)

237. In an action to set aside a conveyance as fraudulent, plaintiff alleged inadequacy of consideration as evidence of fraud. Defendant answered that the present value of the premises, rendering the consideration paid by him apparently inadequate, was due to improvements made by him of the value of $500. Plaintiff replied, denying the making of the $500 improvements by defendant before notice of plaintiff's claim. *Held*, an admission of the improvements and their value, and of the adequacy of the price paid by defendant.—Durfee v. Pavitt, 14 Minn. 424, (Gil. 319.)

238. A complaint alleged that defendant was a corporation. The answer denied each and every allegation not admitted, qualified, or modified, and then alleged acts done by defendant without averring that they were done in a capacity other than that stated in the complaint. *Held*, that the allegation of the incorporation stood admitted.—St. Anthony Falls W. P. Co. v. King Bridge Co., 23 Minn. 186.

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239. In an action against a sheriff for taking and detaining certain personal property on premises occupied by A., the complaint alleged plaintiff's ownership and right to possession, defendant taking the same under a writ of attachment against A., service of notice of plaintiff's claim, and affidavit setting forth his title, the value of the property, and his ground of title, demand on the sheriff before suit, and refusal to return the property. The answer denied plaintiff's ownership and right of possession; averred the commencement of an action against A.; the filing of an affidavit, giving bond for and issuance of a writ of attachment therein on the ground that A. had fraudulently assigned, secreted, and disposed of his property with the intent to defraud his creditors; the taking of said property under said writ as A.'s property; and that such property, at the time of such taking, was the property of A. *Held*, the character of the sale of such property from A. to plaintiff was not put in issue, and the rejection of evidence and refusal to charge, upon the theory that it was, was proper. —Livingstone v. Brown, 18 Minn. 308, (Gil. 278.)

240. In an action for the price of intoxicating liquor the complaint alleged that plaintiff was duly licensed to sell the same, and this allegation was not denied in the answer. *Held*, that evidence to show that plaintiff was so licensed was not necessary to a recovery by him.—Olson v. Hurley, 21 N. W. 842, 33 Minn. 39.

241. In an action for the value of services, when the answer was insufficient as a denial of the value as alleged in the complaint, unless it be construed as admitting a fact averred in the nature of evidence of value, there was a recovery by plaintiff, although no proof of the value was offered. *Held*, that the admission in the answer of such evidential fact stands in the place of evidence, for the purposes of the case.—Dexter v. Moody, (Minn.) 30 N. W. 667.

36 Minn. 205.

242. An admission, in an answer, of a cause of action in favor of the plaintiff, wholly different from that alleged in the complaint, does not entitle the plaintiff to a recovery under such complaint.—Brandt v. Shepard, (Minn.) 40 N. W. 521. 39 Minn. 454.

243. Defendant in his answer pleaded a settlement. Plaintiff in reply denied the allegation of settlement of "all claims except in the manner herein set forth," and then set forth at length the circumstances of the settlement, but omitted the essential elements of a defense of fraud and deceit. *Held*, that the admissions in the reply controlled the denial, and thus confessed the answer by failing to properly set up matter in avoidance. Defendant therefore was entitled to judgment on the pleadings.—Gaffeny v. St. Paul, M. & M. Ry. Co., (Minn.) 35 N. W. 728.

38 Minn. 111.

244. A complaint alleged a sale of a horse by defendant to plaintiff with a warranty, and a breach thereof, the return of the horse to defendant, and that he received and retained it, and repaid to plaintiff part of the price, and that he promised to pay the remainder, the recovery of which was demanded. The answer admitted the sale, but denied the warranty and breach. It admitted the return of the horse to defendant, but alleged the agreement to have been that defendant should pay thereon to plaintiff the amount already repaid only. *Held*, that the issue as to the warranty and breach was immaterial, the real issue being whether the new contract was to repay the plaintiff the whole of the price paid, or only the part already repaid to him.—Gross v. Deller, 23 N. W. 837, 33 Minn. 424.

245. Where there is no answer in an action, the relief granted to plaintiff cannot exceed that specifically prayed for in his complaint.—Minnesota Linseed Oil Co. v. Maginnis, 20 N. W. 85, 32 Minn. 193; Prince v. Farrell, 20 N. W 234, 32 Minn 293.

Evidence admissible—General issue.

246. On a general denial by defendant, plaintiff is bound to prove all he alleges in his complaint, and the defendant may prove anything that tends to directly controvert such allegations.—Bond v. Corbett, 2 Minn. 248, (Gil. 209.)

247. Where the answer consists merely of a denial, the plaintiff is only required to prove, and the defendant permitted to controvert, the facts alleged in the complaint.—Finley v. Quirk, 9 Minn. 194, (Gil. 179.)

248. Under a general denial a party may show anything that tends to directly disprove the allegations of the complaint. Thus, where a complaint avers the transfer of certain personal property to plaintiff, under a general denial, defendant may show that the property was never in fact delivered.—Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 190.)

249. The complaint alleged the drawing of a check by one partner and acceptance by the firm. The answer denied the allegations of the complaint. *Held*, that evidence that the check was for the individual benefit of one partner, and that plaintiff had notice thereof, was, under the pleadings, incompetent.—Bank of Commerce v. Selden, 1 Minn. 340, (Gil. 251.)

250. Under a general denial of the execution of a contract, evidence merely in avoidance thereof is not admissible.—Brown v. Eaton, 21 Minn. 409.

251. A party cannot, under a general denial, in an action for work and labor performed and materials furnished, avail himself of an express contract for arbitration as to the price to be paid, but such contract must be specially pleaded.—Lautenschlager v. Hunter, 22 Minn. 267.

252. Under a general denial of a complaint alleging that defendant hired plaintiff to work, and agreed to pay him, defendant may prove that he made the contract of hiring as agent, and disclosed his principal to plaintiff.—Scone v. Amos, (Minn.) 35 N. W. 575.

38 Minn. 79.

253. Under an answer denying the plaintiff's alleged title to the property which is the subject of the action, defendant may show that the property was given by plaintiff's intestate to another.—Beard v. First Nat. Bank, (Minn.) 43 N. W. 7.

41 Minn. 153.

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254. Where an answer alleged that plaintiff "violated the terms and broke the conditions" of a certain chattel mortgage, without specifying in what particular or by what act, and on the trial proves certain acts of plaintiff in support of such allegation, the latter may, under a general denial in his reply, show, by any evidence, that such acts were not a violation of such terms or conditions.—Ellingsen v. Cooke, (Minn.) 34 N. W. 747.
37 Minn. 400.

Evidence admissible — New matter not pleaded.

255. Any evidence which bears directly upon an issue raised by the pleadings is admissible without being pleaded.—Siebert v. Leonard, 21 Minn. 442.

256. Proof of ratification of a payment made to an agent who had no authority to receive it is admissible under an allegation in the pleading of authority of such agent to receive the payment.—Janney v. Boyd, 15 N. W. 308, 30 Minn. 319.

257. The defense of fraud cannot be made, unless set up in the answer.—Daly v. Proetz, 20 Minn. 411, (Gil. 363.)

258. In an action for damages for breach of a contract by defendants to erect a building, defendants offered to show that the land was insufficient to sustain the building, by reason of which it fell when partly erected, and that the plaintiffs agreed to keep the foundations drained, and that a second fall resulted from their neglect so to do. *Held*, that the evidence offered, being not pleaded in the answer, and inconsistent with facts pleaded, was properly excluded.—Stees v. Leonard, 20 Minn. 494, (Gil. 448.)

259. In an action for work, labor, and materials, the answer was a general denial. On the trial there was proof of an agreement that the price was to be determined by the arbitrament of a third person, whose decision was to be final. *Held*, that such contract, constituting new matter, could not be availed of as a defense without being pleaded.—Lautenschlager v. Hunter, 22 Minn. 267.

260. In an action on a note given as part of the consideration for the deed of a patent-right, defendant in his answer set up certain parol warranties contemporaneous with the deed. On the trial he offered to prove warranties made subsequent to the delivery of the deed, and on objection thereto failed to ask leave to amend his answer to conform to the offer. *Held*, that the evidence was properly excluded.—Jones v. Alley, 17 Minn. 292, (Gil. 269.)

261. In an action against a railroad company for the death of a child, where the answer alleges contributory negligence on the part of the child and his playmates, evidence is not admissible to show negligence on the part of the child's mother, in allowing him to play on defendant's grounds.—O'Malley v. St. Paul, M. & M. Ry. Co., (Minn.) 45 N. W. 440.
43 Minn. 289.

262. In an action against warehousemen for failing to notify plaintiffs, as agreed, of the removal to another warehouse of the goods stored by plaintiffs, by reason of which removal a policy of insurance which had been issued to plaintiffs on the goods had become void, the answer merely alleged that after such removal, and before the goods were destroyed by fire, plaintiffs knew of the removal, and could have had the policy changed to cover them; also that the insurance company after the removal promised defendants to fix the insurance. *Held*, that defendants could not, under the pleadings, show that, by reason of the withdrawal of one of the members from plaintiff's firm, the policy had become forfeited, and that plaintiffs were therefore not damaged by defendants' failure to notify them of the removal.—Brigham v. Wood, (Minn.) 51 N. W. 228.

263. Evidence offered by plaintiff to establish a joint ownership in certain matters of counterclaim set up by defendant, such ownership not being alleged in the reply, should be rejected.—Clonan v. Thornton, 21 Minn. 380.

264. Where defendant pleads new matter as a defense, all the material allegations of which are put in issue, it is not error for the court to charge that the burden of proof is on defendant to prove the defense in all its particulars.—Day v. Raguet, 14 Minn. 273, (Gil. 203.)

Variance.

265. The absence of an allegation, indispensable to the maintenance of an action, is not cured by the provisions of Rev. St. Minn. c. 70, §§ 86–88, in regard to variance, nor can a decree be founded upon the proof of such fact without the allegation.—Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

266. A complaint, whether on contract or otherwise, need set out no facts but those material to the plaintiff's cause of action, and the fact that the contract contains other matter, not alleged, will not constitute a variance.—Rollins v. St. Paul Lumber Co., 21 Minn. 5.

267. A complaint alleged a contract for collecting and rafting logs. The proof showed an agreement with one partner, who said that when his absent partner returned, "if he was not satisfied with it, he could fix it to suit himself." *Held*, that there was no variance between the proof and the allegations of the complaint.—Short v. McRea, 4 Minn. 119, (Gil. 78.)

268. The contract alleged was one terminable at the will of either party; that proven was by its terms to continue for more than one year. *Held* a fatal variance.—Cowles v. Warner, 22 Minn. 449.

269. Under a complaint alleging the making by defendant to plaintiff of a promissory note described therein, an instrument in writing was offered in evidence, bearing the date and expressing the promise or contract alleged, but also containing certain other terms of agreement respecting the title and possession of certain personal property. *Held* that, it not appearing that defendant was prejudiced, the variance might be disregarded under Gen. St. Minn. c. 65, § 34, providing that a variance between the evidence and the pleadings shall be disregarded as immaterial

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unless the court is satisfied that the adverse party is prejudiced thereby.—Johnston Harvester Co. v. Clark, 15 N. W. 252, 30 Minn. 308.

270. In an action to recover the value of goods alleged to have been sold by plaintiff to defendant, where there is only proof of a sale by plaintiff to a third party, and of a subsequent contract between such third party and defendant, whereby the latter agreed to pay to plaintiff the original price of the goods sold, the variance is fatal.—Benson v. Dean (Minn.) 42 N. W. 207.
40 Minn. 445.

271. In a suit for the price of cattle alleged to have been sold and delivered by the plaintiff to the defendant, the proof being that the plaintiff delivered the cattle to the defendant in performance of an executory contract made with another, and by him assigned to the defendant, there is a failure of proof and not a mere variance.—Dennis v. Spencer, (Minn.) 47 N. W. 795.
45 Minn. 250.

272. In an action to recover monthly rent alleged to be due for the month of October, where the complaint alleges that the term began August 1st, proof that it began September 1st, and that the rent for September had been paid, is an immaterial variance.—Erickson v. Schuster, (Minn.) 46 N. W. 914.
44 Minn. 441.

273. Under an allegation that the owner of personalty, by an instrument signed by him, duly sold, assigned, and transferred the same to plaintiff, proof of a voluntary assignment by himself and wife, for the benefit of creditors, is not a variance.—Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 190.)

274. Where a pleading alleges attachments in suits in which A., B. & Co., D., C. & Co., E., F. & Co., creditors of the defendant, were plaintiffs, without designating the plaintiff in each action, no material variance arises by showing at the trial who were the respective plaintiffs.—Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

275. Under an answer which only sets up actual fraud as a defense the defendant cannot prove mere mistake.—Leighton v. Grant, 20 Minn. 345, (Gil. 298.)

276. In an action of damages for an assault and battery, an allegation in the complaint that plaintiff expended moneys to be cured of his wounds is not sustained by proof that he simply incurred liability therefor.—Ward v. Haws, 5 Minn. 440, (Gil. 359.)

277. Where essential facts stated in a complaint have been proved, failure to prove immaterial facts averred will not preclude the right to recover.—The War Eagle v. Nutting, 1 Minn. 256, (Gil. 201.)

X. Waiver of Defects—Aider by Verdict.

Failure to demur or answer.

278. A defect of parties appearing on the face of the complaint should be taken advantage of by demurrer, and, if not so appearing, by answer. If no objection is taken either by demurrer or answer, the defect will be deemed waived. Gen. St. Minn. c. 66, §§ 74, 77, 78.—Lowry v. Harris, 12 Minn. 255, (Gil. 166;) McRoberts v. Southern Minn. R. Co., 18 Minn. 108. (Gil. 91;) Blakeley v. Le Duc, 22 Minn. 476; Baldwin v. Canfield, 1 N. W. 261, 26 Minn. 43; Densmore v. Red Wing Lime & Stone Co., (Densmore v. Shepard,) 48 N. W. 528, 681, 46 Minn. 54; Christian v. Bowman, (Minn.) 51 N. W. 663.

279. The provisions of Gen. St. Minn. 1878, c. 66, §§ 92, 94, 95, that where there is a defect of parties appearing on the fact of the complaint the objection may be taken by demurrer, if it does not appear on the face of the complaint, it may be taken by answer, and, if not taken either by demurrer or answer, defendant is deemed to have waived it, apply to a defect of parties plaintiff in actions *ex contractu*. Hence, where a member of a partnership is not joined as plaintiff in an action on a demand due to the firm, if objection is not taken to the defect by answer, it is not ground for a motion for nonsuit at the trial for variance or failure of proof.—Davis v. Chouteau, 21 N. W. 748, 32 Minn. 548.

280. The objection that there is a defect of parties defendant by reason of the non-joinder of one member of a partnership in an action upon a promissory note, made by another member thereof in the firm name, must appear upon the face of the pleadings, or it is waived.—Sandwich Manuf'g Co. v. Kimberly, (Minn.) 33 N. W. 782.
37 Minn. 214.

281. An objection that plaintiff is a married woman, and wife of one of the defendants, is an objection to the legal capacity of the plaintiff to sue, which must be raised by answer or demurrer, and when not so raised will be deemed waived, under Comp. St. Minn. c. 60, § 64.—Tapley v. Tapley, 10 Minn. 448, (Gil. 360.)

282. A complaint to recover proceeds of a sale on execution alleged the issuance of an execution from the supreme court to, and levy upon the sale of lands in, a particular county. *Held* that, defendant failing to answer, it would be presumed that the judgment was duly docketed in such county, and that other steps preliminary and necessary to the validity of such sale were taken.—Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

283. Misjoinder of causes of action in a complaint must be taken advantage of by demurrer or answer, or it will be deemed waived.—James v. Wilder, 25 Minn. 305; Densmore v. Red Wing Lime & Stone Co., (Densmore v. Shepard,) 48 N. W. 528, 681, 46 Minn. 54.

Answering to the merits.

284. A defendant does not, by answering, waive the objection that the court has no jurisdiction of the subject-matter of the action, or that the complaint does not state a cause of action.—Stratton v. Allen, 7 Minn. 502. (Gil. 409.)

285. An objection in an action by a partnership that one of its members, joined as a plaintiff by a corporate name, is not proved to be a corporation, and that the names of the persons represent-

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ed by it should have been used, being a mere objection for misnomer, cannot be taken after pleading to the merits and going to trial.—Sandwich Manuf'g Co. v. Donahue, (French v. Donohue,) 12 N. W. 354, 29 Minn. 111.

286. An admission or averment in the answer of a material fact omitted from the complaint will cure the defect arising from such omission. —Bennett v. Phelps, 12 Minn. 326, (Gil. 216;) Shartle v. City of Minneapolis, 17 Minn. 308, (Gil. 284;) Warner v. Lockerby, 8 N. W. 879, 28 Minn. 28.

287. A complaint, after alleging a contract for the driving of certain logs, alleged that plaintiff had driven certain quantities of logs, without averring that they were all that were agreed to be driven. *Held* that, as the complaint was not objected to before the answer, and the answer admitted that the quantities stated in the complaint were all that were agreed to be driven, the defect must be disregarded. Bennett v. Phelps, 12 Minn. 326, (Gil. 216;) Shartle v. Minneapolis, 17 Minn. 308, (Gil. 284,) followed.—Rollins v. St. Paul Lumber Co., 21 Minn. 5.

Retention of defective pleading.

288. Pleadings containing defect of form merely must be returned within a reasonable time. A defect in a verification of a pleading will be deemed waived if it is retained without objection.—Smith v. Mulliken, 2 Minn. 319, (Gil. 273;) Folsom v. Carli, 5 Minn. 333, (Gil. 264;) Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

289. Pleadings served after time, insufficiently verified or defective in matters of form, must be returned within a reasonable time, (24 hours is the rule in New York,) or the defects will be deemed waived.—Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

Trial of issues not properly raised.

290. Where a pleading substantially alleges a sale to have been fraudulently made, and issue is joined thereon, and evidence is introduced by both parties at the trial on the questions of fraud, an objection made for the first time when the court comes to instruct the jury, that the fraud is insufficiently pleaded, is too late to be available. —Howland v. Fuller, 8 Minn. 50, (Gil. 30.)

291. Where a case has been tried by the parties, and submitted to the jury by the court without objection, upon a certain construction of the pleadings, such construction will be conclusive on the parties.—Keyes v. Minneapolis & St. L. Ry. Co., (Minn.) 30 N. W. 888.
36 Minn. 290.

292. While the defense of "former recovery" is new matter and ought to be pleaded, where both parties have tried the case and allowed it to go to the jury on the theory that this defense was in issue, they will be bound by the result as they would be had the defense been properly pleaded.—Bowe v. Minnesota Milk Co., (Minn.) 47 N. W. 151.
44 Minn. 460.

293. The consent of a party to litigate an issue not raised by the pleadings cannot be inferred from the fact that no objection was made to a question to a witness bearing on such issue, but which was also competent under the issues actually made.—O'Neil v. Chicago, M. & St. P. Ry. Co., 24 N. W. 192, 33 Minn. 489.

294. Evidence pertinent to the issues made by the pleadings cannot be considered upon an issue not made therein, although it would have been pertinent to such issue if it had been made. The fact that such evidence was received without objection implies no consent by the opposite party to try any such issue, especially when inconsistent with the admissions of the pleadings themselves. —Payette v. Day, (Minn.) 34 N. W. 592.
37 Minn. 366.

295. A claim by a defendant that there was a fatal variance between the pleadings and the proof, will not be considered where the point was not made in the trial court, and it appears that on the trial defendant admitted that if plaintiff proved the alleged contract he would be entitled to recover.—Cummings v. Petsch, (Minn.) 42 N. W. 789.
41 Minn. 115.

296. An objection to a variance between one of the allegations of a complaint and the proof offered to sustain it, not made until application for a new trial, was held to be too late.—Johnson v. Avery, 43 N. W. 340, 41 Minn. 485.

Defects cured by verdict.

297. Defects of substance in the pleadings may be cured by verdict.—Daniels v. Winslow, 2 Minn. 113, (Gil. 93.)

298. Where the sense of a pleading is clear, a verdict will not be set aside for an error in its punctuation.—Hemphill v. Holley, 4 Minn. 233, (Gil. 166.)

299. Where a complaint is defective in not alleging, in express terms, particular matter, and yet contains general allegations sufficient to comprehend such matter in fair and reasonable intendment, which allegations are such as to require proof of the particular matter in order to entitle plaintiff to recover, the defect will be aided by verdict in his favor.—Hurd v. Simonton, 10 Minn. 423, (Gil. 340.)

300. An allegation in a complaint that plaintiff on a certain day caused certain described lands to be duly surveyed, marked, and platted by a competent surveyor, according to the statute in such case made and provided, and the plat to be recorded, is, at least after judgment, a sufficient allegation of a legal platting.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

301. Where a complaint is so drawn as to establish either a cause of action for false warranty, or for deceit, defendant's remedy is by motion to strike out, or to make the complaint more definite, or to compel plaintiff at the trial to elect on which cause of action he will rely. The objection is not available after judgment.—Marsh v. Webber, 13 Minn. 109, (Gil. 99.)

302. A complaint cannot be attacked after judgment for mere indefiniteness or uncertainty; and, unless it is clearly and radically defective, it will be sustained.—Rich v. Rich, 12 Minn. 468, (Gil. 369.)

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303. Failure of a complaint to state facts sufficient to constitute a cause of action is not cured by a verdict for plaintiff.—Lee v. Emery, 10 Minn. 187, (Gil. 151.)

304. The objection that the complaint is insufficient to make out a cause of action may be made at any time, but such objection will not reach indefiniteness or uncertainty, or any defect not substantial and necessarily fatal; and when made after judgment the most liberal construction is to be adopted, if the proceedings can thereby be sustained.—Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

PLEDGE.

By warehouseman, see *Warehousemen*, 13-17.
Cigars pledged not subject to stamp tax, see *Internal Revenue*, 1.
In fraud of creditors, see *Fraudulent Conveyances*, 70.
Interest of pledgor subject to levy of execution, see *Execution*, 33.
Of corporate stock, see *Corporations*, 112.
Recovery by pledgee of note, see *Negotiable Instruments*, 224.

What constitutes—Necessity of possession.

1. To constitute a pledge, the pledgee must take possession, and to preserve his pledge he must retain possession; if he relinquishes possession the pledge is extinguished.—Combs v. Tuchelt, 24 Minn. 423.

2. A manual delivery or manual taking possession by pledgee of pledged property is not essential to the validity of a pledge; it is sufficient if the property, being present, is committed by the pledgor to the exclusive control and charge of the pledgee.—Combs v. Tuchelt, 24 Minn. 423.

3. Unstamped cigars in the rear room of a cigar factory, which could not be removed under the revenue laws of the United States, were delivered by the cigar-makers to one of their clerks as a pledge or security for a debt of the firm. The clerk took possession of the cigars, made an inventory of them, and thereafter none of the cigars were sold by the makers except by the consent of the clerk, who in case of each sale received the proceeds thereof, and applied the same on the debt secured. The clerk left the firm, and went to Milwaukee, but returned to look after the cigars, took an inventory of the unsold remainder, and notified a receiver of the property of the firm of his title. *Held*, that the evidence was sufficient to show retention of possession on the part of the clerk, and that he was entitled to hold the cigars as against the receiver.—Combs v. Tuchelt, 24 Minn. 423.

Discharge of lien—Tender.

4. A sufficient tender of payment of a debt, although made after maturity, the same being refused without good reason, discharges the lien of the creditor upon property held in pledge as security for the debt.—Norton v. Baxter, (Minn.) 42 N. W. 865.

41 Minn. 146.

5. A tender having been refused without sufficient reason, the pledgee loses his right to retain the pledge as against another creditor of the pledgeor who has, subsequent to the making of the pledge, acquired rights in the property, although the pledgeor did not keep his tender good.—Norton v. Baxter, (Minn.) 42 N. W. 865.

41 Minn. 146.

Redemption.

6. N. conveyed an undivided half interest in a mine to defendants, part of the purchase money being paid in cash. Defendants were to have the option, after an examination, to complete the purchase, or to be repaid the sum paid by them, in which case the mine was to be turned over to them, to be worked until they should repay themselves from the product. A corporation was then formed by the parties, and the property was conveyed to it. Afterwards defendants elected not to complete the purchase, and entered into a contract by which they were to pay off debts which were standing against the property, and all the stock of the corporation when issued was to be transferred to them, and the possession and control of the property was to be turned over to them, with power to work and develop it, and to sell stock to raise money for certain purposes. N. and plaintiff, to whom he had conveyed a part, and afterwards transferred all, of his interest, were to have the right, at their election before a certain time, upon the payment of all the money that defendants had theretofore or might thereafter expend on the property, including the cash paid by them to N., to have all the unsold stock assigned to them. Plaintiff did not exercise the option, and, after it had expired, sued defendants for an accounting and to redeem the stock. *Held* that, even if the contract was a pledge, and not a sale with an option to repurchase, defendants should be credited with the cash payment made by them to N., and with all claims against the property paid by them, and all disbursements in operating the mine, with interest thereon, and to be charged with their receipts from the mine, with interest.—Newton v. Van Dusen, (Minn.) 50 N. W. 820.

47 Minn. 437.

Negligence of pledgee.

7. In the absence of express stipulation, the duty of the pledgee is to exercise ordinary care, and he is liable only for neglect of such care.—Cooper v. Simpson, 42 N. W. 601, 41 Minn. 46; Minneapolis & N. Elevator Co. v. Betcher, 44 N. W. 5, 42 Minn. 210.

8. A creditor to whom a negotiable promissory note is pledged as collateral security is bound to exercise ordinary diligence in preserving its value, and collect the same when due, and its loss, when caused by his negligence, is a good defense to the principal debt.—Lamberton v. Windom, 12 Minn. 232, (Gil. 151.)

9. A creditor, to whom a negotiable promissory note is pledged as collateral security, is not liable for its loss from the insolvency of the maker, unless such loss occurred through the negligence of such creditor in failing to take active measures for the collection thereof while the maker was solvent. It is not sufficient that at the date of its maturity the maker had a large

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amount of real and personal property, if he was in fact insolvent.—Lamberton v. Windom, 18 Minn. 506, (Gil. 455.)

10. Loss or depreciation in value of the thing pledged, through negligence of the pledgee, does not operate to extinguish, *pro tanto*, the debt secured.—Cooper v. Simpson, (Minn.) 42 N. W. 601. 41 Minn. 46.

Rights of judgment creditors.

11. If the maker of a pledged note pay it to the pledgee, after levy upon the pledgor's interest, and notice of such levy, he is not thereby discharged as to the balance above the debt for which it was pledged.—Mower v. Stickney, 5 Minn. 397, (Gil. 321;) Same v. Same, 5 Minn. 407, (Gil. 330.)

Sale by pledgee.

12. Where property is pledged as collateral, the general property remains in the pledgor, and the special property created by the pledge cannot be transferred by the pledgee as a right separate from the debt. The chose in action cannot be owned by one and the lien by another. — Van Eman v. Stanchfield, 13 Minn. 75. (Gil. 70.)

13. A pledgee, where there is no agreement as to the manner of sale in case of enforcement of pledge, can exercise his power of sale only after reasonable notice to the debtor to redeem, and of the time and place of sale.—Goldsmidt v. Trustees of First Methodist-Episcopal Church, 25 Minn. 202.

14. A purchaser of pledged promissory notes, from a pledgee having a general power of sale, he knowing them to be pledged, is not relieved from the effect of failure to give notice to the debtor to redeem, and of the time and place of sale, by the fact that they were indorsed by the pledgor in blank.—Goldsmidt v. Trustees of First Methodist-Episcopal Church, 25 Minn. 202.

15. The pledgeor cannot make it the duty of the pledgee to sell within a specified time, merely by directing or requesting him so to do.—Cooper v. Simpson, 42 N. W. 601, 41 Minn. 46; Minneapolis & N. Elevator Co. v. Betcher, 44 N. W. 5, 42 Minn. 210.

16. A merely colorable and pretended sale of pledged property by the pledgee after default does not affect the rights of the pledgeor as against one not standing in the position of a *bona fide* purchaser.—Norton v. Baxter, (Minn.) 42 N. W. 865. 41 Minn. 146.

17. It seems that where there are no facts or circumstances to show that an unindorsed note transferred by delivery, after maturity, as collateral security for a debt, could not have been fully realized on by action at law, the pledgee will not be permitted to dispose of the note by sale.—White v. Phelps, 14 Minn. 27, (Gil. 21.)

POISON.

Sale without label.

Under the Minnesota statutes, (Laws 1885, c. 147, § 14; Pen. Code, § 329,) forbidding the sale of poison without labeling it "Poison," etc., a druggist is liable for damages for the death of a person who purchased from the druggist's clerk poison which was unlabeled, and partook of the poison in ignorance of its deadly qualities.—Osborne v. McMasters, (Minn.) 41 N. W. 543. 40 Minn. 103.

Police Power.

See *Constitutional Law*, 179–182.

Policy.

Of insurance, see *Insurance*.
Public, see *Contracts*, 41–46.

Polygamy.

See *Bigamy*.

POOR AND POOR-LAWS.

Power to remove pauper, see *Constitutional Law*, 174.

Liability for support—Settlement.

1. In an action by one county against another to recover moneys expended for the support of a sick pauper alleged to be a resident within the defendant county, it appeared from an agreed statement of facts that such pauper had resided in that county nine months. *Held*, that he had not gained "a legal residence and settlement" in that county within Gen. St. Minn. 1878, c. 15, § 4, requiring for that purpose a residence of one year in the county for any person other than certain excepted classes, to none of which such pauper belonged; and that, therefore, defendant county was not liable for the expenses incurred.—Board County Com'rs of Lyon County v. Board County Com'rs of Murray County, 13 N. W. 43, 29 Minn. 240.

2. The provision of Gen. St. Minn. 1878, c. 15, § 3, making the support of the poor a charge upon the county in which they have a legal residence and settlement, was repealed, as to Freeborn county, by Sp. Laws 1875, c. 74, providing that each township in that county should take care of and bear the expense of its own poor; and, as the act of incorporation of the city of Albert Lea, formerly part of a township of that county, which was passed subsequently, made no provision for the support of paupers resident within that city, their support and maintenance is not a charge upon the county of Freeborn.—Fenholt v. Board County Com'rs of Freeborn County, 12 N. W. 458, 29 Minn. 158.

3. Sp. Laws Minn. 1875, c. 74, requiring each town in Freeborn county to bear the expense of its own poor in the same way as was provided for counties taking care of the poor, and making the township boards of supervisors supervisors of the poor in their respective towns, to the exclusion of the county commissioners of that county, includes incorporated cities under the term "town;" and the city of Albert Lea, in that county, incorporated by Sp. Laws 1878, c. 1, is liable for the support of its own poor, although

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its act of incorporation is silent on the subject. —Odegaard v. City of Albert Lea, 23 N. W 526, 33 Minn. 351.

4. Under Sp. Laws Minn. 1887, c. 90, declaring the support of the poor in villages in Wright county a village charge, and making the provisions of chapter 215, Sp. Laws 1878, applicable to villages, the support of existing paupers devolved upon the village in which they had a legal residence or settlement at the time of the passage of the act.—Wellcome v. Town of Monticello, (Minn.) 42 N. W. 930.

41 Minn. 136.

Distinguishing State v. City of Lake City, 25 Minn. 404; City of Winona v. School-Dist. No. 82, 41 N. W. 539, 40 Minn. 13.

5. And every person, at that time receiving aid from a town, and being maintained elsewhere than in the place of his actual residence at the time of becoming a pauper, is to be deemed to have a legal settlement in the village in which he actually resided when first making application for public support.—Wellcome v. Town of Monticello, (Minn.) 42 N. W. 930.

41 Minn. 136.

Contract for medical attendance.

6. Gen. St. Minn. 1866, c. 15, § 12, which authorizes a single county commissioner to make an order for the allowance of a limited sum of money to a pauper in need of temporary relief, confers no authority on a commissioner to bind the county, by contract with a physician other than the county physician provided for by section 10, for professional attendance upon a pauper.—Bentley v. Board County Com'rs, Chisago County, 25 Minn. 259.

Possession.

Adverse, see *Adverse Possession.*
Change of possession, see *Chattel Mortgages*, 25–40; *Fraudulent Conveyances*, 42–47.
Constructive notice, see *Vendor and Purchaser*, 140–149.
Evidence of title, see *Adverse Claim*, 40; *Mortgages*, 110.
Mortgagee in possession, see *Mortgages*, 97–102.
Of pledge, see *Pledge*, 1–3.
policy, see *Insurance*, 11.
stolen property, see *Larceny*, 30–34.
Recovery by landlord, see *Landlord and Tenant*, 77–95.
—— mortgagee without foreclosure, see *Mortgages*, 84, 85.
Right to possession of dead body, see *Torts*, 2.
To sustain action for partition, see *Partition*, 2–7.
—— for trespass, see *Trespass*, 1–4.
—— of ejectment, see *Ejectment*, 1–3.
—— of replevin, see *Replevin*, 6–12.
—— to determine adverse claim, see *Adverse Claim*, 3–10.
—— to quiet title, see *Quieting Title*, 16–19.
—— to try tax title, see *Taxation*, 268, 269.

Post-Office.

Presumption of receipt of letter mailed, see *Evidence*, 23, 24.

POWERS.

Execution of deed by attorney, see *Deed*, 7, 8.
In trust, see *Trusts*, 2.
Of sale in mortgages, see *Mortgages*, 156–159.
Powers of attorney by Indian half-breeds, see *Public Lands*, 105,106.
Reformation in equity, see *Equity*, 27.

To sell or mortgage—In general.

1. A general power to sell and convey real estate does not confer power to mortgage, and a mortgage executed under such power is void.—Morris v. Watson, 15 Minn. 212, (Gil. 165.)

2. A real-estate firm having dissolved, one member thereof conveyed his interest in the firm's lands to his copartner, with "full power to grant and convey said premises, and mortgage the same, as he may see fit," in consideration of the latter's "being trustee of said estate, and of his having increased liabilities therefor, and of the necessity of his having fuller power for the proper settlement of the affairs" of the firm. *Held*, that this gave the grantee power to mortgage the property to secure a debt, without any showing outside of the conveyance that he incurred "increased liabilities."—Wilson v. Bell, 17 Minn. 61, (Gil. 40.)

3. A finding of fact that R. and C. authorized H. to use their real estate to extricate the latter from his financial embarrassments, will be construed to mean that they gave him valid legal authority to sell or mortgage.—Baker v. Byerly, (Minn.) 42 N. W. 395.

40 Minn. 489.

Testamentary powers to sell and convey.

4. A will provided that when the executor "shall deem it best for the interests of my estate, he may sell the whole or any part of the real estate belonging to me in block 16." The only mention of the other real estate of testator was that "it is my desire that no division of the balance of my real estate shall be made amongst my children until the youngest child shall become of lawful age. * * * When my youngest child shall become of lawful age, all the rest and residue of my real estate and personal property, wheresoever situate, shall be equally divided between my wife and our children, share and share alike." *Held*, that the executor had no authority, under the will, to sell any real estate other than that included in block 16. Following Simpson v. Cook, 24 Minn. 180.—Officer v. Simpson, 6 N. W. 488, 27 Minn. 147.

5. A will devised all the testator's real estate, and gave the executors power to convey "any real estate that may come into their possession and control under this will," the will not otherwise expressly giving them possession or control of any real estate. *Held*, that the power applied to all the real estate.—Ness v. Davidson, (Minn.) 48 N. W. 10; Jaggar v. Same, Id.

45 Minn. 424.

Powers of attorney—Construction.

6. A power of attorney authorized the attorney to sell real estate, or any part thereof, for

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such sum and on such terms as to him should seem meet. *Held*, that the power authorized a sale on credit, or for consideration other than cash, or of an undivided interest, and also to receive payments when credit was given.—Carson v. Smith, 5 Minn. 78, (Gil. 58.)

7. A power of attorney authorized the attorney to enter upon and take possession of all such lands, tenements, hereditaments, and real estate whatever in the county of Fillmore, territory of Minnesota, to or in which the grantor was or might be in any way entitled or interested. *Held* that, though the grantor, at the time of the power, lived in another state, and Fillmore county was then entirely unsurveyed, and belonged to the United States, as he might have had some interest in some lands in that county, the power was valid. EMMETT, C. J., dissenting.—Carson v. Smith, 5 Minn. 78, (Gil. 58.)

8. A naked power of attorney, given to convey certain land about to be platted as an addition to a town, "in lots, as surveyed by B.," does not authorize a conveyance of an unplatted portion thereof by metes and bounds, and the fact that the owner, in a subsequent conveyance of another portion of such land, referred to such deed, so made under the power, to indicate a boundary line, does not estop him from disaffirming the action of the attorney.—Rice v. Tavernier, 8 Minn. 248, (Gil. 214.)

9. A power of attorney to sell, convey, etc., lands in which the grantor "might be in any way entitled or interested," does not authorize the making of a contract to convey lands in which the maker of the power has no interest at the execution of the power; and his subsequently obtaining title will not give force to the deed.—Carson v. Smith, 12 Minn. 546, (Gil. 458.)

10. A power of attorney "to enter into and take possession" of all lands, tenements, etc., to or in which the grantor is or may be "in any way entitled or interested," and to grant, bargain, and sell the same, does not authorize the making of a contract to convey land in which the grantor has an unfounded claim under the town-site act, nor will subsequently obtaining title give force to the contract to convey; and the grantor may show, in defense of an action for specific performance, that he had no interest in the property at the date of the execution by the attorney of the contract to convey.—Carson v. Smith, 12 Minn. 546, (Gil. 458.)

11. Such defense is unaffected by an allegation that he claimed the land under the town-site act, other facts, appearing in the answer, showing that such claim was then unfounded, notwithstanding he afterwards proved his claim before the judge, and received a conveyance, and subsequently executed deeds of the lands to others.—Carson v. Smith, 12 Minn. 546, (Gil. 458.)

12. A power of attorney, in addition to a general power to buy and sell goods, wares, and merchandise, and give notes therefor, and do all things necessary to a general merchandise, trading, money-loaning, and other lawful business, authorized the agent to buy and sell real estate in the name of the principal, and receive and execute all necessary contracts therefor. *Held*, that it gave him no authority to transfer real estate purchased by the principal prior to, and his title to which was on record at the date of, the power, but only land purchased by the agent; and this construction was not extended by a recital, in a subsequent revocation by the principal, describing the agent as "my attorney, for me, and in my name, to sell and convey lands belonging to me."—Greve v. Coffin, 14 Minn. 345, (Gil. 263.)

13. A power of attorney authorized the attorney to enter into possession of, and to grant and convey, "all such lands and real estate, wherever situated," etc., "in or to which the donors of the power are or may be entitled or interested," and "all such lands and real estate belonging to or that may belong to them." *Held*, that the attorney might thereunder convey and give valid title to after-acquired lands.—Berkey v. Judd, 22 Minn. 287.

14. A letter of attorney authorizing the attorney to sell and convey "all and any lands" owned by the principal in a certain city, and to release and discharge "all mortgages upon all and any real estate" held by the principal in said city, includes lands and mortgages acquired after the execution of the letter of attorney.—Williams v. Livingston, 9 N. W. 31, 28 Minn. 57.

15. A power of attorney authorized the attorney to sell certain land described, and "to do, execute, and perform, as largely and amply, to all intents and purposes," as the grantor might do if personally present, generally, every act, thing, and devise in the law necessary to be done in the premises, giving to the attorney the grantor's "full and whole power in and about the premises." *Held*, that the attorney was authorized to execute a proper conveyance on a sale of the real estate.—Farnham v. Thompson, 26 N. W. 9, 34 Minn. 330.

16. A power of attorney "to grant, bargain, sell, and convey any and all personal or real property," gives authority to sell and convey, by assignment of the certificate of sale, the interest of a purchaser at a mortgage sale during the period of redemption.—Cooper v. Finke, (Minn.) 35 N. W. 469.
38 Minn. 2.

17. Two persons jointly executed a power of attorney, which by its terms authorized C. to sell land "to which we are entitled," and to make deeds thereto "for us and in our names." *Held*, that this power did not authorize C. to convey a tract owned by one of his principals as her separate property.—Gilbert v. How, (Minn.) 47 N. W. 643. 45 Minn. 121.

Powers of attorney — Modification by parol.

18. An attorney in fact, acting under a power to sell land which did not authorize a conveyance of the land, and a verbal direction from his principal to convey, sold the land and executed a deed, as such attorney, and subsequently reported the sale to his principal, who verbally approved the same, and accepted the consideration paid. *Held*, that the verbal direction to sell, under the power, did not enlarge such power, or confer authority to sell independent of the power, and that the subsequent acts of ratification by the principal would not affect the rights of one claiming *bona fide*, and without notice, through a deed from the principal, executed and deliv-

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ered after the deed by the attorney, and before the acts of ratification.—Allis v. Goldsmith, 22 Minn. 123.

19. Husband and wife executed a power of attorney to an agent, authorizing him to sell their lands at such prices as he might approve, and to convey the same. Afterwards the wife, by writing not under seal, directed him to convey part of the land which belonged to her, without consideration, to D., which was done. *Held*, that these directions modified only the power to sell, which might be changed by parol, and the deed was not void.—Dayton v. Nell, (Minn.) 45 N. W. 231.

43 Minn. 246.

Execution—Ratification.

20. A deed purporting to be that of a principal, executed by an attorney in fact, designated therein by name, and executed by such attorney by affixing thereto the name and seal of the principal alone, is sufficient, though not signed by the attorney.—Berkey v. Judd, 22 Minn. 287.

21. A ratification by a principal of a deed by his attorney, executed under a power so defective as to acknowledgment as not to be entitled to record, relates back to the time of such conveyance.—Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

22. Where one claiming through a deed executed under a defective power relies, as against another claiming through a subsequent conveyance, directly from the principal, upon a ratification of the deed under the power, the burden of proof is upon the claimant under the defective power to show that the facts amounting to such ratification existed before the execution of the second deed.—Allis v. Goldsmith, 22 Minn. 123.

PRACTICE IN CIVIL CASES.

I. Dismissal, 1-20.
II. Notices, Motions, Orders, and Dockets, 21-44.
III. Stipulations, 45-52.
IV. Filing Papers, 53-56.
V. Service of Papers, 57-61.
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See, also, *Abatement and Revival; Appeal and Error; Appearance; Attachment; Case and Bill of Exceptions; Certiorari; Continuance; Costs; Counter-Claim and Set-Off; Courts; Damages; Deposition; Discovery; Eminent Domain; Execution; Garnishment; Injunction; Interpleader; Judgment; Jury; Justices of the Peace; Mandamus; New Trial; Parties; Pleading; Quieting Title; Reference; Removal of Causes; Replevin; Summons; Trespass; Trial; Venue in Civil Cases; Witness.*

I. Dismissal.

On stipulation.

1. Compromising an action, and filing a stipulation that it is settled, and thereby discontinued as between the parties, takes it out of court, so that no ground remains upon which either can take proceedings therein against the other.—Eastman v. St. Anthony Falls Water-Power Co., 17 Minn. 48, (Gil. 31.)

2. Gen. St. Minn. 1878, c. 66, § 262, enumerates the modes of dismissing actions, among which is an agreement of the parties. Section 263 provides that in every case other than those mentioned in section 262 judgment shall be entered on the merits. *Held*, that a written stipulation, before trial, that an action be dismissed, without costs, did not authorize the entry of a judgment as on the merits, so as to bar a subsequent action for the same cause.—Rolph v. Burlington, C. R. & N. Ry. Co., 40 N. W. 267, 39 Minn. 398; Rolfe v. Same, 40 N. W. 268, 39 Minn. 400.

On submission to arbitration.

3. The submission of a pending case to arbitration, being not one of the modes of dismissal prescribed by Gen. St. Minn. 1866, c. 66, § 242, which further provides that "all other modes of dismissing an action, by nonsuit or otherwise, are abolished," will not operate as a discontinuance of the action, though followed by an award.—Hunsden v. Churchill, 20 Minn. 408, (Gil. 360.)

By plaintiff before trial.

4. Where matters of defense are pleaded as a counter-claim, plaintiff cannot dismiss the action of his own motion.—Griffin v. Jorgenson, 22 Minn. 92.

5. In an action against a railroad company to recover land on which it had built its road, the answer set up title in defendant, but alleged, pursuant to Gen. St. Minn. 1878, c. 34, §§ 33-38, which provide that a judgment for plaintiff in such case shall be for the compensation to which he is entitled, and not for the land, its readiness and willingness to pay plaintiff for the land, provided on the trial he established his right to recover. *Held*, that the relief demanded in the answer was not "affirmative," within the meaning of Gen. St. Minn. 1878, c. 66, § 262, giving plaintiff the right to dismiss his action at any time before trial, "if a provisional remedy has not been allowed, or counter-claim made, or affirmative relief demanded in the answer."—Koerper v. St. Paul & N. P. Ry. Co., (Minn.) 41 N. W. 656.

40 Minn. 132.

6. Under Gen. St. Minn. 1878, c. 66, § 262, subd. 1, allowing the dismissal of an action "by the plaintiff at any time before trial," plaintiff is not entitled to dismiss after the trial has commenced, before the submission of the case to the court or jury, as subdivision 3 provides for a dismissal "upon the trial."—Bettis v. Schreiber, 17 N. W. 863, 31 Minn. 329.

Power of court.

7. The exercise by the court of the power granted to it by Gen. St. Minn. c. 66, § 262, to dismiss an action at any time before trial, upon the application of either party, and sufficient cause shown, will not be interfered with where the record does not disclose what showing was made upon the application for the dismissal.—Mathews v. Taaffe, (Minn.) 46 N. W. 850.

44 Minn. 400.

8. Where plaintiff fails to appear at the trial, and the answer sets up no counter-claim, the

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court may dismiss the action on the application of defendant. A trial and judgment upon the merits are not authorized in such case.—Keator v. Glaspie, (Minn.) 47 N. W. 52.

44 Minn. 448.

9. Although a trial court may dismiss an action as to a defendant, or direct the jury to find a verdict in his favor, the court has no authority to order a judgment, not of dismissal, for a party, unless he is entitled to it on the pleadings alone; it cannot be done on the pleadings and testimony. —Woodling v. Knickerbocker, 17 N. W. 387, 31 Minn. 268.

10. In an action to establish and enforce a mechanic's lien, defendants asserted the invalidity of the lien in their answer, and demanded that it be declared void, and be canceled. *Held*, that the right of the court to dismiss the action upon trial on plaintiff's application was within its discretion.—Althen v. Tarbox, (Minn.) 50 N. W. 828.

For failure of proof.

11. In an action based upon alleged false and fraudulent statements and representations, the answer under the rules of pleading technically admitted their falsity. Plaintiff's evidence in chief, however, showed that such statements, etc., were true. *Held*, that it was not error for the court to dismiss the action at the close of plaintiff's testimony.—Searles v. Thompson, 18 Minn. 316, (Gil. 285.)

12. Defendant may move to dismiss the action on plaintiff's failure to prove a cause of action, notwithstanding he has set up a counter-claim in his answer.—Slocum v. Minneapolis Millers' Ass'n, 23 N. W. 862, 33 Minn. 438.

13. A motion by defendant in an action, made upon plaintiff resting his case, for dismissal on the ground that the cause of action set forth in the complaint is equitable and that some fact is wanting in the proofs to make the cause of action equitable, should not be granted where the proofs make out any cause of action, legal or equitable, within the allegations of the complaint. —Greenleaf v. Egan, 15 N. W. 254, 30 Minn. 316.

14. In an action triable by the court some of the issues were submitted to the jury in the form of specific questions, an affirmative answer to the first of which was essential to a recovery by plaintiff. *Held* that, if at the close of plaintiff's case the affirmative of such first question was not established, the court might properly dismiss the action.—Sloan v. Becker, 18 N. W. 143, 31 Minn. 414.

15. Where the decided preponderance of evidence was for defendant, though there was not such lack of proof on part of plaintiff as would have justified the court in taking the case from the jury, defendant's motion to dismiss the action for failure of proof was properly denied.—Farrell v. St. Paul & N. P. Ry. Co., (Minn.) 38 N. W. 100. 38 Minn. 394.

For neglect to comply with order.

16. Under Gen. St. Minn. 1866, c. 66, § 242, subd. 3, which provides that an action may be dismissed before the final submission of the case where the plaintiff fails to establish his cause of action, an action to remove a cloud may be dismissed upon failure to comply with an order requiring defendant's grantee to be made a party to the suit, although the proofs of the respective parties have been submitted to the court.—Johnson v. Robinson, 20 Minn. 170, (Gil. 153.)

For neglect to enter judgment.

17. Under Rev. St. Minn. 1851, c. 70, § 162, as amended by Laws 1852, p. 10, which provides that an action may be dismissed without a final determination of its merits, for sufficient cause shown, if a plaintiff unreasonably neglects to enter a judgment to which he is entitled, defendant may move to dismiss the cause.—Deuel v. Hawke, 2 Minn. 50, (Gil. 37.)

Where plaintiff is entitled to nominal damages.

18. When a party has established a cause of action for nominal damages, it is error to dismiss the case, where the recovery of nominal damages would carry costs.—Potter v. Mellen, 30 N. W. 438, 36 Minn. 122; Farmer v. Crosby, 45 N. W. 866, 43 Minn. 459.

Reinstatement.

19. A cause, having been called for trial, was dismissed upon motion, before any evidence had been introduced; but the court subsequently, deeming such dismissal erroneous, granted a new trial. *Held* proper practice, under Gen. St. Minn. 1878, c. 66, § 253, which provides that "a verdict, report, or decision may be vacated, and a new trial granted," for "irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court * * * by which the moving party was prevented from having a fair trial."—Dunham v. Byrnes, 30 N. W. 402, 36 Minn. 106.

Time for bringing new action.

20. On dismissal of an action, the court has no authority to extend the time for bringing a new action for the same cause beyond the time limited by the statute.—Humphrey v. Carpenter, (Minn.) 39 N. W. 67.

39 Minn. 115.

II. Notices, Motions, Orders, and Dockets.

Notice of trial.

21. The "term" for which a notice of trial may, under Gen. St. Minn. 1866, c. 66, § 200, be given, includes a special term, at which the action might, under Gen. St. c. 64, § 15, be properly tried, as well as a general term.—Colt v. Veader, 19 Minn. 539, (Gil. 469.)

22 In the computation of time upon service of notice of trial in the district court, under Gen. St. Minn 1878, c. 66, § 218, requiring it to be served "at least eight days before the term," the day of service is excluded, and the first day of the term included.—State v. Weld, (Minn.) 40 N. W. 561.

39 Minn. 426.

23. Defendant's right to have a cause stricken from the calendar of the district court, because the notice of trial required by Gen. St. Minn. 1878, c. 66, § 218, was not given, is not waived by his pro-

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ceeding to trial after the court has denied his motion to strike.—Mead v. Billings, (Minn.) 45 N. W. 228.

43 Minn. 239.

24. Under Comp. St. Minn. c. 61, § 8, providing that issues once placed upon the calendar of a term, if not tried at the term for which notice was given, need not be noticed for a subsequent term, but must remain on the calendar until finally disposed of, a subsequent amendment of the pleadings of a cause at issue, which has been duly noticed and placed upon the calendar, does not render another notice of trial necessary.—Stevens v. Curry, 10 Minn. 316, (Gil. 249.)

25. Gen. St. Minn. 1878, c. 66, § 218, requires notice of the trial of a cause to be given, and that, where a cause is placed on the calendar, and not tried at the term for which notice was given, it need not be noticed for a subsequent term, but shall remain on the calendar until finally disposed of. A new trial was granted in a certain cause, and an appeal taken from the order, pending which proceedings were stayed. *Held*, that the cause, pending its decision in the supreme court, did not remain on the calendar of the district court within the meaning of the statute, and upon affirmance notice is necessary before a trial can be had.—Mead v. Billings, (Minn.) 45 N. W. 228.

43 Minn. 239.

Note of issue.

26. In an action by Frederick H., his attorneys filed a note of issue in the cause entitled Jacob H. against the defendant, and the cause was so entered on the calendar. Jacob H. was alleged in the answer to be the owner of the property in controversy, but there was no case pending between him and defendant; and defendant admitted that he was not misled. *Held*, that a motion to strike the case from the calendar was properly denied.—Homberger v. Brandenberg, 29 N. W. 123, 35 Minn. 401.

Notice of motion.

27. A notice that a motion will be made at the "next special or adjourned term" of the district court for Olmsted county, "to be held," etc., "on the 28th day of January, 1867," contains a sufficient designation of the term.—Blake v. Sherman, 12 Minn. 420, (Gil. 305.)

Order to show cause.

28. Under Pub. St. Minn. c. 72, § 17, requiring eight days' notice of motions, but allowing the court or judge to prescribe a shorter time by order to show cause, such an order will be presumed to have been made in a proper case, and in the exercise of suitable discretion.—Goodrich v. Hopkins, 10 Minn. 162, (Gil. 130.)

29. An order to show cause, in matters proper for the consideration of the court in vacation, but not for the judge at chambers, was made returnable before the proper judge at chambers. *Held*, that it was not for that reason invalid, and the language should be taken as merely designating the place for holding the court, where no surprise or injury is shown.—Yale v. Edgerton, 11 Minn. 271, (Gil. 184.)

30. Defendant's attorney procured an order, in the nature of an order to show cause why a judgment should not be opened, and they have leave to answer, fixing the time and place for hearing such motion. The hour designated was 1 o'clock P. M. The copy served stated it at 10 o'clock, and a notice of hearing was also served for 1 o'clock. The hearing was at 1 o'clock. Plaintiff's attorney being present, and taking no part, the motion was granted. *Held*, that by being present and hearing papers read, without objection, he waived the objection to the discrepancy as to the hour of hearing.—Marty v. Ahl, 5 Minn. 27, (Gil. 14.)

Hearing and determination of motion.

31. Under Pub. St. Minn. c. 61, § 44, providing that, where a motion is made before a district court judge in vacation, he shall appoint a day for the hearing, the appointment by the judge of the time of hearing at the place designated in the notice is essential to the protection of the opposing party, whether heard on notice or order to show cause.—Marty v. Ahl, 5 Minn. 27, (Gil. 14.)

32. Where a motion is made in a district adjoining the one in which an action is pending, it is not necessary that it be made to appear that the place at which the motion is to be heard is no further from the county-seat of the county where the action is pending than is the residence of the judge of the district in which such action is pending, in compliance with the provisions of Laws Minn. 1867, c. 67, § 4, or that such motion is made in time; for, if nothing appears to the contrary, the necessary jurisdictional facts will be presumed.—Johnson v. Higgins, 15 Minn. 486, (Gil. 400.)

33. Where the affidavits offered in opposition to a motion show the moving party entitled to the relief prayed, though on grounds not stated in the moving papers, he may take advantage of the grounds thus shown.—Richards v. White, 7 Minn. 345, (Gil. 271.)

34. Parties have no right, after submission of a motion, to introduce additional affidavits or evidence, except by leave of court and upon notice to the other side.—Dunwell v. Warden, 6 Minn. 287, (Gil. 194.)

35. Upon a notice of a motion asking for specific relief, and such other or further relief in the premises as to the court shall seem meet and proper, the court may grant any relief compatible with the facts; care being taken that the opposite party is not taken by surprise by such further relief.—Landis v. Olds, 9 Minn. 90, (Gil. 79.)

Renewal of motion.

36. An order which unconditionally denies a motion for the vacation of a previous order is, while it remains unchanged, a bar to any subsequent application for the same relief.—Griffin v. Jorgenson, 22 Minn. 92.

37. The denial of a motion "without prejudice," does not bar the renewal of it.—Minneapolis Ry. Terminal Co. v. Minneapolis U. Ry. Co., (Minn.) 36 N. W. 105.

38 Minn. 157.

38. Where a motion is once denied for any cause, technical or on the merits, the defeated

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party must obtain leave of court before he can renew the motion on the same state of facts.—Irvine v. Myers, 6 Minn. 558, (Gil. 394.)

39. Where an application to remove the default of a garnishee, and permit him to disclose, has been denied, the subsequent granting of an order to show cause why such application should not be granted is sufficient consent by the court to a renewal of the application.—Goodrich v. Hopkins, 10 Minn. 162, (Gil. 130.)

Order by court or judge.

40. An order by a district judge, fixing the time and place of hearing, on application to set aside a judgment and for leave to answer, is a chamber order, and may be made by a judge out of the district. The addition of the words "by the court" does not change its character.—Marty v. Ahl, 5 Minn. 27, (Gil. 14.)

41. An order setting aside a stipulation for dismissal of an action is one that must be made by the court, and cannot be made by a judge at chambers; but, the consent of the opposite party to such dismissal having been obtained, under Gen. St. Minn. 1866, p. 484, § 242, subds. 2, 5, providing that either party may dismiss an action with the written consent of the other, if the order be signed by the judge of the proper court, it will, in the absence of special circumstances, even if application is heard at chambers, be regarded as the order of the court.—Rogers v. Greenwood, 14 Minn. 333, (Gil. 256.)

42. An order of reference, made in open court and entered in the minutes, is sufficient without being signed by the judge.—Leyde v. Martin, 16 Minn. 38, (Gil. 24.)

43. There is a distinction between an order and a direction for an order; and a decision, under Gen. St. Minn. 1866, p. 482, c. 66, § 226, providing that a decision may be made out of term, may consist either of an order or merely a direction for an order that may be entered by the clerk.—Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

Vacating order—Time of application.

44. Under Gen. St. 1866, c. 66, § 105, authorizing the court, "in its discretion, at any time within one year after notice thereof," to relieve a party from a judgment, order, etc., taken against him through his mistake, etc., the time for making an application to vacate an order on the grounds stated cannot be extended beyond one year by the fact that subsequent proceedings have been had, based upon such order.—Griffin v. Jorgenson, 22 Minn. 92.

III. Stipulations.

Validity.

45. A stipulation by an attorney that the action shall abide the event of another action pending, binds his adult clients, unless it be improvidently, fraudulently, or collusively made; but such stipulation does not bind an infant party unless approved and ratified by the court upon a showing that it is not prejudicial to the interest of the infant, and that the matters in controversy in the two actions, so far as they affect the infant, are precisely the same, and that he is represented in the two actions by the same guardian *ad litem*.—Eidam v. Finnegan, (Minn.) 50 N. W. 933.

46. The spelling of plaintiff's name as "Eidem," instead of "Eidam," in a stipulation by the attorneys in a case, is not a misnomer; and, even if it were, it would be immaterial, as the court before acting on the stipulation could ascertain if it were intended to be one in the case.—Eidam v. Finnegan, (Minn.) 50 N. W. 933.

Construction and effect.

47. Where it is stipulated that a motion shall be heard upon certain papers, it is error to allow others to be read.—Shaw v. Henderson, 7 Minn. 480, (Gil. 386.)

48. A stipulation admitting that, for the purpose of the trial, certain facts in issue shall be deemed to exist, is binding.—Bingham v. Board of Sup'rs Winona County, 8 Minn. 441, (Gil. 390.)

49. The court cannot control the stipulation of the parties; and, where it is stipulated, in an equitable action, that certain costs shall abide the event of the suit, and defendant is really the prevailing party, though judgment is entered in favor of plaintiff, the court cannot require the defendant to pay them.—Dorr v. Steichen, 18 Minn. 26, (Gil. 10.)

50. In an action for damages for breach of a contract for the exchange of lands, where the answer prays a decree for specific performance in case plaintiff's title is adjudged marketable, where the parties stipulated that all questions involved, except the value of the lands, should be tried, and, if the court should hold plaintiff entitled to recover, they might, at a subsequent day, submit evidence as to the value of the lands and measure of damages, and such other questions having been first tried, it was proper for the court to make and file its findings and decision on those questions, and, the matter of the measure of damages being afterwards tried, to make and file its findings and decision on that issue.—Mealey v. Finnegan, (Minn.) 49 N. W. 207.

46 Minn. 507.

Setting aside.

51. A stipulation by an attorney for the dismissal of an action cannot be set aside on the ground of mistake, if the mistake be one which ordinary care would have prevented.—Rogers v. Greenwood, 14 Minn. 333, (Gil. 256.)

52. The fact that a former county attorney stipulated as to a certain statement of facts, in a case against the county, and thereby waived all but one of four separate defenses, is no reason for setting such stipulation aside.—Bingham v. Board of Sup'rs of Winona County, 6 Minn. 136, (Gil. 82.)

IV. Filing Papers.

Time of filing pleadings.

53. The fact that a complaint is not filed with the clerk on or before the second day of the term at which the action is heard and determined, as provided by Laws Minn. 1867, c. 62, § 3, will not affect the judgment, and has no application to a case where the defendant is in default and cause

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is not noticed for trial.—Young v. Young, 18 Minn. 90, (Gil. 72.)

54. The effect of Sp. Laws Minn. 1887, c. 21, § 3, relating to pleadings and proceedings in the municipal court of the city of Minneapolis, which provides that certain titles of Gen. St. c. 66, shall apply thereto "so far as they are applicable, except that the time to demur and reply shall be 10 days," is to make 10 days the uniform period in which to serve answers to such pleadings, whether original or amended.—Keyes v. Clare, (Minn.) 41 N. W. 453.

40 Minn. 84.

What constitutes filing.

55. The delivery of a complaint for filing to the clerk of the court outside of his office, and the making of an indorsement of filing by the clerk thereon, do not constitute a filing of the complaint in his office, the paper not being deposited there, nor any entry of a filing made there.—Schulte v. First Nat. Bank, 24 N. W. 320, 34 Minn. 48.

56. On the question whether a complaint was filed in the office of the clerk, a distinct finding of fact by the court that it was "never filed or on file in the office of said clerk" until a certain date, must control a finding that it was handed to the clerk as he was passing from his office into the court-room; and the latter cannot be interpreted as a finding that it was delivered to the clerk in his office.—Schulte v. First Nat. Bank, 24 N. W. 320, 34 Minn. 48.

V. Service of Papers.

Pleadings.

57. Under Comp. St. Minn. c. 60, § 51, providing that where a summons without a complaint is served, if the defendant appear within ten days after such service, the complaint must be served three days after the appearance, "and the defendant shall have at least ten days thereafter to answer," the defendant in such case has the same time to answer the complaint after it is served upon him that he had of unexpired time when he served his notice of appearance. — Swift v. Fletcher, 6 Minn. 550, (Gil. 386.)

58. Plaintiffs' attorneys lived at St. Cloud, defendant's at Moorhead. Personal service of summons was made November 17th, and, on December 7th, defendant's attorneys mailed their answer at St. Paul, directed to plaintiffs' attorneys at St. Cloud, who received it the following day. *Held*, that the service was not good, as the answer was not mailed from the place of residence of defendant's attorneys, as provided in Gen. St. Minn. 1878, c. 66, § 75, relating to service by mail.—Van Aernam v. Winslow, (Minn.) 35 N. W. 381.

37 Minn. 514.

Copy of account—Demand.

59. A stipulation by the parties to an action that a copy of the items of an account, pleaded generally in the defendant's answer, should be given to the plaintiff within a stated time, dispenses with the necessity for a demand; and, upon failure to furnish the account as stipulated, the defendant is subject to the statutory consequence, and "precluded from giving evidence thereof."—Tuttle v. Wilson, (Minn.) 44 N. W 10.

42 Minn. 233.

Of order.

60. The service of a copy of an order of the court before the same is filed is at most an irregularity that may be waived or cured; and an admission of "due service by copy of within order," indorsed on the original order, and signed by the attorney of the party against whom it is made, operates as such waiver, and estops the party from denying the validity of such service.—Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

Of case.

61. Plaintiff's attorney admitted due service of a proposed case by defendant after the time for serving it had elapsed. *Held*, that the objection to the time of service was waived, and that *mandamus* would issue to the judge to settle and allow the case.—State v. Baxter, (Minn.) 36 N. W. 108.

38 Minn. 137.

VI. Production of Books and Papers.

Order—When vacated.

62. An order for the production of certain documents for plaintiff's use at the trial (Gen. St. Minn. 1878, c. 73, § 88) was properly vacated when such documents were found to contain hearsay evidence only, and that they could not be used in evidence on the trial by either party.—Powell v. Northern Pac. R. Co., (Minn.) 48 N. W. 907.

46 Minn. 249.

Pre-emption.

Of public land, see *Public Lands*, 1-4, 77-83, 92, 93, 136-146.

Preferences.

Of creditors, see *Assignment for Benefit of Creditors*, 11; *Fraudulent Conveyances*, 23-26; *Insolvency*, 45-71.

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—— service of summons, see *Summons*, 52.
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Of title, from possession, see *Adverse Claim*, 40.
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Principal and Accessory.

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PRINCIPAL AND AGENT.

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I. Appointment and Dismissal of Agents.

When relation exists.

1. A single act by an agent, and adoption thereof by the principal, may, if sufficiently positive, unequivocal, and comprehensive, be enough to establish an agency to do other similar acts. —Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269.

2. Proof merely that one is "acting" for another, without proof of his authority to so act, does not show the relation of principal and agent.—Walsh v. Culbertson's Estate, (Minn.) 38 N. W. 631.
39 Minn. 23.

3. Where there was evidence that a son lived on the farm with his father, and had the principal management of his business, and sold the cattle in question for him, a verdict for the father in an action for the price will not be disturbed.—Dennis v. Knight, (Minn.) 39 N. W. 304.
39 Minn. 149.

4. Evidence that one had acted for two or three years as an agent for a corporation, settling its obligations, is sufficient to establish *prima facie* the fact of and authorize the agency.—Neibles v. Minneapolis & St. L. R. Co., (Minn.) 33 N. W. 332.
37 Minn. 151.

5. Authority to sell, or to contract for the sale of, real estate may be conferred by parol, and, if the agent acts within the scope of the authority conferred, the principal will be bound. —Groff v. Ramsey, 19 Minn. 44, (Gil. 24.)

6. In an action to recover the purchase price of land paid by plaintiffs to L., as agent of defendants, it appeared that the land was described in the contract of sale as in H. & M.'s addition, and defendants denied the agency, and that they were interested in the addition, etc. There was evidence that one of defendants went to L. with H., and gave him a list of the property in the addition for sale; that after the making of the agreement with plaintiff, L. told defendants that he had sold the land and they said that they had already learned so from H.; that they, with H., listed other property in the addition with other agents; that they participated in selecting a name for the addition; that one of defendants acknowledged that he was the M. designated in the name given to the addition; and that the other defendant acknowledged that he had an interest in the addition, and said that he would see that plaintiffs got an abstract of title. *Held*, that there was sufficient evidence of the agency of L. to submit to the jury.—Jensen v. Weide, (Minn.) 43 N. W. 688.
42 Minn. 59.

Duration and termination of agency.

7. A contract by which plaintiff, as agent, was to sell windmills for defendant, provided that when plaintiff should have "collected for all of the goods as above, and the aforesaid notes shall be paid for each year's business," then defendant would pay plaintiff a certain amount for each mill "sold that year." Afterwards it was agreed that the business should "be continued" under the previous contract, and that the parties should check up accounts during the month of January of each year, and as much oftener as they might desire during the continuance of the business under said contract. *Held*, that either party had the right to terminate the contract at any time.—Hoover v. Perkins Windmill & Axe Co., (Minn.) 42 N. W. 866.
41 Minn. 143.

Extension of agency.

8. Where plaintiffs appointed defendant their agent for three days to sell certain land at a named price, and on the last day of the agency defendant represented that he could not sell the land for the sum specified, but that he could sell the land for a less sum, and plaintiffs authorized defendant to make the sale at the price which he said he could obtain, there was an extension of the agency.—Hillis v. Stout, (Minn.) 44 N. W. 982.
42 Minn. 410.

Revocation of agency.

9. M., the agent of an insurance company, resigned his agency, and asked the appointment of his son in his place, saying that the work of the latter would be under his immediate supervision. Another agent, through whom this was communicated to the company, added that the business

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would run the same as before, but that he, M., "desires his son to learn the business, and have some responsibility, and takes this method." The son was thereupon appointed. *Held*, that the evidence justified the finding that M. had still authority to act for the company.—Ganser v. Fireman's Fund Ins. Co., (Minn.) 35 N. W. 584.

38 Minn. 74.

II. Powers of Agents.

Contract of agency—In general.

10. Defendant, who was general manager of a printing company, made a contract retaining plaintiff's services as editor, in which, however, his principal was not mentioned. He afterwards indorsed on it an acceptance by the company, but no express consent thereto on the part of the company was shown. *Held*, that the indorsement did not bind the company, since an agent cannot bind his principal by a contract which is in effect with himself.—Williams v. Journal Printing Co., (Minn.) 45 N. W. 1133.

43 Minn. 537.

11. Where real estate is placed in the hands of a person to sell as agent for the owner, although the price and terms of sale are fixed by the owner himself, yet it is incompatible with the agent's duty to his principal to accept any employment as agent also of the purchaser, which would render it to his interest to sell only to those who would give him such double employment, to the exclusion of other persons.—Webb v. Paxton, (Minn.) 32 N. W. 749.

36 Minn. 532.

Extent of authority, generally.

12. It is competent for a principal appointing a special agent to show what his instructions to such agent were, in order to prove the extent of the agent's authority.—Nininger v. Knox, 8 Minn. 140, (Gil. 110.)

13. Where agency is to be inferred from the conduct of the principal, such conduct is the only evidence of the extent, as well as the existence, of such agency.—Humphrey v. Havens, 12 Minn. 298, (Gil. 196.)

14. Authority to bind a principal as maker of a promissory note would create no inference of authority to bind him for the payment of the note and mortgage of a third person.—Humphrey v. Havens, 12 Minn. 298, (Gil. 196.)

15. In establishing a specific act of agency the general custom of an agent in transacting his principal's business is immaterial.—Ames v. First Div. St. P. & P. R. Co., 12 Minn. 412, (Gil. 295.)

16. Authority of the agent to bind the principal may be inferred from the habit and course of dealing of principal and agent, but not of the agent alone, though done in the name of the principal.—Lawrence v. Winona & St. P. R. Co., 15 Minn. 390, (Gil. 313.)

17. An agent employed to solicit orders for coal cannot bind his principal by an agreement that the price shall be applied to his own indebtedness to the purchaser.—Talboys v. Boston, (Minn.) 48 N. W. 688.

46 Minn. 144.

18. The mere fact that one is an agent for several persons interested in a particular enterprise, as the establishment of a town, does not authorize him to conduct the business for them under a common name, so as to make them severally liable, under Pub. St. Minn. c. 60, § 38, providing that any one of such joint associates may be sued for the obligations of all.—Cooper v. Breckenridge, 11 Minn. 341, (Gil. 241.)

Implied powers—Apparent authority.

19. An implication of authority in an agent to do a certain act cannot be created by the fact that the principal had ratified a previous act of the agent of an entirely different character, but outside the scope of the employment.—Humphrey v. Havens, 12 Minn. 298, (Gil. 196.)

20. An agent, who was intrusted with goods to be delivered to defendant, and by him sold on commission, represented to defendant that he was a member of the firm to whom such goods belonged, and subsequently the defendant, without notice that such was not the case, in good faith paid the agent money on account of such goods. *Held*, in an action by the owners, that defendant was entitled to credit for such payment.—Lough v. Thornton, 17 Minn. 253, (Gil. 230.)

21. A request by the owner of land to a person living near it, to direct any person examining it to C., as his agent to sell, will not justify a person informed of such request in assuming that C.'s authority to sell was unlimited, nor excuse him from ascertaining such authority.—Dayton v. Ruford, 18 Minn. 126, (Gil. 111.)

22. Defendant transmitted money to persons to invest in real estate, taking title in his name, build houses thereon, sell and convey; they to have a share in the profits, when the land was sold, and guarantying the return of the money sent. *Held*, that an attorney, having no knowledge of the contract, could sue the principal for services rendered in lawsuits and examining titles, relying upon the apparent authority of his agents.—Mason v. Taylor, (Minn.) 35 N. W. 474.

38 Minn. 32.

23. Where an agent, by the authority of his principal, acts generally for him in a particular department of his business, or assumes so to act, with the knowledge and consent of his principal, in dealing with third persons, who are thereby induced to rely on the authority of the agent, the principal is bound by his acts.—Tice v. Russell, (Minn.) 44 N. W. 886.

43 Minn. 66.

24. Defendant, by its general manager, contracted with plaintiff for the publication in its paper of certain matter by a given date; the matter to be furnished, and the details of the publication to be looked after, by defendant's passenger agent. The agent failed to furnish the matter until after the date named in the contract for publication. As soon as the matter was furnished, plaintiff published it in accordance with the contract, except as to time. *Held*, that the plaintiff had a right to assume that the delay of the agent was authorized by defendant.—American Graphic Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., (Minn.) 46 N. W. 143.

44 Minn. 93.

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Authority to sell—Contract for sale of land.

25. Defendant, on being informed by his agent that his lands might be sold for $3 to $3.50 per acre, authorized such agent to sell for $3 per acre cash, or half down, and balance in one or two years, secured by notes and mortgage bearing 9 per cent. interest. *Held* not to authorize the agent to sell such lands for $3.40 per acre, one half in 30 days, upon the delivery of a deed, and balance in 2 years from that time, with interest at 10 per cent. per annum, though apparently more favorable than the terms authorized, and the purchaser could not enforce such contract.—Dayton v. Buford, 18 Minn. 126, (Gil. 111.)

26. An agent, authorized to sell certain land subject to a lease thereof, executed an agreement for a conveyance by his principal "in fee-simple, and with a perfect title, free from all incumbrances." *Held*, that this was unauthorized, and not enforceable against his principal.—Thomas v. Joslyn, 15 N. W. 675, 30 Minn. 388.

27. Where an agent is authorized to sell land, "one-half payable *on or before* one year," a contract to sell, "one-half payable *in* one year," is in pursuance of the authority; the legal rights of the vendor being the same in either case.—Deakin v. Underwood, (Minn.) 33 N. W. 318.

37 Minn. 98.

Distinguishing Jackson v. Badger, 26 N. W. 908, 35 Minn. 52.

28. The nature, effect, and interpretation of correspondence between the owner of land and his agent in relation to the sale of the land is a question of fact for the jury.—Dayton v. Buford, 18 Minn. 126, (Gil. 111.)

—— Contract for sale of personal property.

29. An agent selling furnaces for a specific use, to be shipped by the vendor in detached parts, has implied authority to contract for putting the furnaces together, and for putting them into the buildings where they were to be used.—Boynton Furnace Co. v. Clark, (Minn.) 44 N. W. 121.

42 Minn. 335.

30. An agent for the sale of a machine, with no restriction of his authority, may make a contract for a sale if the machine on trial shall work to the satisfaction of the purchaser, and may deliver the machine to him to make such trial.—Deering v. Thom, 12 N. W. 350, 29 Minn. 120; Oster v. Mickley, 28 N. W. 710, 35 Minn. 245.

31. A local agent intrusted with farm machinery for the purpose of sale, no restrictions appearing, may be presumed to be authorized to sell with warranty.—Flatt v. D. M. Osborne & Co., 22 N. W. 440, 33 Minn. 98; McCormick v. Kelly, 9 N. W. 675, 28 Minn. 135.

32. Manufacturers of harvesting-machines which were sold through agents, with a warranty thereof, issued blank orders for the machines, containing such warranty, which were furnished to customers, to be filled up and signed and delivered to the agents. Such an order was signed by plaintiff, directed to particular agents of the manufacturers, by which he agreed to receive the machine ordered under the warranty, and to make payment for it as therein stated. The manufacturers, acting on the order, supplied the machine, and subsequently attempted to repair it, and also accepted and collected the note given therefor. *Held*, that the manufacturers were bound by the terms of the warranty.—Melby v. D. M. Osborne & Co., 24 N. W. 253, 33 Minn. 492.

Authority to employ subordinates.

33. The chief engineer of a railway company, employed to survey and establish its line of road, has, as such, apparent authority to employ, on behalf of the company, such subordinates, and to incur such expenses, as are reasonably suitable to that end; and the company is liable to one rendering services and making expenditures in pursuance of such employment by him, notwithstanding an undisclosed limitation of the engineer's apparent authority.—Gillis v. Duluth, N. S. & S. W. R. Co., 25 N. W. 603, 34 Minn. 301; Coats v. Same, 25 N. W. 642, 34 Minn. 301.

Authority to make loans.

34. Where an agent, intrusted with the entire management of his principal's business of making, negotiating, and collecting loans, exacts, for the benefit of the principal, a bonus in excess of legal interest, which is included in the amount of the securities, there being no evidence that it was done without the authority or consent of the principal, the act of the agent must be *held*, as a matter of law, to be the act of the principal.—Lewis v. Willoughby, (Minn.) 45 N. W. 439.

43 Minn. 307.

35. Where a non-resident is engaged in the regular business of loaning money through a resident agent, to whose discretion he intrusts the entire management of the business of loaning and collecting money, under a general authority, upon such security and terms as the agent may deem proper, the acts of his agent in conducting such business, and in exacting and including in contracts unlawful rates of interest or bonuses, will bind his principal, and such contracts will be held usurious as to him.—Adamson v. Wiggins, (Minn.) 48 N. W. 185.

45 Minn. 448.

Authority to borrow money.

36. An authority from principal to agent "to use money remitted, in my name and as my agent, at your own discretion, either in the purchase of real estate or loaning, as you or your adviser may think may be the most profitable for me in the end," does not authorize the agent to borrow money or use the credit of the principal in his transactions.—Humphrey v. Havens, 12 Minn. 298, (Gil. 196.)

Execution of power—By one of several.

37. An authority conferred upon several as agents must be executed by all, and an attempted execution by a less number is not binding on the principal.—Rollins v. Phelps, 5 Minn. 463, (Gil. 373.)

38. The rule that, when an authority to do an act is conferred upon several agents, all must join in its execution, has no application where the authority is conferred upon a partnership. In such case,

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each partner may execute, and the act of one is the act of the firm, and in strict pursuance of the power.—Deakin v. Underwood, (Minn.) 33 N. W. 318.

37 Minn. 98.

—— Signing name of principal.

39. A duly-authorized agent may sign the name of his principal without indicating that the signature was made by an agent.—First Nat. Bank v. Loyhed, 10 N. W. 421, 28 Minn. 396.

40. An agreement in writing, executed by an agent in transacting the business of his principals, referred to their business, and purported to be one of the terms of a contract of sale which he was making for them. It was signed by him in his own name, with the word "agent" added. *Held* that, although it was *prima facie* his contract, the circumstances warranted the jury in finding that it was intended and understood to be a part of the contract of sale made by him for his principals, and binding on them as such. Following Bingham v. Stewart, 13 Minn. 106, and 14 Minn. 214; Pratt v. Beaupre, 13 Minn. 187.—Deering v. Thom, 12 N. W. 350, 29 Minn. 120.

41. Where a contract that need not be under seal is executed by an agent under seal, who has authority to make the contract as a simple contract, but not under seal, the seal will be rejected as surplusage, and the instrument held valid as a simple contract. Following Minor v. Willoughby, 3 Minn. 225, (Gil. 154.)—Dickerman v. Ashton, 21 Minn. 538.

42. An agent, having authority by certain letters only to sell land, affixed a seal to his agreement for the sale thereof. *Held*, that the seal might be rejected as a separable excess of authority, and the agreement stand as a simple contract.—Thomas v. Joslyn, 15 N. W. 675, 30 Minn. 388.

—— Using agent's name only.

43. An agent, to bind his principal, must contract in the latter's name.—Sencerbox v. McGrade, 6 Minn. 484, (Gil. 334.)

44. In a contract for rafting logs the parties of the one part, four in number, were described as agents, authorized by the log-owners. It was signed by three of them, with the addition of "agent" after their signatures. *Held* that, there being no principal disclosed, and it being signed by three only of those designated as agents, it must be deemed the contract of the parties signing it.—Rollins v. Phelps, 5 Minn. 463, (Gil. 373.)

Distinguishing Sanborn v. Neal, 4 Minn. 126, (Gil. 83.)

—— Excess of authority.

45. Mere excess of authority in some one particular, in the making of a contract by an agent, will not make it void as to the remainder, which was within his authority.—Reed v. Seymour, 24 Minn. 273.

III. Ratification.

What subject to ratification.

46. An attempted lease by an agent, which is absolutely void, cannot be made valid by ratification.—Sanford v. Johnson, 24 Minn. 172.

47. Where a person acting as an insurance adjuster has no authority to act for an insurance company, and does not profess to act for it, the subsequent assent of the company to be bound as principal does not bind it, since a ratification is only effectual when the act ratified was done by a person professedly acting as agent.—Mitchell v. Minnesota Fire Ass'n, (Minn.) 51 N. W. 608.

What constitutes ratification—In general.

48. Ratification of the acts of an agent, to be effectual, must be with a full knowledge of all the material facts of the transaction ratified.—Humphrey v. Havens, 12 Minn. 298, (Gil. 196.)

49. The fact that one who is sued for the specific performance of a contract for the conveyance of land, in a letter written after the transaction in question, to one who had assumed to act as his agent, does not deny such agent's authority, is not sufficient evidence of ratification.—Stillman v. Fitzgerald, (Minn.) 33 N. W. 564.*

37 Minn. 186.

50. An agent was authorized by his principal to sell lands on certain terms. The written contract of sale made by him varied from these in certain particulars. He notified his principal, a non-resident, of the sale, and sent him a deed for execution, and also a purchase-money mortgage, with notes, ready for execution by the purchaser, showing the terms of the purchase as agreed on for his inspection. These were received and acknowledged by the principal, who made no objection to the modification in the terms of payment, and promised to return them after submission to his counsel. While he held the papers, the purchaser notified the agent that he would accept the title, and that he was ready to complete the purchase. The vendor subsequently refused to proceed further under the contract. *Held*, that the contract as made was ratified by him, and the purchaser was entitled to a specific performance.—Dana v. Turlay, 35 N. W. 860, 38 Minn. 106.

51. A mere effort on part of the principal, after knowledge of the unauthorized act of the agent, to avoid loss thereby, will not amount to ratification so as to relieve the agent from liability.—Triggs v. Jones, (Minn.) 48 N. W. 1113.

46 Minn. 277.

—— Acceptance of benefits of agent's acts.

52. Subsequent ratification of the acts of an assumed agent is binding on the principal as if such acts had been done by previous authority, and an acceptance of a benefit by the principal will estop him from denying the authority of the agent.—Woodbury v. Larned, 5 Minn. 339, (Gil. 271.)

53. Where an agent exceeds his authority, and the knowledge of the fact does not reach the principal until it is out of his power to restore what is received through the transaction, he is not bound, as a condition of his repudiation of the agent's action, to make restoration, nor if such restoration would be but a mere formality, without practical value.—Humphrey v. Havens, 12 Minn. 298, (Gil. 196.)

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What constitutes ratification—Delay in repudiating unauthorized acts.

54. Where a principal desires to dissent from an unauthorized act of an agent, he must act within a reasonable time after he has notice of such act, otherwise he will make it his own.—Stearns v. Johnson, 19 Minn. 540, (Gil. 470.)

55. Defendant, residing in Minnesota, had in his hands, as agent for the plaintiff, residing in Massachusetts, $4,500 in cash, and a note for $1,500, falling due March 18, 1867. November 1, 1866, a person assuming to act as agent for the plaintiff, but in fact unauthorized, settled with defendant, agreeing to take $3,800 in United States bonds, in full, and allow defendant to keep the note as his own. Notice of the arrangement was at once given to the principal by the assumed agent, but no notice of repudiation of the transaction was given until after the maturity of the note. *Held*, that such repudiation was not within a reasonable time, and that the fact that the delay may have arisen from the fear that defendant, being insolvent, would, to prevent recovery of the note, transfer the same before maturity to a third person, was immaterial.—Stearns v. Johnson, 19 Minn. 540, (Gil. 470.)

—— Necessity of writing.

56. Where the original authority of an agent to do a particular act is required to be in writing, a ratification of such an act, done by an agent not so authorized, must be in writing.—Judd v. Arnold, 18 N. W. 151, 31 Minn. 430.

IV. Rights and Liabilities inter Se.

Liabilities of agent—Care of principal's property.

57. Money intrusted by principals to their agents for a specific purpose was placed by the agents in the same safe drawer with their own money, and was stolen therefrom, without their fault. *Held*, that the agents were not liable to the principals therefor, as having converted the money, it appearing that the fund had remained intact.—Furber v. Barnes, 19 N. W. 728, 32 Minn. 105.

58. A contract between a principal and agents, relating to property delivered to the agents by the principal for sale, required the agents to "take out a policy or policies of insurance * * * in the name and for the benefit" of the principal, and to pay the expenses thereof. It provided that any such property unsold eight months after shipment to the agents was to be subject to the order of the principal. *Held*, that the agents were not required to keep the property insured during all the time it might remain in their possession, but only to insure it for a reasonable time, not exceeding eight months; and that they were not liable for property destroyed by fire, without their fault, three years after its delivery to them under the contract.—Milburn Wagon Co. v. Evans, 14 N. W. 271, 30 Minn. 89.

—— Price of goods sold.

59. By a contract of agency for the sale of machines manufactured by the principal, a corporation, the agents agreed to sell them only to persons of responsibility and good reputation, and having property of a specified amount, and to require a statement from such persons as to their property, and, upon failure to do so, to indorse on the notes given by such persons a guaranty of collection thereof; and that, should any notes turned over to the corporation without indorsement prove uncollectible, 23 per cent. of the amount due thereon might be charged to, and would be paid by, the agents. *Held* that, if the corporation, on a note being turned over to it, did not then require the guaranty by the agents, their liability thereon under the contract was exclusively fixed by the 23 per cent. clause; and that this, as a special provision for a particular case, controlled any general provisions of the contract which might otherwise embrace the liability of the agents for a failure to comply with their agreement.—Minneapolis Harvester Works v. Smith, 16 N. W. 462, 30 Minn. 399.

60. An agent was authorized to sell to responsible parties only, yet upon final settlement, by the terms of his contract, might take in payment of his commissions promissory notes received from purchasers "proving doubtful on examination." *Held*, that the principal could not hold the agent liable by suit instituted two years after receiving from him certain uncollectible notes, and retaining them during that period without objection.—Plano Manuf'g Co. v. Buxton, (Minn.) 30 N. W. 668.
36 Minn. 203.

61. In a contract of agency for the sale of machinery, it was stipulated by the agent that he would not deliver possession to any purchaser or other person, or permit the use of any machinery intrusted to him until the same was paid for in cash or notes, and in case he did so that he would be responsible for the payment of the price. *Held*, that on a breach of such contract by the agent a cause of action arose in the principals' favor for the contract price of machinery so delivered, and on payment therefor to the principals by the agent the agent might be subrogated to the rights of the principals in respect to such machinery.—Nichols, Shepard & Co. v. Wadsworth, 42 N. W. 541, 40 Minn. 547.

—— Profits made by agents.

62. Defendants represented to plaintiffs that they had the refusal of a tract of land which could be purchased for $20,000 and no less, and plaintiffs employed them to make the purchase. They concealed from plaintiffs the fact that they were also agents of the land-owner to effect a sale, and bought the land for a less sum than that represented to plaintiffs. *Held*, that plaintiffs are entitled to recover the difference, as the defendants cannot be permitted to make profit out of their agency.—Crump v. Ingersoll, (Minn.) 46 N. W. 141.
44 Minn. 84.

—— Failure to perform duty.

63. An agent to rent lands, and collect the rent thereon as it falls due, is not liable for failure to perform his duty, although he assumes entire control of the premises, where it is not shown that he could, with reasonable diligence, have rented the land, or collected the rent thereon.—Burpe v. Van Eman, 11 Minn. 327, (Gil. 231.)

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Liabilities of agent—Fraud on principal.

64. The owner of a piece of land authorized C. to sell it so that it should bring a specified net sum to her; he to have for making the sale all above that sum for which he might sell. *Held*, that it was his duty, upon afterwards learning of a fact in the condition of the land increasing its value, and of which she was ignorant when she authorized him to sell it, to inform her of the fact; and a sale by him on the basis of the sum fixed, without so informing her, was a fraud.—Hegenmyer v. Marks, (Minn.) 32 N. W. 785.

37 Minn. 6.

65. Plaintiffs, the principals, were defeated in an action on a contract for sale of machinery made in their behalf by defendant as their agent, on the ground of his alleged fraud in procuring the contract, such contract appearing on its face to be in conformity with plaintiff's instructions. *Held* that, if the allegations of fraud are true, such contract also operated as a fraud on the plaintiffs, and rendered defendant liable to them for the costs and damages sustained in consequence thereof; but that in an action therefor against defendant, the latter not being a party to the former suit, the allegations of fraud must be established by plaintiffs, as well as the fact that the issue thereon was litigated and determined in the former suit, and that the judgment record therein was only evidence, as against defendant, of the fact of the recovery, and the amount thereof, and the issues raised by the pleadings in that action.—Nichols, Shepard & Co. v. Wadsworth, 42 N. W. 541, 40 Minn. 547.

66. One who turns over money to others to invest, as his agents, in land to be held and sold on his account, is entitled to repudiate their action, and recover the money, if, after purchasing the land and taking a deed thereof, they mortgage it without his knowledge and consent.—Friesenhahn v. Bushnell, (Minn.) 50 N. W. 597.

47 Minn. 443.

67. One who turns over money to others to invest, as his agents, in land to be held and sold on his account, is entitled to repudiate a purchase by them, and recover the money, if they conceal from him the fact that they are the owners of the land in which they invest.—Friesenhahn v. Bushnell, (Minn.) 50 N. W. 597.

47 Minn. 443.

—— Conversion.

68. An agent in whose hands money is placed by the principal, to be invested in the name of such principal, is guilty of conversion if he invests it in his own name.—Farrand v. Hurlburt, 7 Minn. 477, (Gil. 383;) Cock v. Van Etten, 12 Minn. 522, (Gil. 431.)

Compensation of agent.

69. Upon the question whether the agency is general, the agent having the exclusive right to make sales of the principal's wares within certain territory, so as to entitle him to compensation for sales within the territory made by himself or the principal, or a limited agency, the agent to make such sales as he could, and receive pay for such as he made, where the direct evidence is conflicting, the acts of the agent known to and acted on by the principal may be shown.—Turnbull v. Northwestern Terra Cotta Co., (Minn.) 49 N. W. 229.

46 Minn. 513.

Application of moneys collected—Set-off.

70. Defendant, after he had been, by an instrument in writing, authorized by the owner of land to collect rents and make a certain disposition thereof, accepted an order by such owner directing him to pay a specified portion of the accruing rents to the payee therein. *Held* a modification of the original agreement, and binding upon defendant, though he might otherwise have been entitled to apply such rent to the satisfaction of claims held by him.—Gray v. Barge, (Minn.) 50 N. W. 1014.

47 Minn. 498.

Indemnity to agent.

71. Where a servant of a railway company prevents another company from crossing its road according to his employer's orders, and, in so doing, violates an injunction of which he had no knowledge, the employer, thus knowingly exposing him to punishment for contempt of court, must indemnify him for any damages suffered on account of his acts in obeying its orders, and such liability is in no wise dependent on the final determination of the court in regard to the injunction.—Guirney v. St. Paul, M. & M. Ry. Co., (Minn.) 46 N. W. 78.

43 Minn. 496.

V. Rights and Liabilities as to Third Persons.

Liabilities of principal — Purchase of goods by agent.

72. A principal is not liable for goods purchased by his agent without authority, real or apparent, and applied to the payment of the principal's debt, where the agent has been provided with funds for the payment of such debt.—Eckart v. Roehm, 45 N. W. 443, 43 Minn. 271.

—— Sale of goods by agent.

73. Where one purchases of another, who is acting as agent of a third person, it is presumed that the fact of the agency was communicated to the vendee.—Durfee v. Pavitt, 14 Minn. 424, (Gil. 319.)

74. Defendant having on the same day authorized two agents to sell the same tract of land, one of them on that day effected a sale, which was consummated by a conveyance. Subsequently the other agent, without notice of the previous sale, contracted with plaintiff for a sale of the land to him. *Held*, that the sale by one agent precluded the other, without any notice, and that plaintiff in dealing with the agent took the risk of revocation of his agency.—Ahern v. Baker, 24 N. W. 341, 34 Minn. 98.

75. In replevin, defendants claimed to be owners under purchase from plaintiff's agent, who was in possession of the property. The agent was the local agent of plaintiff for the sale of farm machinery, and the property consisted of castings adapted and intended to supply the place of parts broken or worn out in plaintiff's machines. They were listed by plaintiff to the agent at the price

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at which they were to be sold by him for a certain commission, and those remaining unsold were to be returned to plaintiff. The agent sold goods, valued at $465, to defendants for $100, appropriated the proceeds, and left the state. Defendants claimed to be purchasers for value, and without notice. The defendants were not engaged in selling farm machinery. One of defendants lived with the agent, and presumably had some knowledge of his business, and knew that the agent was about to leave the state, and had heard that the agent had had some difficulty with plaintiff. The defendants afterwards removed the property from the state, and only returned it on threat of criminal prosecution. *Held*, that a verdict for defendants was not justified by the evidence.—Warder-Bushnell & Glessner Co. v. Rublee, (Minn.) 43 N. W. 569.

42 Minn. 23.

Liabilities of principal—Fraud of agent.

76. Where a married woman employs her husband to negotiate a sale of her land, and in such negotiation he makes false representations, and she afterwards completes the sale by making a deed, the representations will be held as though made by herself, since she cannot retain the benefits of his negotiations, and repudiate the means by which they were obtained.—Knappen v. Freeman, (Minn.) 50 N. W. 533.

47 Minn. 491.

77. A special agent, D., authorized to sell lot 5, fraudulently showed plaintiff lot 7 (a lot of greater value) as being lot 5. Relying on the representation as true, plaintiff purchased and received a deed of lot 5, believing it to be the lot pointed out to her by the agent. The principal neither knew of, authorized, nor ratified this fraud. Plaintiff never demanded a rescission of the contract and restitution of the purchase money. *Held*, that plaintiff could not maintain an action against the principal to recover the difference in value between the two lots, as damages for the fraud of the agent in effecting the sale; that her only remedy against him was to demand a rescission of the contract, and repayment of the purchase money.—Davies v. Lyon, (Minn.) 31 N. W. 688.

36 Minn. 427.

—— Knowledge of or notice to agent.

78. Knowledge of an agent acquired previous to the agency, but appearing to be actually present in his mind during the agency, and while acting for his principal in a particular transaction or matter, will, as respects such transaction or matter, be deemed notice to the principal.—Lebanon Sav. Bank v. Hallenbeck, 13 N. W. 145, 29 Minn. 322.

79. In an action for the taking, under attachments against one G., of goods claimed by plaintiff, plaintiff's husband testified, on his direct examination, that at the time of the levy of the attachments he had received and was holding possession of the goods as agent for his wife on a sale thereof made to her through him by G. *Held*, that it was proper, on his cross-examination, to inquire into all the circumstances of the transfer tending to show its fraudulent character and purpose, and the fraudulent nature of his possession, as plaintiff would be affected with any notice or knowledge acquired by him in the transaction of any facts which might affect the honesty or validity of the transfer.—Bowers v. Mayo, 20 N. W. 186, 32 Minn. 241.

80. Knowledge of a fact received by an agent at a time when he is not acting as such, if actually had in mind by the agent when he subsequently acts for his principal, will, as respects that transaction, be imputed to the principal.—Wilson v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 30 N. W. 401, 36 Minn. 112.

81. The rule that a principal is affected by notice to or the knowledge of his agent does not justify a legal imputation of actual malice in the conduct of a principal merely because of facts known only to his agent.—Reisan v. Mott, (Minn.) 43 N. W. 691.

42 Minn. 49.

Liabilities of agent—Personal warranty.

82. Plaintiff, having agreed with agents of the manufacturers of a harvesting machine to purchase the machine and pay for it in secured notes, being unable to furnish such notes, for which alone the agents were authorized under their contract with the manufacturers to deliver the machine, they agreed to accept from him his notes to themselves and a larger cash payment than originally stipulated; and, on his insisting upon his right to have the machine "set up and proved, so that he could see if it would work," they assured him that it was proved already, and "guarantied it one of the best in the market;" whereupon he executed the notes, and they agreed to set up the machine, and put it in good running order, upon notice by him. *Held*, that evidence of these facts was sufficient to sustain a finding by the jury of a personal warranty of the machine by the agents.—Rondquist v. Higham, 24 N. W. 190, 33 Minn. 490.

—— Money paid over to principal.

83. An agent to whom money is paid for his principal by mistake is not liable to the party paying it if he has paid it over to the principal before notice of the mistake, and that he is required not to pay it over.—Shepard v. Sherin, (Minn.) 45 N. W. 718.

43 Minn. 382.

84. The notice need not be formal, but must be made by one having an interest in the matter, and must apprise him of the mistake, and that the party intends by reason of it to reclaim the money.—Shepard v. Sherin, (Minn.) 45 N. W. 718.

43 Minn. 382.

—— Undisclosed principal.

85. Where a written contract is claimed to have been made by an agent, it must, in order to relieve such agent from liability, appear upon its face to have been made on behalf of the principal. It is not sufficient that he simply signed it as agent.—Fowler v. Atkinson, 6 Minn. 578, (Gil. 412.)

86. Where one who has signed a contract and is *prima facie* liable thereon seeks to change such liability on the ground of agency, the fact of agency must first be shown.—Pratt v. Beaupre, 13 Minn. 187, (Gil. 177.)

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87. One who procures a real estate broker to obtain a loan on land, without disclosing the name of the owner of the land, for whom the loan is in fact intended, is himself liable for the value of the broker's services.—Bacon v. Rupert, (Minn.) 40 N. W. 832.

39 Minn. 512.

88. An agent, without disclosing his agency, contracted with a stranger. *Held*, in an action brought by the real principal upon such contract, such stranger might set up any equity existing in his favor against the agent prior to notice of plaintiff's rights.—Lough v. Thornton, 17 Minn. 253, (Gil. 230.)

—— Wrongful assumption of authority.

89. One who acts as agent without authority makes himself personally liable.—Pratt v. Beaupre, 13 Minn. 187, (Gil. 177.)

90. Where one without authority executes an instrument in the name of another, adding his own as agent merely, he cannot be treated and sued as a party thereto, unless it is shown that he was the real principal.—Sheffield v. Ladue, 16 Minn. 388, (Gil. 346.)

91. One who, without authority, executes a contract for and in the name of another, adding his name as agent to the name of the assumed principal, cannot be sued on the contract; but an action in the nature of an action on the case lies against him.—Sheffield v. Ladue, 16 Minn. 388, (Gil. 346.)

92. Defendant, wrongfully assuming to be the authorized agent of the owner of certain land for the sale thereof, induced plaintiff to enter into a compact for the purchase of the land, which provided that plaintiff should build a house thereon within three months. *Held*, that plaintiff might recover from defendant, in addition to damages for the loss of the bargain, the expenditures in making improvements on the property in pursuance of the contract.—Skaaraas v. Finnegan, 19 N. W. 729, 32 Minn. 107.

93. An action against an agent for falsely assuming to act as such will not lie in behalf of a third person if the assumed principal ratify the act of the agent, provided that the making the ratification relates back, and places such third person in no worse position than he would otherwise have occupied.—Sheffield v. Ladue, 16 Minn. 388, (Gil. 346.)

94. The failure of the agent to give notice of the ratification of his unauthorized act will not make him liable, unless facts are shown imposing on him a duty to give such notice, and damage resulting from his neglect so to do.—Sheffield v. Ladue, 16 Minn. 388, (Gil. 346.)

—— False representations.

95. Where an agent of the owner of property makes representations as to its character and condition, which are relied on by a purchaser, to his prejudice, and which are in fact false and fraudulent, and unqualifiedly made by such agent as of his own knowledge, the purchaser may maintain an action against him for damages.—Clark v. Lovering, (Minn.) 33 N. W. 776.

37 Minn. 120.

Liabilities of agent—Conversion.

96. An agent or servant, who, acting solely for his principal or master, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property.—Leuthold v. Fairchild, 27 N. W. 503, 28 N. W. 218, 35 Minn. 99.

—— Trespass.

97. An agent acting under instructions is not liable as trespasser unless his principal would also be so liable.—Strong v. Colter, 13 Minn. 82, (Gil. 77.)

Rights of principal and third persons as creditors of agent.

98. A manufacturing company domiciled in another state entered into a contract with an agent for the establishment of a branch of its business in this state, under which he carried on the business in his own name, with the knowledge and consent of the company, and contracted a large amount of indebtedness. Afterwards he made an assignment for the benefit of his creditors. *Held*, that a creditor of the company was not entitled to a preference over the creditors of such agent because moneys received from the company were used in his business, or in the purchase of the assigned property before the indebtedness to such creditors accrued.—Mackellar v. Anchor Manuf'g Co., (Minn.) 51 N. W. 616.

VI. Actions.

Between principal and agent—Pleading—Judgment.

99. In an action to recover money alleged to have been collected by defendant for plaintiff, an answer by defendant that he had received the claim from one H., who told him he could retain all collected above a certain sum, is insufficient in not alleging that H. was the agent of plaintiff or authorized to act in her behalf.—Davenport v. Ladd, (Minn.) 38 N. W. 622.

38 Minn. 545.

100. The complaint in an action by a principal against his agent charged specific acts of conversions of the principal's property, and also made out a case for, and demanded, an accounting. The court found that defendant had appropriated to his own use, and had not accounted for, certain items of money and goods of the principal. *Held*, that judgment might be ordered for the amount and values of such items, without a general statement of the accounts between the parties. If such a statement would show that defendant had accounted for those items, it was for him to show it.—Greenleaf v. Egan, 15 N. W. 254, 30 Minn. 316.

By agent—Trustee of express trust.

101. Gen. St. Minn. 1878, c. 66, § 28, authorizes the trustee of an express trust to sue without joining with him the person for whose benefit the action is prosecuted, and provides that "a person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express

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trust within the meaning of this section." *Held* that, where a contract for the sale of land is taken by an agent in his own name for the benefit of his principal, the agent may sue in his own name for non-performance.—Cremer v. Wimmer, (Minn.) 42 N. W. 467.

40 Minn. 511.

102. An agent having taken in his own name a mortgage of chattels, he may sue therefor in trover as the trustee of an express trust.—Close v. Hodges, (Minn.) 46 N. W. 335.

44 Minn. 204.

Evidence.

103. Where a transaction relied upon as defense to an action on a note was had with an agent, the authority of the agent must be shown.—Brayley v. Kelly, 25 Minn. 160.

104. The authority of an agent to act for his principal cannot be proved by the former's acts and declarations.—Sencerbox v. McGrade, 6 Minn. 484, (Gil. 334.)

105. On a question as to the authority of one who acted as an agent, it is proper to charge that the party seeking to bind a person by the acts of an agent must affirmatively prove to the satisfaction of the jury that the agent was fully authorized to perform the act, and that the agent's own statement that he was authorized is not sufficient of itself to prove his authority.—Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123, (Gil. 98.)

106. Defendant had in his hands, as agent for the plaintiff, $4,500 in cash, and a note payable to bearer for $1,500 more. Five or six months before the maturity of the note, the son of the plaintiff, assuming to act as agent for his father, but without actual authority, settled with the defendant, taking $3,800 in United States bonds for the whole claim. Plaintiff, though promptly notified of the arrangement, did not repudiate the same until after maturity of the note, when he brought suit to recover its possession. *Held*, that evidence in such suit that defendant, before settling, took legal advice as to whether a criminal action could be brought against him for refusing to pay over the funds in his hands, and that he stated that plaintiff had attempted to commit a rape upon his daughter, and he meant to make him pay roundly for it, was properly excluded as immaterial.—Stearns v. Johnson, 19 Minn. 540, (Gil. 470.)

PRINCIPAL AND SURETY.

I. Suretyship in General, 1-7.
II. Release and Discharge of Sureties, 8-23.
III. Remedies, 24-31.

See, also, *Bonds; Guaranty; Indemnity.*
Liability on appeal bonds, see *Appeal and Error*, 760-762.
—— on bonds of county treasurer, see *Counties*, 40-45.
—— on bonds of executors and administrators, see *Executors and Administrators*, 14, 15.
—— on promissory notes, see *Negotiable Instruments*, 108-114.
—— on replevin bonds, see *Replevin*, 92.
Limitation of actions, see *Limitation of Actions*, 31.
Set-off in favor of surety, see *Counterclaim and Set-Off*, 36, 37.
Subrogation of surety, see *Subrogation*, 2-4, 11-13.

I. Suretyship in General.

When relation exists.

1. A surety is any person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was compelled to do so. Parties who contract a debt as partners may, by reason of subsequent arrangements or transactions, become, as between themselves, principal and surety.—Wendlandt v. Sohre, (Minn.) 33 N. W. 700.

37 Minn. 162.

2. The partnership between plaintiff and defendant having been dissolved, a full accounting, adjustment, and settlement was had, as was supposed, of all the partnership business, both as between the firm and third persons, and as between the partners themselves. But by inadvertence one debt contracted by the firm was overlooked and left unpaid. When it became due, plaintiff paid one-half of it, and, upon defendant's refusal to pay the other half, brought an action against him for indemnity, and to compel him to pay it. *Held* that, as between the plaintiff and defendant, the former bore the relation of surety for the payment of the remaining half of the debt, and as such could maintain the action.—Wendlandt v. Sohre, 33 N. W. 700, 37 Minn. 162.

Fraud.

3. The fact that county commissioners knew, when they accepted the treasurer's bond for a second term, that he had converted funds during the prior term, does not avoid the bond.—Pine County v. Willard, (Minn.) 39 N. W. 71.

39 Minn. 125.

Scope of contract—Successive terms of office.

4. A treasurer, on surrendering his office during his second term, failed to account for or pay over all the funds then chargeable to him. *Held*, that the sureties for the second term were *prima facie* liable, and that, to exonerate themselves, the burden was on them to show that this deficiency occurred during the former term.—Pine County v. Willard, (Minn.) 39 N. W. 71.

39 Minn. 125.

5. The sureties for the second term would be responsible for money coming into the treasury during that term, though it was placed there merely to cover a previous defalcation, and also if public money received during the second term were misapplied to cover a previous delinquency.—Pine County v. Willard, 39 N. W. 71, 39 Minn. 125.

Transfer of interest of principal.

6. Under Gen. St. Minn. 1878, c. 90, § 3, two contractors for the erection of a building gave a bond, the condition of which was that they "shall pay all just claims for work done and to be done, and all materials furnished." One of the con-

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tractors assigned the contract to the other, who erected the building. *Held*, that the sureties on the bond were liable for materials furnished without notice of the assignment.—Abbott v. Morrissette, (Minn.) 48 N. W. 416.

46 Minn. 10.

Application of payments.

7. A. made his promissory note, which, by its terms, bore interest after its maturity at the rate of 4 per cent. per month. A. and B. joined in a mortgage on the estate of B. to secure the same. After maturity, A. made a payment on the note, which was applied by him and the holder as interest after maturity. *Held*, that B. was bound by such application.—Allen v. Jones, 8 Minn. 202, (Gil. 172.

II. Release and Discharge of Sureties.

Consideration.

8. The fact that a surety on a note refrained from taking from the maker security to indemnify him from liability, at the request of the holder, and in reliance on the latter's promise that if he would so refrain he should be released from liability, constitutes a sufficient consideration for the promise to release, where but for such request and promise the surety would and could have obtained the indemnity.—Heitsch v. Cole, (Minn.) 50 N. W. 235.

47 Minn. 320.

Change of principal's contract.

9. An unsigned memorandum, stipulating for a change of the rate of interest to 3 per cent. per month, though indorsed upon the note to which it refers, is not an agreement in writing, within Pub. St. Minn. c. 30, § 1, is not binding, and will not discharge the surety.—Allen v. Jones, 8 Minn. 202, (Gil. 172.)

10. Plaintiffs furnished building material to certain contractors, used in a house erected by them for G. under a contract with him, and were sureties for the faithful performance of the contract by them. After the work was commenced, and the first installment paid, and before such building materials were furnished by plaintiffs, G. so far departed from the terms of the contract that payments were made by him to divers persons on the order of the contractors, without reference to the state of the work or the terms of the contract, and in some instances to an amount exceeding the installments due as stipulated therein, and in anticipation thereof. *Held*, that plaintiffs were thereby discharged from their obligation as sureties, and therefore not estopped to enforce their claims for a lien upon such building.—Simonson v. Thori, (Minn.) 31 N. W. 861.

36 Minn. 439.

11. The rights of those furnishing labor or material, the real obligees in bond given by a contractor under Gen. St. Minn. 1878, c. 90, § 3, conditioned to pay all claims and prevent a lien from attaching against the building, cannot be affected by any agreement or act of the principal obligor and nominal obligee. An extension of the time for completing the building does not affect the obligation of the sureties.—Steffes v. Lemke, 41 N. W. 302, 40 Minn. 27.

Payment by creditor to principal debtor.

12. Where the contractors for grading the streets of a city execute a bond to the city conditioned upon the payment of all claims for labor and materials furnished to the contractors, the sureties in such bond are not discharged by payment to the principals of all money due them from the city upon the completion of their contract.—City of Duluth v. Heney, (Minn.) 45 N. W. 7.

43 Minn. 155.

Formal release by creditor in insolvency.

13. Under the Minnesota insolvent act of 1881, the discharge of the insolvent is a discharge by operation of law, and the execution of the formal release by a creditor, in pursuance of the statute, as a condition of sharing in the assets, does not operate to release the sureties of the insolvent debtor.—Ames v. Wilkinson, (Minn.) 49 N. W. 696.

47 Minn. 148.

Extension of time.

14. An extension of time given by a creditor to the principal debtor, without the consent of the sureties, releases the sureties, though the debt was due when the extension was given.—Wheaton v. Wheeler, 8 N. W. 599, 27 Minn. 464.

15. Where two persons are sued on a promissory note, one as surety, an allegation by him that after maturity the holder, at the request of the principal debtor, for a valuable and sufficient consideration, extended the time of payment, constitutes a good defense, though neither the time of extension nor nature of the consideration is stated.—Huey v. Pinney, 5 Minn. 310, (Gil. 246.)

16. In an action on a promissory note against the maker and a surety there was evidence that a person in possession of the note, assuming to act for the payee, at maturity accepted from the maker a new note, including the interest on the original note for six months in advance, and that the payee thereafter expressed himself as dissatisfied, stating that the surety considered himself released, and requested such person to sue the notes, and upon his refusal took them into his own possession. *Held*, that this was sufficient to show a ratification by him of the transaction, which discharged the surety.—Woodbury v. Larned, 5 Minn. 339, (Gil. 271.)

17. Extending time of payment to the principal will not discharge the surety, where the relation of principal and surety does not appear on the face of the contract, and it is not alleged or proved that notice of such relation was communicated to the creditor at the time of such extension.—Agnew v. Merritt, 10 Minn. 308, (Gil. 242.)

18. Mere neglect to bring suit, or take active efforts to collect the note of the principal maker at the request of the surety, is insufficient to discharge the latter.—Benedict v. Thoe, 35 N. W. 10,* 37 Minn. 431.

19. A member of a partnership who has agreed, after dissolution of the partnership, with his copartners, to personally pay a partnership debt, has no authority to give a partnership note therefor; and if the creditor, knowing such facts, accepts such a note, extending the time for payment, he

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thereby discharges the partners not consenting thereto, since they have the rights of sureties.—Leithauser v. Baumeister, (Minn.) 49 N. W. 660. 47 Minn. 151.

Release of levy.

20. Where one recovers a judgment against several parties, some of which are liable as sureties only, and levies upon property of one of the parties primarily liable, sufficient to satisfy the judgment, a release of such levy, without the consent of those whose liability is that of surety, operates as a satisfaction as to such sureties. Willis v. Davis, 3 Minn. 17, (Gil. 1,) approved.—Moss v. Pettingill, 3 Minn. 217, (Gil. 145.)

21. But where a creditor recovers judgment against a principal debtor and his sureties, and levies upon property belonging to such debtor and another, as partners, and afterwards releases the levy for the reason that the liabilities of the partnership were greater than the assets, such release will not operate to discharge the sureties of the principal debtor.—Moss v. Pettingill, 3 Minn. 217, (Gil. 145.)

Release of collateral security.

22. A surety upon a promissory note is not discharged by the release of collateral security, where such release was given at his instance and with his consent.—Pence v. Gale, 20 Minn. 257, (Gil. 231.)

Use of collateral security for other purposes.

23. Where a creditor who has received collateral security from the debtor allows the debtor to use such collateral for other purposes than the payment of the debt, he thereby releases, *pro tanto*, one who was surety for such debt.—Nelson v. Munch, 9 N. W. 863, 28 Minn. 314.

III. Remedies.

Action against surety—Pleading.

24. In an action on a bond executed and delivered, an answer by the surety that he and the principal agreed that the bond should not bind him unless another surety was obtained on it, and that the obligee had notice of such agreement, is bad, since it does not allege that the obligee had such notice before the bond was delivered.—Farrell v. Fabel, (Minn.) 49 N. W. 303. 47 Minn. 11.

—— Evidence.

25. The acts and transactions of the makers of a promissory note in reference to the consideration, are competent evidence upon the issue as to whether they were both principals, or one was surety; and it appearing that they were partners, and the note was given to purchase property turned over to the firm, the firm books are competent to show that one, as principal, was credited with same, and when so credited.—Strong v. Baker, 25 Minn. 442.

26. Partnership books are competent to show that the relation of the partners to a certain joint note was that of principal and surety.—Strong v. Baker, 25 Minn. 442.

27. Evidence that plaintiffs delayed for some time to enforce a lien on a building securing a debt due them, and that in the mean time the building was destroyed by fire, was properly excluded in an action against sureties for the debt, it not appearing that plaintiffs were under any contract to enforce the lien in a given time, or that defendants had requested such enforcement.—Bardwell v. Witt, (Minn.) 44 N. W. 983. 42 Minn. 468.

Action by surety to compel payment to creditor.

28. Under Comp. St. Minn. c. 72, § 35, providing that an action may be brought by one against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as surety, a surety on a promissory note cannot require the holder to bring suit and enforce his debt against the principal debtor, as he has himself the right to sue to compel the maker to pay the holder.—Huey v. Pinney, 5 Minn. 310, (Gil. 246.)

Action by surety for reimbursement.

29. A surety who has paid the debt of his principal may sue the principal for reimbursement, though the payment was made on a judgment recovered by the creditor against both principal and surety, and the surety is entitled to the benefit of the judgment, and may enforce it against the principal by execution.—Kimmel v. Lowe, 9 N. W. 764, 28 Minn. 265.

Contribution between co-sureties.

30. A co-surety, who, after having paid the debt, recovers a judgment therefor against the principal and a garnishee, but by neglect loses the remedy against the latter, by reason of his insolvency, cannot maintain an action for contribution against his co-surety.—Schmidt v. Coulter, 6 Minn. 492, (Gil. 340.)

31. Defendants, by an instrument under seal, guarantied to the amount of $2,000 the performance by P. of a contract into which he had entered. Afterwards plaintiff, by a separate instrument under seal, guarantied to the amount of $1,000 the performance by P. of the same contract. Plaintiff was compelled to pay the $1,000 by reason of P.'s failure to fulfill his contract. *Held*, that plaintiff was not entitled to contribution from defendants, as co-sureties with him.—Young v. Shunk, 16 N. W. 402, 30 Minn. 503.

Priorities.

Grants of land in aid of railroads, see *Public Lands*, 72-76.
Liens, see *Chattel Mortgages*, 83-87; *Execution*, 41-43; *Judgment*, 185-191; *Mechanics' Liens*, 108-115; *Mortgages*, 46-50.

Privilege.

From service of process, see *Summons*, 23, 24.
Of witness, see *Witness*, 60-66.
Privileged communications, see *Libel and Slander*, 32-41; *Witness*, 10-15.

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Privity.

See *Adverse Possession*, 28; *Assignment*, 25.

Probable Cause.

See *Malicious Prosecution.*

Probate.

Admission of will to probate, see *Wills*, 33-42.

Probate Courts.

See *Courts*, 14-17.
Appeal from, see *Appeal and Error*, 681-690.
Constitutional provisions as to jurisdiction, see *Constitutional Law*, 42, 43.
Power to compel performance of contract, see *Specific Performance*, 6.
—— to make partition, see *Partition*, 1.

Process.

See *Execution; Search-Warrant; Summons.*
Failure to execute, see *Sheriffs and Constables*, 5-8.
Garnishee summons, see *Garnishment*, 27.
Powers of officer, see *Sheriffs and Constables*, 2.
Presumptions as to service, on appeal, see *Appeal and Error*, 408, 409.
Service by publication, see *Attachment*, 73; *Constitutional Law*, 156, 157.

Production of Books and Papers.

See *Practice in Civil Cases*, 62.

PROHIBITION, WRIT OF.

When granted.

1. A writ of prohibition will not be issued by the supreme court unless it clearly appears that the inferior court or tribunal is about to proceed in some matter over which it has no jurisdiction.—Prignitz v. Fischer, 4 Minn. 366, (Gil. 275.)

2. The office of the writ of prohibition is to restrain courts from going beyond their jurisdiction, and, if granted against other bodies or offices, can only be in restraint of judicial powers.—Home Ins. Co. of St. Paul v. Flint, 13 Minn. 244, (Gil. 228;) Dayton v. Paine, 13 Minn. 493, (Gil. 454.)

3. The writ of prohibition is issued to arrest proceedings, and cannot be used as a remedy for acts already completed.—Dayton v. Paine, 13 Minn. 493, (Gil. 454.)

4. The statutes of Minnesota, (Gen. St. Minn. 1866, c. 80, tit. 11,) confirming the use of the writ of prohibition, do not limit or change its common-law use and application.—Home Ins. Co. of St. Paul v. Flint, 13 Minn. 244, (Gil. 228.)

5. The writ of prohibition will not lie to the judge of a probate court and to an administrator to examine into the legality of proceedings had by the administrator before the judge, and to restrain the administrator from making sales of real estate belonging to his intestate.—Dayton v. Paine, 13 Minn. 493, (Gil. 454.)

6. The supreme court will, on the relation of a purchaser at administrator's sale, after a confirmation of such sale, prohibit the probate court, which confirmed the sale, from proceeding to vacate the same.—State v. Probate Court of Ramsey County, 19 Minn. 117, (Gil. 85.)

7. A writ of prohibition may be granted to prevent the exercise by a judge of the legislative power of incorporating a village, under a statute assuming to confer on him such power; the proceedings being, in many of their features and results, *quasi* judicial, and conducted under judicial forms, and there being no other adequate remedy.—State v. Simons, 21 N. W. 750, 32 Minn. 540.

8. The powers vested in justices of the peace by Gen. St. Minn. 1878, c. 1, §§ 49, 50, 51, to take testimony in cases of contest of election to either house of the legislature, not being judicial, a writ of prohibition will not be issued to restrain justices so acting, unless they assume functions beyond those conferred on them, and judicial in their character.—State v. Peers, 21 N. W. 860, 33 Minn. 81.

9. A writ of prohibition will not lie to test the title of a *de facto* judicial officer to the office.—State v. McMartin, (Minn.) 43 N. W. 572.
42 Minn. 30.

Existence of other remedy.

10. Prohibition will be granted to restrain the excess of jurisdiction, in subordinate tribunals, in proceedings other than ordinary actions, although there may be a remedy by appeal, and the question of jurisdiction has not been raised in the inferior court; especially where, from the action taken by the court, it may be presumed that it passed upon the question of jurisdiction.—State v. Wilcox, 24 Minn. 143.

11. A writ of prohibition will be granted to restrain proceedings by a judge of probate against a county treasurer, as for contempt in refusing to pay a judgment entered by the probate court against a county, for the fees and expenses of a proceeding for the commitment of an insane person to the asylum for the insane, though an appeal lies from the action of the probate judge in the premises.—State v. Wilcox, 24 Minn. 143.

Distinguished in State v. Municipal Court of St. Paul, 2 N. W. 167, 26 Minn. 163.

12. In an action brought in the municipal court of the city of St. Paul to obtain restitution of real estate, as provided by Gen. St. Minn. c. 84, defendant filed an answer setting forth what he contended was an equitable defense. Gen. St. Minn. c. 64, § 82, provides that, "where any equitable defense * * * is interposed, * * * said [municipal] court shall immediately cause an entry of the fact to be made of record, and cease all further proceedings in the cause," and certify it to the district court. *Held*, that prohibition would not lie to the municipal court to

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certify the district court, the remedy being by appeal or *certiorari*.—State v. Municipal Court of St. Paul, 2 N. W. 166, 26 Minn. 162.

Distinguishing State v. Wilcox, 24 Minn. 143.

13. Where it is alleged, in an ordinary action in the district court, that the court has not jurisdiction of the person of defendant, the proper remedy is to obtain the decision of the court on the question of jurisdiction, and review the same on appeal from the judgment; and, where the remedy by appeal is adequate, prohibition will not lie.—State v. District Court for Ramsey Co., 2 N. W. 698, 26 Minn. 233.

Limiting Guernsey v. American Ins. Co., 13 Minn. 278, (Gil. 256.)

14. On a question of the jurisdiction of the municipal court of St. Paul to try issues presented in an action of forcible entry and detainer by an answer setting up fraud and usury, a writ of prohibition should not issue; the remedy by appeal being open to the relator.—State v. Cory, 28 N. W. 217, 35 Minn. 178.

Procedure.

15. Const. art. 6, § 2, having declared that there shall be no trial by jury in the supreme court, that court will not issue a writ of prohibition in a form to entitle the parties to join issue upon the return triable by a jury, but will only issue it in the first place as an order to show cause.—Prignitz v. Fischer, 4 Minn. 366, (Gil. 275.)

16. Where a writ of prohibition is issued to an officer, he is required to make a return, upon which issue is joined. If issued to a court and prosecuting party, the party is not required or allowed to make return, but may be allowed to adopt that of the court. The question is whether the court should be restrained, and, if it cannot, the party cannot be restrained; and his acts, except as relating to the prosecution of the suit, are immaterial, and not a subject of inquiry.—Dayton v. Paine, 13 Minn. 493, (Gil. 454.)

Promissory Notes.

See *Negotiable Instruments*.

PROPERTY.

Animals estray, see *Animals*, 7.
Conflict of laws as to title, see *Conflict of Laws*, 1.
Corporate stock, see *Corporations*, 86-115.
Finding lost property, see *Larceny*, 7-9.
Literary property, see *Copyright; Literary Property.*
Logs, see *Logs and Logging*, 35-38.
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Riparian property and water rights, see *Riparian Rights; Waters and Water-Courses.*
Taking for public use, see *Eminent Domain.*
Taxable property, see *Taxation*, 18-34.

Crops grown on land of state.

1. Wheat and oats sowed and harvested by an individual on land belonging to the state, although by trespass and without right, are his property after they are gathered, and he may recover for the destruction thereof by the negligence of another.—Lindsay v. Winona & St. P. R. Co., 13 N. W. 191, 29 Minn. 411.

Distinguished in Carner v. Chicago, St. P., M. & O. Ry. Co., 45 N. W. 713, 43 Minn. 376.

Grass grown on land of railway company.

2. An owner of land adjoining a railway who cuts grass growing on land belonging to the railway company, is not, as against the company, the owner of the hay made from the grass, and cannot recover for its destruction by the negligence of the railway company.—Lindsay v. Winona & St. P. R. Co., 13 N. W. 191, 29 Minn. 411.

Prosecuting Attorneys.

See *District and Prosecuting Attorneys.*

Protest.

For nonpayment of promissory note, see *Negotiable Instruments*, 122-149.

Proximate.

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Improvements, see *Municipal Corporations*, 211-306.
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PUBLICATION.

In newspaper, see *Newspapers.*
Of advertisement for bids, see *Municipal Corporations*, 105-107.
city ordinance, see *Municipal Corporations*, 19-21.
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delinquent tax list, see *Taxation*, 99.
libel, see *Libel and Slander*, 27-30.
notice to redeem from tax sale, see *Taxation*, 199-202.
statutes, see *Statutes*, 9, 10.
Service of process by, see *Constitutional Law*, 156, 157; *Judgment*, 33-36, 207; *Summons*, 29-52.

Sufficiency—Affidavit of publication.

1. Where a notice is required to be published once in each week for 10 successive weeks, an affidavit that it was published 10 weeks, without

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showing that is was published once in each week, is insufficient.—Ullman v. Lion, 8 Minn. 381, (Gil. 338.)

2. An affidavit of publication of notice, not made by the printer of the paper, or his foreman or principal clerk, as required by Comp. St. Minn. c. 84, § 60, and which does not state that the notice annexed was taken from the paper, is insufficient.—Ullman v. Lion, 8 Minn. 381, (Gil. 338.)

PUBLIC LANDS.

I. Entries under Federal Laws, 1-53.
a. *Pre-emptions*, 1-4.
b. *Homestead Entries*, 5-10.
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I. Entries under Federal Laws.

a. *Pre-emptions.*

Certificate of settlement and entry.

1. Certificates by the register or receiver of a United States land-office, showing a pre-emption settlement and entry of public land, made, by Gen. St. Minn. c. 73, §§ 91, 92, prima facie evidence of title in the person named therein, are evidence that his pre-emption right commenced at the date of settlement, and was consummated at the date of entry, stated therein.—Winona & St. P. R. Co. v. Randall, 13 N. W. 127, 29 Minn. 283.

Joint claim.

2. Prior to Act Cong. Aug. 4, 1854, extending the right of pre-emption to unsurveyed lands in Minnesota, plaintiff and B. squatted upon certain lands, making a joint claim, and agreeing to divide the lands in accordance with a certain line. Both made improvements upon a certain quarter-quarter section, through which the agreed line ran, and, in the fall of 1854, both made application to enter and purchase the same; and, upon contest being had, it was finally awarded by the general land-office to B.'s administratrix. *Held*, no fraud or surprise being shown, that the award was properly made, under the above act, as the pre-emption could only be made by one, and that the grantee took the land subject to no trust or equity in favor of plaintiff by virtue of such agreement or otherwise.—Warren v. Van Brunt, 12 Minn. 70, (Gil. 36.)

Abandonment.

3. In June, 1863, defendant built a shanty on his claim then made, dug out a spring, and hauled lumber on the land, which plaintiff removed. Defendant's shanty was then removed, whereupon he posted notices offering a reward for the discovery of the trespasser. Prior to June, 1864, defendant did not remove his family, consisting of a wife and several small children, to the claim, owing to the illness of the wife, of which she died in 1865, and his controversy with plaintiff, who threatened to use force to eject defendant from the claim. In May, 1864, defendant dug a cellar on the claim, and in June of that year moved thither with his family, and continued to reside there until the death of his wife. *Held* sufficient evidence that defendant had not abandoned the claim. — Kelley v. Wallace, 14 Minn. 236, (Gil. 173.)

4. An agreement by a pre-emptor to abandon his rights in, occupancy of, and improvements on the land pre-empted, so that another may enter upon and pre-empt it, is not a violation of Rev. St. U. S. § 2263, declaring, in relation to pre-emptions, that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."—Olson v. Orton, 8 N. W. 878, 28 Minn. 36.

b. *Homestead Entries.*

What subject to.

5. Under Rev. St. U. S. § 2258, government lands included within the limits of any incorporated town are not subject to pre-emption or homestead entry, and hence the land department has no jurisdiction to allow such entries under any circumstances, and a patent issued upon a homestead entry of land included within that class is void.—Burfenning v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 48 N. W. 444

46 Minn. 20.

Relinquishment—Rights of wife.

6. In an action by a wife to recover possession of a homestead entered by her husband under the laws of the United States, which has been fraudulently and collusively relinquished by the husband, and entered by defendant, it is error to charge that a homestead cannot be relinquished without the consent of the wife, as that principle depends upon a state law which has no application to homestead entries of United States lands. —Michaelis v. Michaelis, (Minn.) 44 N. W 1149.

43 Minn. 123.

7. Where a husband relinquishes a homestead claim theretofore entered by him, and deserts his wife, leaving her in possession, and the land department has recognized her right to contest the subsequent entry of such land by one having notice of such facts, she may recover possession from him, pending the contest, with damages for his dispossessing her and destroying improve-

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ments left upon the premises, which improvements he claims by a sale from the husband that is shown to be collusive.—Michaelis v. Michaelis, (Minn.) 44 N. W. 1149.

43 Minn. 123.

Rights of heirs and devisees.

8. Upon a homestead entry in Minnesota, under the law of the United States, the father and mother dying, leaving children under 21 years of age, a patent subsequently issued by the land-office, granting the land so entered to "the minor heirs" of the father, passes the title to the persons described in section 2292, Rev. St. U. S., to-wit, the children under 21 years of age, though by the law of that state some of them were not minors.—Anderson v. Peterson, (Minn.) 32 N. W. 861.

36 Minn. 547.

9. When a settler upon public lands, under the homestead law of the United States, dies before acquiring title, having devised the homestead, the devisee perfecting his title, pursuant to section 2291 of the Revised Statutes, acquires the land exempt from liability for prior debts, as provided in Rev. St. U. S. § 2296.—Coleman v. McCormick, (Minn.) 33 N. W. 556.

37 Minn. 179.

Cancellation of entry for fraud.

10. A homestead entry of public lands of the United States may be canceled for fraud by the officers of the land department, even after final proof has been made, but before the issuing of the patent.—Judd v. Randall, 29 N. W. 589, 36 Minn. 12.

Distinguishing Randall v. Edert, 7 Minn. 450, (Gil. 359.)

c. *Timber Culture.*

Right to crops and trees.

11. One who enters land under the "Timber Culture Act," and who has complied with its conditions, is, during the term required to perfect his right to a patent, the owner of hay made from the grass which he cuts on the land, and of trees standing thereon; and he can recover for the destruction thereof caused by fire set by a locomotive.—Carner v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 45 N. W. 713.

43 Minn. 375.

12. The fact that, after the destruction of the trees, he surrendered his claim, does not affect his right to recover.—Carner v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 45 N. W. 713.

43 Minn. 375.

Distinguishing Lindsay v. Winona & St. P. R. Co., 13 N. W. 191, 29 Minn. 411.

Relinquishment and transfer.

13. Plaintiff, to whom one H. had delivered a certificate of entry on a timber culture, issued to H., with his surrender written thereon, filed the same, with the consent of H., in the land-office for cancellation, and thereby, under Rev. St. U. S. § 2478, became entitled to notice of cancellation, which gave him an opportunity to secure priority as to a new filing for himself, or such person as he might direct. In consideration of plaintiff's agreement on receiving notice of the cancellation to make the new entry for defendant, defendant gave plaintiff his note for $200. *Held*, that such note was supported by a sufficient consideration.—Thompson v. Hanson, 11 N. W. 86, 28 Minn. 484.

14. The written relinquishment of a timber culture claim, provided for by 21 U. S. St. at Large, c. 89, p. 140, which gives to the holder the advantage of securing the claim for himself, by simultaneous entry in his own right, although not strictly a conveyance or assignment, being all the transfer which the nature of the case permits, is included in an award directing the holder to "convey, set over, assign, and deliver" certain personal and real property mentioned, particularly designating such claim; and the mere consent of the holder to the other party taking possession of the claim, without such written relinquishment, is not a compliance with the contract.—Palmer v. March, 24 N. W. 374, 34 Minn. 127.

d. *Town Sites.*

Entry—Right of, and validity.

15. A right to have lands entered as a town-site under the act of congress, even where a plat has been made and recorded, may be so lost by abandonment of occupancy that other persons may become entitled to have them entered for their benefit.—Weisberger v. Tenny, 8 Minn. 456, (Gil. 405.)

16. Before any portion of the surveyed public lands of the United States can be entered under the town-site act, they must be actually settled upon and occupied as town-site. Platting the land as a town is not enough.—Carson v. Smith, 12 Minn. 546, (Gil. 458.)

17. To constitute one an occupant and beneficiary under the town-site act, he must be in possession of the premises in person, or by improvement, tenant, or agent. Merely surveying and platting land into lots and blocks will not constitute possession or occupancy under such act.—Carson v. Smith, 12 Minn. 546, (Gil. 458.)

18. On a question as to the validity of a certain town-site entry, letters addressed by the commissioner of the general land-office to a certain person described therein as the attorney of the proprietors are admissible in connection with the proofs of entry and of the action of the department upon the application for entry.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

19. When a town-site company settles upon and occupies land so that it is not subject to preemption, such company is entitled to have a trust established and declared in its favor.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

—— Conclusiveness and effect.

20. Under the town-site act of congress of May 23, 1844, the land-officers of the United States are the sole judges as to whether an entry has been properly or improperly made, and their allowance or disallowance of such entry is conclusive.—Leech v. Rauch, 3 Minn. 448, (Gil. 332.)

21. The duplicate of the record in the proper land-office, on entry of land as a town-site, under Act Cong. May 23, 1844, is conclusive evi-

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dence in the state courts that the lands described therein have been settled upon and occupied as a town-site in accordance with the law.—Leech v. Rauch, 3 Minn. 448, (Gil. 332.)

22. The state courts have nothing to do with questions with regard to the entry, but may in a proper case determine who were occupants.—Leech v. Rauch, 3 Minn. 448, (Gil. 332.)

23. The action of the federal land-officers in entering a town-site on the application of a land company is conclusive as to the competency of the company to take a town-site.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

24. The fact that the settlement and occupancy of the town-site of Mankato was prior to the extinguishment of the Indian title, and the survey by the United States, cannot, after proof of settlement and occupancy are accepted by the federal land-officers, invalidate the title claimed by virtue of such settlement and occupancy. Carson v. Smith, 5 Minn. 78, (Gil. 58,) followed. —Village of Mankato v. Meagher, 17 Minn. 265 (Gil. 243.)

—— Rights of occupants.

25. Under Act Cong. May 23, 1844, relating to the entry of town-sites, the entry, as a matter of law, relates back to the date of the proof entitling the applicant to entry, and a settler upon the land after such proof does not thereby acquire any rights as occupant.—Leech v. Rauch, 3 Minn. 448, (Gil. 332.)

26. The rights of occupants, under the town-site act, are fixed at the date of submitting proofs upon which the entry is allowed, though the entry may be delayed by appeal or otherwise. The title, when granted, relates back, and occupancy and improvement after submission of proofs will confer no rights.—Castner v. Gunther, 6 Minn. 119, (Gil. 63;) Same v. Echard, 6 Minn. 149, (Gil. 92;) Same v. Lowry, Id.

27. The rights of occupants of the town-site of Mankato became fixed on March 21, 1856, the day of application for entry and submission of proofs, and neither the act of congress of March 3, 1857, granting the right of way over the public lands to railroads then contemplated, nor the territorial act of May 22, 1857, disposing of the land grant, gave the railroad any right of way over such town-site.—Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, (Gil. 188.)

28. The rights of the occupants of the town-site of Mankato became fixed and settled at the time of application by the judge to enter the same, on March 21, 1856.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

29. By the entry of the town-site the judge of the district becomes seised as trustee for the occupants of such town-site, according to their respective interests as they then exist.—Village of Mankato v. Meagher, 17 Minn. 265. (Gil. 243.)

Filing of claims.

30. Gen. St. Minn. 1866, c. 42, § 4, requiring a claim to lands in a town-site by "a person, association, or company of persons," to be filed, has no application to a claim by a village for lands dedicated for streets, etc., in a town-site. —Village of Mankato v. Willard, 13 Minn. 13, (Gil. 1.)

31. The owner of a lot in a town-site died before receiving a patent therefor, and his widow filed a statement under Territorial Act Minn. March 3, 1855, § 4, claiming the land, and the trustee afterwards gave her a deed therefor. *Held*, that the trustee took the title in trust for the heirs of deceased, and the widow and her grantees, with constructive notice of the rights of such heirs, also took the title as trustees for such heirs, and that the general words of said section 4 of the act, requiring claimants to lands to file claims thereto within 60 days, or be forever barred, did not apply to minors, and they were not barred from asserting their rights by reason of failure to file such claim.—Coy v. Coy, 15 Minn. 119, (Gil. 90.)

Distinguished in Taylor v. Winona & St. P. R. Co., 47 N. W. 454, 45 Minn. 69.

32. Territorial Act Minn. March 3, 1855, requiring claimants of town-site lots to sign and deliver to the town-site trustee a statement of the nature and extent of their claims within 60 days after publication of notice of entry by the trustee, does not apply to the infant heirs of such claimant so as to bar a recovery by them in case of default by them in making such statement.—Coy v. Coy, 15 Minn. 119, (Gil. 90.)

Trial of adverse claims.

33. Under 5 U. S. St. at Large, p. 657, and Laws Minn. Terr. 1855, c. 7, p. 29, which provide for the determination of conflicting claims to land, plaintiff claimed upon a written acknowledgment by defendant's grantor, in which he was described as an equal partner in the land, but no consideration was expressed nor terms disclosed by the writing. *Held*, that it was incumbent upon plaintiff to establish affirmatively the consideration of and causes for the partnership; and it appearing that he had abandoned the claim, or at least so neglected the arrangements on his part as to ruin the project, his claim should not be allowed.—Foster v. Bailey, 1 Minn. 436, (Gil. 310.)

34. In an action under Pub. St. Minn. c. 33, relating to town-sites, defendant cannot deny plaintiff's title unless he also shows a good title in himself.—Castner v. Gunther, 6 Minn. 119, (Gil. 63;) Same v. Echard, 6 Minn. 149, (Gil. 92;) Same v. Lowry, Id.

35. The sufficiency of proofs of entry, acted upon by the secretary of the interior, in allowing an entry under the town-site act, cannot be inquired into by the claimants under such entry, in proceedings between themselves.—Castner v. Gunther, 6 Minn. 119, (Gil. 63;) Same v. Echard, 6 Minn. 149, (Gil. 92;) Same v. Lowry, Id.

36. In an action brought under Act Minn. March 3, 1855, prescribing rules and regulations for the execution of the trust arising under the town-site act, the supreme court must, on the request of either party, pass upon all questions of fact, and make final disposition of the case, except in the single instance where the questions

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of fact have been passed upon by a jury, when a new trial in the court below may be awarded.—Castner v. Gunther, 6 Minn. 119, (Gil. 63;) Same v. Echard, 6 Minn. 149, (Gil. 92;) Same v. Lowry, Id.

37. In an action brought under Pub. St. Minn. c. 33, to determine conflicting claims to lands entered pursuant to the act of congress as a town-site, an answer which merely denies plaintiff's right is bad. Facts showing defendant's right to be superior to that of plaintiff should be set out.—Weisberger v. Tenny, 8 Minn. 456, (Gil. 405.)

Agreements relating to town sites.

38. The act of congress of August 4, 1854, (10 U. S. St. at Large, p. 576,) extended the right of pre-emption and town-site settlement to unsurveyed lands of Minnesota; and agreements relating to the entry and location of town-sites on unsurveyed lands are not illegal. Carson v. Smith, 5 Minn. 89, (Gil. 58,) followed.—Wood v. Cullen, 13 Minn. 394, (Gil. 365.)

Conveyance by claimant.

39. An occupant of lands under Act Cong. May 23, 1844, relating to town-sites, has an interest, within the meaning of the recording act, and a subsequent deed to a *bona fide* purchaser for a good consideration, and without notice of his interest, first recorded, will take precedence over a prior unrecorded conveyance.—Davis v. Murphy, 3 Minn. 119, (Gil. 69.)

40. A claimant under a town-site act may have a valuable possessory right in unsurveyed lands,—an interest in real estate,—which he may convey by deed. Carson v. Smith, 5 Minn. 78, (Gil. 58,) followed.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

Conveyance by trustee—Rights of beneficiaries.

41. A purchaser from the trustee of lands entered as a town-site under Act Cong. May 23, 1844, who relies in part upon the original settlement of an occupant, who has platted such town-site, and dedicated a portion thereof to public use, takes subject to such dedication, where the plat and survey are also recognized by the trustee's deed.—City of Winona v. Huff, 11 Minn. 119, (Gil. 75.)

42. A town-site occupant, who receives a deed from the trustee of the town-site, takes the legal title to land occupied for streets adjoining his lots, subject to the public easement, the same as in ordinary cases of conveyances of land adjoining a highway.—Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, (Gil. 188.)

43. A trustee of a town-site, under the act of Minnesota of March 3, 1855, at the request of an occupant of lands within the town-site, entitled to a deed thereof, executed such deed to another person, and received from the occupant a mortgage in the name of such person, executed by the occupant as attorney, to secure the fees of the trustee, which mortgage was void because unauthorized. *Held*, that the deed and mortgage could not be considered as one transaction, so as to make the validity of the deed depend upon the validity of the mortgage.—Morris v. Watson, 15 Minn. 212, (Gil. 165.)

44. Defendant claimed title to lands entered as a town-site, through grantors having a deed from the district judge as trustee of the town-site, and who claimed as occupants, but whose occupancy did not commence until after date of entry. *Held*, that it was not error to charge that the jury should examine into the occupancy, and see if the acts necessary to constitute occupancy had been done by the grantors, and to refuse to charge that if the deeds from the trustee and the deeds to defendant purported to convey the fee, defendant must be considered as the owner of the lands.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

Distinguished in Taylor v. Winona & St. P. R. Co., 47 N. W. 454, 45 Minn. 69.

45. Where the judge who holds land under the United States town-site act, in trust for the occupants, executes an official deed for a part of it, the presumption obtains that he did his duty in all respects by compliance with all the statutory prerequisites, and that he conveyed it to a proper party; and one not a beneficiary of the trust, but a mere stranger to the title, cannot litigate or call in question the validity or regularity of the deed in those respects.—Taylor v. Winona & St. P. R. Co., 47 N. W. 453, 45 Minn. 66; Lamm v. Chicago, St. P., M. & O. Ry. Co., 47 N. W. 455, 45 Minn. 71.

Distinguishing Coy v. Coy, 15 Minn. 119, (Gil. 90;) Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

46. But it must appear that the judge was trustee, that is, had already entered the land when he executed the deed, and a recital of that fact in the deed itself is not evidence as against a stranger to the instrument.—Taylor v. Winona & St. P. R. Co., (Minn.) 47 N. W. 453.

45 Minn. 66.

47. As soon as the land is entered, the trustee may proceed to execute the trust by giving deeds to the beneficiaries, although the patent from the United States has not been yet issued, and the patent when issued relates back to the date of the entry, and no further deed from the trustee is necessary to vest title in such beneficiaries.—Taylor v. Winona & St. P. R. Co., (Minn.) 47 N. W. 453.

45 Minn. 66.

48. A county may acquire title in fee to land under the "town-site act," (Act Cong. May 23, 1844.)—Board of County Commissioners of Blue Earth County v. St. Paul & S. C. R. Co., 11 N. W. 73, 28 Minn. 503.

49. A plat of land entered under the "town-site act," (Act Cong. May 23, 1844,) contained one square marked "Court-House." The county took possession of the premises so designated and erected county buildings thereon. Afterwards the town trustees conveyed the premises to the county There was no evidence that the county entered under any dedication. *Held*, that the county was the absolute owner in fee-simple of the premises in question.—Board of County Commissioners of Blue Earth County v. St. Paul & S. C. R. Co., 11 N. W. 73, 28 Minn. 503.

50. Occupants of government land caused the same to be platted as a town-site, with a street along the shore of a navigable lake. Thereafter

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this town-site was entered and purchased, and title thereto obtained by a judge of the district court, as provided by act of congress of May 23, 1844. In the execution of his trust said judge conveyed to one of the beneficiaries a lot fronting upon the street before mentioned, describing the same in accordance with the town plat. *Held*, that the fee title, subject to the public easement, to the entire street to low-water mark, including all riparian rights, and not merely to the middle of the street, passed to the grantee, and on a conveyance by him by the same description passed to his grantee.—Wait v. May, (Minn.) 51 N. W. 471.

Distinguishing Brisbine v. St. Paul & S. C. R. Co., 23 Minn. 114.

Action to set aside conveyance.

51. Where town authorities, who have entered lands as a town-site under Act Cong. May 23, 1844, have wrongfully conveyed a part of such land, to which a party was entitled, such party can maintain an action against the authorities and their grantee to vacate such conveyance, and compel a conveyance to himself, without first paying or tendering a just proportion of the sum expended in entering the land, etc., as required by Pub. St. Minn. c. 33, §§ 11, 12.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

52. In an action by a claimant, under the town-site act of congress of May 23, 1844, to enforce a conveyance to him, a complaint alleged that at the time of the making of the survey and plat and the record thereof he was the occupant of certain land, occupying and improving the same as a town-site; that at the date of application to enter said lands, and at the entry and purchase thereof, he was the sole and exclusive occupant of the lots, blocks, etc., enumerated in his statement in writing addressed to the town council, occupying and improving the same for the purpose of erecting and building a town thereon, and that defendant never occupied any portion thereof. *Held*, that this complaint sufficiently shows acts of improvement and occupancy by plaintiff.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

53. In an action to set aside a conveyance of land entered as a town-site under Act Cong. May 23, 1844, a defendant who does not show any title in himself cannot, by a mere denial, compel the plaintiff to establish his title.—Cathcart v. Peck, 11 Minn. 45, (Gil. 24.)

II. Grants in Aid of Railroads and Other Roads.

Construction in general.

54. A legislative grant of lands to aid in the construction of a railway is to be construed, not merely as a grant, but also as a law, and such effect must be given to it as will carry out the intent of the legislature.—Nash v. Sullivan, 12 N. W. 698, 29 Minn. 206.

55. Nothing will pass by legislative grant except what is clearly and manifestly intended.—St. Paul & C. Ry. Co. v. Brown, 24 Minn. 517.

56. Sp. Laws 1863, c. 4, granting lands to aid in the construction of the St Paul & Pacific Railroad, on the branch road from St. Paul to Winona, is a valid contract, whether considered as a present grant or an executory promise to convey on conditions stated; and the company, having complied with the conditions, may supply deficiencies within the prescribed limits by selections from any lands belonging to the state at the time the right to make the selection is perfected.—St. Paul & C. Ry. Co. v. Brown, 24 Minn. 517.

57. Sp. Laws Minn. 1873, c. 107, extends the time "for the grading and completion" of a railroad, in order to entitle the company to a grant of public lands. *Held*, that the road is "completed," within the meaning of the act, when made ready for the running of trains, though not actually equipped with rolling stock.—De Graff v. St. Paul & P. R. Co., 23 Minn. 144.

58. The effect of the act of congress of March 3, 1855, (10 St. at Large, 683,) as to the right of way of rail and plank roads or macadamized turnpikes, was simply to extend the provisions of the act of Aug. 4, 1852, (10 St. at Large, 28,) with all its restrictions as to the lands through which the right was granted, so as to operate in the territories the same as in the states.—Simonson v. Thompson, 25 Minn. 450.

59. Act Cong. March 3, 1857, (11 St. at Large, 195,) granted land in aid of the construction of a railroad, within certain limits of the line of such road. Act Cong. March 3, 1865, (13 St. at Large, 526,) granted additional land to such railroad, and provided that no land should become attached to the grant until indicated by the secretary of the interior. *Held*, that such provision applied only to the land granted by the act of 1865, and did not affect the grant of 1857.—Winona & St. P. R. Co. v. St. Paul & S. C. R. Co., 6 N. W. 461, 27 Minn. 128. Affirmed in United States supreme court. 5 S. Ct. 334, 112 U. S. 720.

60. Act Minn. May 22, 1857, containing no express grant of right of way to the Transit Railway Company, but referring, for the power and authority of the company, to the act of March 3, 1855, incorporating it, and the latter act containing an express grant of right of way, such a grant must be taken upon the terms prescribed by the act of 1855.—Radke v. Winona & St. P. R. Co., (Minn.) 43 N. W. 967.

42 Minn. 61.

Extent of grant.

61. The grant of right of way for railroads through public lands, by act of congress of August 4, 1852, (10 U. S. St. at Large, p. 28,) did not extend to the town-site of Mankato.—Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, (Gil. 188.)

62. Act March 6, 1863, which grants to the St. Paul & Pacific Railway Company 7 miles of swamp lands "on each side of said line" for a certain distance, is a grant of 7, and not 14, full sections per mile.—St. Paul & C. Ry. Co. v. Brown, 24 Minn. 517.

63. Act Cong. March 3, 1865, (13 St. U. S. 526,) extending the time for the completion of certain land-grant railroads, regranted to the

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state of Minnesota the grant of March 3, 1857, (11 St. U. S. 195,) of six sections per mile, to aid in the construction of the St. Vincent branch of the St. Paul & Pacific Railroad, after it had been released by the state by acceptance of the terms of the joint resolution of congress passed July 12, 1862, (12 St. U. S. 624,) substituting a branch road to Lake Superior for the branch to St. Vincent, and increased such grant to 10 sections per mile. *Held*, that these provisions operated as an affirmative grant of such 10 sections per mile, and not merely as an increase of the former grant, to take effect if such former grant should be subsequently restored by congress; and that Act Cong. March 3, 1871, (16 St. U. S. 588,) authorizing a change of part of the line of that branch, in consideration of a relinquishment of lands, did not require a release to the United States of all the lands along the entire branch, but only the lands along the abandoned part of the line.—Nash v. Sullivan, 12 N. W. 698, 29 Minn. 206.

64. Sp. Laws Minn. 1862, c. 56, appointed certain persons to survey, locate, and construct a road, and provided that, on completion of the survey, 10,000 acres of swamp lands of the state, within six miles of the road as located on either side thereof, should be conveyed to them. *Held*, in case of a deficiency in quantity of swamp lands within the prescribed limits, that the parties had no claim on the state for other lands to make up such deficiency.—Goodwin v. Rice, 1 N. W. 257, 26 Minn. 20.

Vesting title.

65. Act Minn. March 2, 1865, (Sp. Laws 1865, c. 6,) granted to the St. Paul & Pacific Railroad Company all lands granted, or which might thereafter be granted, by congress to the state to aid in the construction of the lines of that company. *Held*, that conveyances to the company by the governor of the state, in accordance with the act, of lands so granted to the state by Act Cong. March 3, 1865, were valid and operative, although the state had no title thereto on March 2, 1865, when it made the grant to the company. —Nash v. Sullivan, 12 N. W. 698, 29 Minn. 206

66. The Minnesota & Pacific Railroad Company, under the act of congress of March 3, 1857, (11 St. at Large, 195,) and the act of the territorial legislature of May 22, 1857, (Laws 1857, Ex. Sess. c. 1,) was authorized to appropriate a right of way through the public lands of the United States for the lines of its road, and after the location of such right of way any one purchasing from the United States, with notice thereof, took subject thereto.—Simonson v. Thompson, 25 Minn. 450.

67. When act Cong. March 3, 1857, commonly known as the "Land-Grant Act," was passed, the title to the government sections 16 and 36, within the territory of Minnesota, and the right to dispose thereof, still remained in the United States. Under that act and the act of assembly passed May 22, 1857, the Minnesota & Pacific R. Co. acquired a right of way over the even sections not disposed of before the location of its line, including school sections 16 and 36. Following Simonson v. Thompson, 25 Minn. 455.—Coleman v. St. Paul, M. & M. Ry. Co., (Minn.) 36 N. W. 638.

38 Minn. 260.

68. The grant of the right of way over sections 16 and 36 (school sections, so called) of the public domain, acquired by the Transit Railway Company, under act Cong. March 3, 1857, and the act of the Minnesota territorial legislature, passed May 22, 1857, was not a grant *in præsenti*, but *in futuro*, the route along which the right of way was granted being described only in a very general way, and there being no express intention that the right should attach before the road was located; a private right, acquired before appropriation under the above acts will compel the road to proceed by condemnation to acquire its right of way.—Radke v. Winona & St. P. R. Co., (Minn.) 39 N. W. 624.

39 Minn. 262.

69. The certificate of the secretary of the interior provided by section 3 of the act of congress of July 13, 1866, entitled "An act relating to lands granted to the state of Minnesota, to aid in constructing railroads," certifying to the state the lands granted to it by the congressional land-grant act of March 3, 1857, and by the act of congress of March 3, 1865, entitled "An act extending the time for the completion of certain land-grant railroads in the states of Minnesota and Iowa, and for other purposes," has the force and effect of a patent, and its effect in passing the title to particular lands cannot be questioned by one not interested. —Minnesota Land & Investment Co. v. Davis, (Minn.) 42 N. W. 299.

40 Minn. 455.

70. The act of congress of March 3, 1875, granting to railroads the right of way through the public lands of the United States, is intended to prescribe the only rule governing the subject, and is in the nature of a general offer, which takes effect and becomes operative as a grant to a particular company only when the company accepts its terms by a compliance with the conditions precedent prescribed in the act, and as of the date of such compliance.—Red River & Lake of the Woods R. Co. v. Sture, 20 N. W. 229, 32 Minn. 95.

71. In ejectment brought by a railroad company, claiming the land under the grant by Act Cong. March 3, 1865, (13 St. U. S. 526,) plaintiff produced in evidence a copy, certified by the state auditor, of a certificate from the interior department, certifying to the state a list of lands, embracing that in controversy, granted to the state by that act, to aid in the construction of plaintiff's road; a deed by the governor of the state, conveying the land in contest to plaintiff, and containing full recitals showing plaintiff's performance of all things requisite to authorize its execution; and a copy, certified by the register of deeds of the county in which the land was situated, of a list of lands received by plaintiff from the state, including that in dispute, which list was certified by the state auditor, and filed in said register's office, pursuant to Gen. St. Minn. 1878, c. 40, § 41, making such a list, so certified and filed, *prima facie* evidence of the title of the railroad company to the lands therein described. *Held*, that this was *prima facie* evidence of title in plaintiff as of March 3, 1865, the date when the title passed out of the United States.—Winona & St. P. R. Co. v. Randall, 13 N. W. 127, 29 Minn. 283.

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Conflicting grants—Priorities.

72. Swamp lands appropriated to certain charitable and educational institutions, under Sp. Laws 1865, c. 5, authorizing the setting apart of such lands "not otherwise disposed of prior to the passage of the act," could only be lawfully set apart to such institutions from the surplus of such lands, after grants made by the state prior thereto had been filled.—St. Paul & C. Ry. Co. v. Brown, 24 Minn. 517.

73. Act Minn. March 5, 1869, (Sp. Laws 1869, c. 86,) granted to plaintiff, to aid in the construction of its railroad, 10 sections to the mile of any swamp lands belonging to the state, without restriction as to locality. Act March 9, 1875, (Sp. Laws 1875, c. 54,) granted to intervenor, for a like purpose, 10 sections to the mile of swamp lands, to be selected within 10 miles on each side of its road, providing that if there was not enough of such land within those limits the deficiency might be made up from any swamp lands in three named counties. *Held*, that the grant to plaintiff was a float, the right of selection belonging to the state; so that before such selection was made the state had the right to grant any lands to intervenor, provided only that it retained enough to satisfy the prior grant to plaintiff.—Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., (Minn.) 47 N. W. 464.

45 Minn. 104.

74. The provision in the grant to intervenor "that no lands shall accrue to the said company under this act, until all grants of swamp lands previously made shall be fully satisfied," was not intended to postpone the appropriation of any land to intervenor's grant until all prior grants had been actually filled by the selection of specific lands to their full amounts, but merely to provide that in case there were not enough lands to fill all the grants, including intervenor's, the prior grantees should have their full amounts, and intervenor stand the shortage.—Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., (Minn.) 47 N. W. 464.

45 Minn. 104.

75. There not being enough swamp lands in the three counties named to fill intervenor's grant, and there being enough outside these counties to fill plaintiff's grant, the state has no right to appropriate to the latter lands in these counties, at least after intervenor's grant had, by selection, attached specifically to such lands.—Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., (Minn.) 47 N. W. 464.

45 Minn. 104.

76. In an action by a railroad company to restrain defendant from receiving a deed to public lands, whereof the legal title is in plaintiff, it is no defense to aver that another railroad company is the owner of the beneficial interest in such lands, and such allegation will, on motion, be stricken out as immaterial and irrelevant.—Winona & St. P. R. Co. v. St. Paul & S. C. R. Co., 23 Minn. 359.

Prior homestead or pre-emption.

77. Under the act of congress of July 4, 1866, (14 St. U. S. 87,) granting to the state of Minnesota, in aid of the construction of a railroad, land within certain limits, but providing that, "in case it shall appear" that the right of pre-emption or homestead settlement has attached to the same, other public land equal thereto shall be selected in place thereof, lands of which there is a homestead entry of record, valid upon its face, although in fact void, are excepted from the grant.—Hastings & D. Ry. Co. v. Whitney, 27 N. W. 69, 34 Minn. 538.

78. The congressional land-grant act of March 3, 1857, granting land to Minnesota in aid of certain railroads, was in itself a grant conveying to the state the legal title of the lands found to fall within its operation. The certification of lands to the state by the secretary of the interior under the law of 1854 did not affect the legal title of such lands.—Weeks v. Bridgman, 43 N. W. 81, 41 Minn. 352; Id., 49 N. W. 191, 46 Minn. 390.

79. Only upon the definite location of the lines of railroad referred to in the grant, by filing maps thereof in the department of the interior, did the grant become applicable to particular lands, so as to prevent the acquisition of vested rights by pre-emption, which would prevail notwithstanding the grant.—Weeks v. Bridgman, 43 N. W. 81, 41 Minn. 352; Id., 49 N. W. 191, 46 Minn. 390.

80. A definite location of the road is required to be established in the manner stated, even with respect to land in the vicinity of places named in the granting act as defining the route.—Weeks v. Bridgman, 43 N. W. 81, 41 Minn. 352; Id., 49 N. W. 191, 46 Minn. 390.

81. By implication from the terms of the act, lands to which the right of pre-emption should attach before such definite location were excepted from it.—Weeks v. Bridgman, 43 N. W. 81, 41 Minn. 352; Id., 49 N. W. 191, 46 Minn. 390.

82. Before the definite location of one of the land-grant roads, under Act Cong. March 3, 1857, one B. filed his application to pre-empt certain lands as a mail station under the act of congress of 1855, allowing pre-emptions by certain mail-route contractors. The application was refused by the local officers, and their decision was affirmed upon appeal to the commissioner of the general land-office, upon the sole ground that the mail route of the applicant was not such as the act of 1855 contemplated. The secretary of the interior, upon appeal to him, reversed the former rulings, and decided that the entry should be allowed upon proper proofs being made. This was long after the definite location of the road within the limits of whose grant the land was found to be situated. *Held*, that the right of pre-emption attached as early, at least, as the time of the filing of the application, and so the land was excepted from the operation of the granting act of 1857; and a subsequent patent to the pre-emptioner (even though not made upon that pre-emption claim) conveyed the title.—Weeks v. Bridgman, 43 N. W. 81, 41 Minn. 352; Id., 49 N. W. 191, 46 Minn. 390.

83. A settler who has entered public land of the United States under the homestead law has, even before patent issued, an inchoate title to the land, which is property, and, as against him, a railway company has no right of way over the land under the act of congress of March 3, 1875, unless such right was acquired by a compliance

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with the provisions of the act before his settlement.—Red River & Lake of the Woods R. Co. v. Sture, 20 N. W. 229, 32 Minn. 95.

Indemnity or deficiency lands.

84. Under Acts Cong. June 3, 1856, and May 5, 1864, granting to a state, to aid in the construction of a certain line of railroad, the odd-numbered sections for a prescribed width on each side of a line of road, and providing that if, when the line of road should be definitely fixed, any of the specified sections, or parts of sections, should have been sold, or rights of pre-emption attached thereto, an agent of the governor might, to make up such deficiencies, select, subject to the approval of the secretary of the interior, from the lands of the United States outside of said prescribed limits and within other prescribed limits, the title to specific lands between the two limits does not pass until selection and approval.—Musser v. McRae, (Minn.) 38 N. W. 103.

38 Minn. 409.

85. Where an act of congress granting lands to the state of Wisconsin in aid of railroads provided that it should be lawful for agents appointed by the railway company entitled to the grant to select subject to the approval of the secretary of the interior, from the public lands of the United States, "deficiency" lands within certain defined indemnity limits, the issuance of a patent by the United States directly to the railway company for lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States at the date thereof.—Musser v. McRae, (Minn.) 46 N. W. 673.

44 Minn. 343.

86. Where, after certain deficiency lands had been earned by a railway company, under an act of congress granting land to the state of Wisconsin in aid of railroads, and had been so selected and duly certified to the general land-office, but, prior to the issuance of the patent, timber had been wrongfully cut and removed therefrom by trespassers, the title acquired by the patent relates back to the selection of the lands, so as to save to purchasers to whom the lands had been granted by the company, before the trespasses, a right of action for the timber wrongfully removed from the land, or its value.—Musser v. McRae, (Minn.) 46 N. W. 673.

44 Minn. 343.

87. Act Cong. March 3, 1857, granted alternate sections of land along the line of a proposed railroad in aid of its construction, and provided for the selection of indemnity lands to compensate the road for such of the granted sections as had been pre-empted before "the line or route of said road was definitely fixed." *Held*, that the route of the railroad did not become "definitely fixed" until the map of its location was filed in and accepted by the land-office; and that consequently the railroad company could make no valid selection of indemnity lands before that time.—St. Paul & S. C. R. Co. v. Ward, (Minn.) 49 N. W. 401, 47 Minn. 40.

88. An order of the land department, withdrawing the odd-numbered sections within the indemnity limits of a railroad land grant, is inoperative as respects lands then occupied and claimed by a qualified pre-emptor. Such lands are not affected by the withdrawal, so that, if subsequently abandoned, they will, until a selection made by the railway company, be deemed still open for homestead settlement.—St. Paul & S. C. R. Co. v. Ward, (Minn.) 49 N. W. 401. 47 Minn. 40.

89. Where, before a railroad company has definitely fixed the route of its road, a valid homestead right has attached to land within the indemnity limits, and the occupant has in all things complied with the provisions of the homestead law, he will be deemed to have acquired vested rights in the tract so occupied, which the courts will recognize and protect upon the final refusal of the land department to allow him to enter the land, because subsequently selected by the railroad company as part of its indemnity lands. Upon making his final proof in due form, his right to the land becomes complete, and the naked legal title held by the United States or its assignee, the railroad company, is insufficient to warrant a judgment in ejectment against him. —St. Paul & S. C. R. Co. v. Ward, (Minn.) 49 N. W. 401.

47 Minn. 40.

Forfeiture—Regranting.

90. Lands were granted to a railroad company to aid it in the construction of its two lines of road known as the "Brainerd Branch," and the "St. Vincent Extension," both of which were to be completed within a certain time under penalty of forfeiture. The lines of road not having been completed within the time required, Sp. Laws Minn. 1877, c. 201, § 1, declared the land grant, franchises, etc., appertaining to the Brainerd branch forfeited to the state, and provided that the same should be regranted to any company which would undertake to complete such line, subject to the provisions of the act. Section 9 provided that "one-half of all the land, up to 200,000 acres in quantity, which shall be first acquired on account of the construction of the present uncompleted" Brainerd branch, "and one-half of all the lands, up to 400,000 acres, which shall be first acquired on account of the present uncompleted" St. Vincent extension, should be reserved by the state for the payment of claims incurred for work and materials furnished in the construction of such lines by the first company, and directed the governor to sell the lands so reserved, pay the claims, and to convey any residue that might remain "to the company which shall have completed the portions of railroad to which the lands comprising such residue shall appertain. The land so reserved shall be applied to the purposes for which reservation is made, in the manner following: The governor, attorney general, and railroad commissioner * * * shall * * * examine into the claims, * * * and adjust and ascertain the amount remaining owing and unpaid * * * for work or materials, or for both, furnished in the construction of said extension lines of railroad; and they shall file in the state auditor's office a compiled statement of the amounts so ascertained by them to be owing and unpaid upon said claims." *Held* that, as against a company accepting the provisions of the act of 1877, the lands reserved were applicable to the claims allowed under section 9,

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without regard to the branch in the construction of which they were incurred.—Western R. Co. v. De Graff, 6 N. W. 341, 27 Minn. 1.

91. Act Minn. March 9, 1875, (Sp. Laws 1875, c. 54,) granted land, on condition subsequent, in aid of the construction of the railroad of intervenor. Act March 9, 1878, (Sp. Laws 1878, c. 246,) passed before there had been any breach of such condition, provided that in case of a forfeiture of intervenor's lands the same should go to defendant. There was afterwards a breach of the condition by the intervenor, but before any forfeiture was declared it performed the condition and earned the right to the lands. *Held*, that the grant to defendant was on the condition precedent that intervenor's land should be revested in the state by a formal declaration of forfeiture for breach of condition subsequent, and as the state has lost the right to enforce the forfeiture by intervenor's ultimate performance, defendant can take nothing under the grant to it.—Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., (Minn.) 47 N. W. 464.

45 Minn. 104.

III. School Lands.

Rights of pre-emptors.

92. The state took its grant of school and university lands subject to the claims of pre-emptors who had settled thereon prior to the survey and brought themselves within the pre-emption act. —State v. Bachelder, 5 Minn. 223, (Gil. 178;) Same v. Stevens, 5 Minn. 521, (Gil. 416.)

93. The territory of Minnesota, by memorial of February 26, 1856, requested congress to permit settlers on lands in sections 16 and 36, which had been reserved by Act Cong. March 3, 1849, for school lands, to pre-empt the same, and to have other lands selected in lieu thereof. By Act Cong. Feb. 26, 1857, such sections were granted to the state for school land, but by joint resolution of March 3, 1857, in response to such memorial, lands settled upon in such sections were withdrawn from the grant, and the right given to select other lands in lieu thereof. The constitution of the state, adopted October 13, 1857, accepted the school lands incumbered with such pre-emption rights. *Held*, that the state could not thereafter set up its right to the whole of the school sections, unincumbered with pre-emption rights of actual settlers prior to the survey. — State v. Batchelder, 7 Minn. 121, (Gil. 79.)

Conditional sale.

94. As the statute authorizing the sale of school and internal improvement lands of the state does not provide for conditional sales or contracts to convey, a sale which is only to be consummated in the event of a previous certificate of sale of the lands, regular on its face, being declared void by the court, is unauthorized and void.—Wright v. Burnham, 17 N. W. 479 31 Minn 285.

Payment of price.

95. Gen. St. Minn. 1878, c. 38, §§ 35, 40, authorize payments for school lands, principal and interest, to be made to the county treasurer, who is required to pay the same over to the state treasurer.—Gerken v. Board of County Commissioners, (Minn.) 40 N. W. 508.

39 Minn. 433.

Rights of purchaser.

96. Under Gen. St. Minn. 1878, c. 38, §§ 7, 9, requiring interest upon any unpaid balance of the purchase price of school lands to be paid annually "by the purchaser, or by any other person claiming under him," and providing that, if the interest is not so paid, the certificate of purchase shall be "utterly void," where such interest has in fact been seasonably paid to and accepted by the state on such a certificate, it is no ground of attack on a title claimed under the certificate that the payment of interest was made by persons other than the purchaser, whether claiming under him or not.—McKinney v. Bode, 20 N. W. 94, 32 Minn. 228.

97. A purchaser of school land from the state paid part of the price, and received the usual certificate of sale thereof, entitling him, his heirs, assigns, etc., to a patent for the land on payment of the remainder of the price, interest, and taxes; in case of failure to make such payments, the certificate to be void. He went into possession of the land with his family, built a house on it, and paid the interest on the portion of the price unpaid, and remained in possession for about a year. He then indorsed on the certificate an assignment of it to his wife, and abandoned the land and his wife and family, and gave no further attention to the matter. Subsequently the interest on the unpaid purchase money and taxes were paid, on account of the wife, by a son who remained with her, for more than six years, until her death, and thereafter her administrator sold the certificate, under license from the probate court, and the purchaser paid all arrears and obtained a patent. *Held* that, although the assignment of the certificate by the husband to the wife was void, the husband had no equity to the land as against the patentee.—McKinney v. Bode, 23 N. W. 851, 33 Minn. 450.

98. The holder of school land certificates, who purchased them for a merely nominal consideration, never paid the taxes levied on the land, and for more than 10 years failed to pay the annual interest accruing on the certificates, though by their terms they were to become utterly void on a default for more than six days. *Held*, that these facts, taken in connection with the fact that, at the time of the purchase, there was a tax judgment and tax sale against the land, and that the time for redemption had expired, justified a finding that the holder had abandoned all claim to the lands.—Murphy v. Burke, 49 N. W. 387, 47 Minn. 99; Same v. McGuire, 49 N. W. 388, 47 Minn. 103.

IV. Indian Half-Breed Scrip.

Assignability.

99. The privilege of each half-breed to select land under the treaty of September 30, 1854, between the United States and the Chippewa Indians, was a personal right, and the scrip issued as the evidence of the right was not assignable. —Dole v. Wilson, 20 Minn. 356, (Gil. 308.)

Location.

100. In the location of scrip for land issued to Sioux half-breeds under Act Cong. July 17, 1854, it is not necessary that the holder be in possession

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or occupancy of the land located, but only that no other person be in occupancy.—Sharpe v. Rogers, 12 Minn. 174, (Gil. 103.)

101. By act of the president, in pursuance of act of congress, (10 U. S. St. 954-959,) in permitting certain bands of Sioux Indians to locate on lands reserved by the treaty of Mendota of August 5, 1851, consisting of a strip 10 miles wide on each side of the Minnesota river, and bounded on the west by Tchaytam bay and Yellow Medicine river, and on the east by Little Rock river, such lands were not subject to pre-emption or private sale, or to the location of scrip thereon, in the year 1857, and a patent of the United States, issued upon a location of half-breed scrip upon such land during said year, is void.—Sharon v. Wooldrick, 18 Minn. 354, (Gil. 325.)

102. Act Cong. July 17, 1854, (10 U. S. St. at Large, 304,) authorizes the president to make an exchange with the Sioux half-breeds for their reservation on Lake Pepin, by issuing to them scrip for a certain amount of land, and provides that said scrip "may be located upon any of the lands within said reservation, * * * or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements." *Held*, that this provision as to "unoccupied lands" was framed for the protection of occupants, and that the occupant might waive the same, so that a valid location of scrip may be made on his lands, and that the clause, "upon which they have respectively made improvements," qualifies the words "other unsurveyed lands," but not the words "other unoccupied lands."—Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

103. Article 2, subd. 7, of the treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, relating to the selection of land, is not qualified and limited by the provisions of the third article of said treaty relating to the restriction of the power of alienation.—Dole v. Wilson, 20 Minn. 356, (Gil. 308.)

Alienation of lands.

104. The treaty of September 30, 1854, between the United States and the Chippewa Indians, provides that certain public lands are to be secured to the half-breeds "by patent in the usual form." *Held* that, as such patents contain no restriction on the power of alienation, the half-breeds were at liberty to sell and convey the lands thereby secured.—Dole v. Wilson, 20 Minn. 356, (Gil. 308.)

105. In such case, the validity of a contract for the sale of such lands will not be affected by the fact that an attempt was made to transfer scrip representing the right to such lands, though such scrip was not assignable.—Dole v. Wilson, 20 Minn. 356, (Gil. 308.)

106. A power of attorney to sell land, executed by a Sioux half-breed, is good until revoked, and may extend to land subsequently acquired by the location of half-breed scrip.—Gilbert v. Thompson, 14 Minn. 544, (Gil. 414.)

107. A simple power of attorney, given by a Sioux half-breed, for the conveyance of land represented by scrip issued under Act Cong. July 17, 1854, is not invalidated by the provision of that act forbidding the transfer of such scrip; and such power cannot be varied by parol proof to show that it was intended as a transfer of scrip.—Gilbert v. Thompson, 14 Minn. 544, (Gil. 414;) Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

108. An attorney in fact, authorized to locate such half-breed scrip, is at liberty, either before or after such location, to enter into an agreement to secure the title to a third party.—Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

V. Surveys.

Conclusiveness and effect.

109. The field-books and plat of a government survey showed the north and south lines of a fractional section intersecting the Mississippi river, a meander post at each intersection, and the meander line of the river run between such posts; the course and distances being given. *Held*, that the river formed one of the boundary lines of such subdivision, and that it could not be shown that the river was in a different place from that stated in such field-book and plat.—Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82, (Gil. 59.)

VI. Patents.

Effect to pass title.

110. A state's patent to land passes its title, but does not establish that it had title, so a law of a state making such patent presumptive evidence of absolute title in fee in the grantee is of no force in the courts of another state, so as to make the patent evidence that the title had passed from the United States to the state.—Musser v. McRae, (Minn.) 38 N. W. 103.

38 Minn. 409.

Distinguished in Bronson v. St. Croix Lumber Co., 46 N. W. 571, 44 Minn. 352.

Impeaching for fraud.

111. Where lands have been sold by the United States, the state courts have jurisdiction to try and determine conflicting claims thereto arising between citizens, or a citizen and the state, to the same extent as in any other case; and a patent from the United States to a citizen may be impeached in such courts for fraud or collusion in obtaining it.—State v. Bachelder, 5 Minn. 223, (Gil. 178;) Same v. Stevens, 5 Minn. 521, (Gil. 416.)

VII. Sale and Leasing of State Lands.

Regulation.

112. Under Gen. Laws Minn. 1889, c. 22, to regulate the sale and lease of mineral and other lands belonging to the state, which provides, in section 2, that the state land commissioner should prescribe the form of application, it is his duty to prescribe and announce such reasonable rules and regulations as would promote the object of the act, encourage honest competition, and insure the utmost fairness among those who desired to avail themselves of its terms.—Whiteman v. Severance, (Minn.) 49 N. W. 255.

46 Minn. 495.

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113. Under Gen. Laws Minn. 1889, c. 22, "to regulate the lease and sale of mineral and other lands belonging to the state," where more than one application for a lease of land was on file in the commissioner's office when he acted upon an application, it was his duty to award the lease to the applicant who would pay the most for it.—Whiteman v. Severance, (Minn.) 49 N. W. 255.

46 Minn. 495.

114. But the fact that the officer proceeded irregularly, by issuing the lease without any competition between the applicants, and thereafter entered into the contract provided for in section 4, with the holder of the lease, is not sufficient ground for the maintenance of an action to have the holder of the lease and the contract adjudged to hold the same in trust for another of the applicants, and that the latter be decreed the owner of each.—Whiteman v. Severance, (Minn.) 49 N. W. 255.

46 Minn. 495.

VIII. Land Office.

Conclusiveness of decisions.

115. As to all matters confided by law to the examination and decision of the United States land-officers, they act judicially, and their decisions are as final as those of the court.—Leech v. Rauch, 3 Minn. 448, (Gil. 332;) State v. Batchelder, 5 Minn. 223, (Gil. 178;) State v. Stevens, 5 Minn. 521, (Gil. 416.)

116. Where nothing appears to the contrary, every intendment must be that the local land-officers did their duty.—Randall v. Edert, 7 Minn. 450, (Gil. 359.)

117. The decision of the United States land-officers upon the location of Sioux half-breed scrip, issued under the provisions of Act Cong. July 17, 1854, (10 St. U. S. 304,) is final and conclusive.—Monette v. Cratt, 7 Minn. 234, (Gil. 176.)

118. When acting within their authority, the decisions of United States land-officers, in matters of pre-emption, cannot be impeached for fraudulent representations and false oaths on the part of a successful claimant, even as to the fact of settlement by pre-emptor prior to inception of an adverse claimant's title, except where such adverse claimant had no notice of the proceedings before the land-officers until too late to obtain redress before them, and no opportunity to appear and contest before them. Reversed on this point, by the supreme court of the United States. See 1 Wall. 109.—State v. Bachelder, 5 Minn. 223, (Gil. 178;) Same v. Stevens, 5 Minn. 521, (Gil. 416.)

Land warrants.

119. A land-warrant is not canceled, nor does the title thereto pass from the locator, until it is accepted in payment for land by the United States. Such acceptance is not consummated until the entry is fully confirmed by the general land-office.—Johnson v. Gilfillan, 8 Minn. 395, (Gil. 352.)

IX. Relief against Fraud and Mistake.

Erroneous entry.

120. Rev. St. U. S. § 2372, providing that where an entry of public lands has been erroneously made through a mistake in the numbers or description on the part of the person entering, the entry may be transferred to the tract intended, authorizes such transfer only when the tracts intended remain unsold; and a purchaser of the tract intended cannot be charged with constructive notice of a prior application for the transfer.—Manuel v. Fabyanski, (Minn.) 46 N. W. 208.

44 Minn. 71.

Error in issue of patent.

121. Where the United States land-officers construe an entry of land to have been made by a party as administrator of a deceased person, on behalf of the heirs of such person, and that the entry was one which could be so made, and a patent issues accordingly, no one but the United States, or some one having an interest in the land, can complain of error or mistake on the part of such officers.—Dawson v. Mayall, (Minn.) 48 N. W. 12.

45 Minn. 408.

Fraud in procuring patent.

122. After the issue of a patent for public lands on a pre-emption entry, a hostile claimant may show that the patent has been fraudulently procured, and that in equity he is entitled to the land. And while the action of the officers of the land department is not conclusive upon the rights of the parties, it will be presumed lawful until the contrary is made to appear.—Corbett v. Wood, 21 N. W. 734, 32 Minn. 509.

123. In an action to set aside a patent for land, brought by one claiming under a prior settlement and pre-emption entry, the complaint alleged the facts showing such prior settlement, residence, and improvements on the land. Defendant's answer expressly denied these allegations, and also put in issue the good faith of plaintiff's occupancy, and alleged that his improvements were made by others whose tenant he was, and that his pre-emption entry was fraudulent, and had been duly canceled. *Held* that, upon demurrer to the answer, it could not be implied that plaintiff's tenancy constituted him a *bona fide* settler and occupant, so as to support his claim by pre-emption.—Corbett v. Wood, 21 N. W. 734, 32 Minn. 509.

124. In an action for the cancellation of an entry of lands, and the patent issued thereunder, on the ground of fraud, the facts constituting the fraud must be alleged, otherwise evidence thereof will not be received.—Kelley v. Wallace, 14 Minn. 236, (Gil. 173.)

X. Relief of Bona Fide Settlers.

Right to purchase land.

125. Under Sp. Laws Minn. 1862, c. 20, § 8, providing that all persons who, in good faith, had settled on any of the lands thereby granted to a certain railroad company, "at or prior to the time when the line of railroad and branch was definitely fixed and located, with a view to pre-empt," might purchase the same at a certain price, the location referred to was the preliminary survey theretofore made, which was the only location of the line that had been made.—Peterson v. First Div. St. P. & P. R. Co., 6 N. W. 615, 27 Minn. 218.

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126. Plaintiff entered on land on August 12, 1857, built a shanty and dug a well, but did not reside on the land, or in any way occupy the shanty. During the following winter, he cut some rails and built fences on the land. He never slept on the land until 1860. The land was part of the grant to defendant railroad company, whose road was located thereon on October 16, 1857. *Held*, that plaintiff was not a settler in good faith "prior to the time when the line of said [defendant's] road and branch was definitely fixed and located," within Sp. Laws Minn. 1862, c. 20, § 8, authorizing such settlers to purchase the land settled at a certain price.—Peterson v. First Div. St. P. & P. R. Co., 6 N. W. 615, 27 Minn. 218.

XI. Contracts Relating to Public Lands.

Legislative power to regulate.

127. The state alone has power to regulate contracts relating to lands within its limits, between its citizens and those seeking the aid of its courts, and can alone prescribe what shall be deemed evidence of title to such lands.—Camp v. Smith, 2 Minn. 155, (Gil. 131.)

128. The United States has but a proprietary interest in its unsold lands within the state of Minnesota, and the right of primary disposal thereof, and to make such regulations as congress may find necessary for securing title to *bona fide* purchasers, and the right of exemption from taxation by the state. With these exceptions, such lands are subject to the same control by the state government as other lands. When the United States has sold the lands, and secured the title to the purchaser, the lands are relieved from all control of the federal government, except such as is incident to the general relation of the state to the federal Union. Camp v. Smith, 2 Minn. 155, (Gil. 131,) followed.—State v. Bachelder, 5 Minn. 223, (Gil. 178;) Same v. Stevens, 5 Minn. 521, (Gil. 416.)

Contracts before entry.

129. Under Act Cong. Sept. 24, 1841, § 13, contracts, before entry, for conveyance or mortgage of lands to be acquired by pre-emption are void.—St. Peter Co. v. Bunker, 5 Minn. 192, (Gil. 153;) Evans v. Folsom, 5 Minn. 422, (Gil. 342;) McCue v. Smith, 9 Minn. 252, (Gil. 237;) Warren v. Van Brunt, 12 Minn. 70, (Gil. 36.)

130. Money paid upon a contract for the purchase of land, to be acquired under a pre-emption right, made prior to entry and payment, cannot be recovered back.—Bruggerman v. Hoerr, 7 Minn. 337, (Gil. 264.)

131. Defendant, a pre-emptor under the act of congress of September 4, 1841, who had not entered and paid for the land occupied by him, agreed to convey a portion to plaintiff, on account of which plaintiff paid him $150. Subsequently, for the purpose of enabling him to make the affidavit, defendant induced plaintiff to surrender the evidence of such agreement, promising verbally to renew it when the entry was complete. *Held*, that such agreement was void, as against public policy, and that no action would lie thereon, either for damages for its non-performance, or to recover the money paid thereon.—St. Peter Co. v. Bunker, 5 Minn. 192, (Gil. 153.)

132. A note and mortgage of pre-empted lands given to secure a loan of money to pay for the pre-emption are illegal and void under Act Cong. Sept. 24, 1841, § 13, when made in pursuance of an agreement entered into prior to such payment, although not actually executed until after the issuance of the duplicate or certificate of pre-emption.—McCue v. Smith, 9 Minn. 252, (Gil. 237.)

Overruled in Jones v. Tainter, 15 Minn. 514, (Gil. 424.)

133. A promissory note, the consideration of which was money advanced to a pre-emptor, upon an agreement that a portion of the land to be pre-empted should be conveyed to the party making such advance, is not a legal set-off or recoupment against a valid demand made by the pre-emptor against the party making such advance, for the consideration of the note is illegal.—Ferguson v. Kumler, 11 Minn. 104, (Gil. 62.)

134. Under Act Cong. Sept. 4, 1841, entries by pre-emption are for the exclusive benefit of the pre-emptor; and no agreement between the pre-emptor and another, prior to the entry, that lands shall be shared between them, can be enforced.—Warren v. Van Brunt, 12 Minn. 70, (Gil. 36.)

135. The mere fact that a pre-emptor obtained the money from a third person with which to pay for his land, there being no previous contract or agreement that such third person shall succeed to any of the rights in such land, will not invalidate the pre-emption, and no presumption of an agreement that any portion of such land shall inure to the benefit of the person so furnishing money arises from the fact of his furnishing it.—Sharon v. Wooldrick, 18 Minn. 354, (Gil. 325.)

Assignment or conveyance by pre-emptor or homesteader.

136. Act Cong. Sept. 4, 1841, § 12, which provides that an assignment by a pre-emptor of his "right secured" prior to the issuing of the patent shall be void, prohibits only an assignment of the right to pre-empt, and a grant of the land, or the pre-emptor's interest, after entry and payment, but before the patent issues, inures to the benefit of the grantee, so as to enable him to secure the patent in his own name.—Camp v. Smith, 2 Minn. 155, (Gil. 131.)

137. Under Act Minn. July 23, 1858, which provides that conveyances of pre-empted lands made before the issuance of the patent shall be as binding as if made thereafter, the right to assign the lands is complete in the pre-emptor, on purchase and entry, and when a patent issues, it inures to the benefit of his grantee.—Camp v. Smith, 2 Minn. 155, (Gil. 131.)

Distinguished in Randall v. Edert, 7 Minn. 455, (Gil. 364.)

138. A quitclaim deed of unsurveyed lands of the United States, in which the party has no rights, estate, or interest to impart or lose, is inoperative.—Cole v. Maxfield, 13 Minn. 235, (Gil. 220.)

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139. An assignment by the occupant of a home stead, under the United States laws, of all his "homestead right and claim, together with all structures, buildings, and improvements put thereon," is a good consideration for a promissory note given therefor.—Lindersmith v. Schwiso, 17 Minn. 26, (Gil. 10.)

140. The sale and relinquishment by the occupant of a homestead of his homestead rights, and right to acquire title thereto, and of the improvements thereon, is not against public policy, as tending to place the land beyond the reach of taxation for an indefinite period; nor is such relinquishment void as a fraud upon, or against the policy of, or prohibited by, the homestead act.—Lindersmith v. Schwiso, 17 Minn. 26, (Gil. 10.)

141. Act Cong. Sept. 24, 1841, § 13, forbidding a pre-emptor to make a contract by which the title to lands pre-empted, to be acquired from the government, shall inure to the benefit of another person, will not operate to prevent a pre-emptor from conveying after the completion of entry, and before the issuance of a patent.—Woodbury v. Dorman, 15 Minn. 338, (Gil. 272;) Sharon v. Wooldrick, 18 Minn. 354, (Gil. 325.)

142. A mortgage of pre-empted lands, executed by the pre-emptor, after making his proofs, but before the patent issued, pursuant to an agreement made before the proofs, is void under Act Cong. Sept. 24, 1841, § 13, forbidding a pre-emptor to make a contract by which the title to such land, to be acquired from the government, shall inure to the benefit of another person. BERRY, J., dissenting.—Woodbury v. Dorman, 15 Minn. 338, (Gil. 272.)

Overruled in Jones v. Tainter, 15 Minn. 514, (Gil. 424.)

143. A mortgage executed by a pre-emptor, to secure the payment of money advanced to pay for the land pre-empted, in pursuance of an agreement made previous to final proofs of, and payment for, pre-emption entry, is not invalid under Act Cong. Sept. 4, 1841, § 13, providing that a pre-emptor shall make no contract by which his title, when acquired from the government, shall inure to the benefit of any other person. MCMILLAN, J., dissenting. McCue v. Smith, 9 Minn. 252, (Gil. 237,) and Woodbury v. Dorman, 15 Minn. 338, (Gil. 272,) overruled.—Jones v. Tainter, 15 Minn. 512, (Gil. 423.)

144. Rev. St. U. S. § 2290, requiring one applying to make a homestead entry of public land to make an affidavit that the application is for his exclusive use and benefit, and section 2291, requiring that before the patent shall issue he shall make an affidavit that no part of the land has been alienated, do not render invalid an agreement by such an applicant, after his application, and before issue of the patent thereon, that he will convey the land as soon as he shall make final proof of his claim thereto, upon a consideration to be paid to him at that time.—Townsend v. Fenton, 16 N. W. 421, 30 Minn. 528.

145. A person making an entry under the homestead laws of the United States may execute a valid mortgage upon land so entered, prior to submitting final proof and receiving the final certificate; Rev. St. U. S. § 2296, prescribing that no lands acquired under the homestead act shall become liable for debts contracted prior to the issuing of the patent, not applying to such a case.—Lewis v. Wetherell, 31 N. W. 356, 36 Minn. 386; Lang v. Morey, 42 N. W. 88, 40 Minn. 396.

—— Effect as forfeiture of rights.

146. Where a pre-emptor forfeits his rights by attempting to convey land pre-empted before completing his entry, the United States government only can enforce such forfeiture; and, if forfeiture be waived by the government, no one else can insist upon it.—Woodbury v. Dorman, 15 Minn. 338, (Gil. 272.)

Rights of purchasers.

147. Persons purchasing land of a pre-emptor subsequent to entry, and prior to the issue of a patent, take subject to the right and power of the commissioner of the general land-office and secretary of the interior to vacate such entry, and defeat the rights acquired thereunder. Camp v. Smith, 2 Minn. 155, (Gil. 131,) distinguished.—Randall v. Edert, 7 Minn. 450, (Gil. 359;) Gray v. Stockton, 8 Minn. 529, (Gil. 472.)

Distinguished in Judd v. Randall, 29 N. W. 590, 36 Minn. 14.

148. Comp. St. Minn. c. 32, § 7, declaring that, where a grant for a valuable consideration is made to one person on a consideration paid by another, no use or trust shall result in favor of the latter, does not apply to a sale of public lands. Irvine v. Marshall, 20 How. 558, followed as controlling in this case, but questioned as to other cases.—Irvine v. Marshall, 7 Minn. 286, (Gil. 216.)

Contract to arbitrate conflicting claims.

149. Plaintiff and defendant B., each claiming to have made improvements and to be entitled to the exclusive right to purchase certain lands of the United States, entered into an agreement by which they were each to furnish defendant M. one-half of the purchase money, with which he was to purchase the lands in his own name, and convey the same according to the decision of five disinterested persons. *Held* that, after the lands were purchased, neither party could abandon or repudiate the contract, but M. could convey to either or both, as directed by the five persons chosen under the contract.—Irvine v. Marshall, 7 Minn. 286, (Gil. 216.)

Distinguished in German Land Ass'n v. Scholler, 10 Minn. 339, (Gil. 266.)

Liability of land for debts of homesteader.

150. 12 U. S. St. at Large, c. 75, § 4, (homestead act,) providing that lands taken as a homestead shall not become liable for debts of the settler contracted prior to the issuance of the patent, is not in conflict with Const. U. S. art. 4, § 3, which provides that nothing in the constitution shall be so construed as to prejudice the claims of any particular state.—Russell v. Lowth, 21 Minn. 167.

151. Const. art. 2, § 3, which prohibits any interference with the primary disposal of the soil

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by the United States, is an express inhibition of the state legislature to pass any law subjecting lands, patented under the homestead act of congress, to levy or sale on execution for any debt created prior to issuance of the patent.—Russell v. Lowth, 21 Minn. 167.

152. Lands patented as a homestead to an actual settler by the United States do not become liable for any indebtedness existing against the patentee prior to the existence of the patent, though conveyed by him to another person; as 12 U. S. St. at Large, c. 75, § 4, provides that such lands shall not become liable for such indebtedness "in any event."—Russell v. Lowth, 21 Minn. 167.

Punishment.

See *Criminal Law*, 124–133; *Municipal Corporations*, 68, 69; *Rape*, 23.

Punitive Damages.

See *Damages*, 14–23.

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Q.

Quantum Meruit.

See *Work and Labor*, 3-10.

Questions of Law and Fact.

See *Trial*, 52-119.

Quiet Enjoyment.

Covenant for, see *Covenants*, 12-19.

QUIETING TITLE.

See, also, *Adverse Claim.*
Limitation of action to remove cloud on title, see *Limitation of Actions*, 37.
To lands sold for taxes, see *Taxation*, 257-274.

What constitutes cloud on title.

1. Action to remove a cloud from title cannot be maintained by a municipality claiming under a common-law dedication, as against one not disputing the public easement, but may as against one interfering with such rights.—Village of Mankato v. Willard, 13 Minn. 13, (Gil. 1.)

2. Where the amount due upon lands sold on foreclosure is paid to the purchaser before the period of redemption expires, and he refuses to execute the necessary certificate, an action to remove the cloud upon the title created by the foreclosure is proper.—Donnelly v. Simonton, 7 Minn. 167, (Gil. 110.)

3. A deed of the land of a corporation, executed in his own name by one who owns all the stock of the corporation, is void on its face, and does not constitute a cloud on the title to such land.—Baldwin v. Canfield, 1 N. W. 261, 26 Minn. 43.

4. A deed of the land of a corporation which is regular on its face, but which is void because it was executed without authority, constitutes a cloud on the title, for the removal of which an action will lie.—Baldwin v. Canfield, 1 N. W. 261, 26 Minn. 43.

5. Where the interest of the grantee in a deed of land absolute in terms, he having executed a simultaneous bond for reconveyance, duly recorded, is that of a mortgagee simply, and the land is sold on execution against him, the certificate of sale issued thereon constitutes a cloud on the title of the grantor in the deed, to remove which he may maintain an action.—Butman v. James, 27 N. W. 66, 34 Minn. 547.

6. An action to quiet title to land by removing an alleged cloud cannot be maintained where plaintiffs have title to the land, and the records clearly show that the title claimed by defendants is subordinate to that of plaintiffs, and invalid. MITCHELL, J., dissenting. — Mogan v. Carter, (Minn.) 51 N. W. 614.

—— Taxes and assessments, and sales therefor.

7. In an action to vacate a tax-sale and cancel a certificate issued thereon, as a cloud on title, defendant objected that, as their invalidity was apparent, the court could not take cognizance of the action. *Held* that, as Pub. St. Minn. c. 9, § 93, provides that a tax-deed issued upon such certificate shall be *prima facie* evidence of the assessment and sale, plaintiff was entitled to the relief sought. EMMETT, C. J., dissenting.—Weller v. City of St. Paul, 5 Minn. 95, (Gil. 70;) Morrison v. Same, 5 Minn. 108, (Gil. 83.)

8. Tax proceedings, to create a cloud upon title to land, must be *prima facie* valid, but in fact void.—Scribner v. Allen, 12 Minn. 148, (Gil. 85.)

9. The lien of a tax for a local improvement, valid on its face, is a cloud on title, to remove which an action in equity may be maintained.—Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468, (Gil. 424;) Ankeny v. Same, 20 Minn. 477, (Gil. 431;) Sewall v. City of St. Paul, 20 Minn. 511, (Gil. 459.)

Distinguished in Albrecht v. City of St. Paul, 50 N. W. 609, 47 Minn. 532.

10. The owner of property charged with a special assessment, which appears of record to be a valid lien thereon, but which is shown by extrinsic evidence to be invalid, is entitled to equitable relief against it.—Mayall v. City of St. Paul, 15 N. W. 170, 30 Minn. 294; Armstrong v. Same, 15 N. W. 174, 30 Minn. 299.

Overruled in Albrecht v. City of St. Paul, 50 N. W. 609, 47 Minn. 533.

11. No cloud upon title for the removal of which an equitable action can be sustained is created by assignments made by a county auditor under tax-sales at which the land was bid in for the state, where no effect is given by statute to such an assignment as evidence of the regularity or validity of antecedent proceedings, or of any right, title, or interest in the land described, and where, from the proceedings upon which the validity of the tax-sales depends, it appears that the court by which the tax judgments were entered upon which such sales were had had no jurisdiction to enter the judgment.—Gilman v. Van Brunt, 13 N. W. 125, 29 Minn. 271.

Jurisdiction—Adequate remedy at law.

12. Neither an action under the statute to quiet title, nor to discharge the lien of a mortgage, can be maintained against a mortgagee by one whose claim is adverse, and, if valid, paramount to that of mortgagor.—Banning v. Bradford, 21 Minn. 308.

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13. An action to remove a cloud upon title is not maintainable where the alleged invalidity of the instrument complained of is apparent upon its face. MITCHELL, J., dissenting.—Maloney v. Finnegan, (Minn.) 35 N. W. 723.
38 Minn. 70.

14. A plaintiff asserting title by a mortgage foreclosure is not entitled to relief as to a void judgment recovered against the mortgagor after the recording of the mortgage; the time for enforcing the judgment by redeeming from the foreclosure sale having expired, and no apparently valid redemption having been made.—Maloney v. Finnegan, 35 N. W. 723, 38 Minn. 70.

Laches.

15. A complaint to quiet title is not demurrable, because 15 years have elapsed since the imposition of the cloud, no other facts appearing to charge plaintiff with laches.—Sanborn v. Trustees of Hamline University, (Minn.) 36 N. W. 338.
38 Minn. 211.

Possession of plaintiff.

16. Actual possession is not necessary to enable an owner to maintain an action in equity to remove a cloud from the title to real estate.—Donnelly v. Simonton, 7 Minn. 167, (Gil. 110.)

17. An owner of real estate, not in possession, may bring an action in equity against defendants in possession to cancel a forged deed placed on record, and deeds from the grantee therein, and is not obliged to confine himself to his remedy by ejectment.—Hamilton v. Batlin, 8 Minn. 403, (Gil. 359.)

18. An administrator who does not show himself in possession of real estate belonging to the estate, or that he has obtained a license from the probate court to sell the same, as required by Rev. St. Minn. c. 52, § 5, cannot maintain an action to remove a cloud from the title thereto.—Paine v. First Div. St. P. & P. R. Co., 14 Minn. 65, (Gil. 49.)

19 An action to remove a cloud on title may be maintained by one out of possession against one in possession of the land.—Bausman v. Kelley, 36 N. W. 333, 38 Minn. 197; Sanborn v. Trustees of Hamline University, 36 N. W. 338, 38 Minn. 211.

Parties.

20. In an action to remove a cloud from a title, when the premises have been conveyed by the defendant before the suit was commenced, the defendant's grantee is a necessary party.—Johnson v. Robinson, 20 Minn. 170, (Gil. 153.)

21. In an action to remove a cloud, persons claiming other lands on whose title the same cloud rests need not be made parties.—Sanborn v. Trustees of Hamline University, (Minn.) 36 N. W. 338.
38 Minn. 211.

Pleading—Complaint.

22. Under a contract of sale, the vendee of lands went into possession and made some payments. Afterwards certain third persons obtained a judgment against him for the sale of his interest, and declaring him a trustee for them of his interest in the land to the extent of their claim, and decreeing a sale thereof. *Held*, that the judgment creditors could not maintain a suit to quiet title against the vendor, upon a complaint alleging that, by collusion with the vendee, he falsely and fraudulently claimed that the latter owed him "a large amount," and that, under the contract, she had forfeited her right in the land by making default in the payments, the latter averment being merely a conclusion of law, not supported by the facts stated; and a further averment that complainants had tendered the vendor the amount due him from the vendee was immaterial.—Bennett v. Hotchkiss, 17 Minn. 89, (Gil. 66.)

Distinguishing Banning v. Armstrong, 7 Minn. 40, (Gil. 24.)

23. Plaintiff brought an action to have his title to certain premises confirmed, and set out his chain of title in the complaint, but did not, in terms, allege any interest in the said premises. *Held* that, although the complaint lacked that explicit averment of plaintiff's interest which good pleading required, still it should be upheld, against a motion to dismiss, or an objection to the reception of evidence upon the ground of insufficiency.—Johnson v. Robinson, 20 Minn. 189, (Gil. 169.)

24. The complaint in an action to set aside a tax-sale, and the certificate of sale issued thereon, alleged no facts showing that the sale or certificate was not valid; the only allegation in that regard being "that said sale of said land was made without authority of law, and is void." *Held*, that this was insufficient.—Knudson v. Curley, 15 N. W. 873, 30 Minn. 433.

25. A complaint does not show a case for an injunction to prevent a cloud upon title, if it appears only by inference, and not by averment, that acts are threatened or contemplated which will impose a cloud.—Maloney v. Finnegan, (Minn.) 35 N. W. 723.
38 Minn. 70.

26. A complaint which is clearly framed as one to remove a specified cloud upon title, if defective as such, cannot be sustained as a complaint in an action under Gen. St. Minn. 1878, c. 75, §§ 2, 3, to determine an adverse claim, although it states facts showing that plaintiff might have brought and maintained such a statutory action.—Walton v. Perkins, 10 N. W. 424, 28 Minn. 413; Knudson v. Curley, 15 N. W. 873, 30 Minn. 433.

—— Supplemental complaint.

27. The complaint in an action to quiet title to lands set up title under deeds so defective as to pass the equitable title only. *Held*, that a supplemental complaint might be filed, setting up a legal title under deeds made since the commencement of the action to cure the defects in the prior deeds.—Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

—— Counter-claim.

28. In an action to quiet title by removing the cloud of defendant's judgment and execution levied on plaintiff's land, defendant set up the defense that plaintiff held under a fraudulent conveyance, executed to hinder defendant in the

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collection of his judgment. *Held*, that the matter alleged by defendant, though constituting a complete defense to the action, might also be pleaded as a counter-claim, and that, it having been so pleaded, plaintiff was not entitled to dismiss the action.—Griffin v. Jorgenson, 22 Minn. 92.

QUI TAM AND PENAL ACTIONS.

Right of appeal by informer.

No appeal lies in an action for a penalty, under Comp. St. c. 63, § 33, against a justice of the peace for not setting up in his office a table of his fees, from a verdict of acquittal, though brought by an informer, to whom the law awards such penalty.—Kennedy v. Raught, 6 Minn. 235, (Gil. 155.)

Quitclaim Deed.

See *Deed; Dower*, 4; *Mortgages*, 141, 142, 184; *Vendor and Purchaser*, 86, 93, 135, 148, 149.

QUO WARRANTO.

Jury trial, see *Constitutional Law*, 149.

When proper—Against officers.

1. Under Gen. St. Minn. 1866, c. 79, § 3, which provides that the attorney general may bring an action in the nature of a *quo warranto* "when any person usurps, intrudes into, or unlawfully holds or exercises, any public office, * * * or any office in a corporation created by the authority of this state," *quo warranto* will lie to determine whether the office held by defendant, which is one recognized by law in organized counties, exists in the unorganized county where he assumes to hold and exercise it.—State v. Parker, 25 Minn. 215.

2. Leave to file an information in the nature of a *quo warranto* to determine the title to a public office, especially on the application of a private person, is discretionary, and should not be granted where the law furnishes another remedy, unless under special and exceptional circumstances.—State v. Dowlan, 24 N. W. 188, 33 Minn. 536.

—— Against corporations.

3. The object of proceedings by *quo warranto* against a corporation being to protect public interests, to warrant a forfeiture of corporate franchises for misuser the misuser must be such as to work or threaten a substantial injury to the public.—State v. Minnesota Thresher Manuf'g Co., (Minn.) 41 N. W. 1020.

40 Minn. 213.

4. Where a corporation is charged with taking up with its own stock the stock and indebtedness of an insolvent company, at fictitious values, and with the unlawful purchase and retirement of part of its own stock, as the unauthorized acts affect merely stockholders and creditors who have an adequate legal remedy, the state will not interfere.—State v. Minnesota Thresher Manuf'g Co., (Minn.) 41 N. W. 1020.

40 Minn. 213.

5. *Quo warranto* is a proper proceeding to try the right of a foreign corporation to carry on its corporate business in Minnesota.—State v. Fidelity & Casualty Ins. Co., (Minn.) 41 N. W 108.

39 Minn. 538.

6. Proceedings by information in the nature of *quo warranto*, under Gen. St. 1878, c. 63, conferring on the supreme court power to issue writs of *quo warranto*, etc., to corporations, and to individuals, will lie directly against a *de facto* or pretended municipal corporation for the usurpation of corporate franchises, or to oust it from the enjoyment of the privileges thereof.—State v. Tracy, (Minn.) 51 N. W. 613.

Jurisdiction.

7. Under the provision of Const. Minn. art. 6, § 2, that the supreme court shall have "original jurisdiction in such remedial cases as may be prescribed by law," the legislature may confer on the court jurisdiction to issue writs of *quo warranto;* and the exercise of such jurisdiction, conferred by the act of 1876, is not affected because other adequate remedies in cases falling within the scope of the writ are furnished by Gen. St. Minn. 1878, cc. 76, 79, which were in force when that act was passed.—State v. St. Paul & S. C. Ry. Co., 28 N. W. 245, 35 Minn. 222.

Who may sue.

8. Under Rev. St. c. 80, § 5, which provides for an action by the attorney general in the nature of *quo warranto* against one who usurps or unlawfully exercises any public office, two dissimilar interests may be united,—one on the part of the territory, to prevent the exercise of official functions, and the other on behalf of the claimant, to establish his right to the office, and to recover damages for the usurpation.—Territory v. Smith, 3 Minn. 240, (Gil. 164.)

9. *Quo warranto* will not issue, without the consent of the attorney general, on the information of a private person, to try the right of an incumbent to an office, unless the person applying for the *quo warranto* has an interest in the question distinct from that of the public, such as a right in himself to the office.—In re Barnum, 8 N. W. 375, 27 Minn. 466.

10. In a proceeding in the nature of *quo warranto*, charging respondents with usurping a corporate franchise, it cannot be objected that relator actively acquiesced in the exercise of the franchise so as to estop himself to proceed against respondents; since the attorney general institutes and conducts the proceeding as the representative, not of relator, but of the people.—State v. Sharp, 6 N. W. 408, 27 Minn. 38.

11. *Quo warranto* proceedings under Gen. St. 1878, c. 63, against a municipal corporation to test its right to exercise corporate franchises, cannot be prosecuted on the relation and at the instance of private persons, but must be prosecuted by the attorney general on behalf of the state; and it is not sufficient that it be prosecuted by private persons with the formal approval of the attorney general.—State v. Tracy, (Minn.) 51 N. W. 613.

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Parties.

12. Proceedings in the nature of *quo warranto*, when instituted for the purpose of restraining a corporation from an unlawful exercise of franchises, must be against the corporation, and not merely against its officers and agents.—State v. Somerby, (Minn.) 43 N. W. 689.

42 Minn. 55.

Procedure—Burden of proof.

13. A proceeding by information in the nature of *quo warranto*, under Gen. St. Minn. 1878, c. 63, § 1, is governed by the rules of the common law, and not by Gen. St. Minn. 1878, c. 79; and the burden is on respondents to show the existence of the corporate franchise which they are charged with usurping.—State v. Sharp, 6 N. W. 408, 27 Minn. 38.

14. In *quo warranto* against a *de facto* or pretended municipal corporation for the usurpation of corporate franchises, or to oust it from the enjoyment of the privileges thereof, the lawful existence of the corporation is not admitted by the fact that the information is brought directly against it, and it is mentioned by its corporate name.—State v. Tracy, (Minn.) 51 N. W. 613.

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R.

RAILROAD COMPANIES.

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I. Charter and Franchises.

Nature of franchise.

1. A right to make and maintain a railway, and receive tolls or fare for transportation, is a prerogative of the sovereign power, and in the hands of a subject is a franchise that can only be exercised under a grant by legislative authority. —Blake v. Winona & St. P. R. Co., 19 Minn. 418, (Gil. 362.)

Powers and duties, in general.

2. A railroad company, though denominated a private corporation, is a *quasi* public corporation, and owes the public the duty of exercising its power with reference to the general and common interest.—Stewart v. Erie & Western Transp. Co., 17 Minn. 372, (Gil. 348.)

3. It is the right, as well as the duty, of every railroad corporation, so far as its authority permits, to use all usual and customary ways to increase its business, and to furnish the public with all needful facilities for safe, cheap, and speedy transportation.—Stewart v. Erie & Western Transp. Co., 17 Minn. 372, (Gil. 348.)

—— Power to operate ferry.

4. Act Minn. Terr. March 2, 1855, did not authorize the Southern Minnesota Railroad Company to operate boats on the Mississippi river to and from a road running to the Mississippi river, but to operate boats to and from Hokah, via the canal authorized to be constructed, to the main channel of the Mississippi river; Hokah being the "eastern terminus" of the road, which the company was not allowed to change.—McRoberts v. Southern Minn. R. Co., 18 Minn. 108, (Gil. 91.)

5. Under Act Minn. May 22, 1857, the Southern Minnesota Railroad Company was authorized to transport persons and property on the Mississippi river from any point to which its road constructed on the line authorized might run to or connect with the river, and on a road running up the west bank to La Crescent it could, (not interfering with prior ferry rights,) at pleasure, along said bank, construct depots or run boats in connection with its road.—McRoberts v. Southern Minn. R. Co., 18 Minn. 108, (Gil. 91.)

6. By Laws Minn. Ex. Sess. 1857, p. 22, c. 3, § 10, the Southern Minnesota Railroad Company was authorized to transport persons and property on any navigable water which its road might run to, on condition that it should build its road within a certain time, and in a certain place and manner. *Held* that, unless the road as constructed by the company was authorized by the act, it had no right to operate a ferry from a connection with the Mississippi river, and a person holding an exclusive ferry franchise within a certain territory could contest the right of the road to operate a ferry within such territory.—McRoberts v. Southern Minn. R. Co., 18 Minn. 108, (Gil. 91.)

Change of name.

7. On March 19, 1867, after the adoption of Sp. Laws Minn. 1867, c. 1, which authorized the St. Paul & Pacific Railroad Company to change the name of any of its branches, its board of directors passed a resolution naming that portion of its road extending from St. Paul to Winona the "St. Paul & Chicago Railway Company," which was duly filed with the secretary of state. *Held*, that such resolution did not purport to, and could not, create a distinct corporation, and that the St. Paul & Pacific Railroad Company could not be sued, by the name of the St. Paul & Chicago Railway Company, for materials furnished such Winona branch before the change of

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name.—Morris v. St. Paul & C. Ry. Co., 19 Minn. 528, (Gil. 459.)

Forfeiture—Dissolution of corporation.

8. Under Sp. Laws Minn. 1864, c. 1, subc. 2, § 5, and Laws 1865, c. 15, § 4, attaching to the grant of franchises thereby made to a railway corporation the condition that it should construct and equip its road and branches within a fixed time, and that, upon failure to do so, all unbuilt portions thereof, "with the properties, rights, and franchises appertaining thereto, shall be absolutely forfeited," etc., such failure to construct one of its branches is not cause of forfeiture of its corporate franchise, or of its franchise to maintain and operate the constructed portion of its road. The forfeiture is restricted to the unbuilt portion.—State v. St. Paul & S. C. Ry. Co., 28 N. W. 245, 35 Minn. 222.

9. Under Sp. Laws Minn. 1881, c. 228, authorizing the sale and conveyance by the St. Paul & Sioux City Railroad Company to another company named of all its railroads, and the appurtenances and equipments thereof, and the franchises and corporate rights necessary to the use of the property, but expressly excepting other franchises and powers which had been conferred on the company, such sale and conveyance, and the consequent suspension by it of all its business as a railroad company, did not operate as a forfeiture of its corporate franchise.—State v. St. Paul & S. C. Ry. Co., 28 N. W. 245, 35 Minn. 222.

10. Where, in a proceeding by the attorney general in behalf of the state for the dissolution of a railroad corporation, under a statute which expressly provides for a judgment of dissolution of a railroad corporation which for one year suspends its lawful business, the facts clearly bring the case within its terms, it is mandatory upon the court to declare a forfeiture.—State v. Minnesota Cent. Ry. Co., (Minn.) 30 N. W. 816.

36 Minn. 246.

11. The statute (Gen. St. Minn. 1878, c. 76, § 11) provides that the suspension of its lawful business by a railroad company for one year shall be a ground of forfeiture "of its privileges and franchises acquired under the laws of this state." But the corporation is not to be deemed dissolved until such forfeiture is judicially ascertained and declared.—State v. Minnesota Cent. Ry. Co., 30 N. W. 816, 36 Minn. 246.

12. The duty of a railroad corporation to maintain and operate its road is a public duty, and the chief end of its creation and existence, and the consideration on which it receives its grants and franchises from the state; and the suspension of such duties is a suspension of its lawful business within the meaning of the statute, and a cause for forfeiture, though the corporation also possess, and continue to exercise, other subordinate and secondary franchises, unless such forfeiture is waived, or the right to continue to exist as a corporation after such suspension of its business is sanctioned by the state.—State v. Minnesota Cent Ry. Co., 30 N. W. 816, 36 Minn. 246.

II. Regulation by State.

Statutory provisions.

13. Gen. Laws Minn. 1887, c. 10, § 3, sub. *a*, of the act entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers," and providing that railroads should furnish proper transfer facilities at intersections, is inconsistent with and so far supersedes section 1, c. 14, Gen. Laws 1887, known as the "Freedom of Traffic Act," relating to the same subject, and approved by the governor two days before chapter 14, as to operate as a repeal of said section.—State v. St. Paul, M. & M. Ry. Co., (Minn.) 42 N. W. 21. 40 Minn. 353.

Regulation of rates—Penalties for violation.

14. Where the legislature has granted a franchise to make and maintain a railway, and to receive tolls thereon, it may regulate the use of such franchise, and limit the amount of tolls that it shall be lawful for the railroad or holder of such franchise to take, unless it has, by contract, deprived itself of the power so to do.—Blake v. Winona & St. P. R. Co., 19 Minn. 418, (Gil. 362.)

15. The legislature, having the power to fix the maximum rates of toll that may be charged by a railroad company, have also the right to affix a money penalty for a violation of such regulation or a charge in excess of such maximum rates.—State v. Winona & St. P. R. Co., 19 Minn. 434, (Gil. 377.)

Railroad commissioners—Powers.

16. The Minnesota railroad and warehouse commission has no authority to prescribe rates for transportation by common carriers in another state, nor to fix rates between two points within the state, over a route extending across a neighboring state.—State v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 41 N. W. 1047.

40 Minn. 267.

—— Appeal from orders.

17. Gen. Laws Minn. 1887, c. 10, creating the rail road and warehouse commission, and defining its duties does not authorize an appeal to the district court from an order of the commission prescribing rates to be charged by common carriers.—Railway Transfer Co. v. Railroad & Warehouse Commission, (Minn.) 39 N. W 150.

39 Minn. 231.

18. No appeal lies to the district court from an order of the railroad and warehouse commission appointed under Laws Minn. 1887, c. 10, relating to the mode of operating a railway so as to promote the safety and convenience of the public. Objections to such an order can only be made by way of defense to an action brought to enforce it.—Minneapolis & St. L. R. Co. v. Board of Railroad Com'rs, (Minn.) 46 N. W. 559.

44 Minn. 336.

—— Enforcement of regulations.

19. By section 8, of the railroad and warehouse commission act, (Laws Minn. 1887, c. 10,) the supreme court is vested (concurrently with the district court) with original jurisdiction of all proceedings by *mandamus*, to compel compliance with the regulations of the commission with reference to transportation rates, as provided therein.—State v. Chicago, M. & St. P. Ry. Co.,

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37 N. W. 782, 38 Minn. 281. Reversed in United States supreme court, 10 S. Ct. 462, 134 U. S. 418.

20. Under Gen. Laws Minn. 1887, c. 10, § 8, the determination of the railroad and warehouse commission as to what are usual and reasonable fares and rates for the transportation of persons and property by a railway company is conclusive; and, in proceedings by *mandamus* to compel compliance with the tariff of rates recommended and published by them, no issue can be raised or inquiry had on that question.—State v. Chicago, M. & St. P. Ry. Co., 37 N. W. 782, 38 Minn. 281; State v. Minneapolis E. Ry. Co., 41 N. W. 465, 40 Minn. 156.

III. Construction of Road.

Location of route—Change of location.

21. Where the charter of a railroad does not expressly direct to the contrary, the exercise of such discretion in the location of its route, incident to an ordinary survey, made with reference to the nature of the country and obstacles encountered or avoided, is to be implied as authorized.—Southern Minn. R. Co. v. Stoddard, 6 Minn. 150, (Gil. 92.)

22. Sp. Laws Minn. 1864, c. 1, granted the Southern Minnesota Railroad Company certain property rights, privileges, franchises, etc., on condition that it should construct a certain piece of road, 20 miles of which was graded, from La Crescent up the Root River valley, "on the present located line thereof, except so far as it may be necessary to change the same for engineering purposes, in coming up the valley of the Root river." *Held*, that "present located line" meant that upon which said road was already partly constructed, and that the only change allowed was the adoption of such route, in coming up the valley of the Root river, from La Crescent, on which it could be built, operated, and kept in repair in the best, cheapest, and safest manner.—McRoberts v. Southern Minn. R. Co., 18 Minn. 108, (Gil. 91.)

23. The charter of a railway corporation (Laws Minn. 1857, Ex. Sess. c. 1, subc. 1) authorized the company "to survey, locate, construct, complete, alter, change the location of, reconstruct, maintain, and operate a railroad," and to take land "for the purposes contemplated herein." *Held*, that the power granted to exercise the right of eminent domain was not exhausted by the original location of the line, and might be again employed for the purpose of relocating it; and that Sp. Laws 1862, c. 20, limiting the times within which specific portions of the road should be built, did not place any limit on the time within which the right to relocate it might be exercised.—Hewitt v. St. Paul, M. & M. Ry. Co., 28 N. W. 255, 35 Minn. 226.

Duty to build—Compelling construction.

24. Under Act Cong. March 3, 1857, granting land to Minnesota to aid in the construction of a railroad "from La Crescent" up the valley of the Root river, and Act Minn. May 22, 1857, (Sp. Laws 1864, c. 1; Sp. Laws 1865, c. 1,) enacted to execute such trust, the Southern Minnesota Railroad Company, "authorized and empowered" to build such road, cannot be compelled to build the road to La Crescent, no such duty being imposed upon it either expressly or by implication.—State v. Southern Minn. R. Co., 18 Minn. 40, (Gil. 21.)

Connecting with and crossing other railroads.

25. Under Sp. Laws Minn. 1879, c. 185, the A. company was authorized to cross the tracks of any other company, whenever necessary for the exercise of the power granted in that act to the A. company to extend its lines. *Held* that, under this act, the A. company might cross the tracks of the B. company, in order to make connection with the C. company, and that the objection that the connection was for the benefit of the C. company, and proceedings should have been instituted by that company, was without merit, as the court would presume the connection to be equally beneficial to both companies.—In re Minneapolis & St. P. Ry. Co. v. St. Paul, M. & M. R. Co., 32 N. W. 556, 36 Minn. 481.

26. Under the provisions of section 4 of the same act, authorizing the court to which the petition is presented to prescribe the location and manner of crossing, such location and manner of crossing are to be determined upon the evidence produced and showing made before the trial court as questions of fact; and in reviewing the decision thereon, the supreme court will only inquire whether there are legal errors in the proceedings, or any abuse of discretion on the part of the trial court.—In re Minneapolis & St. L. Ry. Co. v. St. Paul, M. & M. R. Co., (Minn.) 32 N. W. 556.

36 Minn. 481.

27. In proceedings for the condemnation for railroad purposes of land situated on the main line of the railroad, it is immaterial to inquire as to the validity of a consolidation attempted to be effected by the petitioner with certain connecting roads, even if such consolidation is averred in the petition.—In re Minneapolis & St. L. Ry. Co. v. St. Paul, M. & M. R. Co., (Minn.) 32 N. W. 556.

36 Minn. 481.

28. Under Gen. St. Minn. 1878, c. 34, § 47, (as amended by Gen. Laws 1879, c. 35, § 3,) a railway company has no absolute right, at its own mere election, to a crossing over the railroad of another company. The court to whom the application for the appointment of commissioners is made is first to determine whether the crossing sought is necessary and required by public interests. The provisions of section 17, in that regard, are applicable.—In re St. Paul & N. P. R. Co., (Minn.) 33 N. W. 701. 37 Minn. 164.

29. Under the Minnesota statute authorizing the district court to prescribe a location for the crossing of one railroad by another, the place and manner of the crossing must be so ordered as to be as little injurious to the former as is consistent with the accomplishment, in a reasonable manner, of the purposes contemplated; regard being had for the interests and necessities of both corporations, and of the public.—In re Minneapolis & St. C. Ry. Co., (Minn.) 39 N. W. 65.

39 Minn. 162.

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30. An agreement which, by its terms, gives the exclusive right of way to a railway corporation in or through a certain tract of land, in so far as it attempts to exclude other railway corporations from acquiring a right of way over the same tract, upon land not appropriated or required for its use by the covenantee, is against public policy, and void.—Kettle River R. Co. v. Eastern Ry. Co., (Minn.) 43 N. W. 469.

41 Minn. 461.

31. A third party, not interested in lands taken for a right of way by a railway company, cannot raise the objection that the corporation has no power under its charter to acquire the specific lands for railway purposes.—Kettle River R. Co. v. Eastern Ry. Co., (Minn.) 43 N. W. 469.

41 Minn. 461.

Occupation of highways—Crossing highways.

32. The charter of a railway company, (Laws Minn. 1857, Ex. Sess. c. 1, subc. 1, § 7,) authorizing the company to construct its railroad "upon and along, across, under, or over any private or public highway, road, street," etc., if necessary, required that the company should "put such highway, road, street," etc., "in such condition and state of repair as not to impair or interfere with its free and proper use." *Held*, that the duty thereby imposed was a continuing one, and was not fulfilled by simply putting the street, at the time the railroad was built, in such condition as not to impair or interfere with its free and proper use at that time, nor even by maintaining it in such condition as would have accomplished that end had the circumstances and conditions originally existing continued; and that when, by reason of the increase in the number of tracks and the railway traffic at a street crossing, and the increase of the travel on the street, it became necessary to carry the street under the railway by a viaduct, whatever structures were necessary for the purpose must be erected and maintained by the railway company wholly at its own expense, including necessary approaches to such viaduct; that the expense of making compensation to owners of abutting property injured by a change of grade of the street in making such approaches must also be borne by the company; and that the company had power to condemn land for that purpose, as a part of the enterprise authorized by the charter.—City of Minneapolis v. St. Paul, M. & M. Ry. Co., (State v. St. Paul, M. & M. Ry. Co.,) 28 N. W. 3, 35 Minn. 131.

33. Sp. Laws Minn. 1853, c. 66, incorporating a railroad, and providing that when it crosses a street or highway it shall put such highway in such condition and state of repair as not to impair its usefulness to the owner or public, imposes a continuous duty to restore public streets to usefulness, by bridging or otherwise, when necessary.—State v. Minneapolis & St. L. Ry. Co., (Minn.) 39 N. W. 153.

39 Minn. 219.

34. St. Minn. 1887, c. 15, relating to highway crossings by railroads, does not authorize all crossings to be at grade, but merely prescribes how grade crossings shall be constructed.—State v. Minneapolis & St. L. Ry. Co., 39 N. W. 153, 39 Minn. 219.

35. Upon the laying out of a public highway across the track and right of way of a railroad company, the latter is not entitled to compensation for providing and maintaining cattle-guards and signboards at the new crossing.—State v. District Court, 44 N. W. 7, 42 Minn. 247; Same v. Shardlow, 46 N. W. 74, 43 Minn. 524.

36. It is entitled to compensation for planking the road-way where it crosses the railroad tracks, and for the maintenance of the planking.—State v. District Court, (Minn.) 44 N. W. 7.

42 Minn. 247.

37. Laws Minn. 1887, c. 15, and Laws 1889, c. 222, which require railroad companies to construct crossings wherever highways intersect their tracks, are not unconstitutional because they make no provision for compensation, since such provision is made by the general statutes regulating the laying out of highways. — State v. Shardlow, (Minn.) 46 N. W. 74.

43 Minn. 524.

38. In assessing damages to a railroad company for laying out a highway across its track, benefits by increase in its traffic or business, arising from the increased facility for travel which the highway affords, are not to be taken into account.—State v. Shardlow, (Minn.) 46 N. W. 74.

43 Minn. 524.

39. Upon an appeal to a justice of the peace under Gen. St. Minn. 1878, c. 13, § 60, in proceedings for laying out a highway by supervisors of a town, the supervisors, by consenting to a continuance before making any objection to the bond filed pursuant to that section, waive any defects in it.—State v. Shardlow, (Minn.) 46 N. W. 74.

43 Minn. 524.

40. As the legislature has full and paramount authority over all public highways, where it authorizes and requires a railway company, by its charter, in constructing its railway across a street, to put the same in proper condition and repair, so as not to interfere with public travel, it is not a trespasser in entering thereon for the purpose of restoring and improving the same, as commanded by its charter, and, if the work is done with reasonable prudence and skill, it is not liable for consequential damages to owners of abutting land.—Robinson v. Great Northern Ry. Co., (Minn.) 51 N. W. 384.

Bridges at highway crossings.

41. Where the plan, proposed for the restoration of a street crossed by a railroad to suitable condition for public use, includes a bridge over the contiguous tracks of two railway companies, neither company can be compelled to change its route further than is reasonably necessary for such purpose.—State v. St. Paul, M. & M. Ry. Co. (Minn.) 36 N. W. 870.

38 Minn. 246.

42. Where the tracks of two companies cross the same streets so near each other as to require a continuous bridge over all the tracks, it is proper to require each company to construct those parts of the bridges above its own systems of tracks respectively, and approaches on its respective sides, without other apportionment between them of the

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cost of the entire bridge structures and approaches.—State v. Minneapolis & St. L. Ry. Co., (Minn.) 39 N. W. 153.

39 Minn. 219.

43. The fact that a railroad has once been lawfully constructed on the grade of a street does not exempt it from bridging when that becomes necessary.—State v. Minneapolis & St. L. Ry. Co., 39 N. W. 153, 39 Minn. 219.

4 Where the tracks of two companies cross the same streets so near each other as to require a bridge over both systems of tracks if over either, evidence is admissible in proceedings against one company as to the extent of the use of the street crossing by the other company, showing the necessity for a bridge at the place in question.—State v. Minneapolis & St. L. Ry. Co., 39 N. W. 153, 39 Minn. 219.

45. Sp. Laws Minn. 1879, c. 185, authorizing the company to construct branch lines and tracks, and requiring the city to build the approaches to necessary street bridges, does not apply to the already existing line of road.—State v. Minneapolis & St. L. Ry. Co., 39 N. W. 153, 39 Minn. 219.

Fences.

46. Laws Minn. 1872, c. 25, § 1, which requires all railroad companies within the state to build cattle-guards at all wagon crossings and fences on each side of their roads, repeals Gen. St. c. 34, § 33, which made the duty to fence dependent on the action of the county commissioners in prescribing rules for building them.—Gowan v. St. Paul, S. & T. F. R. Co., 25 Minn. 328.

47. It is within the police power of the state to regulate the construction and maintenance of fences, etc., along railroad tracks, and a provision in the charter of a railroad company declaring what fences, etc., are necessary to protect life and property, and when the company shall provide them, is not sufficient to conclude the state from a future exercise of such police power.—Gillam v. Sioux City & St. P. R. Co., 3 N. W. 353, 26 Minn. 268.

48. A railway company is not required to fence grounds needed and actually used for depot purposes, and required by public necessity and convenience to be left open; following former Minnesota decisions.—Smith v. Minneapolis & St. L. R. Co., (Minn.) 33 N. W. 316.*

37 Minn. 103.

49. The Minnesota statute requiring railways to be fenced is not a law for line or partition fences, but a police regulation, the object of which is to *inclose* the roads so that cattle cannot get upon them; and when station grounds are required by public necessity or convenience to be left unenclosed, a railway company owes no duty to the owner of abutting land to build a fence between his land and such station grounds. DICKINSON, J., dissenting.—Smith v. Minneapolis & St. L. R. Co., 33 N. W. 316, 37 Minn. 103.

50. The implied exception to Gen. St. Minn. 1878, c. 34, §§ 54, 55, imposing upon railway companies the duty of fencing their tracks, by which places necessary and convenient for the use of the public may be left open, cannot be extended to a siding used merely for the loading of ties, wood, and piling purchased by the company, (there being no testimony tending to show the amount of such business,) and for the passing of trains, at a point where no depot is maintained, no employe stationed, and where persons desiring to take passage are obliged to flag the trains themselves.—Hurt v. St. Paul, M. & M. Ry. Co., (Minn.) 40 N. W. 613.

39 Minn. 485.

Distinguishing Greeley v. St. Paul, M. & M. Ry. Co., 22 N. W. 179, 33 Minn. 136; Kobe v. Northern Pac. R. Co., 32 N. W. 783, 36 Minn. 518; Hooper v. Chicago, St. P., M. & O. Ry. Co., 33 N. W. 314, 37 Minn. 52.

51. Under Gen. St. Minn. 1878, c. 18, § 2, providing that the wire fence such as therein described shall be sufficient, "in all cases where any law of this state requires to be erected or maintained any fence or fences for any purpose whatever," such a fence is a compliance with Gen. St. 1878, c. 34, § 54, requiring railroad companies to fence their roads.—Halverson v. Minneapolis & St. L. Ry. Co., 19 N. W. 392, 32 Minn. 88; Wessbecher v. Same, 19 N. W. 393, 32 Minn. 89.

Failure to fence—Damages.

52. A railroad company failing to erect cattle-guards and fences, as required by Laws Minn. 1872, c. 25, which makes such failure negligence, and renders the company liable for injuries to stock resulting therefrom, is not liable for damages to an adjoining owner committed by cattle trespassing on the railroad land, and, by reason of such failure, passing to that of such adjoining owner; for in such case the owner of the cattle is alone liable.—Gowan v. St. Paul, S. & T. F. R. Co., 25 Minn. 328.

53. Under Gen. St. Minn. 1878, c. 34, § 57, providing that if a railroad company fails to fence its road it shall be liable for all damages sustained by any person in consequence of such neglect, a railroad company is liable for damages to an abutting farm caused by a failure to fence its road.—Emmons v. Minneapolis & St. L. Ry. Co., 29 N. W. 202, 35 Minn. 503; 36 N. W. 340, 38 Minn. 215; Nelson v. Same, 42 N. W. 788, 41 Minn. 131.

54. The measure of damages in such a case is the depreciation in the rental value of the farm, which means the value of its use for any purpose for which it is adapted in the hands of a prudent and discreet farmer upon a judicious system of husbandry; and evidence of any fact tending to show how and to what extent the absence of a railway fence injuriously affected the value of such use is competent.—Nelson v. Minneapolis & St. L. Ry. Co., (Minn.) 42 N. W. 788.

41 Minn. 131.

55. The issue being how much the rental value of an abutting farm is diminished by reason of a railway not being fenced, an expert witness may be asked either what would be the difference between the rental value with the road fenced, and with the road unfenced, or, first, what the rental value would be with the road fenced, and then what it would be with it unfenced.—Emmons v. Minneapolis & St. L. Ry. Co., (Minn.) 42 N. W. 789.

41 Minn. 133.

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56. The diminution in the rental value of a farm through which it passes, caused by its neglect to fence, is a proper item of damage.—Finch v. Chicago, M. & St. P. Ry. Co., 48 N. W. 915, 46 Minn. 250.

57. Gen. St. Minn. 1878, c. 34, § 57, providing that "any company or corporation" operating a line of railroad in that state shall be liable for damages sustained by any person by reason of its failure to fence its track, applies to all railroads in that state, and not merely to such as existed at the time of the passage of the act.—Finch v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 915.

46 Minn. 250.

58. In an action for an animal killed by defendant railroad while being driven across the track by the side of which it, with others, was herded by plaintiff, it appeared that defendant had failed to fence its track. *Held*, that contributory negligence on the part of plaintiff is not to be presumed, but to be proved, the failure to fence being the proximate cause of the injury.—Vinson v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 50 N. W. 228.

47 Minn. 265.

Cattle-guards.

59. The term "wagon crossings," as used in Gen. St. Minn. 1878, c. 34, § 54, requiring railroad companies to build and maintain "cattle-guards," refers to wagon roads used for public travel crossing railroads, and not to private ways or farm crossings.—Sather v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 458.

40 Minn. 91.

60. Gen. St. Minn. 1878, c. 34, § 54, requiring railroad companies to fence their roads and to build cattle-guards at wagon crossings, applies within the limits of incorporated cities and villages; no exception thereof being made by the statute.—Greely v. St. Paul, M. & M. Ry. Co., 22 N. W. 179, 33 Minn. 136.

61. Gen. St. Minn. 1878, c. 34, § 54, requiring railroad companies to fence their roads and to build cattle-guards at wagon crossings, when construed in the light of other provisions against obstructing highways, etc., allows an exception where the company has no legal right to fence, as where a fence would obstruct public streets or other public grounds. And an exception is to be implied as to places required to be left open by public necessity or convenience, such as station or depot grounds. But mere difficulty or inconvenience to the company creates no exception, and will not relieve it from liability for a failure to comply with the law.—Greely v. St. Paul, M. & M. Ry. Co., 22 N. W. 179, 33 Minn. 136.

Distinguished in Hurt v. St. Paul, M. & M. Ry. Co., 40 N. W. 614, 39 Minn. 486.

IV. Municipal Aid.

Authority to grant.

62. The legislature may authorize a municipal corporation to issue its bonds to a railway company as a donation to secure the construction of a railroad, and to levy and collect taxes to pay the same, though the company may already be bound to construct its road, and it is to be built outside the city limits. — Davidson v. County Com'rs Ramsey County, 18 Minn. 482, (Gil. 432.)

63. In 1874, the village of C. voted to issue $12,000 of bonds to aid in the construction of defendant's railroad. In 1875, the village voted to issue $8,000 additional bonds to aid in the construction of the railroad. Neither of such votes was based on any agreement or proposition on the part of defendant, and no bonds were issued pursuant thereto. In 1879, the village voted $20,000 of bonds to defendant, based on the written agreement of defendant to build its road, etc., in consideration of the issue of such bonds, and the bonds were issued accordingly. *Held*, that defendant waived its right under the votes of 1874 and 1875, so that an issue of only $20,000 of bonds was authorized, and Const. Minn. art. 9, § 14*b*, restricting the amount of the issue of bonds by a municipal corporation to 10 per cent. of the value of the taxable property within the same, was not violated, the taxable property in the village of C. amounting to $330,000.—Coe v. Buell, 6 N. W. 621, 27 Minn. 197.

Ordinances, resolutions, and agreements —Validity and effect.

64. Sp. Laws Minn. 1869, c. 35, authorized the city council of the city of Red Wing to provide by ordinance for the issuing of certain railroad bonds, and to specify therein the times, terms, and conditions of such bonds; and provided that such ordinance should not take effect until the same had been submitted for approval to the qualified voters of the city. *Held*, that such times, terms, and conditions could not be subsequently waived or altered by the city council after the said ordinance had been properly submitted to and approved by the legal voters of the city; and that the act by which the issue of the bonds was authorized did not become *functus officio* by the submission to such voters of a void ordinance.—Hodgman v. Chicago & St. P. Ry. Co., 20 Minn. 48, (Gil. 36.)

65. Under Sp. Laws Minn. 1869, c. 35, authorizing the city of Red Wing to issue bonds in aid of the St. Paul & Chicago Railway Company, the agreement contemplated by section 3 of such chapter, as to the times, terms, and conditions of issuing such bonds, must precede the submission of the ordinance for the issuance of such bonds to the voters; and an ordinance submitted before such agreement is void, and will not prevent the submission of a second ordinance after the making of such agreement.—Hodgman v. Chicago & St. P. Ry. Co., 20 Minn. 48, (Gil. 36.)

66. Sp. Laws 1869, c. 34, authorized a city at any time prior to August 1, 1870, by the action of a majority of the council, ratified by a vote of the people, to create and issue certain bonds in aid of a railroad; the question of the issue to be submitted to the voters before August 1, 1870, and, if by them approved, the council to make such agreement with the company as they saw fit relating to the disposal of the bonds. *Held*, that an ordinance authorizing such bonds, and prescribing the terms and conditions upon which they should be issued,—among others, that none should be issued until after the completion of the work, which was subsequent to August 1, 1870,—duly adopted by the council, and ratified

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by the voters in May, 1870, was a proper exercise of power on the part of the council, and that the bonds, being authorized before August 1, 1870, might be issued and delivered afterwards.—Warsop v. City of Hastings, 22 Minn. 437.

67. The town of Lime, under the authority of Sp. Laws Minn. 1869, c. 46, adopted a resolution directing its supervisors to issue to a railroad company certain bonds. *Held*, that the adoption of such resolution was a statutory obligation, binding upon the town upon a compliance by the company with the condition imposed, and that no written agreement or formal acceptance by the company was essential to give it validity.—State v. Sup'rs Town of Lime, 23 Minn. 521.

68. The adoption by a municipal corporation of an ordinance authorized by law, obligating itself, upon the performance of certain conditions by a railroad company, to issue its bonds in aid thereof, and the performance of such conditions by such company, constitutes a valid and binding obligation to issue them in accordance with such ordinance. State v. Town of Lime, 23 Minn. 521, followed.—State v. City of Lake City, 25 Minn. 404.

69. An agreement by a town, under Laws Minn. 1877, c. 106, § 7, (Gen. St. Minn. 1878, c. 34, § 98,) to issue bonds to aid in the construction of a railroad, must, to be binding upon such town, be arrived at and perfected before the construction of the road, or piece of road, the construction of which the agreement is to aid.—State v. Town of Highland, 25 Minn. 355.

Donation of land—By recording plat.

70. Gen. St. Minn. 1878, c. 29, § 5, provides that, when a plat is made out and recorded as required by the statute, every grant or donation to the public or to any corporation, marked or noted on such plat, shall be sufficient, in law and equity, to vest the fee-simple of such land "as therein expressed," etc. On a town plat was shown a strip of land undivided into lots, on which were the words, "Reserved for right of way, line of S. M. R. R." *Held*, that the intent to donate to the railroad company was not sufficiently shown.—Watson v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 1129. 46 Minn. 321.

Issuing bonds—Elections.

71. A city ordinance providing, subject to ratification of the voters of the city, pursuant to statutory authority, for the issue of bonds of the city in aid of a railroad, was an ordinance adopted May 3d, and designated May 15th as the day of the election, and directed 10 days' notice of such election to be given. The ordinance was first published, together with the first publication of the notice of election, on May 5th. *Held*, the ordinance taking effect on first publication, that such notice was not invalid because published simultaneously with the first publication of the ordinance.—Warsop v. City of Hastings, 22 Minn. 437.

72. Under Sp. Laws Minn. 1875, c. 132, requiring notice of the time, place, and object of a meeting to vote on the question of issuing bonds by a village to aid in the construction of a railroad to be posted in three public places "at least 10 days prior" to such meeting, notices posted on May 13th, of a meeting to be held on May 23d, are sufficient.—Coe v. Buell, 6 N. W. 621, 27 Minn. 197.

73. Sp. Laws Minn. 1875, c. 132, provides that certain villages and towns in certain counties may vote to issue bonds "to aid in the construction of any railway running into, or proposed to be built through, either of the counties aforesaid." *Held*, that such villages and towns may hold several elections and vote several issues of bonds.—Coe v. Buell, 6 N. W. 621, 27 Minn. 197.

74. Under Sp. Laws Minn. 1875, c. 132, which provides that certain towns may hold an election to vote on the question of issuing bonds in aid of a railroad running into or proposed to be built through the same, the fact that one election has been held at which the issue of such bonds was refused does not preclude the town from holding another election for the purpose.—Hoyt v. Braden, 8 N. W. 591, 27 Minn. 490.

75. An agreement entered into between a railway company and the authorities of a town, upon petition of a majority of the tax-payers in pursuance of the provisions of section 7, c. 106, Laws Minn. 1877, for the issuance of the bonds of such town, but which was not submitted to a vote as required by section 5, is invalid, and imposes no legal obligation upon the town, by reason of the unconstitutionality of the statute; and if the company procures officers of the town to issue the bonds, the town is not estopped to resist the enforcement of the bonds; and if they are negotiated by the company, and enforced against the town, it may recover from the company the amount of the bonds with interest. Following Harrington v. Town of Plainview, 6 N. W. 777, 27 Minn. 224.—Town of Plainview v. Winona & St. P. R. Co., 32 N. W. 745, 36 Minn. 505; Town of Elgin v. Same, 32 N. W. 749, 36 Minn. 517. Writs of error dismissed in United States supreme court, 12 S. Ct. 530, 143 U. S. 371.

—— Time.

76. Act Minn. March 6, 1868, (Laws 1868, c. 15,) authorized the issuance of bonds, prior to a day specified, to aid in the construction of a railway, the vote of officers providing for such issue to be ratified by a vote of the people, at an election therefor to be held before such day, and provided that no bonds should issue until after such ratification, after which they might be issued and disposed of in such way as the parties might agree upon. *Held*, that it was not essential that such bonds be issued and delivered prior to the final day named for ratification. Warsop v. City of Hastings, 22 Minn. 437, followed.—State v. City of Lake City, 25 Minn. 404.

—— Demand.

77. The agent of a railroad company, empowered by his principal to demand the issue of certain municipal aid bonds, made such demand, to which the mayor of the city, by instruction of the city council, replied that they declined to issue the bonds, on the ground that all questions respecting the validity of such bonds had not been decided by the supreme court. *Held*, a waiver by the city of objections to the sufficiency of the demand, and the authority of the agent and his principal to make the demand.—State v. City of Hastings, 24 Minn. 78.

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Issuing bonds—Conditions.

78. Under Sp. Laws Minn. 1876, c. 55, authorizing the issuance of bonds by certain municipalities to aid in the construction of the Minnesota Midland Railway, a mere vote of a town does not entitle the company to the issuance of such bonds; but the agreement between the company and such town, contemplated by section 4 of said act, fixing the conditions on which the bonds are to be delivered, is essential, as is also performance of its conditions.—State v. Town of Roscoe, 25 Minn. 445.

79. Under Sp. Laws Minn. 1875, c. 132, which authorizes certain villages and towns in certain counties "to issue bonds * * * to aid in the construction of any railway running into, or proposed to be built through, either of the counties aforesaid," the voters of such villages may impose, as a condition of the issue of the bonds voted by them, that the depot of the railway proposed to be aided shall be at a certain place.—Coe v. Buell, 6 N. W. 621, 27 Minn. 197.

80. Under Sp. Laws Minn. 1875, c. 132, which authorizes certain villages and towns in certain counties "to issue bonds * * * to aid in the construction of any railway running into or proposed to be built through either of the counties aforesaid," the voters of such village or town may impose, as a condition of the issue of the bonds voted by them, that the bonds shall be payable at a place designated, on or before the expiration of 20 years, though the statute provides that such bonds "shall be payable in not less than 10 nor more than 20 years."—Hoyt v. Braden, 8 N.W. 591, 27 Minn. 490.

81. An ordinance authorizing the issue of municipal bonds to aid in the construction of a railway provided that the bonds should not be issued until the railway should be fully completed from St. Paul by the way of the cities of Hastings, Red Wing, and Lake City, and from thence to some point of connection with a railroad leading to Milwaukee and Chicago, with the cars running thereon. *Held*, that the words "a railroad leading to Milwaukee and Chicago" should not be restricted to a road whose line reached Milwaukee and Chicago, but embraced a road connecting, either directly, or by the way of another railroad or railroads, with one whose line reached said points.—State v. City of Hastings, 24 Minn. 78.

82. A resolution of the town of Lime authorized the issuance of $4,000 of the bonds of said town to a railroad company on the following terms: One-half of the bonds to be delivered when the first 12 miles of the road should be completed; the other half when the remainder of the road should be completed: provided, that the second half of the bonds should never be delivered, unless the whole road should be completed before August 1, 1872. *Held* that, upon grading and bridging the first 12 miles of said road, the company became entitled to the first installment of bonds, though such grading and bridging were not completed until after August 1, 1872.—State v. Sup'rs Town of Lime, 23 Minn. 521.

83. A contract between the city of Winona and a construction company, in regard to bonds of the city to be issued to aid the construction of a railway to said city from the city of St. Paul, provided that the company should build and equip such railway, to connect at Winona, "by bridge or ferry," with the L. C., T. & P. Railroad. A subsequent clause, inserted in the original draft of the contract before its execution, provided that in no case should said bonds, or any part thereof, be delivered to said construction company until a truss railroad bridge should be constructed across the Mississippi river at Winona, connecting the St. P. & C. Railway or the W. & St. P. Railroad with the L. C., T. & P. Railroad at the terminus of the last-named road. *Held*, that such subsequent clause deprived the construction company of its privilege of making the connection by ferry, but left it optional with the company to build the St. P. & C. Railway over the bridge, and form a junction with the L. C., T. & P. Railroad, or to build the St. P. & C. Railroad to any point in the city of Winona, and then connect with the L. C., T. & P. Railroad by means of the W. & St. P. Railroad, upon which the company would be entitled to the bonds.—City of Winona v. Thompson, 24 Minn. 199.

84. Municipal bonds were voted in aid of a railroad on condition that the road should be ready for the transportation of passengers and freight by a certain time. Before that time the company, in pursuance of authority conferred by special act, contracted with another railroad company for the use of about one-half mile of the road of the latter, to reach one of the termini of the former, by which means the first company was enabled to have its road ready for the transportation of freight and passengers at the specified time. *Held* a sufficient compliance with such condition to entitle the company to the bonds.—State v. Town of Clark, 23 Minn. 422.

85. Municipal bonds were agreed to be issued in aid of railroad construction, upon condition that the company should fully construct, equip, and put its road into successful operation by a specified time. *Held*, that the construction of a bridge across the Mississippi at a point on the proposed route, instead of the provision of other means, usual and customary under like circumstances in railroad transportation for crossing the stream, was not essential to the company's right to the bonds.—Hodgman v. St. Paul & C. Ry. Co., 23 Minn. 153.

86. The provision of Sp. Laws Minn. 1879, c. 182, authorizing the issue, by the city of Minneapolis, of its bonds to a certain railroad company to aid the building of specified lines of railroad, the delivery of the bonds to begin "when the track is laid and the cars are running on a section of not less than 10 consecutive miles of said railroad, beginning at Minneapolis: * * * provided the eastern terminus, general offices, and headquarters of said railroad shall be at Minneapolis," requires that not only the general offices, but the operating headquarters, should be established and permanently maintained in the city of Minneapolis. The establishment of such offices and headquarters was, under the statute, a condition precedent to the issue of the bonds, and there was a continuing obligation on the part of the railroad company, if it availed itself of the benefit of the contract, to maintain such offices and headquarters in that city; and the pro-

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curing, by the railroad company named in the act, of the building of a line of railroad by another company, connecting with the other lines of the latter company, and operated and managed from its own headquarters and general offices in the city of St. Paul, while the former company, although having its general offices in Minneapolis, never built or owned or operated any railroad, was not a compliance with the statute.—State v. City of Minneapolis, 21 N. W. 722, 32 Minn. 501.

87. Where a stipulation, by virtue of which a railroad company is, on performance, to become entitled to certain bonds, is substantially performed within the required time, any subsequent misconduct of the company in operating such road will not affect the company's right to demand the bonds.—Hodgman v. St. Paul & C. Ry. Co., 23 Minn. 153.

88. Upon an issue as to whether a railway company had fully constructed and equipped its road for the carriage of freight by a certain date, so as to entitle itself to demand a delivery of aid bonds, the court properly admitted evidence that the company after that date shipped all of its heavy freight over another line under its control.—Hodgman v. St. Paul & C. Ry. Co., 23 Minn. 153.

Registration of bonds.

89. County commissioners may provide for paying the interest of bonds issued in aid of railroad companies, although such bonds are not registered with the state auditor, as required by Laws 1871, c. 17, which was not intended to require a registration of the bonds as a condition of the holder's right to demand the interest.—Board County Com'rs St. Louis County v. Nettleton, 22 Minn. 356; Same v. Smith, Id.

Agreement by railroad to transfer aid.

90. A railway company agreed to transfer to a construction company "all gifts, donations, bounties, or aid in any form or shape, which have been, or may hereafter be, made or given by any person, corporation, municipality, or state, to aid in the construction of said railway." *Held* to pass the right of the railway company to avail itself of a standing offer by a municipal corporation to issue its bonds in aid of such railway, upon certain terms and conditions, none of which had been complied with at the time of such agreement.—State v. City of Hastings, 24 Minn. 78.

V. Lease, Consolidation, and Sale.

Power to make—Validity.

91. Sp. Laws Minn. 1871, c. 71, § 1, which provides that a certain railroad company may lease its road "to any railroad company of this state," does not authorize a lease to a foreign company.—Freeman v. Minneapolis & St. L. R. Co., 10 N. W. 594, 28 Minn. 443.

92. Gen. St. Minn. 1878, c. 34, § 69, provides that any railroad company incorporated "under the provision of this title, or by special charter, * * * may lease or purchase any part or all of any railroad constructed by any other corporation whose lines are continuous or connected with its own." Section 106 provides that "any railroad * * * organized under the laws of the state of Iowa is hereby authorized to extend and build its road into the state of Minnesota, and such railroad company shall have and possess all the powers, franchises, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the general laws of this state: provided, such non-resident company shall first file a true copy of its article of incorporation with the secretary of this state." *Held*, that a Minnesota company cannot lease its road to an Iowa company until the latter has complied with the provisions of section 106.—Freeman v. Minneapolis & St. L. R. Co., 10 N. W. 594, 28 Minn. 443.

93. Under Sp. Laws Minn. 1871, c. 71, § 1, giving the M. & St. L. Ry. Co. power to lease "the whole or any part of its railroad and franchises to any other railroad company of this state," such railroad company may lease rights which it has acquired by condemnation since the passage of said chapter 71.—State v. St. Paul, M. & M. R. Co., 11 N. W. 80, 28 Minn. 488.

94. A railway corporation, endowed with land grants by the state, disposed of the entire interest and control of the road to another railroad, reserving the granted lands and certain corporate rights, but ceasing to do ordinary railroad business. *Held* that, as such separation of franchises was not authorized by the legislative acts incorporating the railroads, on *quo warranto* proceedings on behalf of the state, judgment of forfeiture and for dissolution of both corporations was authorized.—State v. Minnesota Cent. Ry. Co., (Minn.) 30 N. W. 816. 36 Minn. 246.

Construction and effect.

95. One railroad corporation leased to another the right to build, maintain, and operate a railroad upon land of the former, the track to be located, built, and the grade established, under the direction and control of its superintendent. *Held* that, after the track had been located and built, the parties might, by oral agreement, change its location within the limits specified in the lease; that, even if the agent making such an agreement on the part of the lessor had not authority to do so, acquiescence for six years in the change of track was a ratification.—Minneapolis & St. L. Ry. Co. v. St. Paul, M. & M. Ry. Co., 28 N. W. 705, 35 Minn. 265.

96. Such lease was, in terms, to the lessee corporation, its successors and assigns, forever, and also provided that each and every covenant, promise, and agreement should bind the successors and assigns of the respective parties as if they had been specially named; but another clause provided that none of the rights or privileges thereby granted should be transferred, assigned, or sublet to or permitted to be used or enjoyed by any other corporation. *Held*, that the last clause applied only to an assignment or transfer of the right granted separate from or independent of the railroad of the lessee, but did not prevent such right passing to an assignee of that railroad, as a part thereof.—Minneapolis & St. L. Ry. Co. v. St. Paul, M. & M. Ry. Co., 28 N. W. 705, 35 Minn. 265.

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97. A deed by the St. Paul, Minneapolis & Manitoba Railway Company, conveying to the St. Paul Union Depot Company certain premises as a site for a union passenger depot in the city of St. Paul, contained a reservation to the railway company of the exclusive use and control of certain tracks in such depot, and of platform room for its business, "and the business of such other railroad company or companies as the said party of the first part is now, or itself, its successors or assigns, shall at any time hereafter be, under obligation to furnish or provide with passenger depot accommodations at the city of St. Paul." *Held*, that this language, especially when construed with reference to the whole deed and to other contemporaneous contracts, part of the same transaction, and to the surrounding facts and circumstances, reserved the use of such tracks for any companies with which the grantor company might thereafter contract to furnish depot accommodations, not merely those to whom it was, at the time of the execution of the deed, under obligations to furnish such accommodations; that the reservation covered, not merely the right to the use of the tracks, but the right to general depot accommodations; that such right of the grantor company and its tenants was subject only to the payment of rents and charges, and to such rules and regulations as were common to other companies using the depot; and that such reservation or exception was not repugnant to the grant, nor in conflict with public policy, nor prejudicial to the interests of the depot company.—St. Paul Union Depot Co. v. St. Paul, M. & M. Ry. Co., 29 N. W. 140, 35 Minn. 320.

Rights and liabilities of successor company.

98. Where a railroad corporation is organized under and pursuant to an agreement that it shall succeed to the powers and franchises of an existing corporation, authorized and sanctioned by competent legislative authority, it is bound by a provision therein making it liable for certain debts of the original company, as fully as if they were contracted by itself.—Welsh v. First Division St. P. & P. R. Co., 25 Minn. 314.

99. The St. Paul & Pacific Railroad Company, having become vested with all the rights, powers, and franchises of the Minnesota & Pacific Railroad Company, in pursuance of the act of March 10, 1862, the effect of the arrangement made between it and the holders of special and preferred stock, under Sp. Laws 1864, c. 3, and Sp. Laws 1866, c. 1, was to create a body corporate of the organization therein named as the First Division of the St. Paul & Pacific Railroad Company, and vest in it all the powers, privileges, and franchises purporting to be granted by such agreement and Sp. Laws 1865, c. 1.—First Div. St. P. & P. R. Co. v. Parcher, 14 Minn. 297, (Gil. 224.)

100. Under Sp. Laws Minn. 1881, c. 414, which authorizes the purchase of the Plainview Railroad Company by the Winona & St. Peter Railroad Company, "subject to all claims against the Plainview Company," the Winona & St. Peter Railroad Company succeeded to the liabilities of the latter company.—Town of Plainview v. Winona & St. P. R. Co., 32 N. W. 745, 36 Minn. 505; Town of Elgin v. Same, 32 N. W. 749, 36 Minn. 517. Writs of error dismissed in United States supreme court, 12 S. Ct. 530, 143 U. S. 371.

VI. TAXATION.

Construction of constitutional and statutory provisions, generally.

101. The amendment to Const. art. 9, § 10, authorizing a loan of $5,000,000 to railroads, is a particular provision as to particular subject-matter, and cannot be controlled by Const. Minn. art. 9, § 1, providing that "laws shall be passed taxing * * * all real and personal property at its true value in money."—State v. Winona & St. P. R. Co., 21 Minn. 315.

102. Statutes granting exemption of railroad property from taxation are to be strictly construed.—City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469.

Payment of percentage on gross earnings—Exemption of property.

103. The exemption from taxation granted to the Minnesota & Pacific Railroad Company by section 18 of its charter, as to lands granted by the United States, was one that the territorial legislature was competent to grant, and to bind the future state thereby. Such exemption was not in contravention of the provision of the organic act, and was preserved to the company, and, upon foreclosure of the mortgage given by the company to the state, the exemption passed to the state, if not as a franchise, as a right appendant, and was held by it without merger or extinguishment, and passed with its grant of the other rights and franchises of such company to the First Division St. Paul & Pacific Company. The duty imposed on the company by its charter to build the road, etc., and pay a percentage of gross earnings, was a sufficient consideration for such grant, and the agreement between the stockholders, by which the last-named corporation was created, was not a sale of the lands subjecting them to taxation.—First Div. St. P. & P. R. Co. v. Parcher, 14 Minn. 297, (Gil. 224.)

104. The exemption of the St. Paul & Pacific Railroad from taxation on payment of a percentage of its gross earnings in lieu thereof, provided by Sp. Laws Minn. 1865, c. 6, was a conditional grant, rather than a personal privilege, and appurtenant to the several lines of road it was authorized to build, charging them with the perpetual burden of annual payment of the sum specified, dating from the time when any portion of such lines, equal in extent to 30 miles, should be completed and in operation.—Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217.

105. Act Minn. March 2, 1865, amending Act May 22, 1857, which exempted the Minnesota & Pacific Railroad Company from taxation on payment of a percentage of its gross earnings, provided that such percentage should be paid, 1 per cent. for the first three years, 2 per cent. for the next seven, and 3 per cent. thereafter from the completion of the first 30 miles of the road. *Held* that, for the purpose of ascertaining what amount was due the state on account of the earnings of any one year, the first 30-mile section of completed road must be deemed to have been completed as of the date of the passage

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of the act.—Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217.

106. Sp. Laws Minn. 1865, c. 6, entitled "An act to aid and facilitate the completion of the St. Paul & Pacific Railroad and branches," is applicable to all lines of railroad authorized to be built under the original charter of the Minnesota & Pacific Railroad Company, granted May 22, 1857, (Ex. Sess. Laws 1857, c. 1;) and the St. Paul & Pacific Railroad Company having accepted the provisions and benefits of the act, such company, or other company claiming under it, is estopped to deny the existence of facts which the act assumes as to the ownership and control by that company of such lines of railroad and the franchises pertaining thereto.—Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217.

107. Under the provision in the charter of the former Minnesota & Pacific Railroad Company (Laws Minn. 1857, Extra Sess. c. 1, subc. 1, § 18) requiring payment by it to the state of 3 per cent. of the "gross earnings" of the railroad, in consideration whereof it is exempted from taxation, the term "gross earnings" does not include compensation paid to a company which subsequently acquired the road, by another company, for the right to run trains over a portion of the line.—State v. St. Paul, M. & M. Ry. Co., 15 N. W. 307, 30 Minn. 311.

108. The rights of the state under that provision cannot be affected by a lease or sale of the railroad.—State v. St. Paul, M. & M. Ry. Co., 15 N. W. 307, 30 Minn. 311.

109. The exemption from ordinary taxation, originally created in favor of the Minnesota & Pacific Railroad Company, is a franchise, and it passed, with the lands to which it was appendant, to its successors, the St. Paul & Pacific Railroad Company and the First Division of the St. Paul & Pacific Railroad Company. The modification of that, exemption, by act of March 2, 1865, being ineffectual because not accepted by the corporation before the act of March 4, 1865, which protected from tax proceedings the title remaining in the corporation after contracting to sell such lands, the latter act is to be deemed a tender by the state of a new contract, which upon acceptance became effectual.—In re County of Stevens, 31 N. W. 942, 36 Minn. 467.

110. Sp. Laws Minn. 1870, c. 65, § 1, provides that the lands, franchises, etc., of the Northern Pacific Railroad Company shall be liable to taxation at the same rate and in the same manner, and shall be exempt from taxation to the same extent and on the same terms, as was provided in regard to the Lake Superior & Mississippi Railroad Company by act of March 3, 1865, (which provided for a payment to the state of a percentage on the gross earnings of that railroad, in full of all taxation,) with a proviso, "that the gross earnings of the said railroad company, on which a percentage is to be paid to the state, shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this state." *Held*, that this did not exempt an interest in another railroad, not then in contemplation, but afterwards acquired and operated by the Northern Pacific Company, from liability to pay a percentage of its gross receipts.—State v. Northern Pacific R. Co., 20 N. W. 234, 32 Minn. 294.

111. A contract between the St. Paul, Minneapolis & Manitoba Railway Company and the Northern Pacific Railroad Company, giving the latter the right to the use, in common with the former, for the running of its trains, of the former's line of railroad from St. Paul to St Cloud, contained provisions for putting and keeping the line in good condition, regulating the division of its business, and the rates, apportioning the cost of station service, etc., and the supervision and direction of the movement of trains. *Held*, that these provisions did not prevent the contract operating to pass an estate or interest in that part of the railroad, and that the Northern Pacific Railroad Company took such interest subject to the obligation to pay to the state 3 per cent. on the gross earnings, imposed, in consideration of exemption from taxation, by the charter of the former Minnesota & Pacific Railroad Company, (Laws Minn 1857, Extra Sess. c. 1, subc. 1, § 18,) from which the line of railroad passed to the St. Paul, Minneapolis & Manitoba Railroad Company.—State v. Northern Pacific R. Co., 20 N. W. 234, 32 Minn. 294.

112. By chapter 201, Sp. Laws Minn. 1877, the forfeited rights, privileges, and immunities of a railroad company were transferred to another railroad company. Chapter 6, Sp. Laws 1865, amending the original railroad's charter, exempted the road from taxation, on paying 1 per cent. on its gross earnings during three years after completing the first thirty miles of road, 2 per cent. during the next seven years, and 3 per cent. after the next ten years. *Held*, that the railroad company succeeding to the original railroad's privileges succeeded to its duties, and that the percentage to be paid on its gross earnings was to be computed on the basis of the date of the construction of the first thirty miles of road by the original railroad company.—State v. Northern Pac. R. Co., (Minn.) 30 N. W. 663. 36 Minn. 207.

113. By the terms of section 1, c. 111, Sp. Laws Minn. 1873, (Gen. St. Minn. 1878, c. 12, § 128,) the St. Paul, Stillwater & Taylor's Falls Railroad was to pay to the state 1 per cent. of its gross earnings for three years after January 1, 1872, 2 per cent. for the next seven years, and 3 per cent. from and after the end of ten years after January 1, 1872. Section 2 of the same act provided that any railroad accepting the provisions of the act might become subject to its provisions, and pay such percentage in lieu of taxes, to commence from the first day of March after the completion by the road of 30 miles of such line. *Held*, that the effect of the statute, as to railroads accepting its provisions, was to provide a percentage payment on gross earnings, graduated according to lapse of time after completing 30 miles of road, and that the rate of percentage was not to be computed on the lapse of time after the date mentioned in section 1, which was restricted except as to showing the intent of the second section to the St. Paul, Stillwater & Taylor's Falls Railroad.—State v. Northern Pac. R. Co., (Minn.) 30 N. W. 663.

36 Minn. 207.

114. Where a railroad has been regarded by the court as successor to another railroad, and, as such,

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liable to certain special laws of taxation, it cannot be regarded as coming under the provisions of a later law regarding the taxation of railroads.—State v Northern Pac. R. Co., (Minn.) 30 N. W. 663.
36 Minn. 207.

115. Section 1 of article 9 of the Minnesota constitution, providing for equality of taxation, and section 3 of the same article, specifying what property is subject to taxation, have not the effect of preventing the legislature from modifying the terms of a provision for the payment by a railroad company of a percentage of gross earnings in lieu of other taxation, where that method of taxation had been established prior to the adoption of the constitution.—In re County of Stevens, (Minn.) 31 N. W. 942.
36 Minn. 467.

116. The St. Paul Union Depot Company is not liable to pay, as taxes, a percentage on its receipts or gross earnings under Gen. St. Minn. 1878, c. 11, §§ 128, 129. Payment of a percentage on their gross earnings by the railway companies, which own all the stock and use the terminal facilities of the depot company, constitutes payment of taxes on all the property of the latter.—State v. St. Paul Union Depot Co., (Minn.) 43 N. W. 840.
42 Minn. 142.

Payment of percentage on gross earnings — To what property exemption extends.

117. Land conveyed in July, before the taxes for the year are assessed, to a railway company whose property is exempt from taxation under a provision of its charter for payment of a percentage of its earnings in lieu of taxes, is not taxable for that year, notwithstanding the provision of Gen. St. Minn. 1878, c. 11, § 105, that "the taxes assessed upon real property shall be a lien thereon from and including the 1st day of May in the year in which they are levied."—State v. St. Paul, M. & M. R. Co., (Hennepin County v. St. Paul, M. & M. R. Co.,) 24 N. W. 196, 33 Minn. 534.

Distinguished in County of Murray v. Minnesota Land & Investment Co., 41 N. W. 943, 40 Minn. 140.

118. The provisions of Gen. St. Minn. 1878, c. 11, §§ 128, 129, that any railroad company may accept the provisions of the act for payment of a percentage of its gross earnings in lieu of taxes, and that in consideration of such payment "the railroad, its appurtenances and appendages, and all other property, estate, and effects of said corporation, held or used for, in, or about the construction, equipment, renewal, repair, maintaining, or operating its railroad," etc., shall be exempt from taxation, were enacted, not as a plan for exempting property from taxation, but as a substituted method of taxation; and the exemption declared extends, as respects lands, only to such lands as are held and used for the proper purposes of the corporation, or to such as, although not in actual present use, are being prepared and appropriated to the purposes of the corporation without unnecessary delay. Lands never used for railroad purposes are taxable, although held for such use, for which it is probable they will be needed, at some future time; and lands which have ceased to be so used, although acquired for such purposes, and still held for such use in the future, are taxable, whether leased by the company to individuals for their private use or wholly unoccupied.—Ramsey County v. Chicago, M. & St. P. Ry. Co., 24 N. W. 313, 33 Minn. 537.

119. The charter of a railroad provided for the payment to the state of a stated percentage of its gross earnings, in lieu of all taxes and assessments, and that, in consideration of such payment, the company should be forever exempt from all assessments and taxes on its stock, franchises, or estate, real, personal, or mixed. *Held*, not applicable to large tracts of timber land purchased by the corporation, from which to take timber to be converted into ties and lumber for its use.—Todd County v. St. Paul, M. & M. Ry. Co., 36 N. W. 109, 38 Minn. 163. Writ of error dismissed in United States supreme court, 12 S. Ct. 281, 142 U. S. 282.

120. Logs cut for sale by the Northern Pacific Railroad Company upon its lands, exempt from taxation, under Sp. Laws Minn. 1865, and Sp. Laws 1870, c. 45, § 1, are subject to taxation. DICKINSON, J., dissenting.—State v. Northern Pac. R. Co., (Minn.) 38 N. W. 635.
39 Minn. 25.

121. A grain elevator standing on the lands of a railroad company, owned by it, and constituting a part of its real estate, is not taxable as personal property of the corporation.—Chicago, M. & St. P. Ry. Co. v. Houston County, (Minn.) 38 N. W. 619.
38 Minn. 531.

122. Where the company's charter provides for payment to the state of a certain per cent. of its gross earnings in lieu of taxes and assessments, and that in consideration thereof all stock and estate, real and personal, shall be exempt from taxes, property bought and held in view of its probable use by the road is not exempt.—St. Paul, M. & M. Ry. Co. v. City of St. Paul (Minn.) 38 N. W. 925.
39 Minn. 112.

123. An hotel owned by a railroad corporation, and kept by its lessee as an hotel and place of summer resort, is not included within the exemption from ordinary taxation enjoyed by the corporation in respect to such of its property as is held and used for railroad purposes.—State v. St. Paul, M. & M. Ry. Co., (County of Hennepin v. St. Paul, M. & M. Ry. Co.,) 44 N. W. 63, 42 Minn. 238.

124. A wharf owned by a railroad company and leased by it, to be used in selling and shipping coal, is not exempt from ordinary taxation as property held and used for railway purposes, though the lease binds the tenant to ship annually a certain quantity of coal over the lines of the company, and to unload from vessels, and load on the cars of the company, for a stated compensation, all coal offered for shipment over the lines of the company.—In re Proceedings to Enforce Payment of Delinquent Taxes on Real Estate for St. Louis County, (Minn.) 48 N. W. 334.
45 Minn. 510.

Exemption of lands granted to aid construction.

125. By a judgment of the Minnesota supreme court in State v. Railway Co., 30 N. W. Rep. 816,

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entered March 23, 1887, the charter of plaintiff company was declared forfeited and annulled. Section 416, c. 34, Gen. St. Minn. 1878, continued such corporations for three years for certain purposes, such as disposing of their property, etc. *Held*, that lands acquired by plaintiff under the land-grant act of 1857, and subsequent acts, were exempt from taxation for three years, unless previously leased, sold, or contracted to be sold.—Minnesota Cent. R. Co. v. Donaldson, (Minn.) 35 N. W. 725.

38 Minn. 115.

—— Sale, conveyance, or mortgage of lands.

126. Upon the conveyance, by a railroad company, of the equitable title of lands exempt from taxation, while owned by such company, such right of exemption is destroyed.—State v. Winona & St. P. R. Co., 21 Minn. 472.

127. The Winona & St. Peter Railroad Company became entitled to receive certain lands under the act of May 22, 1857, to aid in the construction of their road, which were to be exempt from taxation while the property of the company. Before receiving title from the state, being indebted to B. and associates, they contracted in writing to sell, and on receiving such title to convey, a portion of such lands in part payment of such indebtedness to B. and associates, they having the option to leave the lands in the name of the railroad company, to be by it sold for their benefit. *Held*, that the entire equitable interest being in B. and associates, the lands were not exempt from taxation, after conveyance by the state to the company, under Act May 22, 1857, c. 2, § 4, exempting such lands from taxation "until the same shall have been sold and conveyed by said company."—State v. Winona & St. P. R. Co., 21 Minn. 472.

128. Lands granted to a railway company to aid in the construction of its road were, by Laws Minn. 1865, c. 15, exempted from taxation until they should be "contracted to be sold, conveyed, or leased" by the company. Subsequently an agreement was made between the company and its stockholders for the declared purpose of providing means for payment of the debts of the company by the issue to the stockholders of "special stock," and the setting apart of a portion of such lands for the payment of dividends thereon, and the final payment and extinction of the stock itself, by means of a sale of the lands through a trustee, appointed by the stockholders, who were to have control of the management of the lands as well as the sale thereof. Such "special stock" was not to entitle the holder of it to vote, or in any manner participate in the business, property, or management of the corporation, or to receive any benefit or dividend from any of its property, except from such lands. A right of redemption, by payment of any part or all of the stock, was also reserved to the company; but the holders of the special stock were empowered, while the land remained unredeemed, to take land in payment of their stock, at the value appraised by the trustee. *Held*, that the instrument did not, on its face, confer on the stockholders the legal or equitable title to the land, but that its terms gave it the character of a mortgage, or an appropriation of the land as a security, rather than of an absolute alienation; and that, if the real purpose of the parties was not in accordance with the legal import of the agreement, the transaction did not remove the exemption of the land from taxation.—St. Paul & S. C. Ry. Co. v. McDonald, 25 N. W. 57, 34 Minn. 182.

129. Another railway company, holding lands granted to it exempt from taxation, under a provision of Sp. Laws Minn. 1865, c. 9, limiting such exemption in the same words, entered into a contract with a construction company for the construction and equipment of its road, the effect of which was to transfer to the construction company the absolute and separate ownership of the lands, although the transaction was, in form, a mortgage. *Held*, that this was, in substance, a conveyance of the lands, which made them subject to taxation.—St. Paul & C. Ry. Co. v. McDonald, 25 N. W. 453, 34 Minn. 195.

130. A railroad company set apart to a trustee for the holders of "special land stock," for the payment of dividends thereon, land granted under an act of congress to the road, to aid in its construction. The land, when granted, was exempt from taxation. The company also gave a power of attorney to sell such land for the purpose of paying the dividends. *Held*, that said land had been "contracted to be sold, conveyed, or leased, by said company," and was therefore subject to taxation under Laws Minn. 1865, c. 15, § 5.—St. Paul & S. C. R. Co. v. Robinson, 42 N. W. 79, 40 Minn. 360, Same v. Shanks, 42 N. W. 83, 40 Minn. 369.

Distinguished in Sioux City & St. P. R. Co. v. Robinson, 43 N. W. 327, 41 Minn. 454.

131. Plaintiff issued bonds to the amount of $3,800,000, to secure funds to build its road, and, to secure the bonds, conveyed about 550,000 acres of its land grant to trustees. The trust-deed provided that the holders of two-thirds of the outstanding bonds might at any time assume control of the sale of the lands, but that until such control was assumed, or default was made in the conditions of the deed, plaintiff should retain control. The holders of the bonds were enabled to convert them into lands; but the lands were not to be appraised for such purpose until title thereto was acquired, and the appraisal was to be made by plaintiff, the trustees concurring. The deed further provided that, when sufficient money should have been realized to pay all outstanding bonds, with interest and expenses, it should be void as to all remaining lands. The bonds were intended to be sold, and were actually sold, to persons who had no connection with the railroad company. The bondholders never assumed control of the lands. *Held*, that the trust-deed did not amount to a conveyance of the lands, within the meaning of Gen. Laws Minn. 1865, c. 15, by which lands of a railroad company become taxable after a contract for their conveyance has been made.—Sioux City & St. P. R. Co. v. Robinson, 43 N. W. 326, 41 Minn. 452; Sioux City & St. P. Ry. Co. v. King, 43 N. W. 329, 41 Minn. 461.

Distinguished in Re St. Paul, S. & T. F. R. Co., (County of Chippewa v. St. Paul, S. & T. F. R. Co.,) 44 N. W. 71, 42 Minn. 300.

132. Where a railroad to which lands are granted by the state to aid in the construction of its road, to be exempt from taxation until "sold and conveyed," sells the lands and receives the considera-

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tion, retaining no lien on nor actual interest in them, though it retains the naked legal title only as trustee for the purchaser, it has "sold and conveyed" them within the meaning of the exempting clause, though a question in regard to them has to be settled by the court.—State v. Webber, (County of Brown v. Winona & St. P. Land Co.,) 37 N. W. 949, 38 Minn. 397.

133. The right to hold exempt from taxation lands granted to a railroad corporation in aid of its principal enterprise is a franchise, but ancillary and subordinate; and the right to exercise such franchise, and to continue its corporate existence for such purposes only, cannot lawfully survive after a sale of its railroad, and the abandonment of its principal business as a railroad corporation, unless by the authority of the legislature expressed or clearly implied. The rights of the state are not lost by delay merely, nor can they be waived by its executive officers.—State v. Minnesota Cent. Ry. Co., (Minn.) 30 N. W. 816.

36 Minn. 246.

134. By Gen. St. Minn. 1878, c. 11, §§ 6, 24, 105, May 1st is fixed as the date for determining the taxability of property, and its ownership and value for the purposes of taxation, and the lands of a railway company, which are exempt from taxation until "sold and conveyed," if conveyed before May 1st, are subject to taxation for the current year.—Martin County v. Drake, (Minn.) 41 N. W. 942.

40 Minn. 137.

Distinguishing County of Hennepin v. St. Paul, M. & M. Ry. Co., 24 N. W. 196, 33 Minn. 534.

135. The Southern Minnesota Railroad Company, having executed a mortgage on its subsidy lands to secure certain bonds, afterwards executed an instrument appropriating a part of those lands as a trust for the satisfaction of certificates to be issued in exchange for such of its mortgage bonds as were outstanding; the lands to be sold by the trustees as needed for the purposes of the trust. *Held*, the mortgage remaining unsatisfied, that such special trust could not be construed a sale and conveyance of such subsidy lands, so as to subject the same to taxation.—State v. Trustees Southern Minn. R. Co., 21 Minn. 344.

136. Lands embraced in a railroad land grant, and exempt from ordinary taxation while held by the corporation for whose benefit the grant was made, become subject to taxation, when the entire beneficial interest of the corporation has been conveyed by a trust-deed, to secure a specified charge upon the lands exceeding their value, and the *cestuis que trustent* have been empowered, at their mere election, to take and appropriate the entire property in satisfaction of their claims upon it, so as to leave nothing to revert to the grantor.—In re St. Paul, S. & T. F. R. Co., (County of Chippewa v. St. Paul, S. & T. F. R. Co.,) 44 N. W. 70, 42 Minn. 295; Id. 44 N. W. 72, 42 Minn. 301; In re Minnesota Land & Investment Co., Id.

Distinguishing Sioux City & St. P. R. Co. v. Robinson, 43 N. W. 326, 41 Minn. 452.

Exemption of lands granted to aid construction—Successor companies.

137. Laws 1857, c. 1, § 4, subd. 2, provided that the lands granted by that act to the Transit Railroad Company should be exempt from taxation until sold and conveyed by such company. *Held*, that the Winona & St. Peter Railroad Company, having succeeded to the rights, benefits, privileges, property, franchises, and interest of the Transit Railroad Company, through the state foreclosure, was entitled to hold such lands exempt from taxation, and their attempted taxation was illegal. First Div. St. Paul & P. R Co. v. Parcher, 14 Minn. 297, (Gil. 224,) followed. —State v. Winona & St. P. R. Co., 21 Minn. 315.

138. The conveyance by the Minnesota Central Railway Company to the McGregor Western Railway Company of its road-way, tracks, equipments, rolling stock, etc., and the conveyance by the McGregor Western Railway to the Milwaukee & St. Paul Railway Company, did not pass the title to the lands acquired by the Minnesota Central Railway Company to aid in its construction, or subject such lands to taxation. —Minnesota C. Ry. Co. v. Melvin, 21 Minn. 339.

139. Act Cong. March 3, 1857, granted to the territory of Minnesota certain public lands to aid in the construction of railroads between certain points. Laws Minn. T. 1857, (Ex. Sess.,) c. 7, granted the lands in question to the St. Paul & S. C. Railroad Company, and declared the lands "exempt from all taxation until the same shall have been sold and conveyed" by said company. Under authority of Sp. Laws Minn. 1869, c. 50, the St. Paul & S. C. Company transferred to defendant railroad company an unconstructed portion of its line with the land grant pertaining to such portion, defendant agreeing to construct and equip such portion of the line. *Held*, that the transfer to defendant was not a sale and conveyance, within Laws Minn. T. 1857, (Ex. Sess.,) c. 1, exempting the lands from taxation.—County of Nobles v. Certain Pieces of Land, 3 N. W. 701, 26 Minn. 294.

140. It being established by the admission of the parties that the respondent succeeded to the ownership of certain lands formerly granted to and held by the Minnesota & Pacific Railroad Company and its successors, and to the exemption from ordinary taxation formerly enjoyed by those corporations, and pertaining to such lands, *held*, that the title remaining in the respondent after it had contracted to sell such lands (the purchase price being still unpaid, and the conditions of the purchase being still unperformed) is protected in accordance with the terms of the act of March 4, 1865, from sale for taxes.—In re County of Stevens, 31 N. W. 942, 36 Minn. 467.

VII. Bonds and Mortgages.

Action on coupons.

141. In an action on overdue interest coupons of a railroad company it is not necessary to introduce at the trial the bonds from which the coupons were detached where they are sufficiently identified by other evidence.—Welsh v. First Division St. P. & P. R. Co., 25 Minn. 314.

142. A railroad company issued its bonds payable to bearer, with interest; interest coupons, in the usual form, being attached. The bonds, under a provision contained in the mortgage securing them, were, before maturity, declared due. Action was brought upon the interest coupons

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for a time subsequent to this, the bonds remaining unextinguished. *Held* that, as the damages allowed by law for default in payment of the principal are at the same rate as the stipulated interest, the holders of the coupons are entitled to recover.—Welsh v. First Division St. P. & P. R. Co., 25 Minn. 314.

143. Where, by the terms of a trust-deed executed by a railroad company, it is expressly agreed that all bonds secured thereby shall be taken and held by the purchasers, subject to the condition that no proceedings, at law or in equity, shall be had to enforce the collection thereof, except after a requisition shall have been made to the trustee in manner and form as provided in such trust-deed, and until after his refusal or unreasonable neglect to proceed as thereby required, the provision is binding upon all the bondholders with notice thereof, and a compliance therewith a condition precedent to an action at law by a bondholder to recover upon a coupon attached to one of the bonds.—Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co., (Minn.) 51 N. W. 658.

Rights of mortgagees or bondholders.

144. Const. Minn. art. 9, § 10, as amended April 15, 1858, which provides that where state aid is given to railway companies, first mortgage bonds of the companies, corresponding to the state bonds issued, shall be transferred to the state treasurer, as further security, etc., does not give the state any priority of lien as to such bonds over other bonds of the same issue held by individuals. FLANDRAU, J., dissenting.—Minnesota & P. R. Co. v. Sibley, 2 Minn. 13, (Gil. 1.)

145. A mortgage of the property of a railroad company, including the tolls, incomes, rents, issues, and profits of such company, does not give the mortgagee a right to the income of the road earned while the mortgagor is in the possession and control thereof.—De Graff v. Thompson, 24 Minn. 452.

Foreclosure—Appointment of receiver.

146. An article of a railway mortgage authorized the trustees, on default, to take possession, hold, and use the road, "operating the same by their superintendents, managers, receivers, or servants, or other attorney or agents." *Held*, that the receiver meant was one of the trustees, and not a technical receiver, to be appointed by the court.—Rice v. St. Paul & P. R. Co., 24 Minn. 464.

147. Where a railroad mortgage provides that in default of payment of interest the trustees may take possession of the property, and collect and receive its incomes and profits, the trustees, upon such default, have an adequate and complete remedy under the mortgage, by taking possession of the property, and cannot ask to have the same placed in the hands of a receiver.—Rice v. St. Paul & P. R. Co., 24 Minn. 464.

148. Trustees in a railroad mortgage were, by virtue of charter provisions and stipulations in the mortgage entitled on default to assume and take possession of the mortgaged property. *Held* that, as the trustees could on default enforce their right to possession by ejectment, a receiver of such property, pending foreclosure, would not be appointed.—Rice v. St. Paul & P. R. Co., 24 Minn. 464.

—— Power of receiver.

149. In a foreclosure proceeding against a railroad company a receiver was appointed, with power to take possession of its railroad, etc., including all goods and chattels owned by it, and to bring suit to protect or collect the same. *Held*, that the receiver had no power to take possession of lumber and wood sold on execution against the company before his appointment.—McIlrath v. Snure, 22 Minn. 391.

—— Rights of creditors to earnings of receivership.

150. One who sold a locomotive to a railroad company six months before the appointment of a receiver, was not entitled to a lien upon the earnings of the receivership, prior to that of the mortgage bondholders.—Manchester Locomotive Works v. Truesdale, (Minn.) 46 N. W. 301.

44 Minn. 115.

—— Deficiency.

151. An action to foreclose a railroad mortgage, given to trustees to secure the payment of negotiable bonds, is a proceeding *in rem*, and no personal judgment for deficiency therein can be entered.—Welsh v. First Division St. P. & P. R. Co., 25 Minn. 314.

152. The effect of a judgment, in a proceeding to foreclose a mortgage given by a railroad company to trustees to secure an issue of negotiable bonds, is to determine the amount of the mortgage debt, so as to know how much of the security will be required to satisfy the same.—Welsh v. First Division St. P. & P. R. Co., 25 Minn. 314.

—— Rights of purchaser.

153. The power to mortgage its corporate franchises, as granted to the Minnesota & Pacific Railroad Company by section 21 of its charter, (Laws Ex. Sess. 1857, c. 1,) as well as by the amendment to Const. Minn. art. 9, § 10, adopted April 15, 1858, and its mortgage to the state made in pursuance of the requirements of said amendment, covered all its road, all its lands, and all its franchises, including that of a right to be a corporation; and, upon foreclosure of such mortgage, all such rights, franchises, and property passed to and were held by the state as an individual, distinct from its sovereign capacity, and without any merger.—First Div. St. P. & P. R. Co. v. Parcher, 14 Minn. 297, (Gil. 224.)

VIII. LIABILITY FOR NEGLIGENCE.

a. *In General.*

Condition of track—Defective crossing.

154. Where a road is openly and notoriously used by the public as a highway, and a railroad company, over whose track such road crosses, recognizes it as a highway by assuming to maintain a public crossing at that point, the railroad company is obliged to keep such crossing in safe repair, whether the road is a legal highway or not.—Kelly v. Southern Minn. R. Co., 9 N. W. 588, 28 Minn. 98.

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Condition of track—Contributory negligence.

155. It is not negligence *per se* for a person to attempt to pass over a railroad crossing on a highway after he has had notice that the crossing is unsafe by reason of being out of repair.—Kelly v. Southern Minn. R. Co., 9 N. W. 588, 28 Minn. 98.

156. A public highway in a village was crossed by the main track and a side track of defendant's railway, about 30 feet apart. Along-side the highway between the two tracks was a ditch about 4 feet deep. Plaintiff's driver, in a sleigh drawn by two horses, driving along the highway about 6 o'clock in a morning in December, crossed the main track just before a train upon it reached the highway, which he had not seen, his view being somewhat obstructed, although it was possible to have seen the train had he looked. Thinking it not safe for the team to stand between the passing train and a box-car on the side track, which obstructed the highway except for a space of about four feet between the car and the ditch, which car he had not seen until he was on the main track, he attempted to drive around the end of the car, not knowing, or not recollecting, the existence of the ditch; and, the ditch being filled with snow, in the darkness he did not see it, and one of the horses fell into the ditch and was injured. *Held*, that it was for the jury to say whether there was negligence on the part of the driver contributing to the injury. —Corey v. Northern Pac. R. Co., 21 N. W. 479, 32 Minn. 457.

Fencing track—Injury to child.

157. The requirements of Laws Minn. 1876, c. 24, and of Laws 1877, c. 73, appearing, from their terms and from the character of the fence described therein, to have been intended to prevent domestic animals coming upon railway tracks, are not applicable to cases of children straying on an unfenced railroad track; and a breach by a railroad company of its statutory duty to fence the line of its road, although it contributes to an injury to a child straying on the unfenced track, is not such negligence as to give a right of recovery.—Fitzgerald v. St. Paul, M. & M. Ry. Co., 13 N. W. 168, 29 Minn. 336.

b. *Lessor and Lessee.*

Liabilities of lessor—Defective crossing.

158. A railroad company which leases its road to another company, without the consent of the state under whose laws it was created, is liable for injuries caused by a defective crossing over such road, though the lessee company is in possession of the same under the lease.—Freeman v. Minneapolis & St. L. R. Co., 10 N. W. 594, 28 Minn. 443.

Distinguished in Crolley v. Minneapolis & St. L. Ry. Co., 16 N. W. 424, 30 Minn. 544.

Liability of lessee—Fire.

159. The liability of a railroad company for its negligence in setting fire to property by sparks from its locomotives is not affected by the fact that it operates its trains over a road leased from another company. — Cantlon v. Eastern Ry. Co., (Minn.) 48 N. W. 22.

45 Minn. 481.

c. *Accidents to Trains.*

Incompetency of locomotive engineer.

160. In an action against a railway company the alleged liability rested on the grounds that it employed an engineer upon a locomotive who was incompetent by reason of old age, near-sightedness, and want of acquaintance with the road, by reason of which he ran the train at too great a speed, and that one of the brakes on the train was defective. *Held*, that proof that such engineer, after the occurrence of the accident complained of, ran his freight train a distance of several miles without a brakeman, and in returning ran the engine off the track, was not admissible; and that evidence that the road-bed in general was in bad condition was not relevant to the issue.—Ransier v. Minneapolis & St. L. Ry. Co., 14 N. W. 883, 30 Minn. 215.

Speed of train.

161. In an action against a railway company for an injury alleged to have been caused by running a train at too great a speed, one of the brakemen on the train testified that, at the place where the accident occurred, the train was running about as fast as it could go, and that trains generally went slowly there. *Held*, that it was proper to ask him, on cross-examination, if it was not customary on trains on which he was employed to run with considerable speed at that point to overcome the grade.—Ransier v. Minneapolis & St. L. Ry. Co., 14 N. W. 883, 30 Minn. 215.

Injury to building near track.

162. The managing officer of defendant railway company took the place of an engineer upon one of its engines, and ran it backward, pushing a flat-car in advance, through a public street in a city, at a rate of speed much greater than was allowed by an ordinance of the city. The car ran off the track, and into a building on the street about 12 feet from the track, injuring a person therein. There was evidence that, if the speed had been less, or if the steam had been shut off when the car left the track, it would not have run into the building. *Held*, that there was substantial evidence of negligence on the part of defendant, which should have been submitted to the jury.—Mahan v. Union Depot St. Ry. & T. Co., 24 N. W. 293, 34 Minn. 29.

163. A violation of a city ordinance limiting the speed of railway trains passing through the city is evidence of negligence in an action for injuries caused by the derailment of a train and its collision with a building near the track. —Mahan v. Union Depot St. Ry. & T. Co., 24 N. W. 293, 34 Minn. 29.

Collisions between trains — Imputed negligence.

164. Where in a suit for injuries in a collision at the crossing of two railroads it appears that defendant's train was brought to a stop at the proper place, and that the train on the other road was not, and that if defendant's engineer had exercised due care in looking he would have seen the train on the other road, and discovered that it was about to make the crossing without stopping, in time to stop his own train before reaching the crossing,

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providing he kept it under proper control between the stop-board and the crossing, defendant is liable if its engineer did not stop, and the collision followed.—Pratt v. Chicago, M. & St. P. Ry. Co., (Minn.) 38 N. W. 356.

38 Minn. 455.

165. A passenger on a railroad train, who is injured in a collision with another train of a different company, may recover of the latter, if negligent, though the collision was partly caused by those in charge of the train on which plaintiff was a passenger.—Flaherty v. Northern Pac. Ry. Co., (Minn.) 40 N. W. 160.

39 Minn. 328.

Contributory negligence — Failure to jump from train.

166. Where, in a collision between a detached engine and a wild train at a crossing, plaintiff was the only one of the former's crew injured, the question whether his failure to jump was contributory negligence is for the jury.—Hansen v. Minneapolis & St. L. Ry. Co., (Minn.) 34 N. W. 223.

37 Minn. 355.

d. *Accidents at Crossings.*

Negligence in management of train—Rate of speed.

167. Where ordinary care and prudence, in order to prevent injuries to persons crossing a railroad track at street crossings, require trains to be run within the city at a less rate of speed than that limited by a city ordinance, the railroad company is bound to exercise such care and prudence.—Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

168. In an action against a railroad company for negligently causing the death of plaintiff's intestate, it appeared that, when decedent approached defendant's track, a train with a bright head-light was passing, ringing its bell. There was no flagman at the crossing, and the view of the track in the direction from which the engine that struck decedent came was obstructed. This engine had a head-light, but was running backwards, and had no light in the direction in which it was going. It was a cloudy night, with a moon nearly new, low in the west, throwing the shadow of the passing train on the track on which was approaching, at about 15 miles per hour, from the opposite direction, the engine that struck deceased. A great many engines were constantly passing the crossing in question. *Held*, that the evidence was sufficient to sustain a finding that defendant was negligent, and that decedent was free from contributory negligence.—Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

169. In an action for injuries at a street crossing in a city, the evidence showed that the train was going at an unlawful rate of speed; that no signals were given as required by law; that the crossing was unusually dangerous, and no flagman was stationed there; and that a view of the passing train was obstructed from travelers on the street by cars left standing on a side track, extending across the street, with an opening for passengers on the street. *Held* sufficient evidence to show negligence by defendant.—Kelly v. St. Paul. M. & M. Ry. Co., 11 N. W. 67, 29 Minn. 1.

170. A railway company cannot be held liable, as for negligence, for causing the death of a person crossing its track at a highway crossing, upon evidence that the train by which he was struck approached the crossing at the rate of 10 miles an hour, giving the usual signals, there being no other circumstances tending to show negligence.—Harris v. Minneapolis & St. L. Ry. Co., 23 N. W. 850, 33 Minn. 459.

Distinguished in Iltis v. Chicago, M. & St. P. Ry. Co., 41 N. W. 1042, 40 Minn. 277.

171. When the circumstances connected with the accident are shown, including the speed of the train and the manner in which it was operated, it is for the jury to say whether, with regard to the safety of travelers, the rate of speed and the management of the train were reasonably prudent.—Bolinger v. St. Paul & D. R. Co., (Minn.) 31 N. W. 856.*

36 Minn. 418.

172. The rules of a railroad company do not necessarily determine the legal standard of negligence in their employes. The failure to stop an engine at a stop-board is not *per se* negligence, but a circumstance to be weighed by the jury.—Hansen v. Minneapolis & St. L. Ry. Co., (Minn.) 34 N. W. 223. 37 Minn. 355.

—— Signals, watchmen, etc.

173. In the absence of statutory provision, there is no legal obligation on a railroad company to sound a whistle or ring a bell as its train approaches a crossing.—Brown v. Milwaukee & St. P. Ry. Co., 22 Minn. 165.

174. The omission of a railroad company to give the required signals at a crossing is evidence of negligence in favor only of persons or animals lawfully upon its track.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

175. The fact that a railroad company spikes down heavy planks between the rails at a private road crossing is not such a recognition of the public use of the road as will charge it with the duty of making statutory signals when its trains approach such crossing.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

176. The charter of a railroad company required, under a penalty, that trains should ring a bell or sound a whistle 80 rods from and while crossing where any road or street crossed its railroad, and made it liable for damages resulting from neglect. *Held* applicable only to the crossing of a public highway or thoroughfare, and not to a mere private crossing.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

177. Where a city ordinance requires railroad trains to ring a bell at street crossings, and prohibits their running at a greater than a certain speed, their failure to observe such requirements will be an act of negligence, making them liable for damages done at such crossing.—Fritz v. First Div. St. Paul & P. R. Co., 22 Minn. 404.

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178. Although the question whether it is negligent to run a railway train across a highway without previously giving warning of its approach by bell or whistle is ordinarily a question for the jury, the running of a heavy train, which cannot be readily stopped, at a high rate of speed, and without any signal by whistle, bell, or otherwise, across a much-traveled public street in a village, where the crossing is dangerous to travelers on the street by reason of obstructions concealing the approach of trains, is so clearly dangerous, that, no excuse being shown for the omission, the law imputes negligence, even though no statute exists requiring the giving of such signals. —Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651, 31 Minn. 526.

179. In an action against a railway company for injuries to plaintiff while on a public highway crossing its track, the court instructed the jury that, under defendant's charter, it was the duty of the engineer of the locomotive to sound the whistle or ring the bell at least 80 rods before reaching the crossing. *Held* that, even though no such obligation was imposed by the charter, as it was not claimed that any signal was given, and as the circumstances made the omission to give a signal negligence, as matter of law, defendant was not prejudiced by the charge.—Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651, 31 Minn. 526.

180. It is for the jury to determine whether the presence of a watchman at the crossing, or other precautions, were reasonably necessary for the safety of the public.—Bolinger v. St. Paul & D. R. Co., (Minn.) 31 N. W. 856.
36 Minn. 418.

181. There was evidence that the train which injured plaintiff at a railroad crossing on the principal street of a village was going at the rate of 25 or 30 miles an hour. Plaintiff's view of approaching trains was obstructed by a natural rise in the ground, as well as by buildings and box-cars. Witnesses testified that on the occasion in question they heard whistles blown at points three-quarters of a mile and 1,900 feet from the crossing, but that they did not hear any signal at any other time or place, except a whistle blown just as the engine struck plaintiff. *Held*, that it was for the jury to say whether the railroad company was not negligent in the matter of giving signals.—Beanstrom v. Northern Pac. R. Co., (Minn.) 48 N. W. 773.
46 Minn. 193.

Contributory negligence — Knowledge of and reliance upon regulations, custom, etc.

182. A girl of 17, with good faculties, who attempts to cross a railroad at its crossing with a public highway, and is killed by a train, will be held to have been negligent, where the train could have been seen for some distance before it reached the crossing, and where she lived near the crossing, and knew of the passage of trains. —Studley v. St. Paul & D. R. Co., (Minn.) 51 N. W. 115.

183. A traveler has no right to attempt to cross a railway track in front of an approaching train at what is nothing more than a common country crossing, although it is within the limits of a city, or to use a part of the right of way within said limits as a footpath, relying on the belief that the trains will be run not to exceed the speed fixed by city ordinance.—Studley v. St. Paul & D. R. Co., (Minn.) 51 N. W. 115.

—— Looking and listening.

184. A railroad crossing over a highway, on the same grade, is a place of danger, and of itself a warning to one about to go upon it to exercise care and vigilance, to the extent of his opportunity, in using his senses of sight and hearing, to discover an approaching train in time to avoid it.—Brown v. Milwaukee & St. P. Ry. Co., 22 Minn. 165.

185. Where the vision of a traveler crossing a railroad track is so unobstructed along the track that he could easily discover an approaching train, or the circumstances are such that had he listened he would have heard it in time to avoid a collision at the crossing, it will, in ordinary cases of collision, be presumed that he did not look or listen, or heedlessly disregarded the knowledge thus obtained. In either case he would not be entitled to recover for injury sustained.—Brown v. Milwaukee & St. P. Ry. Co., 22 Minn. 165.

Distinguished in Clark v. Chicago, M. & St. P. Ry. Co., 9 N. W. 76, 28 Minn. 73.

186. In an action against a railroad company for injuries received by a person while attempting to cross the track at a street crossing, the court properly refused to charge that it is not necessarily the duty of a traveler to stop and listen before stepping on a railroad track, but that whether it is necessary and proper for him to do so depends on the circumstances of the case.—Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

187. At the crossing of two city streets and a railroad, at a point where the railroad was used for the almost constant passage of cars between two yards of the railroad company, as well as for the passage of regular trains, the railroad consisted of two main tracks and some side tracks coming into them. The driver of a horse and wagon, who was familiar with the tracks and the passage of trains, approached the crossing from the east. A flagman kept by the railroad company at the crossing signaled him that a train was approaching, and then passed over to the west side of the tracks, to signal teams approaching from that side. Almost immediately a train passed on the west main track, consisting of 10 or 11 coaches, which necessarily intercepted from the flagman's view the approach of trains on the east main track. There was nothing, however, to prevent the driver of the wagon from seeing an approaching train on that track before driving upon it, but, as soon as the train on the west track had passed, without waiting for any signal from the flagman, and without looking up the east main track to see whether any train was approaching, he drove upon the track, and the horse and wagon were struck by a train coming on the east track, and injured. *Held*, that his going upon the track under the circumstances was so clearly and palpably an act of negligence that the court was justified in directing a verdict for defendant.—Abbott v. Chicago, M. & St. P. Ry. Co., 16 N. W. 266, 30 Minn. 482.

188. In an action against a railway company for personal injuries received by being run over by

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cars at a street crossing at night, plaintiff and another witness testified that they looked and listened for approaching cars when about 14 feet from the track, and saw and heard nothing. *Held*, that the question whether plaintiff was negligent was properly submitted to the jury.—Howard v. St. Paul, M. & M. Ry. Co., 20 N. W. 93, 32 Minn. 214.

189. In an action against a railway company for personal injuries to plaintiff from the wagon in which she was riding being struck by defendant's locomotive at a highway crossing of the railroad, it appeared that the railroad crossed the highway at a sharp angle; that plaintiff approached the crossing from the west, having the railroad on the left hand, but that the view of it from the highway was partially obscured by a cut which terminated about 200 feet from the crossing. The evidence for plaintiff tended to show that she and the driver were looking and listening for indications of danger as they approached the crossing, having looked several times towards the west up the railroad, the last time when at a point from 50 to 70 feet from the crossing, and that in the interval of about 10 seconds before reaching the crossing they were listening for signals or indications of a coming train, their attention being also attracted to an engine standing below the crossing apparently ready to move; that they heard no signal and had no warning of the approach of an engine from the west, but were unexpectedly overtaken by a switch-engine from that direction, running backwards down grade at a high rate of speed, with steam shut off, and without signals of its approach, which they did not discover until too late to avoid a collision. *Held*, that the question of plaintiff's contributory negligence was for the jury, upon consideration of the circumstances and inferences of facts therefrom.—Hutchinson v. St. Paul, M. & M. Ry. Co., 21 N. W. 212, 32 Minn. 398.

Distinguished in Rheiner v. Chicago, St. P., M. & O. Ry. Co., 30 N. W. 549, 36 Minn. 172.

190. In an action against a railway company for killing horses, it appeared that plaintiff's servant was driving northwards up a street parallel to the railway, and passed an engine going to a turn-table on a switch track about 600 feet south of the crossing where the accident occurred, and that he knew the engine would shortly pass up the track over the crossing. When at a point in the street opposite and about 40 feet distant from the crossing, he turned easterly to drive over it, stopping for "a minute or two" looking for the engine. At that place he could see the track on which the engine must come for 615 feet. Not seeing the engine he started on towards the crossing, driving "kind of slow—slow steps," without again looking southwards until "right on the track" at the crossing, where the horses were struck before he could get them off. The horses were attached to a covered wagon, so that from the seat the driver could not see "on the side" without throwing his head and shoulders forward "a foot or so" to look round the covering. *Held*, that the action was properly dismissed.—Rheiner v. Chicago, St. P., M. & O. Ry. Co., 30 N. W. 548, 36 Minn. 170.

Distinguishing Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651, 31 Minn. 526; Hutchinson v. St. Paul, M. & M. Ry. Co., 21 N. W. 212, 32 Minn. 398.

191. Where deceased drove upon the crossing without being watchful to discover whether a train was approaching, such negligence will defeat a recovery.—Harris v. Minneapolis & St. L. R. Co., (Minn.) 33 N. W. 12.

37 Minn. 47.

192. Plaintiff, injured by defendant's locomotive while attempting to pass over a crossing in a lumber wagon, had driven his team at a walk for at least 50 feet before reaching the crossing. He testified that from a point nearly 600 feet distant from the crossing he continuously looked and listened for approaching trains, and that he did not see nor hear any until he entered upon the track. There were numerous obstructions to the view, though there were a number of spaces between such obstructions through which approaching trains might have been seen from the street. *Held*, that the court could not say as a matter of law that plaintiff should have stopped his team before entering upon the crossing, and that the question of contributory negligence was for the jury.—Beanstrom v. Northern Pac. R. Co., (Minn.) 48 N. W. 778.

46 Minn. 193.

193. In an action to recover for the killing of plaintiff's intestate at a railway street crossing, it appeared that decedent, familiar with the surroundings, approached the track near a station-house, on the end of which a bright light was shining, the night being dark and stormy, and attempted to cross in order to meet an expected train, which was a few minutes late, and in so doing was struck and killed. *Held*, that the evidence showed contributory negligence on the part of decedent, in that he either failed to look or listen for the approaching train, or, if he saw it, needlessly attempted to cross the track ahead of it.—Carney v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 48 N. W. 912.

46 Minn. 220.

194. Though the view of a person approaching a railroad crossing on a public road is obstructed until he is within six feet of the track, he should stop then and look for approaching trains, or he will be held guilty of contributory negligence that will preclude his recovery for injuries sustained on being struck by a train.—Clark v. Northern Pac. R. Co., (Minn.) 50 N. W. 365.

47 Minn. 380.

195. Plaintiff's intestate approached a railroad grade crossing at night, in a wagon, knowing that defendant's freight train was due. The train approached the crossing at the rate of about 20 miles an hour, and there was nothing to obstruct the view of the engine head-light, which was thrown 40 rods in front of the engine and 10 rods or more on either side of the track, from the highway along which intestate was traveling. Deceased drove over a space of 60 feet covered by the head-light of the engine, and was struck by the engine and killed; his horses being neither frightened nor unmanageable, and there was nothing to show that he could not have stopped his team within the 60 feet. *Held*, that the court properly instructed the jury that decedent was guilty of contributory negligence, and that plaintiff could not recover.—Brown v. Milwaukee & St. P. Ry. Co., 22 Minn. 165.

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Contributory negligence—Plaintiff's view obstructed.

196. In an action for injuries at a street crossing in a city, the evidence showed that plaintiff's view of the train was obstructed by cars left standing on a side track extending across the street, with an opening for passage on the street. Plaintiff, who was driving a span of horses with a wagon, before going through the opening, brought his horses to a walk, but did not stop them, nor leave his wagon and go forward where he could see an approaching train. He looked and listened for a train, but could not see or hear any signal of its approach. *Held*, that the evidence did not show contributory negligence.—Kelly v. St. Paul, M. & M. Ry. Co., 11 N. W. 67, 29 Minn. 1.

197. Plaintiff, driving upon a public street of a village across a railway track, was struck by a train of cars, the approach of which he did not discover until immediately before driving his horses across the track. The view of the track from the street before reaching the crossing was partially obstructed in both directions. There was evidence tending to show that plaintiff was mindful of the danger and watchful to avoid it, according to his reasonable judgment; that at the time when he might first have seen or heard the train he had reason, from having looked in that direction, to suppose that no train was coming from that direction, while his attention to the track in the opposite direction was apparently more necessary; but that the train was then close at hand, running at a high rate of speed, and he was in a place where he could not safely turn his horses, nor hold them before the passing train. *Held*, that negligence could not be conclusively imputed to him as matter of law, but that it was a question for the jury whether he was negligent.—Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651, 31 Minn. 526.

Distinguished in Rheiner v. Chicago, St. P., M. & O. Ry. Co., 30 N. W. 549. 36 Minn. 172.

198. An engine backing on a down-grade, across the track of another company, was run into by a wild train, and plaintiff, a brakeman on the backing engine, was injured. It appeared that the engine was stopped above the stop-board, and, when passing such board, was going at a very slow rate of speed, and was handled very carefully; that plaintiff was informed that the regular train on the other road had passed; that before reaching the crossing plaintiff looked and listened, but the view of track was obstructed. *Held*, that the question of contributory negligence was for the jury.—Hansen v. Minneapolis & St. L. Ry. Co., (Minn.) 34 N. W. 223.

37 Minn. 355.

199. Where a highway crosses a double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track.—Marty v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 35 N. W. 670.

38 Minn. 108.

200. Plaintiff approached a railroad crossing having a clear view of the track for a mile, except for a coal shed and some box-cars. The mules he was driving were quiet and not afraid of the cars. Plaintiff looked, but did not see an approaching train, nor hear the whistle which was blown. At the place where he testified he looked for the train there was no obstacle. After he passed the coal shed and box-cars he was within 22 feet of the track, but did not see the train, and was run over. *Held*, that he was guilty of contributory negligence.—Weyl v. Chicago, M. & St. P. Ry. Co., (Minn.) 42 N. W. 24.

40 Minn. 350.

—— Plaintiff's control of his vehicle.

201. Plaintiff, traveling with horses and a sleigh on a street in a city which intersected, nearly at right angles, another street on which defendant's railroad was laid, approached the railroad crossing, driving his horses at a slow trot. His view in the direction of an approaching train was obstructed by buildings, so that he could not see the train until he passed a building at the corner of the streets, which stood 53 feet from the center of the railroad track. After passing the building, he saw the train, but, although his horses were ordinarily easily managed, and had never been afraid of railroad cars, they became frightened, so that he could not control them, and ran across the track ahead of the locomotive, which struck the sleigh. In an action for the injuries received thereby, the evidence of plaintiff as to whether he looked along the track as soon as he came where he could do so was confused, and not in all respects consistent, but the inference might fairly be drawn that he did look when at the corner mentioned, and that the train was then very near the crossing. *Held*, that this was sufficient to be submitted to the jury on the issue of plaintiff's negligence, and to sustain a verdict in his favor.—Faber v. St. Paul, M. & M. Ry. Co., 13 N. W. 902, 29 Minn. 465.

202. Negligence on the part of plaintiff could not be conclusively presumed, as matter of law, from his inability, under the circumstances, to control his horses, or to prevent their running away, when they became frightened by the train. —Faber v. St. Paul, M. & M. Ry. Co., 13 N. W. 902, 29 Minn. 465.

203. In an action against a railway company by the driver of a street-car injured by a collision between one of defendant's trains and the street-car at a crossing, it appeared that plaintiff, while driving towards the crossing from a point 265 feet to a point 40 feet distant therefrom, by reason of obstructions to his view, and of some part of his attention being required in the opposite direction and in the care of his horse and car, could not be sure that he would see a train approaching within such a distance as would make it necessary for him to stop his car before reaching the crossing, and also that he might be prevented from hearing such train by the direction of the wind and the noise made by his horse and car, but that at 40 feet distance he could, by looking, make entirely sure whether there was or was not a train coming dangerously near the crossing. *Held*, that it was contributory negligence on his part to allow his car to acquire such a momentum that he could not stop

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it in time to prevent a collision, when, on looking, although 25 or 30 feet from the crossing, he saw the train approaching.—Mantel v. Chicago, M. & St. P. Ry. Co., 21 N. W. 853, 33 Minn 62; Minneapolis St. Ry. Co. v. Same, Id.

Actions—Evidence.

204. Where the rate of speed at which the engine causing the injuries sued for was running is in controversy, plaintiff may show the rate of speed at which defendant railroad company habitually runs its engines under like circumstances with the one in question.—Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

205. In an action against a railroad company for negligently causing the death of plaintiff's intestate by running an engine over him at a public crossing in the night, it appeared that the engine in question carried no head-light, and that a train with a bright head-light had just passed in the opposite direction. *Held*, that it was competent to show how long the eye requires after looking at a brilliant light to recover its natural power of sight. —Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

206. In an action for negligently running a locomotive over plaintiff's intestate at a street crossing, evidence that defendant had no sign over the crossing to warn persons of its presence is proper, though there is no statute or ordinance requiring such sign.—Shaber v. St. Paul, M. & M. Ry. Co., 9 N. W. 575, 28 Minn. 103.

207. In an action against a railway company for injuries from a collision with a train of defendant at the crossing of a street in a city, alleged to have been caused by negligence in running the train, the fact that the train was run at a speed prohibited by an ordinance of the city is competent evidence of negligence, and may be proved, although the existence of the ordinance is not alleged in the complaint.—Faber v. St. Paul, M. & M. Ry. Co., 13 N. W. 902, 29 Minn. 465.

208. In an action against a railroad company for negligence in blowing the whistle of a locomotive and frightening a team, which ran away and injured plaintiff, the complaint being framed to show a cause of action for the violation of a city ordinance, and also one independent of the ordinance for negligence, the admission of the ordinance in evidence, it being void, is harmless error, where the court afterwards charges the jury that it is void, and that they should treat the case as if it had never been passed.—Dugan v. St. Paul & D. R. Co., (Minn.) 45 N. W. 851.

43 Minn. 414.

209. The testimony of a fireman on a locomotive engine, whose duty it is to ring the bell when the engine is in motion, "that, although he had no independent recollection of ringing it on a certain occasion, yet it was his uniform and invariable habit to ring it, so that it had become second nature with him to do so, and that from these facts he was able to state positively that he did ring it on the occasion referred to," is competent and sufficient evidence to justify the jury in finding that the bell was rung, notwithstanding the testimony of other witnesses that they were in position to have heard it if it had been rung, and that it was not rung.—Evison v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 48 N. W. 6.

45 Minn. 370.

—— Questions for jury.

210. Where the mode of running cars by "kicking" is explained to a jury, with the situation of the tracks where cars were so run across the street at night, and the character of the night as to darkness, and of the street as to the extent to which it was traveled, the questions whether the rate of speed at which the cars were run was reasonable, and whether that mode of running the cars was more dangerous or any more convenient than running them with the engine, are proper questions to be submitted to the jury.—Howard v. St. Paul, M. & M. Ry. Co., 20 N. W. 93, 32 Minn. 214.

e. *Injuries to Persons on Track.*

Duty to persons lawfully on or near track.

211. Plaintiff and others were lawfully, and with defendant's knowledge, engaged in grading for a new railway track alongside of and parallel to defendant's original or main track. The ordinary duties of the work frequently required them to be in such close proximity to defendant's original track as to be liable to be struck by passing trains. It had been the uniform practice of those operating trains on the railroad to give these workmen warning of their approach by signals. *Held*, that defendant owed the workmen the duty of active vigilance in giving them proper signals of the approach of trains, and that they had the right to rely on the continued performance of this duty.—Erickson v. St. Paul & D. R. Co., (Minn.) 43 N. W. 332.

41 Minn. 500.

212. While it would not ordinarily be the duty of those operating a train to stop it or slack its speed, provided they gave the proper signals, yet, if the trainmen saw that the workmen did not hear the signals, and were making no effort to escape, it would then be their duty to stop the train, if there was still time to do so.—Erickson v. St. Paul & D. R. Co., (Minn.) 43 N. W. 332.

41 Minn. 500.

213. In an action against a railroad company for negligently killing plaintiff's intestate it appeared that the intestate was employed in a lumber-yard, and was loading one of defendant's cars with lumber. He was standing on a plank, one end of which was resting on the car, and the other on a saw-horse standing between the rails of the track. A loaded car was standing a few feet in front of the car which intestate was loading, and one of defendant's employés attempted to couple the loaded car onto a train to remove it, but missed the coupling and the car was driven against the car which intestate was loading, throwing him upon the rail, inflicting injuries from which he died. *Held*, that a verdict for plaintiff was sustained by the evidence.—Jacobson v. St. Paul & D. R. Co., (Minn.) 42 N. W. 932.

41 Minn. 206.

Duty to trespassers.

214. A railroad company is not liable in damages for injuries caused by its train striking a

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trespasser upon its track, although the engineer of the train could have seen him if he had looked; as it does not owe to a trespasser the duty of having its engineer look to see if he is upon the track, but only to exercise proper care to avoid striking him after having seen him.—Scheffler v. Minneapolis & St. L. Ry. Co., 21 N. W. 711, 32 Minn. 518.

215. Plaintiff, while walking on defendant's track, was struck by a train going in the same direction, and running at the rate of seven miles an hour. At the distance of 150 feet from plaintiff, signals were sounded, and, when it became apparent that plaintiff was not going to leave the track, the engineer did what he could to stop the train. *Held*, that defendant was not wantonly or willfully negligent.—Johnson v. Truesdale, (Minn.) 48 N. W. 1136.

46 Minn. 345.

216. In an action against a railroad company for the killing of a person on its track, an instruction that, if the jury should find that deceased was a trespasser, a recovery cannot be had by plaintiff unless it is also found that the engineer in charge saw her in time to have avoided the accident, and was then guilty of gross negligence in not attempting to avoid a collision, such as would evince a reckless disregard of human life, is correct.—Studley v. St. Paul & D. R. Co., (Minn.) 51 N. W. 115.

217. Plaintiff's intestate, a child about 10 years old, was caught between cars in defendant's "gravity" yard, one of which he and his companions had set in motion by releasing a securely fastened brake, and killed. *Held* that, though such cars might be attractive to boys as a means of amusement, defendant owed no other duty to plaintiff's intestate than to securely fasten the car by means of the brake, and could not be required to set a watch over the cars so fastened, or provide other means than the brake to prevent the cars from being set in motion, and, having discharged its duty in the premises, was not liable for intestate's injury.—Haesley v. Winona & St. P. R. Co., (Minn.) 48 N. W. 1023.

46 Minn. 233.

Contributory negligence.

218. A person who goes on a railroad track, where cars are being shifted, for the purpose of removing an obstruction, and stands with his back to an engine, knowing that it is approaching, and that the engineer cannot see him by reason of an intervening car, must, in the absence of explanation, be held guilty of contributory negligence if injured by the engine.—Carroll v. Minnesota Val. R. Co., 13 Minn. 30, (Gil. 18.)

219. Plaintiff resided and did business near a railroad track, and was familiar with it. While walking down the track, a freight train came along, at 12 to 15 miles an hour. He stepped aside to let it pass, and his attention being attracted to some object on one of the cars, and supposing the entire train had passed, without looking back, stepped on the track again. A portion of the train, that had become detached, and was following down the grade some distance behind the portion of the train that had passed, struck plaintiff, inflicting the injuries complained of. *Held*, that he was guilty of contributory negligence, and could not recover.—Donaldson v. Milwaukee & St. P. Ry. Co., 21 Minn. 293.

Distinguished in Witherell v. Milwaukee & St. P. Ry. Co., 24 Minn. 415.

220. In an action against a railroad company for running a locomotive over plaintiff, it appeared that when plaintiff, who was walking along a country road carrying a bag, reached defendant's track he placed his bag on one of the rails, sat on the edge of the track about 8 inches from the rail, placed his elbow on the bag, his head on his hand, and fell asleep. The locomotive struck him while in this condition. Plaintiff testified that he had been drinking, and that he felt the influence of the liquor. The railroad track was level and straight for a long distance at the place of the accident. *Held*, that plaintiff was guilty of contributory negligence.—Denman v. St. Paul & D. R. Co., 4 N. W. 605, 26 Minn. 357.

221. In an action against a railroad company for causing the death of plaintiff's intestate, it appeared that decedent had worked in a shop a few feet from the track along which trains were running every few minutes during the day for about eight months; that at the time of the accident he went upon the track in the day-time for purposes of his own, and without looking for approaching locomotives. The view of the track was unobstructed, and decedent could have seen the train by which he was struck in time to avoid it, if he had looked. *Held*, that decedent was guilty of contributory negligence.—Smith v. Minneapolis & St. L. Ry. Co. 4 N. W. 782, 26 Minn. 419.

222. In an action for personal injuries to plaintiff from being struck by an engine on defendant's railroad while he was crossing the railroad track at a point in defendant's yard not a street crossing, and from which an approaching engine could have been seen several hundred feet, it was apparent that either he was crossing the track heedlessly, without using his senses to see whether he could do so safely, or, if he did look before starting to cross the track, he must have stopped, and continued to stand upon it, without further observation, for some considerable space of time, while looking back at men who called out to him in attempting to warn him of his danger from the approaching engine. *Held*, that it was conclusively shown that he was guilty of contributory negligence as a matter of law, and that the action was properly dismissed.—Rogstad v. St. Paul, M. & M. Ry. Co., 17 N. W. 287, 31 Minn. 208.

Distinguishing Mark v. St. Paul, M. & M. Ry. Co., 16 N. W. 367, 30 Minn. 493.

223. In an action against a railroad company for personal injuries, plaintiff's evidence showed that he was walking on a dirt-pile along-side defendant's track, and too near it for safety; that the track was straight and unobstructed, and plaintiff knew that trains passed frequently, but he suffered his attention to be attracted by something on the opposite side of the dirt-pile, and was struck by a train; that he might well have walked on the sidewalk on the opposite side of the track. *Held*, that plaintiff was guilty of contributory negligence, and a nonsuit was properly granted.—Hef-

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finger v. Minneapolis, L. & M. Ry. Co., (Minn.) 45 N. W. 1131.

43 Minn. 503.

224. Plaintiff, while walking south along defendant's track in a city, was struck by a train going in the same direction. At the point where plaintiff got on the track he could only see to the north about 300 feet, but, although the distance from that point to the place of the accident was about a block and a half, plaintiff did not look back. Signals sounded at a distance of 150 feet from him, and nearer, were not heard by him, and he admitted that, in looking at an engine on another track, he forgot about other engines. *Held*, that plaintiff was guilty of contributory negligence.—Johnson v. Truesdale, (Minn.) 48 N. W. 1136.

46 Minn. 345.

—— Working on or near track.

225. A steam-boat, during high water, was compelled to move along-side the side track of a railroad, for the discharge of passengers. Plaintiff, a carpenter on the steam-boat, in charge of staging extending from the steam-boat to the side track, was ordered to remove the same to prevent its destruction by an engine which had passed and stopped a short distance away. Plaintiff, believing that those in charge of the engine were aware of his dangerous position on the track, attempted to remove the staging, having his back to the engine, and in so doing was injured by the return of the engine without warning. *Held*, that plaintiff was not guilty of contributory negligence, and was entitled to recover for the injuries received.—Carroll v. Minnesota Val. R. Co., 14 Minn. 57, (Gil. 42.)

226. In an action against a railway company for damages for causing, through negligence, the death of plaintiff's intestate, it appeared that he was killed while at work carrying boards across a side track of defendant's railroad, which it was necessary for him and others to cross in such work about every second minute during the day; that cars were sent in on the side track by defendant, usually by "kicking," four or five times a day, but not at any stated time; that there was a great deal of noise about the place; and that he was killed by a car so sent in. There was evidence that such car was sent in at an unusual rate of speed, with no means of giving a signal of its approach except by the calling out of the brakeman upon it; that he and others called out as the car approached the place where deceased was at work; and that he probably heard the shouting and saw the car when it was very near to him. *Held*, that an instruction to the jury that, if deceased attempted to run across the track when the car was approaching, that would be contributory negligence which would defeat a recovery, was error, because it ignored any consideration of the effect which defendant's negligence might have had on his mind, and on his ability to determine at once justly what was the safest thing for him to do, when, through such negligence, he found the car almost upon him; and that if the jury were satisfied from the evidence that the car was run in negligently, that it was not negligence in deceased not to see the car till it was close upon him, and, if he then ran upon the track, that his doing so was through terror and loss of self-possession, caused by defendant's negligence, then they should find that his doing so was not his negligence.—Mark v. St. Paul, M. & M. Ry. Co., 16 N. W. 367, 30 Minn. 493.

Distinguished in Rogstad v. St. Paul, M. & M. Ry. Co., 17 N. W. 288, 31 Minn. 210.

227. At a subsequent trial of the same case it appeared that defendant railway company had laid a spur track along-side and within 20 feet of a planing-mill, for the purpose of loading and unloading lumber, etc., and a shed extended from the mill to within about four feet of the track. Men were employed at each of several planers in the mill to take the boards coming from them at the end towards the track, and carry them across the track to land owned by defendant, there to be placed in piles near the track, for the purpose of loading them into defendant's cars; and this mode of conducting the business was known to defendant, and the use of the land for the purpose was with defendant's permission. The spur track was used only for such cars as were needed to be loaded or unloaded at the mill, and these were not sent in at regular times, but only as occasion required. Such a car was "kicked" in on the track at an unusual and high rate of speed, without warning to the men who were constantly crossing and recrossing the track while carrying the lumber, and struck and killed one of them. The planers made so much noise as to prevent a person from hearing an approaching car, but if deceased had looked up the track he could have seen the approaching car in time to have avoided the accident. *Held*, that the court could not say that it was negligence for deceased not to keep a lookout for approaching cars; it was for the jury to say whether he ought to have done so, or whether, under the circumstances, he might not rely on being given timely warning of approaching danger.—Mark v. St. Paul, M. & M. Ry. Co., 20 N. W. 131, 32 Minn. 208.

228. A station agent of a railway company, after giving to the owner of lumber loaded on a car leave to run the car by hand past the depot to the owner's lumber yard for the purpose of unloading, directed the driver of plaintiff's team, having a load to deliver at the depot, to deliver it at a side platform, where it was not safe to be when a car was moving on the track at that point; and the driver, not knowing that the lumber car was about to be moved, drove to the platform, and while the team was there the lumber car, moving down the track, struck and killed plaintiff's horse. *Held* that, on the questions of negligence on the part of defendant and plaintiff, the case was one for the jury, and a verdict for plaintiff should be sustained.—Foss v. Chicago, M. & St. P. Ry. Co., 23 N. W. 553, 33 Minn. 392.

229. Deceased had been for two years at work in a brick-kiln, and was accustomed to move cars of wood delivered daily by a freight train on a side-track for the kiln, pushing them from the end of the freight train. Defendant's trainmen on the day in which deceased was killed, changed the manner of delivering the wood, and when deceased began work on the car, as usual, defendant's engine, contrary to custom, without notice or warning, pushed some other cars against the car on

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which deceased was working, at a rapid rate, crushing him. *Held*, that deceased was not guilty of contributory negligence.—Iltis v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 1040.

40 Minn. 273.

Distinguishing Harris v. Minneapolis & St. L. Ry. Co., 23 N. W. 850, 33 Minn. 459.

f. *Stock-Killing Cases.*

Duty to fence track—Application of statute.

230. Laws 1872, c. 25, § 4, in regard to the liabilities of railroad companies for failure to fence their tracks, is to be construed as excepting companies whose duty to fence is imposed and regulated by their charter from the operation of the preceding sections of such act, imposing on railroads generally the duty of fencing their tracks. —Devine v. St. Paul & S. C. R. Co., 22 Minn. 8; Winger v. First Div. St. Paul & P. R. Co., 22 Minn. 11.

231. Laws 1872, c. 25, §§ 1, 2, compelling railroads to build proper cattle-guards and fences, will be presumed to apply to a company operating under a special charter, (not a public act,) unless a charter provision excepting it from the operation of such section is pleaded and proved. —Whittier v. Chicago, M. & St. P. Ry. Co., 24 Minn. 394.

—— Waiver by abutting owner.

232. Where the owner of lands lying on a railroad agrees that the company need not build the fence required by Laws 1872, c. 25, he cannot recover for injuries to his cattle resulting from the omission of the company to build such fence.—Whittier v. Chicago, M. & St. P. Ry. Co., 24 Minn. 394.

—— Streets in cities and villages.

233. Where a railroad company occupies a public street in a city or village, subject to the public easement, it is not entitled to fence its track, and thereby obstruct the street, and interfere with its use; and it is therefore not liable for stock killed because of a failure to so fence its track.—Rippe v. Chicago, M. & St. P. Ry. Co., (Minn.) 43 N. W. 652.

42 Minn. 34.

234. The mere fact that a railroad is within the limits of an incorporated village does not exempt the company from the statutory duty of inclosing the track, where practicable, by fences and cattle-guards.—La Paul v. Truesdale, (Minn.) 46 N. W. 363.

44 Minn. 275.

—— Depot grounds.

235. It is the duty of a company to erect and maintain suitable fences and guards to prevent domestic animals fro passing over or through the depot grounds, onto the track, beyond the limits of such grounds.—Kobe v. Northern Pac. R. Co., (Minn.) 32 N. W. 783.*

36 Minn. 518.

Distinguished in Hurt v. St. Paul, M. & M. Ry. Co., 40 N. W. 614, 39 Minn. 486.

236. Where the injury occurred on part of the defendant's depot grounds, which public convenience required to remain unfenced, no actual negligence in the management of the train being shown, the company is not liable.—Hooper v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 33 N. W. 314. 37 Minn. 52.

Distinguished in Hurt v. St. Paul, M. & M. Ry. Co., 40 N. W. 614, 39 Minn. 486.

237. Plaintiff's horse escaped from his custody without his fault, and entered upon the track of the defendant company at a point where it was not fenced, and was struck by a locomotive and killed. The ground at the place where the horse entered had been purchased by the company with the intent to use it for terminal grounds and side tracks when the business of the company so increased as to render such facilities necessary, but it was not being so used at the time of the accident. *Held*, that the company was liable, the indefinite intent to use the ground for a public purpose not being sufficient to relieve the company from the duty to fence its track as required by statute.—Cox v. Minneapolis, S. S. M. & A. Ry. Co., (Minn.) 42 N. W. 924.

41 Minn. 101.

238. Failure to fence the track, at a point some distance from the depot, is not excused by proof merely that some freight was received and discharged at the place in question.—Moser v. St. Paul & D. R. Co., (Minn.) 44 N. W. 530.

42 Minn. 480.

—— Sufficiency of fence.

239. Under Gen. St. Minn. 1878, c. 34, § 55, providing that railroad companies shall be liable for domestic animals killed or injured by their negligence, and that a failure to build fences, as required by the statute, shall be deemed an act of negligence, a company is liable for the killing of an animal whenever the building and maintaining of a fence would have prevented the accident, regardless of the species of such animal. In the case of small animals the question whether a fence would have prevented the accident may be a question of fact for the jury.—Halverson v. Minneapolis & St. L. Ry. Co., 19 N. W. 392, 32 Minn. 88; Wessbecher v. Same, 19 N. W. 393, 32 Minn. 89.

240. In an action against a railway company for the killing of plaintiff's hogs, through its alleged negligence in failing to fence its road, the issue of fact was whether, having reference to the size of the animals, they would have been restrained by a lawful fence. *Held*, there being evidence that the animals might have been turned by a legal fence, had it existed, a finding for plaintiff should be sustained.—Schimmele v. Chicago, M. & St. P. Ry. Co., 25 N. W. 347, 34 Minn. 216.

241. In an action against a railway company for the killing, by one of its trains, of plaintiff's colts, there was evidence tending to show that the colts went on defendant's right of way from the pasture where they were kept, through bars forming part of a fence, which had been built about six years; and it appeared that the bars were poplar poles, from two to four inches in diameter, and were about four feet high, and that on the morning after the colts were killed the two top poles were found broken, and to be

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half rotten. *Held*, that this was sufficient to sustain a finding by the jury of negligence on the part of the railway company in respect to maintaining the fence.—Hoverka v. Minneapolis & St. L. Ry. Co., 25 N. W. 595, 34 Minn. 281.

—— Repairing fence—Notice of defects.

242. An instruction that a railroad company must maintain a sufficient fence at all times is not error, where the court also charges that when the company has once properly fenced its line negligence cannot be imputed to it until it has a reasonable time to make repairs after reasonable notice of defects.—Varco v. Chicago, M. & St. P. Ry. Co., 13 N. W. 921, 30 Minn. 18.

243. Evidence that a fence along a railroad track had been broken for two or three weeks is sufficient to raise a presumption of notice to the railroad company in an action for injuries to cattle on the track.—Varco v. Chicago, M. & St. P. Ry. Co., 13 N. W. 921, 30 Minn. 18.

244. In a statutory action against a railroad company for the value of animals killed on its track by a passing train, having passed on the track through a gate in the fence along the railroad, a request for an instruction telling the jury, in effect, that an inspection of the fence by the railroad company once every two days was a sufficient exercise of diligence, was properly refused. The question was one for the jury, with reference to the circumstances of the case.—Evans v. St. Paul & S. C. R. Co., 16 N. W. 271, 30 Minn. 489.

245. In an action against a railroad company for killing plaintiff's cattle, which had gotten upon its right of way through a defective fence between it and plaintiff's land, the evidence showed that the fence had been broken down and in part carried away by ice and water about the middle of April, and remained in that condition until May 22d following, when the accident occurred, and that defendant, though it had notice of its condition in the mean time, made no effort to repair it. Defendant claimed that it could not repair it by reason of the high water, but there was evidence tending to show that the water had subsided, and was, for a considerable time before the accident, but a few inches in depth, so that posts could have been driven and wires strung thereon. *Held*, that defendant's negligence was a question for the jury.—Graves v. Chicago, M. & St. P. Ry. Co., (Minn.) 50 N. W. 474.

47 Minn. 429.

—— Adoption of fence built by landowner.

246. Where the owner of land adjoining a railway, in the absence of any agreement therefor, builds and maintains the fence between his land and the railway which the railway company is required by statute to build and maintain the company is not liable for injuries to domestic animals upon the track, as in case of a failure to perform the duty to fence imposed by the statute.—Hoverka v. Minneapolis & St. L. Ry. Co., 17 N. W. 376, 31 Minn. 221.

247. Where the owner of land builds a fence along the adjoining right of way of a railroad company, and the company, with his assent or acquiescence, adopts the fence, it is the duty of the company to maintain the fence in good condition. Following Hoverka v. Railway Co , 17 N. W. 376, 31 Minn. 221.—Hoverka v. Minneapolis & St. L. Ry. Co., 25 N. W. 595, 34 Minn. 281.

Cattle-guards.

248. Where it appeared that the horses in question got upon the track in consequence of a defective cattle-guard, the timbers of which had become so rotten and decayed that the cross-bars had become loose and out of place, and the pit partially filled up with sand, *held* sufficient to support a verdict for plaintiff.—Miller v. Northern Pac. R. Co., (Minn.) 30 N. W. 892.*

36 Minn. 296.

249. Reasonable care and diligence do not require a railway company, unless under exceptional and extraordinary circumstances, to remove natural accumulations of ice and snow from the cattle-guards constructed on its railroad.—Blais v. Minneapolis & St. L. Ry. Co., 24 N. W. 558, 34 Minn. 57; Stacey v. Winona & St. P. R. Co., 43 N. W. 905, 42 Minn. 158.

Farm crossings.

250. In an action for the killing of plaintiff's cattle by a locomotive on defendant's railroad, it appeared that defendant's track was fenced as required by law, but that the fence had been opened on both sides thereof, under an agreement between plaintiff and defendant, for the purpose of affording a crossing for plaintiff's cattle. *Held*, that defendant was bound to use only reasonable diligence in approaching the crossing to discover whether plaintiff's cattle were on the track, and, if discovered there, to use all reasonable measures to avoid injuring them; but that defendant was not bound to slack the speed of its train in approaching the crossing.—Whittier v. Chicago, M. & St. P. R. Co., 5 N. W. 372, 26 Minn. 484.

251. The provision in Gen. Laws Minn. 1877, c. 98, § 4, that railroad companies may furnish landowners with locks for gates at farm crossings, is permissive, and not mandatory; and in case no such locks are furnished, the question of the negligence of the corporation in any particular case, as respects the opening or closing of such gates, or their being securely fastened, is open for investigation, and is not affected by the statutory provision referred to.—Sather v. Chicago, M. & St. P. Ry. Co., 41 N. W. 458, 40 Minn. 91.

252. Plaintiff's colt escaped upon the track during the night at a farm crossing. The track was fenced and the crossing provided with a gate, as required by law, but there was no lock on the gate. Defendant's employes testified that they fastened the gate on the night in question as they went home from their work, but that it was open the next morning. The owner of the field into which the gate opened testified that on that night he "left it open, intending to return soon." *Held*, that defendant was not liable.—Sather v. Chicago, M. & St. P. Ry. Co., 41 N. W. 458, 40 Minn. 91.

Negligence in management of train.

253. Where the track of a railroad company is not fenced, and it is not obliged by law to fence,

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as against cattle unlawfully on its track, it will be held to no greater degree of care than a rail road whose track is fenced.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

254. Where the law requires the owner of cattle to keep them on his inclosure, the engineer of a train has a right to presume that they will be kept there, and is under no obligation, so far as the owner of the cattle is concerned, to keep a lookout for cows on or near the track.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

255. A railroad company is bound to use the same care to prevent injury to a cow unlawfully on its track that a prudent man, owning the animal and the train, would use to prevent injury to either.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

Distinguished in Watier v. Chicago, St. P., M. & O. Ry. Co., 16 N. W. 537, 31 Minn. 92.

256. Plaintiff's cow was killed at a point on defendant's railroad where the view of such point and the grounds on either side thereof for 30 rods was unobstructed to an approaching train for a distance of 60 rods; the train passing, when the cow was killed, at its usual speed. *Held*, the cow being unlawfully on the track, that the burden was still on plaintiff to show that after defendant's agents discovered the cow on the track the killing could have been avoided by the exercise of proper care.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

257. An owner of domestic animals, who, through his own fault or negligence, permits such animals to stray upon a railroad track, takes all reasonable risks of their being injured by passing trains, but the railroad company must use reasonable care to avoid injuring them.—Witherell v. Milwaukee & St. P. Ry. Co., 24 Minn. 410.

258. Reasonable care to avoid injury to animals by a railroad train is such care as a prudent man, owning both train and animals, would take, with proper regard for both.—Witherell v. Milwaukee & St. P. Ry. Co., 24 Minn. 410.

259. A railroad company, while not bound to presume that animals will be upon its track, is bound to use reasonable care to avoid injuring them, and is not authorized to willfully or carelessly injure stock that may stray upon the track.—Witherell v. Milwaukee & St. P. Ry. Co., 24 Minn. 410.

Distinguishing Donaldson v. Milwaukee & St. P. Ry. Co., 21 Minn. 293.

Distinguished in Watier v. Chicago, St. P., M. & O. Ry. Co., 16 N. W. 537, 31 Minn. 92.

260. Where domestic animals stray upon a railroad track, if a passing train cannot be stopped after they are discovered, in time to prevent injury to them, without endangering the safety of the train, the duty of the railroad company to preserve the safety of the train is paramount to their duty to avoid injury to the animals.—Witherell v. Milwaukee & St. P. Ry. Co., 24 Minn. 410.

261. The rule that in case of an animal trespassing on the track, without the fault of the company, there is no duty of watchfulness on the part of those in charge of its trains to ascertain if the animal be there, and that their duty of care with respect to it arises only upon their discovering its peril, applies as well in the case of an animal wrongfully upon a highway at a railroad crossing.—Palmer v. Northern Pac. R. Co., (Minn.) 33 N. W. 707.

37 Minn. 223.

262. Where cattle lawfully on a highway are killed by an engine at the crossing, evidence that the train men omitted to ring a bell or blow a whistle before reaching the crossing, as required by Sp. Laws Minn. c. 1, § 16, is competent.—Palmer v. St. Paul & D. R. Co, (Minn.) 38 N. W. 100.

38 Minn. 415.

263. Where plaintiff's cattle at the time they escaped upon defendant's track and were killed were running at large in violation of the law, and the cattle-guard was not in an unlawful or forbidden condition, defendant's servants, engaged in operating its trains, were not bound to anticipate such trespassing by looking ahead, or by managing a train with reference to such a contingency.—Stacey v. Winona & St. P. R. Co., (Minn.) 43 N. W. 905.

42 Minn. 158.

Cause of injury.

264. In an action against a railroad company for the death of plaintiff's horse, alleged to have been caused by a collision with defendant's locomotive, the only evidence to sustain plaintiff's claim was that his horse was found dead near defendant's track, but there were no wounds on it or marks indicating a collision. *Held*, that a verdict for plaintiff would be set aside as not supported by the evidence.—Jenicke v. Minneapolis & St. L. Ry. Co., 7 N. W. 363, 27 Minn. 359.

265. A mule belonging to plaintiff escaped from him without his fault, and ran upon defendant's railroad at a place where it crossed plaintiff's land, and was not fenced, and, while running along the railroad track, set its foot into a small hole in the soil between the ties, about the size of its foot, and in some way not otherwise explained broke its leg. *Held*, that such injury was not the natural and proximate consequence of defendant's neglect to fence its road, and that therefore defendant was not liable in damages therefor, under Gen. St. Minn. 1878, c. 34, § 55, requiring railroad companies to fence their roads, and making them liable for domestic animals killed or injured by their negligence, and declaring that "a failure to build and maintain * * * fences, as above provided, shall be deemed an act of negligence on the part of such companies."—Nelson v. Chicago, M. & St. P. Ry. Co., 14 N. W. 360, 30 Minn. 74.

266. While plaintiff was traveling in his sleigh along a highway beside defendant's railroad, at a place where it was not fenced, his horses became frightened at a train passing on the railroad, got beyond his control, and ran away from him upon and along the track, and into a culvert, a part of the railroad, and one of them was killed and the other injured. *Held*, that the finding of a jury that the accident was one that might reasonably have been anticipated as a result of the failure

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to fence the railroad should be sustained.—Maher v. Winona & St. P. R. Co., 18 N. W. 105, 31 Minn. 401.

267. A railroad company had inclosed its line of road with a barb-wire fence, except a gateway into plaintiff's field, which it had negligently left open. Plaintiff's horses escaped through the gate-way upon the right of way of the railroad company, and were there suddenly frightened by an approaching hand-car, running in the usual way, and ran back into the wire fence with great violence, and were seriously injured. *Held*, that the question was properly left to the jury whether the horses were exposed to this danger through the neglect of the company to complete its fence, and that the court could not say, as matter of law, that the alleged cause was too remote.—Savage v. Chicago, M. & St. P. Ry. Co., 18 N. W. 272, 31 Minn. 419.

268. In an action against a railroad company for killing stock, where the evidence does not conclusively show that a lawful fence would not have prevented the stock from getting on the track, it is for the jury to find whether the failure of defendant to maintain a lawful fence was the cause of the injury.—Alexander v. Chicago, M. & St. P. Ry. Co., (Minn.) 43 N. W. 481.

41 Minn. 515.

Contributory negligence—Land not sufficiently fenced.

269. A railroad company, which constructs and operates its road through land by license from the owner, but without acquiring the right of way, is liable for injury to his cattle on the land without any other negligence of the company than in not preventing the cattle getting upon the track; the law as to fencing being inapplicable.—Mathews v. St. Paul & S. C. R. Co., 18 Minn. 434, (Gil. 392.)

270. Under Gen. St. Minn. 1878, c. 34, § 55, which provides that "all railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies, and a failure to build and maintain cattle-guards and fences, as above provided, [section 54,] shall be deemed an act of negligence on the part of such companies," it is not negligence for the owner of land adjoining a railroad, which has not been fenced by the company, to allow his cattle to range on such land.—Schubert v. Minneapolis & St. L. Ry. Co., 7 N. W. 366, 27 Minn. 360; Holtz v. Same, 13 N. W. 147, 29 Minn. 384; Evans v. St. Paul & S. C. R. Co., 16 N. W. 271, 30 Minn. 489.

271. In an action against a railway company under Gen. St. Minn. 1878, c. 34, § 56, for the value of a domestic animal killed on defendant's track, evidence that plaintiff permitted the animal to run at large in his pasture, as usual, after previous notice that it had frequently passed through defendant's railroad fence, which was defective and insufficient, and through which the animal finally escaped on the track and was killed, is not sufficient to establish contributory negligence, as matter of law, on plaintiff's part.—Johnson v. Chicago, M. & St. P. Ry. Co., 13 N. W. 673, 29 Minn. 425.

Contributory negligence—Animals running at large.

272. It is *prima facie* contributory negligence for one to voluntarily allow a valuable horse to run at large in the public streets, contrary to law, in the immediate vicinity of unfenced railroad tracks.—Moser v. St. Paul & D. R. Co., (Minn.) 44 N. W. 530.

42 Minn. 480.

273. Cattle roaming upon a highway without restraint, though upon their owner's premises, are at large within the meaning of Gen. St. Minn. c. 90, § 16, subd. 6, prohibiting cattle from being allowed to go at large between the months of October and April.—Johnson v. Minneapolis & St. L. Ry. Co., (Minn.) 45 N. W. 152.

43 Minn. 207.

274. Where a city ordinance authorizes cows to run at large, it is not, *per se*, negligence for an owner of a cow to turn her into the street, even though she is likely to stray upon a railroad crossing; and the railroad company is, in such cases, bound to use reasonable care to avoid injury, having regard to the fact that the cow is not a rational being.—Fritz v. First Div. St. Paul & P. R. Co., 22 Minn. 404.

—— Animals trespassing.

275. Under Gen. St. Minn. 1878, providing that if any railroad company fails to fence its tracks it "shall hereafter be liable for all damages sustained by any person in consequence of such failure," it is no defense, in an action for injuries to plaintiff's cattle which have strayed on defendant's track in consequence of defendant's failure to construct fences, that the cattle were trespassers on the land from which they went on the track.—Gillam v. Sioux City & St. P. R. Co., 3 N. W. 353, 26 Minn. 268.

276. Railway companies being required by statute to maintain fences and cattle-guards, not only as respects cattle of adjoining owners, but all domestic animals, whether trespassing or otherwise, merely permitting such an animal to run at large, in violation of a special act prohibiting it in certain towns, and making persons violating its provisions liable for trespasses by such animals, does not constitute negligence on the part of the owner, contributing to an injury to the animal, caused by its entering a railway company's right of way through a defective fence. Following Gillam v. Railroad Co., 26 Minn. 268.—Watier v. Chicago, M. & St. P. Ry. Co., 16 N. W. 537, 31 Minn. 91.

Distinguishing Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283:) Witherell v. Milwaukee & St. P. Ry. Co., 24 Minn. 410.

Actions—Pleading and proof.

277. In an action for killing plaintiff's horse, where the evidence shows that, by reason of neglect to fence the railroad, the horse went on the track, fell into a railroad bridge, and in some way was killed, there is no material variance or defect of proof, although the complaint alleges that the horse was killed in being taken out of the bridge.—Moser v. St. Paul & D. R. Co., (Minn.) 44 N. W. 530.

42 Minn. 480.

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278. In an action against a railroad company to recover the value of domestic animals killed on defendant's track, evidence that the fences on each side of the track had become very poor in places, and insufficient as a protection against cattle, is sufficient to support a finding of negligence on the part of the company; and it may reasonably be inferred therefrom that plaintiff's animals escaped from the adjoining premises, where they were kept, through some of the openings in the fence, upon the track.—Holtz v. Minneapolis & St. L. Ry. Co., 13 N. W. 147, 29 Minn. 384.

279. Evidence that, on a certain day, the timbers of a cattle-guard were so rotten that the "cross-bars" had become loose and out of place, and that the "pit" had become partially filled up with sand, is admissible to prove that it was in the same defective condition on the day previous.—Miller v. Northern Pac. R. Co., (Minn.) 30 N. W. 892.*
36 Minn. 296.

280. Plaintiff offered evidence, in an action to recover damages for killing his cow at a crossing, that the train passed the crossing at its usual hour, without slacking its speed, which evidence was received. *Held* objectionable, as leaving the jury to conjecture as to the speed of the train.—Locke v. First Div. St. P. & P. R. Co., 15 Minn. 350, (Gil. 283.)

Actions—Costs.

281. To entitle a plaintiff to extra or double costs under chapter 34, § 56, Gen. St. Minn. 1878, relating to the killing of stock by railroad companies, the action should not be commenced until after the expiration of the 30 days allowed the railroad company to pay or tender the actual damages.—Hooper v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 33 N. W. 314.
37 Minn. 52.

g. *Fires.*

Statutory presumption of negligence—Burden of proof.

282. Gen. St. Minn. 1878, c. 34, § 60, making the fact that fire was scattered or thrown from an engine of a railway company *prima facie* evidence of defect in the engine or negligence on the part of the employes of the railway company, does not change the character of the issue in an action for damages caused by such fire, but the existence of negligence on the part of the company or defects in its engine remains the issue.—Mahoney v. St. Paul, M. & M. Ry. Co., 29 N. W. 6, 35 Minn. 361.

283. Under Gen. St. Minn. 1878, c. 34, § 60, making the fact that fire has been scattered by an engine *prima facie* evidence of negligence by the railroad company, where the fact of setting the fire has been established, the burden of proof is on the company to show that it was not negligent either as to the construction, condition, or manner of operating the engine.—Karson v. Milwaukee & St. P. Ry. Co., 11 N. W. 122, 29 Minn. 12; Sibelrud v. Minneapolis & St. L. R. Co., 11 N. W. 146, 29 Minn. 58.

—— Evidence to rebut.

284. In an action for damages caused by fire from a locomotive, a *prima facie* case of negligence being established by plaintiff, it is not sufficient to disprove such negligence to show that the engine was of approved construction, and was operated by a skillful fireman and engineer, in the customary manner, without also showing that the customary manner was a careful one.—Woodson v. Milwaukee & St. P. Ry. Co., 21 Minn. 60.

285. Where a fire is kindled by sparks from a locomotive, a presumption of negligence arises, which may be met and overcome by satisfactory proof that the engine was properly constructed and managed, and in suitable repair; and, if the uncontradicted evidence on the part of the railway company shows that it has fully performed its duty in these respects, the presumption of negligence is rebutted, and evidence of negligence other than the bare fact that the fire was set by the engine is necessary, in order to warrant a verdict for plaintiff in an action for damages caused by the fire.—Daly v. Chicago, M. & St. P. Ry. Co., (Minn.) 45 N. W. 611. 43 Minn. 319.

286. In an action against a railway company for the destruction of plaintiff's property by fire, alleged to have been caused by one of defendant's engines, there was evidence sufficient to justify the jury in finding that the fire was started by sparks or cinders from defendant's locomotive. *Held*, that to rebut the statutory presumption of negligence thereby raised, it was incumbent on defendant to rebut every negligent act or omission which might, under the circumstances, reasonably or naturally have caused the fire.—Nelson v. Chicago, M. & St. P. Ry. Co., 28 N. W. 215, 35 Minn. 170.

287. In an action for damages by fire, communicated from an engine on defendant's railroad, the only witness as to the condition of the engine testified that he examined it in the morning of the day on which the fire occurred, and that it was in good condition; but his testimony was to a great extent based on an entry of his report made by another person; and other witnesses for defendant testified that the escape of fire from such an engine indicated that something about the engine was out of order. *Held*, that the jury were justified in finding that the statutory presumption of negligence under Gen. St. Minn. 1878, c. 34, § 60, from the fact of fire scattered by an engine, was not rebutted.—Karson v. Milwaukee & St. P. Ry. Co., 11 N. W. 122, 29 Minn. 12.

288. In an action for damages by fire communicated from an engine on defendant's railroad, there was testimony tending to show that the fire was caused by a large coal thrown from the engine. *Held*, that the jury were justified in finding that the statutory presumption of negligence from such fact, under Gen. St. Minn. 1878, c. 34, § 60, was not rebutted by testimony that the engine was in proper condition, that the engineer was competent for his place, and that he managed the engine to the best of his ability. Sibelrud v. Minneapolis & St. L. R. Co., 11 N. W. 146, 29 Minn. 58.

289. In an action for loss by fire, caused by sparks escaping from defendant's locomotive, there was evidence that the volume of sparks thrown out of an engine depends on the manner in which it is worked, and that on this occasion

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a very unusual volume of sparks was discharged. Besides conflicting evidence as to the quantity of sparks, the only other evidence to rebut plaintiff's proof and the statutory presumption of negligence raised in such cases by Gen. St. Minn. 1878, c. 34, § 60, was the opinion of the engineer that he handled the engine very carefully; and he further testified that he did not operate the engine differently from what he usually did, although on this occasion a very high wind was prevailing. *Held*, that whether the engine was managed in a careful and prudent manner was for the jury to determine.—Johnson v. Chicago, M. & St. P. Ry. Co., 16 N. W. 488, 31 Minn. 57.

290. In an action against a railroad company for damage from fire which started and spread from defendant's right of way, under circumstances tending to prove that the fire was caused by defendant's locomotive, the person whose duty it was to inspect the fire apparatus of defendant's engines testified that he inspected the engine in question on the morning after the fire, and that it was properly constructed and in good order, and particularly that the smoke-stack was so protected as to be entirely safe if the engine was properly managed; and the fireman of the engine testified that at the time of the fire there was nothing unusual in its management, and that it was operated in a proper manner. *Held*, that this was not sufficient to rebut conclusively the statutory presumption of negligence on defendant's part, but the question was for the jury to consider.—Sibley v. Northern Pac. R. Co., 21 N. W. 732, 32 Minn. 526.

291. An expert witness for the defendant, testifying that, with the appliances in use to prevent such accidents, the fire could not have been so caused, unless the engine had been out of repair, considered in connection with the statutory presumption of negligence, justify a verdict against defendant, though other evidence tended to show that the engine was provided with the best appliances; that they were in good order; and that the engineer and fireman were competent.—Dean v. Chicago, M. & St. P. Ry. Co., (Minn.) 40 N. W. 270.*

39 Minn. 413.

292. In an action for the value of property destroyed by a fire admitted to have been set out by one of defendant's locomotives, to rebut the statutory presumption of negligence defendant introduced evidence showing that the locomotive was in perfect condition the day after the fire set. The engineer and fireman testified that so far as they knew the engine was in perfect order. The former had only made a cursory examination of the engine while oiling it, and the latter while cleaning out the hopper and ash-pan. They also testified that the locomotive was properly handled and managed. *Held*, that the evidence was not conclusive to rebut the presumption of negligence but its sufficiency was for the jury.—Holman v. Chicago, M. & St. P. Ry. Co., (Minn.) 45 N. W. 608.

43 Minn. 334.

293. The locomotive by which it was alleged that a fire was set had all proper and improved appliances to prevent the escape of fire, and the engine-driver testified that he ran it with the usual care and skill, there being nothing to show that he was not ordinarily a careful and skillful hand. It was shown that a high wind was blowing at the time, and that there was a quantity of combustible material along the right of way. *Held*, that a finding that the locomotive was not operated with due care and skill on this occasion was warranted by the evidence.—Hayes v. Chicago, M. & St. P. Ry. Co., (Minn.) 47 N. W. 260.

45 Minn. 17.

294. In an action in Minnesota to recover for property destroyed by a fire set by a railroad locomotive, a verdict involving a finding of negligence in the operation of the locomotive is sustained, in view of the statutory presumption of negligence, where defendant fails to show whether the dampers, 10 inches wide and 4 feet long, at the front and rear of the ash-pan beneath the fire-box, or either of them, were closed.—Cantlon v. Eastern Ry. Co., (Minn.) 48 N. W. 22.

45 Minn. 481.

Combustible matter on right of way.

295. The fact that a railway runs through a prairie country, with wild grass on its right of way and adjacent thereto, does not, as matter of law, relieve it of the duty to cut such wild grass on its right of way, in order to prevent fire, which may escape from its engines, from communicating to property of others adjoining its right of way.—Sibelrud v. Minneapolis & St. L. R. Co., 11 N. W. 146, 29 Minn. 58.

296. Evidence that a railway company allowed combustible materials to accumulate and remain upon its land, liable to be ignited by sparks from its engines, and to communicate fire to property on adjoining land, is sufficient to sustain the finding of a jury of negligence on its part.—Clarke v. Chicago, St. P., M. & O. Ry. Co., 23 N. W. 536, 33 Minn. 359; Swingler v. Same, Id.

297. Evidence showed that the railroad company left standing on its right of way, but separated from its track some 20 feet by a burned-out ditch, timothy stubble and aftermath from one and a half to four inches high. *Held*, that the question of defendant's negligence was for the jury. GILFILLAN, C. J., and MITCHELL, J., dissenting.—Bowen v. St. Paul, M. & M. R. Co., (Minn.) 32 N. W. 751. 36 Minn. 522.

Cause of fire.

298. A fire broke out on defendant's line of road about 15 feet from the end of the ties, soon after the passing of a train, and spread to plaintiff's adjoining premises. There was no direct evidence as to the cause of the fire, or as to the condition or management of the engine, but plaintiff's witnesses testified that a high wind was blowing, that coals were found where the fire originated, though there was nothing but grass growing there, and that several fires broke out along the line of the track shortly after the passage of the train, and that one engine would scatter coals at times with forward damper open and rear one shut. *Held*, that there was evidence sufficient to go to the jury that the fire was caused by the engine, and that it was in a defective or imperfect condition, or negligently operated; and that it was not necessary for plaintiff to show affirmatively, by direct evidence, defects in the engine or negligence in its manage-

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ment.—Woodson v. Milwaukee & St. P. Ry. Co., 21 Minn. 60.

299. Evidence tending to show that a fire started in the grass near to leeward of a railroad track a few minutes after an engine had passed, and that no person or other fire than that of the engine was in the vicinity at the time, is sufficient to justify the jury in finding that the fire was set by the engine.—Karson v. Milwaukee & St. P. Ry. Co. 11 N. W. 122, 29 Minn. 12.

300. Evidence that fire started in a field about 60 feet north of a railroad, immediately after the passing of a locomotive, while a strong wind was blowing from the south; that no persons were about; and that there was no apparent cause except the passing engine,—is sufficient to justify the conclusion that the fire was set by the engine.—Dean v. Chicago, M. & St. P. Ry. Co., (Minn.) 40 N. W. 270 39 Minn. 413.

301. The evidence showed that immediately on the passing of defendant's train, before it was out of sight, a small fire was seen 150 feet from defendant's track; that it spread rapidly in the direction of plaintiff's hay, which was soon burned. No one was seen in the vicinity of the place where the fire started. *Held*, that the evidence justified a verdict for plaintiff.—Hoffman v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 301.
40 Minn. 60.

302. In an action against a railroad company for burning plaintiff's buildings, it was shown that the fire was discovered shortly after defendant's train passed, about 60 feet from its track, and that a high wind caused it to spread in the direction of plaintiff's premises. One witness testified that the engine scattered fire from its ash-pan while passing. The train of another company had passed on an adjoining track about 30 minutes before. *Held*, that the question whether the fire was caused by defendant's negligence was for the jury.—Wilson v. Northern Pac. R. Co., (Minn.) 45 N. W. 1132.
43 Minn. 519.

303. In an action against a railway company for the destruction of property by fire, alleged to have been communicated from an engine on defendant's road, the evidence as to the origin of the fire was all circumstantial, but, while not strong or conclusive, it was sufficient to warrant the jury in finding that the damage was caused by fire thrown from a passing engine. *Held* that, defendant having introduced no evidence to rebut the statutory presumption of negligence arising from that fact, a verdict for plaintiff should be sustained.—Wolff v. Chicago, M. & St. P. Ry. Co., 25 N. W. 63, 34 Minn. 215.

Contributory negligence.

304. The omission of one whose hay was destroyed by fire set out by a locomotive to plow around the stacks, so as to prevent fire from reaching them, is not negligence *per se*. Whether it is negligence is a question of fact for the jury. —Karson v. Milwaukee & St. P. Ry. Co., 11 N. W. 122, 29 Minn. 12.

305. Where property on lands adjoining a railway is destroyed through negligence of the servants of the railway company in setting fire to dry grass on its right of way, the owner of such property is not chargeable with contributory negligence in failing to take precaution to protect it against fire.—Lindsay v. Winona & St. P. R. Co., 13 N. W. 191, 29 Minn. 411.

306. Plaintiff's omission to plow around his hay stacks, and thus protect them from running fires, does not constitute negligence *per se*.—Hoffman v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 301. 40 Minn. 60.

Actions—Admissibility of evidence.

307. In an action for damages by fire set by sparks escaping from a locomotive, evidence of a "negligent habit" on the part of the railway company as to the construction and handling of its engines must be limited to show the prevalence of such a habit at or about the time of the fire complained of.—Davidson v. St. Paul, M. & M. Ry. Co., 24 N. W. 324, 34 Minn. 51.

308. In an action for damages from fire alleged to have been kindled by sparks from defendant's locomotive, testimony showing frequent fires of wood-piles along the line of defendant's road is irrelevant in the absence of any evidence that such fires were set by defendant's locomotives.—Davidson v. St. Paul, M. & M. Ry. Co., 24 N. W. 324, 34 Minn. 51.

309. A record of the inspection of locomotives kept by a person who is employed for the purpose of making a daily inspection, and ascertaining their condition, is not evidence of such condition except under certain contingencies, not appearing in this case. Usually it can only be used to refresh the memory of a witness.—Hoffman v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 301.
40 Minn. 60.

310. In an action against a railroad company for burning property along its road, evidence that there was combustible material on the right of way is admissible as bearing upon the degree of care necessary in operating the locomotive.—Cantlon v. Eastern Ry. Co., (Minn.) 48 N. W. 22.
45 Minn. 481.

—— Instructions.

311. By Gen. St. Minn. 1878, c. 34, § 60, the fact that the fire was thrown from a railway engine is made *prima facie* evidence *only* of defects in the engine, and negligence in *operating* it, and not of negligence in leaving the right of way in an unsafe condition. But where the questions of negligence in operating the engine and in leaving combustible matter on the right of way are both in issue, it is not error, as against a *mere general exception*, to charge generally that the fact that fire was scattered from an engine was *prima facie* evidence of negligence. Additional instructions should have been asked.—Bowen v. St. Paul, M. & M. R. Co., (Minn.) 32 N. W. 751.
36 Minn. 522.

—— Question for jury.

312. The engine, alleged to have started the fire which injured plaintiff's property, was what was known as a "diamond stack." It appeared that for at least two years another kind of engine known as "extension front" had been in general use

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on railroads, and that all defendant's other engines were of this latter pattern. There was evidence that the apparatus of the "extension front" for preventing the escape of sparks was better than that of the "diamond stack," and it was not contended that the "extension fronts" were not equally serviceable for the purposes of the company, or that it was not practicable to have used them exclusively. *Held*, that it was for the jury to say whether the use of the engine in question was negligence.—Hoy v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 1117.

46 Minn. 269.

RAPE.

See, also, *Indecent Assault*, 5, 6.

What constitutes.

1. Where it appears that when the offense was committed the prosecutrix was rendered unconscious in consequence of the assault and violence of the defendant, the case falls under Pen. Code Minn. § 235, subd. 2, "when her resistance is forcibly overcome," and not under subdivision 5 of the same section, "when she is, at the time, unconscious of the nature of the act."—State v. Reid, (Minn.) 39 N. W. 795.

39 Minn. 277.

Assault with intent to rape.

2. If a man assault a woman with intent to have intercourse with her by force, notwithstanding her utmost resistance, the crime of assault with intent to commit rape is complete, and the jury may convict of such assault, although they are not satisfied that the subsequent resistance on the part of the woman was so continued and persistent as to prove the higher crime of rape.—State v. Bagan, (Minn.) 43 N. W. 5.

41 Minn. 285.

Indictment.

3. Rape being an offense at common law, an indictment therefor need not conclude with the words, "against the form of the statute."—O'Connell v. State, 6 Minn. 279, (Gil. 190.)

4. An indictment for rape which alleges that the defendant did feloniously ravish is sufficient, though an assault be not alleged in terms. The use of the word "ravish" implies an assault.—O'Connell v. State, 6 Minn. 279, (Gil. 190.)

5. The use, in an indictment under Gen. St. Minn. 1878, c. 94, § 51, punishing "whoever assaults any female with intent to commit the crime of rape," of the word "assault" in describing the offense is a sufficient statement of an act, without further detail.—State v. Ward, 28 N. W. 192, 35 Minn. 182.

6. The description, in such an indictment, of the person on whom such assault is alleged to have been committed, as a "female," is sufficient, without adding that she was of the human species.—State v. Ward, 28 N. W. 192, 35 Minn. 182.

7. An indictment for assault with intent to commit rape need not allege the age of the defendant. If he is under the age of competency, that is matter of defense.—State v. Ward, 28 N. W. 192, 35 Minn. 182.

Evidence.

8. On a trial for rape, evidence on the part of the prosecution of complaint of the outrage, made by the prosecutrix directly after the occurrence, as well as marks of violence upon her person, is admissible.—State v. Shettleworth, 18 Minn. 208, (Gil. 191.)

9. Upon a trial for rape it is not competent for the prosecution, as matter in chief, to show the particulars of the offense as stated by the prosecutrix on making complaint of the outrage, or the name of the party she then claimed committed the offense.—State v. Shettleworth, 18 Minn. 208, (Gil. 191.)

10. On trial of an indictment for rape, declarations of prosecutrix that she could not tell whether her pregnancy was caused by defendant or another, as she had lain with both, are not admissible as substantive evidence. Prosecutrix, not being a party to the criminal action, cannot bind the state by her mere declarations, which are not a part of the *res gestæ*.—State v. Shettleworth, 18 Minn. 208, (Gil. 191.)

11. On trial of an indictment for rape the prosecution may show the results of a medical and surgical examination of the person of the prosecutrix made 12 days after the alleged commission of the offense.—State v. Teipner, (Minn.) 32 N. W. 678. 36 Minn. 535.

Distinguishing State v. Shettleworth, 18 Minn. 208, (Gil. 191.)

12. A statement of her injuries, made by the prosecutrix to a physician called two days after the offense, being similar to a statement made to her sister immediately after the offense, is admissible, although she delayed to make public complaint till the next day.—State v. Reid, (Minn.) 39 N. W. 796.

39 Minn. 277.

13. When the testimony of the prosecutrix is that the parties were in her room, engaged in conversation, when she was surprised and suddenly overcome, and her mouth stopped, and that she became unconscious, and received grievous injuries, of which she soon after complained to her sister, the explanation of why no outcry was made after she became conscious is for the jury, and the judgment will not be set aside for refusal to grant a new trial on defendant's motion, though he says the prosecutrix was not unconscious.—State v. Reid, 39 N. W. 796, 39 Minn. 277.

14. On an indictment under Pen. Code Minn. § 236, for carnally knowing and abusing a child under the age of 10 years, where the state has proved the commission of the offense on the day laid in the indictment, but it is shown that the child was 10 years old on that day, the state cannot then abandon the prosecution, as to that offense, and proceed to introduce evidence of a similar offense committed on a previous day, though, under Gen. St. Minn. 1878, c. 108, § 7, it might, in the first instance, show its commission on a day other than that laid in the indictment.—State v. Masteller, (Minn.) 47 N. W. 541

45 Minn. 128.

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Verdict—Conviction of lesser or other offense.

15. Under Comp. St. c. 118, § 20, providing that upon an indictment for any offense the jury may find the defendant not guilty of the commission thereof, and guilty of an attempt to commit the same, upon an indictment for rape, the jury may convict of assault with intent to commit rape.—O'Connell v. State, 6 Minn. 279, (Gil. 190.)

16. In a prosecution for rape, under Pen. Code Minn. § 235, where the indictment is drawn under the third subdivision of that section, for rape committed by preventing the resistance of the female by fear, defendant cannot be convicted, under the second subdivision, of rape committed by overcoming the resistance of the female through force.—State v. Vorey, (Minn.) 43 N. W. 324.
41 Minn. 134.

17. On an indictment for rape, it is not error to charge that if the jury are satisfied beyond a reasonable doubt that the defendant committed an assault upon the woman with intent to commit rape they may convict of an assault in the second degree.—State v. Bagan, (Minn.) 43 N. W. 5.
41 Minn. 285.

18. Upon an indictment for an assault with intent to commit rape, the jury may properly bring in a verdict of simple assault, under Gen. St. 1866, c. 114, § 18, which provides that on indictment for an offense consisting of different degrees the jury may find the defendant guilty of an offense inferior in degree to that charged in the indictment.—State v. Vadnais, 21 Minn. 382.

19. On an indictment for assault with intent to commit rape, though the evidence tends to show, and defendant admits, that an actual rape was committed, the lesser offense is not thereby merged in the greater, and the jury may find a verdict for a simple assault.—State v. Vadnais, 21 Minn. 382.

Review.

20. The bill of exceptions on a trial for rape showed that there was delay on the part of the prosecutrix in making complaint of the outrage. *Held* that, as it did not purport to state all the testimony on that point, it would be presumed that there was testimony excusing such delay.—State v. Shettleworth, 18 Minn. 208, (Gil. 191.)

Distinguished in State v. Teipner, 32 N. W. 679, 36 Minn. 536.

21. Upon a trial for rape, evidence was received that some 8 to 10 days after the offense was committed the prosecutrix seemed downhearted and gloomy, as though there was something she wanted to tell, but dare not. *Held*, while not admissible to corroborate her testimony as to force, it might be admissible, with other facts, to excuse and explain delay in making complaint; and, the bill of exceptions not containing all the testimony, it would be presumed to have been properly admitted for the last-named purpose.—State v. Shettleworth, 18 Minn. 208, (Gil. 191.)

22. Where defendant is indicted for an attempt to commit rape, but is convicted of a simple assault only, the refusal of the court to admit evidence of prior specific acts of unchastity between the prosecutrix and other persons cannot be held error prejudicial to defendant.—State v. Vadnais, 21 Minn. 382.

Punishment.

23. The punishment for the offense of assault with intent to commit rape is determined by Comp. St. Minn. c. 90, § 40, which authorizes imprisonment for 10 years, and not by section 44.—O'Connell v. State, 6 Minn. 279, (Gil. 190.)

Ratification.

By legislature of contract on behalf of state, see *State Prison*, 3.
Of action by infant, see *Infancy*, 22–24.
acts of agent, see *Factors and Brokers*, 10–12; *Principal and Agent*, 46–56.
acts of attorney, see *Attorney and Client*, 16, 17.
alteration of instruments, see *Alteration of Instruments*, 10.
contract by infant, see *Infancy*, 11.
—— made by state agent, see *States and State Officers*, 7, 8.
deed executed under power, see *Powers*, 21, 22.
invalid or irregular foreclosure sale, see *Mortgages*, 292, 293.

Real Property.

See *Adverse Possession; Boundaries; Dedication; Easements; Mechanics' Liens; Property; Public Lands.*
Abstracts of title to, see *Abstracts of Title.*
Actions concerning, see *Adverse Claim; Ejectment; Forcible Entry and Detainer; Partition; Quieting Title; Specific Performance; Trespass; Waste.*
Attachment of, see *Attachment*, 46–50.
Condemnation for public use, see *Eminent Domain.*
Contracts relating to, see *Frauds, Statute of; Specific Performance; Vendor and Purchaser.*
Conveyances, see *Covenants; Deed; Fraudulent Conveyances; Vendor and Purchaser.*
Dangerous premises, see *Negligence.*
Devises, see *Wills.*
Estates, see *Descent and Distribution; Dower; Estates; Homestead; Husband and Wife; Landlord and Tenant; Tenancy in Common and Joint Tenancy; Wills.*
Exchange, see *Exchange of Property*, 3–9.
Fences, see *Fences.*
Fixtures, see *Fixtures.*
Inheritance, see *Descent and Distribution.*
Injuries to, see *Damages*, 57–64.
Jurisdiction of actions involving title, see *Courts*, 23–25.
Limitation of actions relating to, see *Limitation of Actions*, 11–13.
Of decedent, see *Executors and Administrators*, 32–37.
Power of county to take and hold, see *Counties*, 65–67.
—— of national banks to take and hold, see *Banks and Banking*, 30–33.
Presumption as to ownership and possession, see *Evidence*, 19, 20.
Removal of lateral support, see *Adjoining Land-Owners.*

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Replevin for property severed from land, see *Replevin*, 2–5.
Taxation, see *Taxation*, 18–23, 86–175.
Title to, see *Conflict of Laws*, 1.
Venue in actions concerning, see *Venue in Civil Cases*, 5.

Reasonable.

Doubt, see *Criminal Law*, 91, 92, 108–111.
Regulation by carriers, see *Carriers*, 2, 13, 14.
—— by city ordinance, see *Municipal Corporations*, 43–53.
Time for removal of goods from warehouse of carrier, see *Carriers*, 25, 26.

Receiptors.

See *Attachment*, 37, 38; *Sheriffs and Constables*, 4.

Receipts.

See *Payment: Release and Discharge.*
For payment of taxes, see *Taxation*, 66, 67.
Parol evidence to explain or contradict, see *Evidence*, 336–343.
Warehouse receipts, see *Warehousemen*, 1–3.

RECEIVERS.

Appeal from refusal to appoint, see *Appeal and Error*, 69.
Foreign receiver, see *Action*, 3, 4.
In insolvency, see *Insolvency*, 28–38, 64–69, 72–78.
supplementary proceedings, see *Execution*, 155–157; *Fraudulent Conveyances*, 81.
Of insolvent corporation, see *Corporations*, 166.
partnership, see *Partnership*, 76.
railroad companies, see *Railroad Companies*, 146–150.

Appointment.

1. Gen. St. Minn. 1878, c. 75, § 29, which provides that "a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover the real property without a foreclosure," does not abrogate the power of the court to appoint a receiver in an action of foreclosure, when that becomes necessary for the protection of such equitable rights of the mortgagee as do not rest upon the common-law principle that a legal estate is transferred.—Lowell v. Doe, (Minn.) 46 N. W. 297.

44 Minn. 144.

2. A receiver was properly appointed for hotel property at the instance of the mortgagee, where it appeared that the mortgagors had closed it, though the business was especially lucrative; that the property would be depreciated thereby so as to be an insufficient security; that the debtors were insolvent; that the insurance stipulated to be maintained was jeopardized by the disuse; and that taxes were allowed to become delinquent contrary to stipulation.—Lowell v. Doe, (Minn.) 46 N. W. 297.

44 Minn. 144.

3. In an action brought under Gen. St. Minn. c. 76, § 9, providing for the appointment of a receiver of the property and effects of a debtor corporation, when an execution against the corporation has been returned unsatisfied, the return of the execution unsatisfied by the sheriff is conclusive so long as it remains of record in force, and cannot be collaterally assailed by inquiries into the conduct of the officer in executing it, or into the existence of any property which he might have levied on by virtue of it.—Spooner v. Bay St. Louis Syndicate, (Minn.) 46 N. W. 848.

44 Minn. 401.

4. In an action tried before a referee, he reported that a receiver should be appointed for the purpose of selling certain logs in defendant's possession, and to raise a certain sum to be applied on certain debts, and defendant offered to apply that amount as therein directed. *Held*, that the denial of an application for the appointment of such receiver, without prejudice to renew the motion for a receiver for other purposes, was not improper.—Grant v. Webb, 21 Minn. 39.

Custody of goods.

5. An order directing the appointment of a receiver for goods does not place them *in custodia legis* until the receiver is actually appointed, until which time such goods are liable to distress or levy.—Dutcher v. Culver, 24 Minn. 584.

Sales.

6. On a sale of real estate by the receiver of partnership assets, the purchaser refused to carry out his contract because a release of certain rights of dower in favor of the wives of the partners was not secured by the receiver. *Held*, that the rule *caveat emptor* applied, and that the purchaser would be required to complete his contract.—Barron v. Mullin, 21 Minn. 374.

7. A purchaser from a receiver may object to the confirmation of the report of the sale, but where he fails so to object, and especially where he consents to such report, he will be deemed to have adopted the same, and cannot afterwards object to carrying out his contract, on the ground that the report failed to include property purchased.—Barron v. Mullin, 21 Minn. 374.

8. An order directing the sale of "all the assets, property, and business" of an insolvent corporation does not authorize the sale of causes of action which the receiver might have enforced only in the right of the creditors; and therefore such sale did not transfer the right to sue the stockholders for capital withdrawn in the shape of unearned dividends. — Minnesota Thresher Manuf'g Co. v. Langdon, (Minn.) 46 N. W. 310.

44 Minn. 37.

Redemption from sale.

9. Where an execution against a corporation has been returned unsatisfied, and the court has, pursuant to the statute, (Gen. Laws Minn. 1878, c. 76,) appointed a receiver of all the property of the insolvent corporation in order to convert the same into money for the payment of its debts, a creditor of the corporation, who recovers judgment against it after the property is thus taken *in custodia legis*, has no right to redeem real estate sold by the receiver under direction of the court.—Watkins v. Minnesota Thresher Manuf'g Co., (Minn.) 42 N. W. 862.

41 Minn. 150.

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Compensation.

10. Where the appointment of a receiver is for the benefit of all parties to an action, they should share the expenses; and, in the absence of facts justifying such course, it is error to charge the whole of the receiver's compensation to one of the parties only.—Johnson v. Garrett, 23 Minn. 565.

11. Where the receiver of an insolvent corporation has no assets in his hands, it is not error to discharge him upon the application of those at whose instance he was appointed, without making payment of his compensation and charges a condition precedent to the discharge. — Joslyn v. Athens Coach & Car Co., (Minn.) 46 N. W. 77.
43 Minn. 534.

Actions by.

12. Upon an adjudication of the insolvency of a corporation, and the appointment of a receiver of its property and effects under Gen. St. Minn. c. 76, the right to recover capital withdrawn in the guise of unearned dividends paid to the stockholders, passes to the receiver as representing all the creditors, and the right of the creditors under chapter 34, § 139, to maintain such an action, is suspended during the receivership. — Minnesota Thresher Manuf'g Co. v. Langdon, (Minn.) 46 N. W. 310.
44 Minn. 37.

Reception Books.

See *Register of Deeds.*

Recitals.

In deeds, see *Dedication*, 9, 10.

Recognizance.

See *Bail.*
In *habeas corpus* proceedings, see *Habeas Corpus*, 7, 8.
Of witness, see *Witness*, 109, 110.

RECORDS.

Estoppel by, see *Estoppel*, 19–23.
Judicial notice, see *Evidence*, 10.
Notice to purchasers, see *Vendor and Purchaser*, 150–161.
Of assignment for benefit of creditors, see *Assignment for Benefit of Creditors*, 33, 34.
certificate of sale on foreclosure of mortgage, see *Mortgages*, 275, 276.
deed, see *Deed*, 65–83.
mechanic's lien, see *Mechanics' Liens*, 106, 107.
mortgage, see *Mortgages*, 56–75, 171–173.
release or satisfaction of mortgage, see *Mortgages*, 150–152.
town plat, see *Towns*, 4.
On appeal, see *Appeal and Error*, 161–189, 231–279, 686, 687.
Registry of deeds, see *Register of Deeds*, 1.

Supplying lost and destroyed records.

1. The power of a court to replace its own records when lost or destroyed exists before as well as after judgment in civil cases, and extends to the case of the loss of a notice of appeal removed from the files.—Red River & Lake of the Woods R. Co. v. Sture, 20 N. W. 229, 32 Minn. 95.

Right to inspect and copy.

2. The right to inspect the public records and papers in the office of the register of deeds, "either for examination, or for the purpose of making or completing an abstract, or transcript therefrom," given by Gen. St. Minn. 1878, c. 8, § 179, as amended by Laws 1885, c. 116, is not limited to those having some interest in such records.—State v. Rachac, (Minn.) 35 N. W. 7.*
37 Minn. 372.

3. Those who are in the business of making and furnishing abstracts of title to others for compensation are entitled to this right for the purpose of making or completing their "tract indexes," subject, however, to such reasonable rules as the register of deeds may prescribe to secure the safety of the public records intrusted to his official custody.—State v. Rachac, 35 N. W. 7, 37 Minn. 372.

Recoupment.

See *Counterclaim and Set-Off.*

Redemption.

From absolute deed as a mortgage, see *Mortgages*, 16–23, 445–460.
execution sale, see *Execution*, 116–131.
foreclosure of mechanics' liens, see *Mechanics' Liens*, 167, 168.
foreclosure of mortgage, see *Chattel Mortgages*, 109, 110; *Mortgages*, 379–444.
judicial sales, generally, see *Judicial Sales*, 3.
receiver's sale, see *Receivers*, 9.
tax sale, see *Taxation*, 176–205.
Of pledge, see *Pledge*, 6.

Red Wing, City of.

Issue of bonds in aid of railroads, see *Railroad Companies*, 64, 65.

REFERENCE.

Appeal from order of reference, see *Appeal and Error*, 53.
Constitutionality of statute authorizing trial by referees, see *Constitutional Law*, 46.
Of issue involving examination of long account, see *Constitutional Law*, 135.
Review of findings and report of referee, see *Appeal and Error*, 388–391, 498–506.

Power to order—In action of divorce.

1. Under Gen. St. Minn. 1866, c. 66, § 192, providing that where defendant fails to answer, if the proof of any fact is necessary to enable the court to give judgment, the court may in its discretion order a reference, a referee may be appointed to take and report the evidence in an ac-

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tion for divorce, as well when the defendant is in default as where issue is joined. Gen. St. c. 62, § 14, providing that in divorce proceedings, if defendant fail to appear, the court may proceed to hear and determine the action, does not pretend to regulate the manner in which such testimony should be taken.—Young v. Young, 18 Minn. 90, (Gil. 72.)

When ordered—To take account.

2. A cause of action, the trial of which will involve the taking and adjustment of complicated accounts between the parties, is of equitable cognizance, and the court may order a reference to take and state the accounts.—Fair v. Stickney Farm Co., 29 N. W. 49, 35 Minn. 380.

—— Objections and exceptions.

3. An exception to an order of reference is of no effect to preserve an objection to such order, for, under Gen. St. Minn. 1866, c. 66, § 233, exceptions can only be taken at the trial, and then to decisions on matters of law.—St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

—— Waiver of objection.

4. Where plaintiff has appeared before a referee and introduced evidence, and the cause is submitted to the court and determined on the evidence reported by the referee, all without objection, an objection by plaintiff, first made on motion for new trial, that he did not consent to the order of reference, is too late.—Bohles v. Boland, (Minn.) 47 N. W. 155.

44 Minn. 481.

Hearing—Dismissal.

5. Dismissal by a referee, on motion of defendant, at the close of plaintiff's case, is a decision, as matter of law, that there was no evidence tending to support plaintiff's cause of action, or that, taking the evidence altogether, it so conclusively disproves the cause of action that a finding to the contrary could not be sustained. —McCormick v. Miller, 19 Minn. 443, (Gil. 384.)

Reopening case.

6. A referee may, at any time before his report is filed or delivered, in his discretion, and upon proper foundation, reopen a case tried before him, and hear further proofs therein.—Cooper v. Stinson, 5 Minn. 201, (Gil. 160.)

7. On an application to a referee, after his report is drawn, but before its delivery, to open the case and allow defendant to testify, an affidavit which does not excuse the negligence in procuring the testimony, or show its character or its materiality, is insufficient.—Cooper v. Stinson, 5 Minn. 201, (Gil. 160.)

Report and findings.

8. Under Rev. St. Minn. c. 71, § 54, which provides that the report of a referee stands as the decision of the court, and section 41, which provides that the decision of the court must state the facts and conclusions of law separately, it is the duty of the referee to find upon all the issues raised by the pleadings, and report separately his findings of act and conclusions of law.—Bazille v. Ullman, 2 Minn. 134, (Gil. 110;) McMurphy v. Walker, 20 Minn. 382, (Gil. 334.)

9. Where a cause is tried before a referee, he must pass on and determine all the material issues.—Brainard v. Hastings, 3 Minn. 45, (Gil. 17.)

10. A referee need not pass upon questions admitted by the pleadings.—Brainard v. Hastings, 3 Minn. 45, (Gil. 17.)

11. A referee, in his report, found facts from which the law would imply damage, but, without stating as a conclusion of fact the amount of such damage, found judgment for a specified amount. *Held*, that unless it appeared that the referee had erred in the rule of damages, or its application, his failure to state the amount as a conclusion of law or fact would not vitiate the judgment.—Caldwell v. Arnold, 8 Minn. 265, (Gil. 231.)

12. The evidence establishing the facts, and the reasons for the conclusions thereon, should not form part of a referee's report.—McMurphy v. Walker, 20 Minn. 382, (Gil. 334.)

13. Where a referee files a report merely denying defendant's motion for judgment, but reporting no judgment for either party, it is the duty of the district court to send the case back, with directions to report a judgment.—Griffin v. Jorgenson, 22 Minn. 92.

14. Where, on an accounting before a referee, the parties enter into a stipulation as to what matters shall be passed upon by him, his report will be set aside if he disregards the stipulation. —Hatch v. Burbank, 17 Minn. 231, (Gil. 207.)

15. If the report of a referee does not show that he was sworn, in the absence of evidence to the contrary, the presumption is that he took the necessary oath.—Leyde v. Martin, 16 Minn. 38, (Gil. 24;) Young v. Young, 18 Minn. 90, (Gil. 72.)

16. A referee delivered his report to one of the parties November 19th, and the following day removed from the state, remaining absent. The report was not filed until the 31st of January following. *Held*, that the delay was no ground for a new trial.—Leyde v. Martin, 16 Minn. 38, (Gil. 24.)

—— Correcting.

17. Where omissions occur in the report of a referee, the proper practice is to apply, in the first instance, to the court below to send the report back to the referee, with instructions to supply the omissions.—Bazille v. Ullman, 2 Minn. 134, (Gil. 110.)

18. Under Pub. St. c. 61, §§ 41, 54, requiring that a referee in making his report shall state the facts found and conclusions of law separately. upon a motion to vacate a report for an omission of such statement, and for a new trial, the court may send the report back for correction.—Califf v. Hillhouse, 3 Minn. 311, (Gil. 217.)

19. An omission of a referee to find upon a material fact cannot be supplied by the court; the remedy is by application to the referee for a supplementary finding.—Bryant v. Lord, 19 Minn. 396, (Gil. 342.)

20. The district court has no jurisdiction to refer a report back to a referee for correction, after

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an appeal has been taken from the judgment entered in accordance with the report.—McMurphy v. Walker, 20 Minn. 382, (Gil. 334.)

Report and findings—Setting aside.

21. The reception by the referee, after plaintiff has closed his case, of testimony not strictly rebutting, while not proper, under the general rule, will not form ground for new trial unless actual and manifest injustice is the result.—Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

22. Where judgment on a referee's report has been entered without notice, and the moving party has been guilty of no laches, a motion to vacate the report, and for a new trial, for errors occurring at the trial, and insufficiency of evidence, may be made on a case settled, as provided by Gen. St. Minn. c. 66, tit. 20, after entry of judgment.—Cochrane v. Halsey, 25 Minn. 52.

Reformation of Instruments.

See *Equity*, 14-37; *Vendor and Purchaser*, 102, 104.

REFORM SCHOOL.

Commitment.

Since Gen. Laws 1883, c. 37, § 2, providing for the commitment of an infant to the reform school, declares that no infant shall be so committed by a justice of the peace, (the section applying to a municipal court, where proceedings are had therein,) unless the charge is proved by at least two disinterested witnesses, and that no commitment for incorrigibility shall be sufficient to justify the admission of the infant into the reform school, unless such commitment be approved by the judge of the district court, and requires the justice to reduce all evidence taken before him to writing, and transmit the same to the district court, whose duty it shall be to examine the same, and approve or disapprove the conviction, an infant confined in the reform school for incorrigibility is entitled to his discharge on *habeas corpus* where it appears from the record of the proceedings in which he was committed that the testimony of some of the witnesses sworn and examined in the proceeding was not reduced to writing, and therefore not brought before or examined by the district judge.—State v. Brown, (Minn.) 50 N. W. 920.

47 Minn. 472.

Regents.

Of state university, see *University of Minnesota*, 3, 4.

REGISTER OF DEEDS.

Record-books.

1. A register of deeds was required by statute to keep three separate and distinct sets of record-books,—one for deeds, one for mortgages, and one for all other instruments,—with a like number and corresponding set of alphabetical index books. *Held*, that an index book of the miscellaneous records, separately and correctly kept, was not defective because bound in the same volume with one of the books of miscellaneous records to which it referred.—Benton v. Nicoll, 24 Minn. 221.

Compensation.

2. Under Laws Minn. 1857, c. 2, § 2, by which every register of deeds is required and empowered to "procure, open, and keep" reception books, "at the expense of the county," a county is liable to the register for services rendered in making the entries in such reception books, at the rate at which such services are reasonably worth.—Hough v. Board of County Com'rs Ramsey County, 9 Minn. 23, (Gil. 11.)

Distinguished in Nordin v. Board County Com'rs Kandiyohi County, 23 Minn. 171.

3. A register of deeds who fails to make the proper entries in the reception books kept by him, as required by Comp. St. Minn. c. 7, §§ 22, 35, is not entitled to compensation for keeping such books; and the fact that the county retains such books raises no implied obligation to pay for what work he did do therein.—Mapes v. Board of Com'rs of Olmsted County, 11 Minn. 367, (Gil. 264.)

Distinguished in Nordin v. Board County Com'rs Kandiyohi County, 23 Minn. 171.

4. A register of deeds is not entitled to compensation from the county for keeping the reception books required to be kept by Gen. St. Minn. 1866, c. 8, § 155, as, under chapter 70, § 24, the services performed are to be paid for by the parties leaving instruments for record. Hough v. Ramsey County, 9 Minn. 23, (Gil. 11,) and Mapes v. Olmsted County, 11 Minn. 367, (Gil. 264,) distinguished.—Nordin v. Board County Com'rs Kandiyohi County, 23 Minn. 171.

Registration.

See *Records*.
Of municipal bonds, see *Railroad Companies*, 89.

Rehearing.

On appeal, see *Appeal and Error*, 210-215.

RELEASE AND DISCHARGE.

See, also, *Accord and Satisfaction; Compromise; Payment.*
From attachment, see *Attachment*, 39-41.
Of chattel mortgage, see *Chattel Mortgages*, 88-94.
claims against insolvent, on distribution of estate, see *Assignment for Benefit of Creditors*, 100; *Insolvency*, 91-114.
contract to convey real estate, see *Vendor and Purchaser*, 93.
dower, see *Dower*, 4.
guarantor, see *Guaranty*, 8.
mechanic's lien, see *Mechanics' Liens*, 126.
mortgage, see *Mortgages*, 131-153, 183, 184.
putative father, by mother of bastard, see *Bastardy*, 1.

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Of stockholder from liability for corporate debts, see *Corporations*, 141, 142.
surety, see *Negotiable Instruments*, 113, 114; *Principal and Surety*, 8-23.
vendor's lien, see *Vendor and Purchaser*, 126-128.

What constitutes.

1. In an action against a railroad company to recover for labor and materials furnished in grading defendant's road, defendant put in evidence a paper, in form a statement of account only, showing a balance due plaintiff, with a receipt at the end thereof for such balance, signed by plaintiff. *Held*, that such instrument could not be construed as a release, but was a receipt merely, and as such open to contradiction or explanation by parol.—Morris v. St. Paul & C. Ry. Co., 21 Minn. 91.

2. Upon the return by plaintiff to defendant of a horse previously purchased by the former from the latter, defendant repaid the plaintiff one-half of the amount which plaintiff had paid him on account of the price, and plaintiff gave to defendant a writing under seal, whereby he acknowledged the receipt of such money "in settlement for horse to this date." *Held*, that this was a mere receipt for the money, and could not be construed as expressing a release or extinguishment of a claim for repayment of the balance of the price paid.—Gross v. Deller, 23 N. W. 837, 33 Minn. 424.

3. A receipt "in full of all demands" or "all accounts" may, like any other receipt, be contradicted by parol evidence that the payment was not made as acknowledged; but where it contains an agreement or stipulation, upon a compromise or settlement of disputed claims or unliquidated damages that the one party is to receive or accept a certain sum in full acquittance and discharge of such claims, it is a contract, and is not liable to be contradicted by parol, but is conclusive upon the parties in the absence of fraud or mistake.—Cummings v. Baars, (Minn.) 31 N. W. 449.*
36 Minn. 350.

Fraud—Rescission.

4. To entitle one to rescind a release he need not first have positive knowledge of the falsity of the representations on which it was granted. His right depends on the existence of the fraud, and not on the certainty of his knowledge of it.—Peterson v. Chicago, M. & St. P. Ry. Co., (Minn.) 39 N. W. 485.
38 Minn. 511.

5. Plaintiff assumed to rescind a release of her claim against defendant, as procured by a false and fraudulent statement of defendant's agent that her physician had stated that "her injuries would soon be cured, with proper treatment." *Held*, that she need not have entertained an unquestioned belief in the correctness of the alleged opinion of the physician. It was enough, if she so far relied on it, and was influenced by it, that it was the inducing cause of her giving the release.—Peterson v. Chicago, M. & St. P. Ry. Co., 39 N. W. 485, 38 Minn. 511.

6. Plaintiff was injured while a passenger on defendant's road. She executed to defendant a release in consideration of $225, $25 of which was paid to her at the time of the release, and $200 the next day. She claims that she was induced to execute the release by false representations of defendant. The court below, in its charge, submitted to the jury two representations as grounds on which she could avoid the release. As to one of these representations she had admittedly learned its falsity, and knew the facts, when she received the $200. *Held* error in the court to submit that representation to the jury as an independent ground to avoid the release.—Peterson v. Chicago, M. & St. P. Ry. Co., (Minn.) 31 N. W. 515.*
36 Minn. 399.

7. Plaintiff had a claim against defendants for part of commissions earned by them in the sale of real estate. Plaintiff had also contracted with defendants to purchase land, and had paid $100 of the price, and bound herself to make other payments. Afterwards she wrote to defendants stating that she could not get the money to make the payments, and, after referring to "the two hundred and forty odd dollars due me from you as commission on that sale of last summer," she said, "I ask you if you will not allow me to withdraw from the contract, and forfeit the money paid; also the commission due me, before spoken of." No reply was made to this, but afterwards plaintiff had an interview with defendants. Plaintiff's evidence showed that defendants consented to the rescission, but insisted that if it was done plaintiff should be repaid her $100, and she stated that she was willing that this should be retained as forfeited. Nothing was said about forfeiting her commission. The parties then executed a formal agreement annulling plaintiff's contract of purchase. One of the defendants then said, "My brother will now read you a paper, and after you have signed it the cashier will give you a check for $100." Plaintiff wished to know why another paper should be signed, and this defendant said it was a mere matter of form, to protect her from trouble about this property in the future. This defendant then went out telling plaintiff to come in again and "I will have more time to talk to you about that other matter;" referring, as plaintiff supposed, to the commission. The other paper was then read to plaintiff, and she paid no particular heed to it, supposing it was the annulling of the contract, and a receipt for $100. She signed it and received a check for that amount. The paper was a release and discharge of defendants "from all claims and demands," etc. Defendants' testimony contradicted plaintiff on the issue of fraud. *Held*, that the evidence did not justify a verdict avoiding the release executed by plaintiff.—McCall v. Bushnell, (Minn.) 42 N. W. 545.
41 Minn. 37.

8. Plaintiff, an employé of defendant, was injured by the negligence of the latter. Defendant's agent paid plaintiff $250, and persuaded him to sign a release discharging defendant from further liability. Plaintiff and his wife, neither of whom could read or write the English language, testified that they understood that the $250 was paid as wages and that the release was a receipt for the money so paid; and that the agent so represented. The agent stated that the release was read and fully explained to plaintiff. *Held*, that the question of fraud was for the jury.—Sobieski v. St. Paul & D. R. Co., (Minn.) 42 N. W. 863.
41 Minn. 169.

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RELIGIOUS SOCIETIES.

Deed in trust for, see *Trusts*, 1-10.
Exemption from taxation, see *Taxation*, 38-40.

Incorporation—Title to property.

1. A religious congregation became incorporated under title 4, c. 34, Gen. St. Minn. 1878. Afterwards, pursuant to a vote of more than two-thirds of its members, it adopted and filed new articles of incorporation, merely making a change in the name. *Held*, that this did not break its continuity or identity so as to prevent its holding the corporate property previously acquired.—Meyer v. Trustees of the German Evangelical Lutheran Emmanuel Church, (Minn.) 33 N. W. 786.

37 Minn. 241.

2. The matter of notice of a meeting of a religious society to authorize its trustees to convey its real estate goes not to the power of the society to convey, but to the authority of the trustees as its agents. Hence, if the trustees make conveyance under the authority of a resolution passed at a meeting held without giving the notice required by statute, such conveyance is capable of ratification by the members of the society. When *all* the members of the religious society in whose behalf such conveyance has been made unite with two new religious societies, the organization of the old society being abandoned, and the two new societies bring an action to recover possession of the property, claiming title under such conveyance, it amounts to such ratification.—East Norway Lake N. E. Lutheran Church v. Froislie, (Minn.) 35 N. W. 260.

37 Minn. 447.

Membership—Matters of doctrine.

3. Where a congregation, in its constitution, adopts certain books as the exponents of its doctrine, and there arise honest differences of opinion as to the interpretation of the statements of doctrine in such books, and the constitution is silent as to such matter of interpretation, and provides no mode for determining the differences, the civil courts will not hold that adherence to either interpretation dissolves, *ipso facto*, a member's connection with the congregation, so that he ceases to be a member of the corporation it has formed to hold and control its property.—Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, (Minn.) 44 N. W. 663.

42 Minn. 503.

4. While civil courts never assume to determine the abstract truth or falsity of any religious doctrine, they can, when rights of property are dependent on adherence to, or teaching of, a particular religious doctrine, examine what, as a fact, the doctrine is, and whether, as a fact, the particular person adheres to or teaches it.—Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, (Minn.) 44 N. W. 663.

42 Minn. 503.

5. When the contract of association of a religious body provides, or by implication contemplates, that what is according to or consistent with a particular doctrine shall be determined by some religious judicatory, the determination of such judicatory, duly made, when the matter is properly brought before it, is conclusive on the civil courts.—Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, (Minn.) 44 N. W. 663.

42 Minn. 503.

6. In the case of a religious congregation, what are the doctrines, adherence to which is a condition of membership, must be determined by reference to the rules, constitution, or by-laws of the congregation.—Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, (Minn.) 44 N. W. 663.

42 Minn. 503.

7. The only qualification as to membership in a "German Evangelical Society," as regarded religious doctrine, was the declaration in its constitution that the members acknowledged the Scriptures of the Old and New Testament as the word of God, and as the only and infallible guide to faith and life, and adhered to their interpretation as laid down in the Augsburg Confession, the Heidelberg Catechism, and Luther's Catechism, as far as the same agreed; but that, whenever they differed, they confined themselves on all disputed points solely to the Scriptures, and reserved the right of freedom of conscientious views. *Held*, that a pastor or trustee did not cease to become a member of the society on adopting the interpretations of passages in Scripture in regard to baptism and the Lord's Supper, as contained in the catechism of Luther, where such interpretation was different from the interpretation contained in the Heidelberg Catechism.—Trustees of German Evangelical Soc. of St. Cloud v. Henschell, (Minn.) 51 N. W. 477.

Trustees.

8. If a minority of a church congregation, not acting within the regular organization, get together and assume to elect trustees, it has not the color of an election by the congregation.—Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, (Minn.) 44 N. W. 663.

42 Minn. 503.

9. One cannot be a *de facto* officer of a religious society unless he is acting as such, under color of having been rightfully elected or appointed.—Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, (Minn.) 44 N. W. 663.

42 Minn. 503.

Rights of pastor.

10. According to the usage and discipline of the Presbyterian church in the United States, the call of a congregation for the services of a regular pastor, and the proceedings of the parties under it, are subject to the decision of the presbytery having jurisdiction, and the regular pastoral relation is constituted by the presbytery after the due acceptance of the call by the candidate.—West v. First Presbyterian Church of St. Paul, (Minn.) 42 N. W. 922.

41 Minn. 94.

11. This usage is in harmony with Gen. St Minn. 1878, c. 34, § 225, relating to religious corporations, which vests the sole authority to ascertain and fix the salary or compensation to be paid

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to a minister in the society or congregation.—West v. First Presbyterian Church of St. Paul, (Minn.) 42 N. W. 922.

41 Minn. 94.

12. Until such acceptance by him no civil contract for his permanent employment as regular pastor at the stipulated compensation can be formed or made obligatory upon the congregation.—West v. First Presbyterian Church of St. Paul, (Minn.) 42 N. W. 922.

41 Minn. 94.

13. Where by mutual consent his pastoral services are accepted as rendered under or in pursuance of the call, the relation must be regarded as temporary only, pending his decision, and no permanent obligation rests upon the congregation to pay him as if the regular pastoral relation had been duly constituted, or longer than it may consent to such employment, but for actual services so rendered the rate of compensation fixed in the call may be referred to, and properly adopted, as the measure of his compensation.—West v. First Presbyterian Church of St. Paul, (Minn.) 42 N. W. 922.

41 Minn. 94.

Remote and Proximate Cause.

See *Negligence*, 34-50.

Remote Damages.

See *Damages*, 1-10.

Removal.

Of county seats, see *Counties*, 9-19.
Highway obstructions, see *Highways*, 61.

REMOVAL OF CAUSES.

Appeal from order upon application, see *Appeal and Error*, 54.
To district court on certificate of justice, see *Abatement and Revival*, 13.

Statutory provisions, in general.

1. The object of Acts Cong. July 27, 1866, and March 2, 1867, respecting the removal of causes to the federal courts, was to provide for the removal of a class of cases distinct from those embraced in the judiciary act of 1789, § 12, to remove restrictions from the power of removal in certain cases, and not to repeal or alter that act.—Butterfield v. Home Ins. Co., 14 Minn. 410, (Gil. 310.)

Grounds—Local prejudice.

2. Act Cong. March 2, 1867, relating to the removal of suits "between a citizen of the state in which the suit is brought and a citizen of another state," on the ground of local prejudice, from a state court to a United States circuit court, has no application to a controversy between a citizen of the state in which the suit is brought and an alien.—Stinson v. St. Paul, S. & T. F. R. Co., 20 Minn. 492, (Gil. 446.)

Application—Jurisdiction of state court.

3. On a petition for removal of a cause from a state court to the United States circuit court the state court has jurisdiction to inquire into the existence of the facts alleged in the petition, in order to determine whether the cause is in fact within the statutory provision under which removal is sought, even though the petition and bond for removal are in due form, and there has been no order of the federal court remanding the cause.—Dunne v. Burlington, C. R. & N. R. Co., 27 N. W. 448, 35 Minn. 73. Reversed in United States supreme court on writ of error. 7 S. Ct. 1262, 122 U. S. 513.

4. Any contest concerning the facts alleged in the petition for removal of a cause from the state to the federal court must be determined in the federal court.—Roberts v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 51 N. W. 478.

—— Affidavit.

5. The secretary of a corporation cannot, in the absence of authority from the corporation, make the affidavit required by Act Cong. March 2, 1867, to procure the removal of a cause from a state court to a United States court.—Dodge v. Northwestern Union Packet Co., 13 Minn. 458, (Gil. 427.)

—— Security.

6. To obtain a removal of a cause to a United States court, under statutes allowing such removal before trial, the statutory requirements must be fully complied with before the trial; and a failure to produce the security required, until after the jury has been called, will prevent a removal.—St. Anthony Falls W. P. Co. v. King Wrought-Iron Bridge Co., 23 Minn. 186.

—— Notice of filing petition and bond.

7. When defendant in an action in a state court files in the office of the clerk—the court not being in session—a petition and bond for removal of the cause to the circuit court of the United States, it is also incumbent on him to direct the attention of the court to the fact; and, if he fails to do so, the state court has jurisdiction to render judgment.—Roberts v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 51 N. W. 478.

Order for removal.

8. Where the requirements of the act of congress for the removal of a cause from a state court to a United States court are complied with, no order of the state court for such removal is necessary.—St. Anthony Falls W. P. Co. v. King Wrought-Iron Bridge Co., 23 Minn. 186; Scheffer v. National Life Ins. Co., 25 Minn. 534.

Remand by federal court—Effect.

9. The validity of a judgment rendered in a state court after the cause has been removed is not affected by the subsequent remanding of the cause from the federal to the state court, on the ground that the proceedings to remove were not effectual.—Roberts v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 51 N. W. 478.

Rent.

See *Landlord and Tenant*, 59-76; *Use and Occupation*.

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Rights of mortgagee, see *Mortgages*, 86.
—— of tenants in common, see *Tenancy in Common and Joint Tenancy*, 17-22.
—— of vendor and purchaser, see *Specific Performance*, 105, 106.

Repairs.

By mortgagee in possession, see *Mortgages*, 457, 458.
Liability of landlord, see *Landlord and Tenant*, 9, 10.
Of highways, see *Highways*, 58, 59.
sewers, see *Municipal Corporations*, 190.
streets, see *Municipal Corporations*, 136-151.

Repeal.

Of statutes, see *Statutes*, 63-71.

REPLEVIN.

I. When Lies, 1-16.
II. Procedure, 17-90.
III. Bonds and Actions Thereon, 91-98.

Counterclaims, see *Counterclaim and Set-Off*, 7-9.
Effect of assignment of judgment to pass bond for return, see *Assignment*, 14.
For goods attached, see *Attachment*, 74-80.
Jurisdiction of justice, see *Justices of the Peace*, 6, 7.

I. When Lies.

Property subject to replevin — Title deed.

1. Replevin will lie, in a court of competent jurisdiction, on the part of a grantee, to recover a deed, although the fact of its delivery be in controversy, and the title to realty consequently involved in the action.—Simmonsen v. Curtiss, (Minn.) 45 N. W. 1135.
43 Minn. 539.

Property severed from land.

2. Replevin may be maintained by the owner of land for timber cut therefrom by a trespasser. —Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

3. Replevin will lie for things forming a part of the realty, if they have been taken away after their severance from the freehold; but to maintain such action the plaintiff must have had actual or constructive possession of the land. —Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

4. Replevin cannot be maintained for property that formed a part of the freehold, if the series of acts forming the severance and taking away were sufficient to constitute adverse possession.—Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

5. The title of land cannot be tried *ex directo* in an action of replevin for property severed from the freehold.—Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

Right of plaintiff to possession.

6. In the absence of a proper objection, by answer or demurrer, one owner in common of personalty may, without joining his co-owners, maintain an action of replevin therefor against a stranger who has no right to its possession, or any part thereof.—Miller v. Darling, 22 Minn. 303.

7. In claim and delivery by H. against a sheriff who had seized certain property under execution on judgments in favor of certain plaintiffs, it appeared that at the time of the levy H. was in undisputed possession; that, while the answer denied H.'s possession, it did not allege it to have been in the judgment debtors, but simply averred that they were entitled to possession; that no fraud was alleged; that the sale to H. was made several months before the judgments were rendered; and that H. knew that the judgment debtors, of whom he purchased, were in debt. *Held*, that as there was no fraud H. could recover.—Haseltine v. Swensen, (Minn.) 38 N. W. 110.
38 Minn. 424.

8. A chattel mortgagee cannot maintain claim and delivery for the mortgaged property against a third person, before maturity of the notes secured, without proving his right to immediate possession under the terms of the mortgage, which give the mortgagor the right to possession until he defaults in payments, or injures or neglects the property, or attempts to remove or dispose of it, or the mortgagee deems himself insecure.—Kellogg v. Anderson, (Minn.) 41 N. W. 1045.
40 Minn. 207.

Possession of defendant.

9. Replevin will lie for personal property, although not in the actual possession of defendant, but under his control, in the hand of another, after demand of defendant, and refusal to surrender the same.—Bradley v. Gamelle, 7 Minn. 331, (Gil. 260.)

10. An action of claim and delivery is properly brought against the person who is in actual, physical possession of the property involved, although he may be keeping it for another person.—Flatner v. Good, 29 N. W. 56, 35 Minn. 395.

11. Pending a dispute over the cost of constructing a building, plaintiff, at defendants' request, furnished them with certain vouchers, a general statement of expenditures, and an affidavit of its correctness made by his book-keeper. *Held*, that these papers being furnished for inspection only, defendants did not become owners thereof, and an action of claim and delivery will lie for their recovery.—Drake v. Auerbach, (Minn.) 35 N. W. 367. 37 Minn. 505.

12. Replevin will lie against an officer to recover possession of property taken on execution against a third person.—Whitney v. Swensen, (Minn.) 45 N. W. 609.
43 Minn. 337.

Demand.

13. Where a party comes lawfully into the possession of property, replevin will not lie for its recovery until after demand and refusal of possession; and a complaint in replevin which alleges

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neither an unlawful taking nor a demand and refusal is fatally defective.—Stratton v. Allen, 7 Minn. 502, (Gil. 409.)

Distinguished in Hurd v. Simonton, 10 Minn. 426, (Gil. 340.)

14. A demand is necessary before suit to recover possession of personal property from a *bona fide* purchaser thereof at a sale by a public officer under process apparently regular.—Kellogg v. Olson, 24 N. W. 364, 34 Minn. 103.

15. Where a demand is necessary before bringing suit to recover possession of personal property, a demand on an agent having charge of the property for safe-keeping merely is insufficient.—Kellogg v. Olson, 24 N. W. 364, 34 Minn. 103.

16. In actions of replevin a demand for the property before suit is not necessary where the defendant's possession was acquired wrongfully, or where, although it was rightful in its inception, he has subsequently wrongfully converted the property to his own use, or where in his answer he claims a right to it in himself, and demands its return.—Guthrie v. Olson, 46 N. W. 853, 44 Minn. 404; Kellogg v. Olson, 24 N. W. 364, 34 Minn. 103; Tancre v. Pullman, (Tancre v. Reynolds,) 29 N. W. 171, 35 Minn. 476; Ellingbor v. Brakken, 30 N. W. 659, 36 Minn. 156; Miller v. Adamson, 47 N. W. 452. 45 Minn. 99.

II. Procedure.

Affidavit.

17. In replevin in a justice's court for exempt property, the affidavit of plaintiff stated, in the language of Gen. St. Minn. 1878, c. 65, § 89, that the property "was not taken from him by any process legally and properly issued against him, or, if so taken, that it was exempt," etc. *Held*, that the affidavit was not void on account of such alternative statement, as it showed that the property was exempt, whether taken under process lawfully issued or not.—Carlson v. Small, 21 N. W. 737, 32 Minn. 492.

Writ.

18. Under Sp. Laws Minn. 1874, c. 141, establishing the municipal court of Minneapolis, as amended by Sp. Laws 1883, c. 48, which provides that in an action to recover possession of personal property the clerk shall issue the writ, "which may be in form" as set forth in the act, "or the writ may be in any other form that the court may, by rule, prescribe," a writ in form prescribed by rule of the court, which dispenses with both the statement of value and the command to summon the defendant, is sufficient, and the action may be commenced by a summons under the General Statutes.—West Pub. Co. v. Bottineau, 25 N. W. 405, 34 Minn. 239.

19. In an action of replevin, brought after the repeal of the provisions of Gen. St. Minn. 1866, c. 66, tit. 8, §§ 115-117, for the issue of the writ by the clerk on affidavit and request by plaintiff's attorney, and the amendment of section 114 by Laws 1868, c. 76, which provided for the taking of the property by the sheriff on requisition of plaintiff's attorney indorsed on the affidavit, etc., the writ was issued by the clerk as provided before the amendment. *Held*, that such writ was in no sense process of the court, and was void on its face, and the sheriff acting under it was a mere trespasser.—Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

20. Where property is taken under a writ of replevin void on its face, the court has no power to vacate the writ and direct the return of the property, but must leave defendants to their right of replevy, or action for damages against the sheriff, as in case of any other trespass.—Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

21. General appearance, in an action of replevin, does not operate as a waiver of an illegal taking on the writ.—Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

Delivery to plaintiff.

22. In an action of replevin, where the property was not taken possession of by the officer, it will be considered that no provisional remedy was allowed, and that the same was properly dismissed by entry to that effect by plaintiff's attorney in the clerk's register, and giving notice to defendants, without payment of costs or entry of judgment, as allowed by Gen. St. Minn. 1866, c. 66, § 242.—Blandy v. Raguet, 14 Minn. 491, (Gil. 368.)

23. Under Gen. St. Minn. 1878, c. 66, § 132, providing that the plaintiff in an action to recover the possession of personal property may claim immediate delivery, it is optional with plaintiff to claim such delivery, and failure to do so will not change an action of replevin to one for conversion merely, for the purposes of determining the venue.—Benjamin v. Smith, (Minn.) 44 N. W. 1083.

43 Minn. 146.

Right to return.

24. Under Pub. St. c. 60, § 135, relating to claim and delivery of personal property, which provides that defendant may require the return thereof upon giving an undertaking, etc., and, if a return be not required within three days, the property must be delivered to the plaintiff, a coroner taking property from the sheriff should retain it for three days, but if during that time he delivers it to the plaintiff, and the defendant excepts to the sureties on the bond, he waives his right to a return, and cannot, after delivery to the plaintiff, and the expiration of the three days, withdraw his exception, and insist upon a return of the property on tendering an undertaking.—Vanderburgh v. Bassett, 4 Minn. 242, (Gil. 171.)

Dismissal.

25. In replevin, where the property is taken by plaintiff and returned to defendant on the proper bond, plaintiff cannot dismiss by a notice served on defendant's attorneys, even though they retain such notice, as Gen. St. Minn. 1866, c. 66, § 242, subd. 2, requires a consent in writing.—Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

Pleading—Complaint.

26. In an action for the recovery of possession of personal property, a complaint which fails to show that at the time of commencing the action the plaintiff had an existing legal right to the possession of such property is fatally defective.—Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

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27. In an action of replevin the complaint alleged that the plaintiffs were possessed of the property taken "as of their own proper goods." *Held* sufficient allegation of ownership and possession.—Stickney v. Smith, 5 Minn. 486, (Gil. 390.)

28. In an action of claim and delivery plaintiff's ownership and right to possession are properly alleged in the present tense, as the action is founded upon the present right of the plaintiff.—Tancre v. Pullman, (Tancre v. Reynolds,) 29 N. W. 171, 35 Minn. 476.

29. A complaint averred that a barn belonging to and situated upon the land of plaintiff was, by one B., wrongfully and forcibly severed from plaintiff's land, and removed to land subsequently conveyed to defendant, and had ever since been used and occupied by B.; that the defendant refused to deliver the same to plaintiff, or permit him to remove the same to his own land. *Held* that, since no unlawful detention by defendant was averred, the complaint did not state a cause of action.—Tozier v. Merriam, 12 Minn. 87, (Gil. 46.)

30. A complaint in replevin, which avers that plaintiff is the owner and possessor of the property, and that the defendant took and carried the same away, and detains it against sureties and pledgees, states a good cause of action without alleging that the detention is unjust.—Adams v. Corriston, 7 Minn. 456, (Gil. 365.)

31. The complaint in replevin in a justice's court for exempt property need not set out particularly the facts touching plaintiff's title and the levy and exemption; it is sufficient to allege generally plaintiff's ownership, the alleged wrongful detention, the demand, and the value.—Carlson v. Small, 21 N. W. 737, 32 Minn. 492.

32. Where property sought to be recovered in an action of claim and delivery is a certain undivided fractional part of a certain specified quantity of property, uniform in quality and value, and susceptible of a fair and equal division by count, measurement, or weight, (as, for instance, grain in bulk,) the description and proof of the property sought to be recovered, as such undivided fractional part of the specified quantity, is sufficiently specific.—Ellingbor v. Brakken, (Minn.) 30 N. W. 659.

36 Minn. 156.

Pleading—Plea.

33. Under the Wisconsin statute, giving the action of replevin in two distinct classes of cases,—for the wrongful taking and for the wrongful detention,—in an action of replevin in the *cepit*, a plea of the general issue, *non cepit*, admits the title, and simply puts in issue the wrongful taking, and, when they are material, the time and place.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

34. In an action of replevin, especially in the *cepit*, defendant may, as inducement to the traverse of the plaintiff's title, set up title in a third person, and, if successful upon such issue, is entitled to judgment without connecting himself with such outstanding title.—Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

Pleading—Reply.

35. In an action of replevin the complaint alleged that plaintiff was the owner and entitled to the immediate possession of the property in question, and the answer denied these allegations, and averred a former title in a third person named, and that such third person, being the owner, sold the property to defendants, and that they had ever since been the owners of it. *Held* that these allegations of the answer were not new matter requiring a reply.—Williams v. Mathews, 14 N. W. 577, 30 Minn. 131.

—— Defects, how cured or waived.

36. Under the Wisconsin statute in force at the time of the creation of the territory of Minnesota, the complaint in replevin should aver that the property was wrongfully taken. The defect will, however, be cured by verdict.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

37. In an action for the recovery of personal property the affidavit cannot be referred to to supply deficiencies in the complaint.—Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

38. Where a complaint in replevin alleges that the defendant wrongfully detains the property, but does not aver a demand and refusal, the defect is cured by a verdict for plaintiff. Stratton v. Allen, 7 Minn. 502, (Gil. 409,) distinguished.—Hurd v. Simonton, 10 Minn. 423, (Gil. 340.)

Pleading and proof.

39. Where defendants, in replevin by an assignor for the benefit of creditors, allege the title to the property in controversy to be in a third person, from whom they had taken it on execution, they cannot at the trial show an assignment, prior to the assignment to plaintiff, from such third person to another.—McClung v. Bergfeld, 4 Minn. 148, (Gil. 99.)

40. When the fact of partnership is alleged and proved in an action of replevin, the failure to prove the name of the partnership, though alleged, is immaterial.—Stickney v. Smith, 5 Minn. 486, (Gil. 390.)

41. In an action of claim and delivery for certain wheat stored in the warehouse of one H., defendant averred ownership in H., subject to claims of C. & D.; that H. purchased the same with money of C. & D., and under an agreement that it was not to be sold or shipped without their consent. *Held*, that evidence tending to show that it was agreed that C. & D. should have a lien on all wheat purchased, to reimburse them for advances, the wheat to be considered theirs until advances were paid, was properly rejected as irrelevant and inconsistent with the answer.—Miller v. Darling, 22 Minn. 303.

Evidence—Title and ownership.

42. In an action of claim and delivery, plaintiff must specifically identify his own property, and is not relieved from so doing by the fact that the defendant has intermingled it with his own so as to make such identification impossible. Other property, of a similar character, cannot be taken in lieu thereof.—Ames v. Mississippi Boom Co., 8 Minn. 467, (Gil. 417.)

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43. In an action of replevin to recover property, the plaintiff's title to which depends upon a deed of assignment, the validity of which is attacked upon the ground of actual fraud in its execution, the question of fraud is one proper for the jury, under Gen. St. Minn. 1866, c. 66, § 198, providing that issues of fact in actions to recover personal property shall be tried by jury.—Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

44. Where plaintiff in replevin alleges generally that he is the owner of the property in controversy, and entitled to its possession, he may prove a chattel mortgage thereon to himself, and a breach of some condition thereof which by its terms entitles the mortgagee to take possession of the property.—Miller v. Adamson, (Minn.) 47 N. W. 452.
45 Minn. 99.

45. In an action of replevin defendant may show that plaintiff had sold the property to a third party under whom defendant claims it, even though plaintiff's title at the time of such sale may not have been absolute, but subject to a right of redemption under a chattel mortgage.—Bragdon v. Penney, 28 N. W. 241, 35 Minn. 204.

46. In replevin, originally brought in justice's court, the answer, by general and specific denials, put in issue all of the allegations of the complaint, which was in the usual form. The answer also averred that defendant owned the property in dispute, but the previous denials in the answer did not seem to be predicated upon the claim of ownership. *Held*, that it was not error to admit in evidence a certified copy of a chattel mortgage on the property, executed and delivered by its owner (not the plaintiff) to a third person, the previous testimony showing that defendant's possession was as the authorized agent of said third person, mortgagee, and in accordance with the terms of the mortgage.—King v. La Crosse, (Minn.) 44 N. W. 517.
42 Minn. 488.

47. In an action of replevin, where each party pleads in general terms that he has title to the property, and denies the title alleged by the other party, the defendant may avail himself of the defense that the conveyance under which the plaintiff claims title was fraudulent and void as to the defendant.— Mullen v. Noonan, (Minn.) 47 N. W. 164.
44 Minn. 541.

48. In an action of claim and delivery, each party alleging general ownership and right of possession in himself, where the defendant, in support of his claim, introduces in evidence what purports to be a bill of sale from plaintiff, the latter may prove in rebuttal that there had never been in fact any sale or delivery of the property; that the bill of sale had been signed to be placed in escrow until a proposed trade had been completed; and that the person named as vendee therein had fraudulently and unlawfully obtained possession of it.—Grinnell v. Young, (Minn.) 42 N. W. 929.
41 Minn. 186.

49. Where plaintiff in replevin testifies that the property in controversy belongs to him, and was taken from him by defendant, and defendant claims under a mortgage which is introduced in evidence, but there is no evidence that the property mortgaged is the same as that sought to be recovered, a judgment for plaintiff is proper.—Game v. Whaley, (Minn.) 45 N. W. 228.
43 Minn. 234.

50. In replevin against a sheriff for cattle, defendant alleged that they were the property of C., and were seized on execution against him. Plaintiff and C. testified that the former had sent the cattle to C. to be sold, and that C.'s sole interest therein was as plaintiff's agent. For defendant there was evidence that, some time after the execution issued, plaintiff purchased one of the cattle not sold under the execution from a man in whose charge it had been left, and who sold it to reimburse himself for the keeping; and that C. sold one of the cattle, taking in payment a note which he negotiated at a bank, but it was shown that he accounted to plaintiff for it. *Held*, that the evidence will not support a verdict for defendant.—Cosgrove v. Kohler, (Minn.) 47 N. W. 539.
45 Minn. 148.

—— Taking.

51. In an action of replevin for a wagon, a constable may be asked whether, as such, he took the wagon from defendant; and the question cannot be excluded on the ground that the return on the writ is the best evidence, as that would not show whether the witness was the officer who took the wagon.—Goodell v. Ward, 17 Minn. 17, (Gil. 1.)

52. In an action of replevin for a wagon, evidence showed plaintiff's ownership; that the wagon was standing in the highway in front of his yard, and between the fence and traveled part of the street, whence it was removed by defendant. It was in defendant's possession a fortnight later, and he refused to surrender the same. *Held*, that a wrongful taking was fully made out.—Goodell v. Ward, 17 Minn. 17, (Gil. 1)

—— Demand.

53. In replevin for goods wrongfully levied upon by defendant sheriff, under execution against another, an attorney for plaintiff testified that immediately after a levy he told the sheriff that the goods belonged to plaintiff, and he had better give them up; that, if he did not, witness would replevy them, and defendant replied that he was indemnified. *Held* sufficient to authorize a finding of a demand and refusal.—Caldwell v. Bruggerman, 8 Minn. 286, (Gil. 252.)

54. The admission, in an action of claim and delivery, of incompetent evidence of a demand for the property on defendant, is not material where the answer sets up title and prays a return. Following Kellogg v. Olson, 24 N. W. 364, 34 Minn. 103.—Tancre v. Pullman, (Tancre v. Reynolds,) 29 N. W. 171, 35 Minn. 476.

55. Proof of a wrongful taking, or of a wrongful conversion, will support a complaint for a wrongful detention, without proof of demand before suit.—Guthrie v. Olson, (Minn.) 46 N. W. 853.
44 Minn. 404.

—— Value.

56. In claim and delivery, when the value of the property cannot be determined by the ordinary rule of market value, it is not error to permit a jury to consider the owner's estimate of its worth to him.—Drake v. Auerbach, (Minn.) 35 N. W. 367.
37 Minn. 505.

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57. The statutory affidavit to obtain delivery of property, requisition on the sheriff, and sheriff's return thereon, may be admitted in evidence to show a rebonding of property replevied, and that, therefore, plaintiff, as prevailing party, was entitled to have its value assessed and judgment accordingly.—Bennett v. Schuster, 24 Minn. 383.

Damages.

58. In an action of replevin, where the property has been taken by plaintiff and the verdict is in plaintiff's favor, no damages being alleged, the value of the property is not material.—Foster v. Berkey, 8 Minn. 351, (Gil. 310.)

59. In replevin for horses, evidence of the use plaintiff had for such horses, offered to show the damages accruing from their detention, is not admissible unless such damages are specially pleaded.—Ferguson v. Hogan, 25 Minn. 135.

60. In replevin for horses, evidence of a contract made by plaintiff, whose fulfillment required the use of these horses, is not admissible to show damages resulting from their detention, where such contract was made after defendant took the horses, and antedated.—Ferguson v. Hogan, 25 Minn. 135.

61. In replevin by a scripee for the recovery of certain non-assignable Sioux half-breed scrip, the plaintiff is entitled to recover the value of the scrip to him. Defendant, being a wrong-doer, cannot urge as defense that the scrip is of no value to any one but plaintiff, or that he might procure duplicates thereof.—Bradley v. Gamelle, 7 Minn. 331, (Gil. 260.)

62. In an action of replevin, in the absence of evidence of fraud, malice, negligence, oppression, or special damages, the measure of defendant's damages for taking his property is its value at the time of taking, with interest to date of trial.—Berthold v. Fox, 13 Minn. 501, (Gil. 462.)

63. In an action of replevin by the general owner of goods against an officer having a special property therein, by virtue of levy thereon, the measure of the officer's damages in case of judgment in his favor, and failure to return the property, is the amount of execution debt, interest and costs; and, if this is less than the full value of the property, it is error to order judgment for such full value.—Dodge v. Chandler, 13 Minn. 114, (Gil. 105;) La Crosse & M. Steam-Packet Co. v. Robertson, 13 Minn. 291, (Gil. 269.)

64. Where, in an action of replevin, the value of the property is assessed as of the time of taking, allowance of the value of the use of such property as damages for the wrongful detention is improper, unless the character of the property is such that it necessarily, or in fact, has perished, worn out, or become impaired in value by such user.—Sherman v. Clark, 24 Minn. 37.

65. In an action of claim and delivery for a wrongful taking, if the plaintiff recovers, the value of the property is to be assessed as of the time of the wrongful taking or detention. If the defendant recovers, the value is to be as of the time when the property is replevied from him.—Sherman v. Clark, 24 Minn. 37.

66. Part of the property taken by plaintiff in replevin was delivered by him to a receiver of the vendor of the goods to defendant, appointed under the insolvent law subsequent to the sale to defendant. *Held* that, upon defendant being found to be the owner and entitled to possession, plaintiff was not entitled to a deduction, from the amount of the recovery against him, of the value of the goods so delivered to the receiver.—Yallop-De Groot Co. v. Minneapolis & St. L. Ry. Co., 24 N. W. 185, 33 Minn. 482.

67. A mortgagee, after default in the mortgage, has a right to possession only for the purpose of foreclosure or sale under the mortgage, to satisfy the debt, and cannot recover in replevin the value of the use of the property, as special damages.—Thompson v. Scheid, (Minn.) 38 N. W. 801.
39 Minn. 102.

Verdict and findings.

68. In an action of replevin, where the value of the property is not assessed by the jury, the value cannot be assumed to be the amount of damages found.—Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

69. Under Pub. St. c. 61, § 38, which provides that in an action for the recovery of personal property the jury must assess the value of the property, the value of each article need not be assessed separately, and a finding of the value in gross is sufficient.—Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 190.)

70. Under Gen. St. Minn. 1866, c. 66, § 221, which provides that whenever a verdict in replevin is in favor of the party having possession of the property the value thereof shall not be found, the finding of the jury, plaintiff being in possession of a part of the property, of the value of all the property, and of that part taken on the writ, is unwarranted, but may be disregarded as surplusage, and judgment entered for that which was not taken on the writ.—Hecklin v. Ess, 16 Minn. 51, (Gil. 38.)

71. In an action for recovery of possession of grain in bags, a general verdict for defendants was supported by the evidence, except as to the bags, the issues as to which were entirely severable. A motion for a new trial was denied by the trial court, upon a stipulation by defendants that judgment might be entered for the value of the bags. *Held*, that there was no substantial error in this, it being in principle the same as directing an excess to be remitted from a verdict.—Ladd v. Newell, 24 N. W. 366, 34 Minn. 107.

72. In an action of replevin for property of plaintiff levied on and sold by defendant as sheriff under an execution against third parties, it appeared that plaintiff in the replevin had purchased the property at the execution sale and so had become repossessed of it, and was in possession of it at the time of the trial. The taking, sale, and purchase by plaintiff, and the amount paid by him, were admitted by the pleadings. The jury found a verdict for plaintiff, assessing the value of the property at the amount paid by him therefor, but not in terms assessing damages for the detention. *Held*, that the verdict, although wrong in form, was right in substance; that it should have assessed the same amount

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as damages for the detention, to be recovered absolutely; and that defendant could not complain of a judgment for plaintiff for the possession, or, in the alternative, for the amount of the verdict as damages.—Leonard v. Maginnis, 26 N. W. 733, 34 Minn. 506.

—— Amendment.

73. The statute of Wisconsin, in force in Minnesota at the time an action of replevin was brought, provided that in a replevin suit the jury should, if the verdict was in favor of the plaintiff, assess his damages, and also the value of the goods and chattels specified in the declaration. The jury found for plaintiff generally, but did not assess his damages. *Held*, that the verdict was not, for that reason, void, but that the court could amend it by adding nominal damages; and that, the property having been delivered to the plaintiff, an assessment of its value was not essential.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

74. A verdict, in an action of replevin, cannot be amended so as to find the value, where such value is not assessed by the jury.—Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

Judgment—Return of property or its value.

75. In an action of replevin the defendant claimed a return of the property and $50 damages for its detention. The jury assessed his damages at $75, but did not find as to the value of the property, and judgment was entered for a return of the property, or, on failure to return, for $75 as the value thereof. *Held* that, the jury not having found the value, such judgment was irregular.—Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

76. In an action of replevin, if a part of the goods can be returned, the plaintiff can elect to take that part, and a judgment for the value of the remainder, to be assessed by the jury.—Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 190.)

77. In an action of claim and delivery, an offer, made after a return of the property to plaintiff, to allow judgment for damages for detention, with costs, without adjudging the title to the property, is insufficient for any purpose.—Oleson v. Newell, 12 Minn. 186, (Gil. 114.)

78. Where, in an action of claim and delivery, the possession of the property has been returned to the plaintiff, his ownership and wrongful detention having been admitted, he is still entitled to a judgment determining the right of property to be in him, and at least for nominal damages.—Oleson v. Newell, 12 Minn. 186, (Gil. 114.)

79. Under Gen. St. Minn. 1866, p. 433, § 88, which provides that defendant in replevin "may have judgment for the return of the property, or the value thereof if the same has been taken from his possession, or delivered to the plaintiff," judgment for defendant must be in the alternative. Kates v. Thomas, 14 Minn. 460, (Gil. 343.)

80. Judgment for plaintiff in replevin, where the property has not been delivered to him, should be in the alternative.—Sherman v. Clark, 24 Minn. 37.

81. A judgment in replevin in the usual form, for the recovery of money only, is irregular, but not void, and cannot be attacked in an action upon the replevin undertaking.—Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

82. The right of a party to an alternative judgment for the value of the property, if a return cannot be obtained, is exclusively for his own benefit, and he may waive it, and take judgment merely for the return.—Stevens v. McMillan, 35 N. W. 372, 37 Minn. 509; Thompson v. Scheid, 38 N. W. 801, 39 Minn. 102.

83. In replevin, where the plaintiff's title or right of possession is legally divested after suit brought and before trial, he can, as against the owner or person entitled to the possession, recover only damages for the unlawful detention up to the time his title or right of possession was divested. He is not entitled to judgment for the return of the property, or for its value.—Deal v. D. M. Osborne & Co., (Minn.) 43 N. W. 835.
42 Minn. 102.

—— Amendment.

84. In an action of replevin, defendant had a verdict in the alternative for a return of the property, or judgment for its assessed value, and the clerk, through mistake, entered an absolute money judgment. *Held*, that the district court might, in its discretion, amend the judgment so as to conform to the verdict.—Berthold v. Fox, 21 Minn. 51.

85. An amendment by the district court of a judgment in replevin, to make it conform to the verdict rendered, cannot affect the rights of a person, not a party to the suit, but a clause saving such rights should be incorporated in the order of amendment.—Berthold v. Fox, 21 Minn. 51.

—— Review.

86. In an action of replevin for a wagon, a constable was asked, "Did you, as such constable, ever take from the possession of the defendant the wagon, or any part thereof?" *Held*, that an objection that the question was incompetent, immaterial, and irrelevant was insufficient to raise the point that the witness did not know what wagon was in question.—Goodell v. Ward, 17 Minn. 17, (Gil. 1.)

87. In replevin for a horse mortgaged to plaintiff to secure the note of a third person, which horse defendant claimed by purchase from the mortgagor, a judgment for defendant will not be disturbed where there is evidence that the note due plaintiff has been fully paid.—Stein v. Hastings, (Minn.) 47 N. W. 968.
45 Minn. 196.

—— Res judicata.

88. Plaintiff brought an action of claim and delivery against R. for certain wheat, which was taken from the possession of R. and delivered to plaintiff. Subsequently, P., claiming the wheat under a chattel mortgage, brought another action of claim and delivery against plaintiff and two others, in which process was served on such others, but not on plaintiff, and the wheat was taken from plaintiff's possession and delivered to P. Thereafter P. was made a party defend

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ant in the action brought by plaintiff, and answered and took part in the trial therein without objection. *Held*, that the action brought by P. was not a bar to the maintenance of the former action brought by plaintiff; that such former action was to be taken as commenced, as to P., as of the date when he was brought into it; and that, the property and right of possession of the wheat having been found to be in plaintiff, judgment was properly rendered for him against P. for possession of the wheat or its value.—Chadbourn v. Rahilly, 25 N. W. 633, 34 Minn. 346.

89. On reversal, on appeal, of a judgment of a justice in favor of the plaintiff, where the property has been delivered to plaintiff on the writ, defendant is entitled to judgment for the return of the property, or its value; but this is not a judgment on the merits, so as to bar another action.—Daley v. Mead, (Minn.) 42 N. W. 85.

40 Minn. 382.

Costs.

90. Under Rev. St. Minn. p. 370, c. 72, § 2, in relation to actions of replevin, providing that plaintiff shall recover no more costs and charges than damages, unless he recovers at least $50 damages, or property the assessed value of which, with the damages, amounts to $50, where the verdict is for plaintiff, but fails to find the value of the property, he is entitled to nominal costs only.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

III. Bonds and Actions Thereon.

When authorized.

91. Since Laws Minn. 1868, c. 76, repealing Gen. St. 1866, c. 66, §§ 112–117, a writ to take the property in an action to recover the possession of personal property is unauthorized and void, and a bond given to procure the issuance thereof, and a bond given in substitution therefor, for the insufficiency of the sureties in the first bond, are void, notwithstanding all parties may have treated all the proceedings as regular, and they are no protection to the officer taking the property.—Hicks v. Mendenhall, 17 Minn. 475, (Gil. 453.)

Rights of sureties.

92. A surety on a replevin bond, after judgment for defendant, on being sued upon the undertaking in the court of another state, successfully defended the action on the ground of erroneous entry of judgment in the replevin suit, and discharge thereby from liability. *Held*, that he could not thereafter oppose an application to amend the judgment in the replevin suit, or appeal from the order granting such amendment.—Berthold v. Fox, 21 Minn. 51.

When action lies.

93. The issuance of an execution upon a judgment in replevin is not, in the absence of a statutory requirement, a condition precedent to bringing an action upon the undertaking given for the return of the property.—Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

94. Modification by the supreme court, on appeal from a judgment rendered in an action of replevin, as to the amount, will not defeat an action on the replevin bond commenced after judgment in the court below and before appeal taken.—Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

95. The condition of a replevin bond that the plaintiff "shall prosecute said action with effect," is to be construed as meaning a prosecution with success, or to a successful termination, and an action may be maintained on the bond, as for a breach, upon the dismissal of the action in replevin, without a judgment therein for a return of the property to the defendant.—Boom v. St. Paul Foundry & Manuf'g Co., 22 N. W. 538, 33 Minn. 253.

Parties.

96. A plaintiff in replevin, who has signed an undertaking for the return of the property, is a proper defendant, with the sureties, in an action upon such undertaking after judgment against him.—Buck v. Lewis, 9 Minn. 314, (Gil. 298.)

Evidence.

97. In an action on a bond in replevin against a surety therein to enforce a judgment against plaintiff for a return of the property, evidence that the judgment was subsequently satisfied by a delivery of the property is not objectionable as impeaching the record of the judgment or the return of the officer in the replevin suit.—Dempsey v. Cogswell, 12 N. W. 148, 29 Minn. 100.

Recovery.

98. Where an action of replevin in a justice's court is dismissed without judgment for return, the value of the property taken cannot be recovered in an action on the replevin bond.—Clark v. Norton, 6 Minn. 412, (Gil. 277.)

Reply.

See *Counterclaim and Set-Off; Pleading*, 97–112.

Representations.

See *Deceit; False Pretenses; Fraud.*
Estoppel by, see *Estoppel*, 44–58.

Rescission.

Of accommodation note, see *Negotiable Instruments*, 53, 54.
contract for sale of real estate, see *Vendor and Purchaser*, 76–92.
policy of insurance, see *Insurance*, 35.
release, see *Release and Discharge*, 4–8.
sale of goods, see *Sale*, 126–140.
—— of land, see *Vendor and Purchaser*, 61–75.

Reservations.

In deed, see *Deed*, 89–91; *Easements*, 1, 2.

Res Gestæ.

See *Account Stated*, 14; *Criminal Law*, 61; *Evidence*, 102–110; *Homicide*, 75, 76.

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Residence.

Of defendant in attachment, see *Attachment*, 5, 6, 20.

Res Judicata.

See *Judgment*, 92–169.
Condemnation proceedings, see *Eminent Domain*, 236–239.
Judgment in replevin, see *Replevin*, 88, 89.
—— of divorce, see *Divorce*, 28, 29.

Restraint of Trade.

See *Contracts*, 47–49; *Intoxicating Liquors*, 3.

Resulting Trusts.

See *Trusts*, 13–25.

Retainer.

Of attorney, see *Attorney and Client*, 1–17.

Retraction.

Of libel, see *Libel and Slander*, 49–51.

Retrospective and Ex Post Facto Laws.

See *Appeal and Error*, 2, 3; *Constitutional Law*, 80–92; *Statutes*, 58–60.

Return.

Of assessment of tax, see *Taxation*, 48, 49.
attachment, see *Attachment*, 71, 72.
deposition, see *Deposition*, 11–20.
execution, see *Execution*, 105–115.
summons, see *Summons*, 53–56.
On appeal, see *Appeal and Error*, 161–169, 715–719; *Criminal Law*, 155.
To *certiorari*, see *Certiorari*, 27–29.

Revenue.

See *Statutes*, 11.

Review.

Of assessment of tax, see *Taxation*, 54–59.
On appeal or error, see *Appeal and Error*, 216–230, 722–748; *Criminal Law*, 140–192.
certiorari, see *Certiorari*.

Revival.

See *Abatement and Revival*.

Revocation.

Of license, see *License*, 2, 3.
will, see *Wills*, 26–32.

REWARD.

Offer by sheriff, see *Sheriffs and Constables*, 1.

Who entitled to.

1. Where a peace officer performs service in the detection and punishment of crime and recovery of stolen goods, which it is his official duty to perform, he is not entitled to share in the reward.—Warner v. Grace. 14 Minn. 487. (Gil. 364.)

2. A deputy-sheriff, on information furnished by a private person, at the request of such person, without a warrant, and within his own county, arrested one who had committed a felony in another county, and delivered him to the authorities of that county. *Held*, that it was his duty as a peace officer, if satisfied the information was true, to make the arrest, and he was entitled to fees therefor the same as if the arrest had been made on warrant, but was not entitled to share in the reward offered for the arrest and delivery of such prisoner.—Warner v. Grace, 14 Minn. 487, (Gil. 364.)

3. Under Sp. Laws Minn. 1867, c. 19, pp. 54, 61, (Charter of City of Minneapolis,) making it the duty of police officers to pursue and arrest persons violating the laws, the chief of police of a city is not entitled to a reward offered for the "arrest and conviction" of persons who committed a particular offense within the city, though he procured the arrest of such persons of his own motion, and collected the evidence, and caused witnesses to be summoned, and himself testified against them.—Day v. Putnam Ins. Co., 16 Minn. 408, (Gil. 365.)

RIPARIAN RIGHTS.

See, also, *Waters and Water-Courses*.
In navigable waters, see *Navigable Waters*, 7.
Protection by injunction, see *Injunction*, 12, 13.

Ownership, in general.

1. The owner of the fee of the river side of a street bordering on the Mississippi river is a riparian proprietor, holding to low-water mark, subject only to the public easement of the street, and is entitled to compensation for his riparian rights as such owner from a railroad company appropriating that side of the street to its use.—Brisbine v. St. Paul & S. C. R. Co., 23 Minn. 114.

Distinguished in Wait v. May, 51 N. W. 472.

2. The person entitled to the exclusive right to possess and use land abutting on a navigable lake or river is also, though he does not own the fee, entitled to enjoy the riparian rights incident to the land.—Hanford v. St. Paul & D. R. Co., (Minn.) 42 N. W. 596.

43 Minn. 104.

Conveyances—Waiver of rights.

3. Where an improvement company owning land along the shore of a navigable bay plats the same, and also the shoal waters extending to the dock-line established by legislative authority, with a view to filling up and making dry land of the latter, in conveyances of such water it may

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waive all riparian rights therein, incident to the remaining uplands, and a grantee of the latter with notice of such conveyances, and of the general plan of the improvements, recited in his deed, will be bound by such waiver.—Miller v. Mendenhall, (Minn.) 44 N. W. 1141.

43 Minn. 95.

Overruling Lake Superior Land Co. v. Emerson, 38 N. W. 200, 38 Minn. 406.

Submerged lands—Wharves, docks, etc.

4. The owner of land abutting upon the Mississippi river has the riparian right to construct wharves and piers thereon, and to extend them out into the river to the point of navigability, —Rippe v. Chicago, D. & M. R. Co., 23 Minn. 18.

5. The owner of land bounded by a navigable river has the right to free communication between his premises and the navigable channel of the river, and is entitled to the exclusive use of the bed of the stream for the purpose of filling out beyond low water to navigable water, so long as he does not interfere with the rights of the public with respect to navigation.—Carli v. Stillwater St. Ry. & T. Co., 10 N. W. 205, 28 Minn. 373.

6. Defendant deposited stone, earth, and *débris* in the Mississippi river opposite abutting land of plaintiff, and between such land and the center of the river, with plaintiff's consent thereto, given upon defendant's agreement to remove the same by a specified time. Defendant failed to remove the stone, earth, etc., within the time specified, to plaintiff's damage. *Held*, that plaintiff could not complain that the matter so deposited created a nuisance, having consented thereto.—Minneapolis Mill Co. v. Bassett, 18 N. W. 100, 31 Minn. 390.

7. The title to the soil below the low-water mark in a navigable lake is in the state, and not in the owner of the abutting shore, and a deed by him purporting only to convey the soil under water below low-water mark is inoperative. His riparian rights cannot be severed and transferred apart from the shore, so as to give rights in gross.—Lake Superior Land Co. v. Emerson, 38 N. W. 200, 38 Minn. 406.

Overruled in Miller v. Mendenhall, 44 N. W. 1144, 43 Minn. 103; Hanford v. St. Paul & D. R. Co., 44 N. W. 1144, 43 Minn. 120.

8. The right of a riparian proprietor upon navigable waters to improve, reclaim, and occupy the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. Overruling Land Co. v. Emerson, 38 Minn. 406, 38 N. W. 200.—Hanford v. St. Paul & D. R. Co., (Minn.) 44 N. W. 1144.*

43 Minn. 104.

9. A condemnation by a railroad corporation of the upland abutting upon the water embraces also the incidental riparian right of improvement and occupancy of the submerged lands, although no specific mention is made of riparian rights.—Hanford v. St. Paul & D. R. Co., (Minn.) 44 N. W. 1144.* 43 Minn. 104.

10. The term "point of navigability," as used in cases defining the right of a riparian owner to extend landings, piers, wharves, etc., from his land into a navigable river beyond low-water mark, is to be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of water for any kind of navigation for which the stream is used, and for which it is adapted: provided, of course, it does not obstruct the paramount rights of the public.—In re Union Depot St. Ry. & T. Co., 17 N. W. 626, 31 Minn. 297; Brunswick v. Union Depot St. Ry. & T. Co., Id.

11. The establishment by legislative authority of a harbor or dock line in navigable waters is an implied grant to the owners of the adjacent upland of the right to occupy the land between low-water mark and such line, title to which is in the state, and to build on or fill up the same so as to extend the upland to such dock-line.—Miller v Mendenhall, (Minn.) 44 N. W 1141

43 Minn. 95.

12. The owner of land abutting on Lake Superior platted it, together with the shallows beyond the shore, and sold blocks with reference to the plat. *Held*, that the gradual encroachment of the water on one of the shore blocks, so as to entirely submerge it, did not vest the title thereto in the owner of the adjacent inland block.—Gilbert v. Eldridge, (Minn.) 49 N. W. 679.

47 Minn. 210.

13. Where the owner of land abutting on Lake Superior plats it, together with the shallows beyond the shore, and conveys an inland block with reference to such plat, the gradual encroachment of the water until it reaches the block so conveyed does not confer on its owner the riparian right to reclaim and use the submerged blocks and streets.—Gilbert v. Eldridge, (Minn.) 49 N. W. 679.

47 Minn. 210.

14. The riparian right of the owner of lands on the shore of Lake Superior to reclaim, improve, and occupy the land submerged by shallow water, beyond the shore, may be disassociated from the shore-land by the act of the owner, so that a conveyance by him of the shore-land would not include such riparian rights as incident thereto. —Gilbert v. Eldridge, (Minn.) 49 N. W. 679.

47 Minn. 210.

15. A conveyance in fee of land bordering on the Mississippi river, which had been submerged for some distance above low-water mark by dams erected in the river, includes the riparian rights which are naturally incident to the land conveyed, among which is the right to accretions formed by gradual alluvial deposits beyond the line of low water, notwithstanding the fact that the deed also in terms grants certain easements and rights upon the shore, which may be regarded as applicable to the remaining lands of the grantor bordered by the submerged land conveyed.—Minneapolis Trust Co. v. Eastman, (Minn.) 50 N. W. 82.

47 Minn. 301.

Rivers.

See *Navigable Waters; Riparian Rights; Waters and Water-Courses.*

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RULES OF COURT.

Authority to make.

1. Prior to the passage of the Revised Statutes of 1851, the supreme court of Minnesota had no authority by law to make rules binding on the district court. — Smith v. Valentine, 19 Minn. 452, (Gil. 393.)

Force and effect.

2. Under the provision of Pub. St. Minn. c. 53, § 12, that in an action for divorce a copy of the complaint must be served on defendant, with a notice to appear and answer within 30 days, or such other notice as the court or judge may direct, etc., a rule of the district court allowing such a defendant, in case of personal service of the summons and complaint within the jurisdiction of the court, 90 days to answer, is void, because in conflict with the statute.—Fagebank v. Fagebank, 9 Minn. 72, (Gil. 61.)

3. The rules of the district courts which derived their force from Laws Minn. 1862, c. 16, which chapter was repealed by Gen. St. 1878, c. 122, are no longer effective.—Jordan v. White, 20 Minn. 91, (Gil. 77.)

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S.

Sabbath.

See *Sunday*.

St. Anthony, City of.

Purchase of sites and erection of buildings for schools by board of education, see *Schools and School-Districts*, 5, 10, 11.
Return of delinquent taxes, see *Taxation*, 98.

St. Anthony Falls Water Power Company.

Power to appropriate water power, see *Waters and Water-Courses*, 25.

St. Croix Boom Corporation.

Condemnation proceedings by, see *Eminent Domain*, 163.

St. Paul, City of.

Actions against, see *Municipal Corporations*, 320-322.
Assessments for public improvements, see *Municipal Corporations*, 224, 242-244, 247, 254-261, 265-268, 275-283, 285-290, 293-301, 303-306.
Change of grade of streets, see *Municipal Corporations*, 229-234.
Condemnation proceedings, see *Eminent Domain*, 8, 133, 134, 148.
Contracts, see *Municipal Corporations*, 98-100, 108-110, 118-120, 123, 124.
Control and improvement of streets, see *Municipal Corporations*, 133, 134, 137-139, 213-218, 237, 238.
Defective streets, see *Municipal Corporations*, 152-154.
Elections and officers, see *Municipal Corporations*, 74.
Health board, see *Municipal Corporations*, 95.
Licenses, see *Municipal Corporations*, 30-36, 39.
Municipal court, see *Appeal and Error*, 699, 721, 740, 741; *Constitutional Law*, 51; *Courts*, 18, 19; *Criminal Law*, 5; *Forcible Entry and Detainer*, 2, 18; *Justices of the Peace*, 2; *Landlord and Tenant*, 86; *Pleading*, 159: *Prohibition, Writ of*, 14.
Nuisances, see *Municipal Corporations*, 9, 24-27.
Ordinances, see *Municipal Corporations*, 53, 57, 58.
Public parks, see *Eminent Domain*, 48.
—— works, see *Municipal Corporations*, 221, 222.
Regulating hackmen, see *Municipal Corporations*, 50.
—— speed of railway trains, see *Municipal Corporations*, 46-48.
Survey and map of streets, see *Municipal Corporations*, 6.
Water commissioners, see *Constitutional Law*, 62; *Municipal Corporations*, 88, 89.

St. Paul Union Depot Company.

Depot accommodations, see *Railroad Companies*, 97.
Liability to taxation, see *Railroad Companies*, 116.

St. Paul & Chicago Railway Company.

Branch of St. Paul & Pacific Railroad Company, see *Railroad Companies*, 7.

St. Paul & Pacific Railroad Company.

Acquisition of franchises of Minnesota & Pacific Railroad Company, see *Railroad Companies*, 99.
Exemption from taxation, see *Railroad Companies*, 103-109.
Land grants, see *Public Lands*, 56, 62, 63, 65.
Names of branches, see *Railroad Companies*, 7.

SALE.

I. The Contract, 1-50.
II. Warranty, 51-125.
III. Rights and Remedies of Parties, 126-196.
IV. Conditional Sale, 197-202.

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Of ward's realty, see *Guardian and Ward*, 23-49.
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Oral contracts, see *Frauds, Statute of*, 37-46.
Purchase of trust property by trustee, see *Trusts*, 37-40.
To infant, see *Infancy*, 8, 9.
Use of improved scales or measures, see *Weights and Measures*.

I. THE CONTRACT.

What constitutes—In general.

1. Where nothing further remains to be done to complete the transaction, it is not material that the bill of sale reads, "I agree to sell," instead of "I sell," etc. The form of the expression used is not decisive, but the manifest intention of the parties must control.—Bangs v. Friezen, (Minn.) 32 N. W. 173.

36 Minn. 423.

2. Where a husband offers to sell personalty to his wife, if she will pay a note of his, but she does not at the time accept the offer, nor relieve the husband from liability on the note, there is no sale, although she adds her name to the note.—Johnson v. Jacobs, (Minn.) 44 N. W. 6.

42 Minn. 168.

3. Defendant called at plaintiff's place of business, and examined wall-papers, selected the kind that he wanted, expressing satisfaction at the price thereof, gave instructions as to the quantity, and said he would send a paper-hanger to get it. This he did the next day, and the goods were delivered to the paper-hanger, who took them to defendant's house, where he was employed, and they remained there several days. *Held* that, though defendant then refused to allow the paper to be used or to pay for it, there was a complete sale of it at the stipulated price.—Rickey v. Stewart, (Minn.) 48 N. W. 22.

45 Minn. 437.

4. In an action for liquors alleged to have been sold to a husband as the agent of his wife, the defendant, it appeared that defendant was a nonresident, owning a saloon, which she rented to the husband; that she had never carried on the business herself; that the goods were shipped to the husband in his name; that all demands for payment were made upon him personally; and that a payment was made by him on account. *Held* that, a verdict having been given for plaintiff, an order granting a new trial would not be disturbed.—Grommes v. Shute, (Minn.) 48 N. W. 784.

46 Minn. 182.

Sale or bailment.

5. B. delivered to W. certain sheep, under an agreement reciting that they were lent for three years, upon certain special conditions; B. to have a certain amount of wool each year, and W. the increase; W. to pay the taxes on the sheep, to take proper care of them, and at the expiration of the period specified to return as many sheep as were lent him, and of as good quality, etc. *Held*, that such contract did not constitute a sale, but a bailment.—Williams v. McGrade, 13 Minn. 174, (Gil. 165.)

6. Where a manufacturer of a steam snow-plow makes a contract with a railroad company, by the terms of which he leases to them a snow-plow for the term of 99 years, and it appears that the plow will not last so long, and the contract is not qualified by any condition, and there is oral evidence tending to show that the parties put the contract in the form of a lease, instead of a sale, merely for the purpose of enabling the manufacturer to avoid a promise to pay a third person for advertising, under a contract by which he was to make the payment out of the proceeds of the first plow sold, the agreement with the railroad company will be treated as a sale.—National Car & Locomotive Builder v. Cyclone Steam Snow-Plow Co., (Minn.) 51 N. W. 657; Northwestern Railroader v. Same, Id. 658; Lanward Pub. Co. v. Same, Id.

Sale or contract for work and material.

7. A contract to furnish ties and construct a railroad for a given compensation, payable in installments, as the work progresses, upon monthly estimates of work done and material furnished, is a contract for work and material, and not one of sale; and, until placed in the track, the title to ties to be used remains in the contractor, though they have been inspected by the company and included in its estimate.—Chandler v. De Graff, 22 Minn. 471.

Sale of option.

8. After the burning of a grain elevator the warehouseman sold, for the account of all whom it might concern, the "whole mass" of grain upon the premises, and which had been partially destroyed by the fire, with the condition that the purchasers should remove it within 30 days. *Held* a sale and purchase of an option to take away, within the time specified, all of the grain desired by the purchasers, but not as an absolute purchase, including the ashes and grain already destroyed, and rendered worthless, so as to oblige the purchasers to remove such worthless matter from the premises, or make them liable to the public after this had become a nuisance.—City of Duluth v. Dunn, (Minn.) 41 N. W. 1049.

40 Minn. 301.

Parol evidence to establish.

9. Where an order for goods is incomplete as a contract, and is consistent as well with a consignment as a sale, and the terms thereof may apply to either, it may be shown by parol to have been given in response to a proposition to deliver the goods upon consignment.—Head v. Miller, (Minn.) 48 N. W. 192.

45 Minn. 446.

Fraudulent purpose.

10. Defendant as sheriff took under execution certain grain from land belonging to T., the execution debtor. T. had, by written contracts, leased the land to plaintiff for a time certain or "until the grain is secured for the rents." Plaintiff agreed to pay T. $300 to buy seed, etc., also to apply $300 on a debt of T. to plaintiff. T. agreed to cultivate the land, sow, harvest and thresh the grain, and deliver two-thirds to plaintiff. The court instructed the jury that this was a sale to plaintiff, valid between the parties, but whether made with fraudulent purposes was left to the

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jury to say. *Held*, that the instruction was not prejudicial to defendant even if inaccurate, as the question of fraud was left to the jury.—McDonald v. Peacock, (Minn.) 35 N. W. 370.

37 Minn. 512.

Property conveyed.

11. A bill of sale described the property sold as "all the logs belonging to and owned by me in the Mississippi river and along the shores thereof and also in the booms above the falls of St. Anthony of the following marks," etc.; no punctuation appearing in the entire clause. *Held*, to include only logs above the falls of St. Anthony.—Van Eman v. Stanchfield, 8 Minn. 518, (Gil. 460.)

12. A bill of sale described the property sold as "all my entire possessions at G., including the certain household furniture and all paraphernalia thereunto belonging to said house," and then enumerated specific items of both real and personal property. *Held*, that a stock of liquors in a saloon kept by the vendor, not being suggested by anything in the particular description of the items sold, did not pass by the general description, and it was proper to prove by parol a sale of such liquors to the same parties at a subsequent date.—McAlpine v. Foley, 25 N. W. 452, 34 Minn. 251.

Sale by sample.

13. To constitute a sale by sample it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were dealing with the sample, with an understanding that the bulk was like it.—Day v. Raguet, 14 Minn. 273, (Gil. 203.)

14. Where at the time of an agreement to sell goods the seller exhibits a sample, but the parties agree that the goods ordered shall be a certain per cent. better than the sample shown, the sale is not by sample.—Day v. Raguet, 14 Minn. 273, (Gil. 203.)

15. Goods sold by sample were received and retained by the buyer, and a large portion thereof sold by him, without objection until after suit brought for their price, several months after the sale; and he had in the mean time paid part of the price, and tendered his notes for the balance. *Held*, that a finding by the jury that the goods were of the description ordered should be sustained.—Singer v. Brockamp, 24 N. W. 189, 33 Minn. 501.

Price.

16. In an action for the price of lumber sold and delivered the only issue was whether the sale was at the prices specified in the complaint, or whether no prices were fixed or agreed on. It appeared that the lumber was ordered by defendant from price lists furnished by plaintiff for the purpose, and that it was to be delivered at different places, for some of which no price-lists were furnished by plaintiff; but from the course of dealing between the parties and the terms of the order for the lumber it might fairly be assumed that the lots of lumber specified for the several places were all to be supplied at the list prices, which were substantially the same for the different points. *Held*, that the court properly directed a verdict for plaintiff.—Paine Lumber Co. v. Betcher, 26 N. W. 606, 34 Minn. 480.

17. Defendant agreed in writing to buy plaintiff's crop of wheat "at 46 cents per bushel, to be removed and weighed in six days; and also agrees to give said B. [plaintiff] the benefit of the rise of wheat in six days from this date, and in case the wheat declines in price the said B. loses the decline. To establish the price of wheat in six days we take No. 3 wheat at 76½ cents at this time in Chicago, and be governed by the change either up or down." At the end of the six days No. 3 wheat was selling in Chicago for 89½ cents. *Held*, plaintiff was entitled to the difference between 76½ and 89½ in addition to 46 cents agreed on in the contract.—Bass v. Veltum, 11 N. W. 65, 28 Minn. 512.

18. A contract of sale of all the logs at D. bearing a designated mark, the vendee to pay a specified sum per 1,000 feet, "for 273,840 feet, more or less, scaled in the boom of M. & R. at P.," construed as providing that the quantity of the logs, supposed to be about 273,840 feet, should be determined by the scaling of the same at P., and that the aggregate price should be determined thereby.—Jesmer v. Rines, (Minn.) 35 N. W. 180.

37 Minn. 477.

19. Where defendants agree to pay in lumber for goods furnished them by plaintiff, and the time of delivery and prices of the lumber are not particularly specified, it is sufficient that the defendants were ready and willing to furnish it at their lumber-yard, when called for by plaintiffs, at the current market rates.—Hillestad v. Hostetter, (Minn.) 49 N. W. 192.

46 Minn. 393.

20. Plaintiff sold lumber to defendant, and agreed to pile it in his yard until ordered shipped by defendant. The purchase money was to be paid in two installments, at specified times, unless the lumber was ordered to be shipped before the last one was due, in which case defendant agreed to pay for it "as soon as received at M., unloaded, and scaled." *Held*, that plaintiff might require payment from time to time as partial deliveries were made.—Pineville Lumber Co. v. Thompson, (Minn.) 49 N. W. 204.

46 Minn. 502.

When title passes.

21. A memorandum between buyer and seller recited that the latter sold to the former, at a certain place, all the logs of a certain mark cut that season, payments to be made, one-quarter down before team goes out, one-quarter June 1st, one-quarter August 1st, and one-quarter September 1st, logs enough to pay the stumpage, at a certain rate, to be left at a point named. At the time it was made the season was not over, and some of the logs were not cut. *Held*, that it was an executory contract, and not a completed sale, passing present title.—Martin v. Hurlbut, 9 Minn. 142, (Gil. 132.)

22. A clause in a contract was as follows: "R. contracts for all material to put up house, paying part in lots and pianos when possible, using his own judgment as if for himself, for which D. allows R. to make a selection of the best piano in the lot enumerated below, and keep for himself, (R.)" *Held*, that this did not vest the title of the piano *in præsenti* in R., but only gave him the right to select a piano, the title to which should vest on the performance of the contract.—Dodge v. Rogers, 9 Minn. 223, (Gil. 209.)

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23. Upon a contract for the sale of personal property, it is competent for the parties to determine what acts shall be done by the vendor before the title shall vest in the purchaser.—Malone v. Minnesota Stone Co., (Minn.) 31 N. W. 170.
36 Minn. 325.

24. Promissory notes for the price of a machine, and a chattel mortgage of the property given to secure them, made by the purchaser at the same time and as parts of one transaction, are to be read together, and may be construed as evidence of a contract by which such machine was recognized by both parties as the property of the purchaser, notwithstanding a clause in the notes providing that the title to the machine should remain in the seller until full payment of the notes.—Beer v. Aultman & Taylor Co., 19 N. W. 388, 32 Minn. 90.

Distinguishing Third Nat. Bank of Syracuse v. Armstrong, 25 Minn. 530; Minneapolis Harvester Works v. Hally, 8 N. W. 597, 27 Minn. 495.

25. On a sale of all the wheat in the warehouses of the seller along certain lines of railway, to be delivered in lots of one or more carloads, at a certain price per bushel, the purchase money for each lot was payable at any time on demand after delivery, without reference to the delivery of the whole amount. *Held* that, although the contract was a single contract, the delivery of each installment was complete as to that installment, and the title thereto passed to the purchaser.—Fishback v. Van Dusen, 22 N. W. 244, 33 Minn. 111.

26. On a sale of all the wheat in the warehouses of the seller along certain lines of railway, to be delivered at the mill of the purchaser and paid for at an agreed price per bushel, in car-load lots, the seller made deliveries of part of the wheat without insisting on payment at the time, or annexing any condition to the delivery. In previous similar dealings between the parties immediate payment had not been insisted upon, but the purchaser had paid after delivery, as was convenient. It also appeared that he bought wheat exclusively to be ground in his mill; that he never kept it separate from other wheat until paid for, and was accustomed to use it without reference to whether he had paid for it or not; and the evidence tended strongly to show that the seller perfectly understood this mode of dealing with the wheat, and had entire confidence in the purchaser's personal responsibility. *Held*, that this state of facts amply sustained a finding that the delivery of the grain was absolute and unconditional, and was intended to be such, and that such delivery passed the title without payment of the price.—Fishback v. Van Dusen, 22 N. W. 244, 33 Minn. 111.

27. Evidence that one who had owned certain goods had declared and represented to divers persons that he had sold them to another, to whom he delivered possession as the apparent owner, will uphold a finding of title in the latter by the trial court, especially in favor of creditors of the alleged purchaser who had acted upon such representations.—Orth v. Bauer, 38 N. W. 758, 39 Minn. 31.

28. M., being indebted to both plaintiff and defendant, in payment of his debt to defendant sold and delivered to him certain goods, which defendant received in satisfaction of his debt, and delivered to a railway company for transportation. Two days afterwards, M., in payment of his debt to plaintiff, executed to him a bill of sale of the same goods, and on the following day proceedings were instituted against M. under the insolvent law, resulting in the appointment of a receiver. *Held*, that the sale and delivery to defendant were effectual to transfer the property to him, and that his title could not be disputed by plaintiff or the receiver of M.—Yallop-De Groot Co. v. Minneapolis & St. L. Ry. Co., 24 N. W. 185, 33 Minn. 482.

29. Bills of lading, issued by railway station agents,—one on December 1st, for a car-load of barley, another on December 3d, for a car-load of wheat,—were delivered to plaintiff, a corporation handling grain, on commission and otherwise, by a firm engaged in buying, selling, and storing the same article as warehousemen, under an arrangement that the grain should be shipped to and sold by plaintiff, and the net proceeds applied in part payment of a debt owing to plaintiff. In the bills of lading plaintiff was designated as consignee. At the time of delivery neither of the cars was fully loaded, but in each of the bills was a stipulation that the loads might be completed at another station on the line of railway. This was done, and the cars were sealed up and side-tracked ready for hauling to their destination. Afterwards, on December 3d, defendant, as sheriff, seized and attached the contents of the cars to satisfy the claim of another creditor against said warehousemen. *Held*, upon the trial of an action for conversion, brought by plaintiff against said sheriff, that there was either a sale to plaintiff, or the latter's agency as a commission merchant was coupled with an interest, and that it was error to charge the jury that the question for its consideration was as to the ownership of the grain when it was attached; and that if, from a preponderance of evidence, the jury found that by the agreement between plaintiff and its debtors the latter assigned the grain in question to plaintiff to be sold on commission, the proceeds to be applied in payment of a debt, their verdict should be for defendant.—Van Dusen v. Piper, (Minn.) 43 N. W. 684.
42 Minn. 43.

30. Defendant elevator company, having contracted to sell certain grain to M., loaded it in cars, and by a written switching order directed the railroad company to switch the cars into the yard of another railroad company, M. being named therein as consignee. The cars were duly switched, but it did not appear that the latter company ever took possession of them. On the following day the bill for the price was presented to M. and he refused to pay it, and it was again twice presented, and the last time a check was given therefor, which on presentation at the bank was dishonored. *Held*, there being nothing to show whether the sale was for cash or on time, it would be presumed to have been for cash on delivery, and the check not being paid, title did not pass.—Globe Milling Co. v. Minneapolis Elevator Co., 46 N. W. 306, 44 Minn. 153.

31. Where a certain number of articles are sold out of a greater number of exactly the same kind and quality, with the intention that the title shall at once pass, and where the vendee has

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the absolute right, at any time, to take his amount or number out of the whole quantity, this is sufficient to pass the title, though the specific articles are not actually designated, or separated from the remainder.—Mackellar v. Pillsbury, (Minn.) 51 N. W. 222; Same v. Booth, Id.

32. When on a sale of chattels they are clearly designated and appropriated to the contract, are ready for immediate delivery, and the terms of sale, including the price, are explicitly given, there is an executed contract, and the title, as between the parties, passes to the purchaser, even without actual payment or delivery.—Rail v. Little Falls Lumber Co., (Minn.) 50 N. W. 471. 47 Minn. 422.

33. In such case, an agreement by the vendor to transport the chattels to a place named for delivery, or to retain possession for a time, does not render the contract of sale executory.—Rail v. Little Falls Lumber Co., (Minn.) 50 N. W. 471. 47 Minn. 422.

Delivery—Time.

34. Under a contract for the sale and delivery of 3,000 bushels of wheat, which was to be delivered by the seller, a farmer conveying it by team a distance of 12 miles, the evidence tended to show that it was not the expectation of either party that he should commence the delivery immediately, or that he should continue it without interruption until completed; and there was evidence tending to prove that it was agreed, if he did not deliver the wheat fast enough to suit the purchaser, the latter should send him notice, and that this was not done, and that, the contract having been made in June, on an inquiry by the seller in July of the purchaser if the latter was in a hurry for the wheat, a reply was returned that it was not. *Held* that, on the refusal of the purchaser in August, after delivery of part of the wheat, to receive any more, the question of what was a reasonable time for the delivery under the circumstances was a question for the jury.—Roberts v. Mazeppa Mill Co., 15 N. W. 680, 30 Minn. 413.

—— Place.

35. Hardware merchants, whose residence and place of business were in the city of M., agreed with defendant, who resided at B., at their place of business, to sell and deliver to him a quantity of grass, which at the time they did not have in stock, and purchased elsewhere to meet their contract. *Held* that, in an action for the price of the grass, the burden of proof was on defendant to show that the delivery was to be made at B., and not at M.—Janney v. Sleeper, 16 N. W. 365, 30 Minn. 473.

—— Sufficiency.

36. Going upon a raft of logs and marking them, all parties being present, is a sufficient delivery.—Brewster v. Leith, 1 Minn. 56, (Gil. 40.)

37. Defendants gave plaintiffs a written order for a harvester machine, then unselected, to be shipped from the factory to him at B. station on or before July 1, 1878, agreeing to pay them therefor a certain sum, etc. Plaintiffs shipped a lot of harvesters from the factory to M., where one was selected and forwarded to defendant at B. station, it arriving there some time in July. It did not appear that defendant ever received the harvester. *Held*, in an action for the purchase money, that the shipment from M. to B. station, not being in accordance with the contract, did not pass the title to the property nor operate as a constructive delivery thereof, and that if the complaint were sufficient as upon a contract for sale and refusal to accept, plaintiffs having failed to ship according to order, they could not recover.—Jones v. Schneider, 22 Minn. 279.

38. Where, on a *bona fide* sale of seed-wheat, to be sown on the land of the purchaser, the amount of wheat specified in the seed-grain note is in a bin containing a larger quantity, all of the same quality and value, out of which it is agreed the purchaser is then and there entitled to take away the amount purchased, there is sufficient evidence of a sale and delivery of the wheat at the date of the note, as between the maker and payee. Weighing or measuring is not essential, except when necessary to define the subject-matter.—Nash v. Brewster, (Minn.) 41 N. W. 105.

39 Minn. 530.

39. Plaintiff made five contracts to deliver to defendants on the lines of two railroads cross-ties aggregating 224,240. Each contract specified the number of ties to be delivered under it, and on the line of which railroad they were to be delivered. Plaintiff delivered more than the aggregate number of ties called for by the contracts, and on one line he delivered more than the number required to be delivered there, and on the other less than the required number. Plaintiff was credited with the ties delivered, and payments were made thereon, without reference to any particular contract, except that under one contract the price was 30 cents per tie and under the other contract the price was 28 cents. Afterwards the parties had a settlement by which it was ascertained that plaintiff had delivered 20,359 ties in excess of the number called for by the contracts, and defendants paid plaintiff the balance due for the 224,240 ties, and gave him an order on their agent for the 20,359 ties delivered in excess of the contracts. It did not appear that the 20,359 ties last delivered, or any of them, could be distinguished from the others. *Held*, that plaintiff did not have title to any particular ties, but was entitled to 20,359, from the common lot, without regard to where they were delivered or under which of the five contracts.—Chandler v. De Graff, 6 N. W. 611, 27 Minn. 208.

40. Plaintiff sold to defendant 3,000 bushels of wheat to be delivered at defendant's mill. It was understood by both parties that the wheat was to be transported a distance of 12 miles. *Held*, that plaintiff was not required to deliver the whole amount at one time and in one lot, it appearing that such mode of delivery had not been in the minds of the parties, and that it was not reasonably practicable, in view of the nature and situation of the property.—Roberts v. Mazeppa Mill Co., 15 N. W. 680, 30 Minn. 413.

41. Delivery to the carrier at the seller's place of business is a sufficient delivery, where the goods are to be sent by a common carrier.—Kessler v. Smith, (Minn.) 44 N. W. 794.

42 Minn. 494.

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Delivery—Refusal to receive.

42. Plaintiff agreed to sell and deliver to defendant a quantity of lumber, the delivery to be at the rate of 20,000 feet per week. Some of the lumber was to be delivered on the cars, and some on defendant's land. *Held*, that a request by defendant that no more lumber should be shipped until further notice authorized plaintiff to suspend all delivery of lumber, both on the cars and on defendant's land, so long as such request remained in force.—Robson v. Bohn, 7 N. W. 357, 27 Minn. 333.

43. On a contract for the sale and delivery by plaintiff to defendant of 3,000 bushels of wheat, after a part thereof had been delivered, defendant refused to receive any more, upon the ground that the time within which, by the terms of the contract, the wheat was to be delivered, had expired. *Held*, that this amounted to a waiver by defendant of any subsequent tender or offer to deliver by plaintiff.—Roberts v. Mazeppa Mill Co., 15 N. W. 680, 30 Minn. 413.

Acceptance.

44. The vendor of 200 barrels of sound flour, for the purpose of delivery, went with the vendee to a warehouse, where the vendor had 200 barrels of flour stored, and made a formal delivery by authorizing the vendee to take and remove the same. The flour being in barrels, no examination could then be had, and the vendee paid the balance of the purchase price. The vendee made immediate preparation to remove the flour, and, in so doing, to examine its quality. It being found in a damaged condition, he desisted from removing the same, and on the day following, when the vendor returned, informed him of the condition of the flour, refused to receive it under the contract, and demanded repayment of the purchase money. *Held*, that there had been no acceptance of the flour, and therefore no complete delivery.—Knoblauch v. Krouschnabel, 18 Minn. 300, (Gil. 272.)

45. Plaintiff agreed to put on defendant's building shutters of a specified kind and quality. The shutters furnished were not of the kind required by the contract, and, as soon as defendant had an opportunity to examine them, he refused to receive them, and forbade plaintiff to put them on the building. Plaintiff afterwards promised to make the shutters according to the contract or not expect defendant to take them, to which defendant replied it might be made satisfactory, but defendant only wanted such shutters as he had agreed to pay for. Plaintiff then put the shutters on, intending to alter them afterwards, but this was never done. Defendant when asked to pay the contract price replied that the shutters were not the kind ordered, and that unless something was done to them within 10 days he would remove and put up others. *Held*, that defendant did not accept the shutters and waive the defects.—Belt v. Stetson, 4 N. W. 779, 26 Minn. 411.

46. Where a wholesale dealer sells whisky to a retailer, doing business in the same city, on condition that it is of a certain kind and quality, a delay of six weeks, after an examination and discovery as to the kind and quality of the goods delivered, in notifying the vendor that they were not satisfactory to the vendee, and would not be kept, is unreasonable and amounts to an acceptance of the goods.—Rosenfield v. Swenson, (Minn.) 47 N. W. 718.

45 Minn. 190.

47. When goods are ordered, and they are sent before the time specified in the order, the buyer waives the objection that they are prematurely sent by receiving them, and not objecting within a reasonable time.—Sole-Leather Over Manuf'g Co. v. Bangs, (Lee v. Bangs,) 44 N. W. 671, 43 Minn. 23.

48. Under a parol agreement to take railroad ties of plaintiff, no amount being specified, acceptance of a certain number actually delivered does not bind defendant to receive more.—Russell v. Wisconsin, M. & P. Ry. Co., (Minn.) 39 N. W. 302. 39 Minn. 145.

49. On a sale by sample, the buyer acquiesces in the quality of the goods by receiving them, and making no objection.—Sole-Leather Over Manuf'g Co. v. Bangs, (Lee v. Bangs,) 44 N. W. 671, 43 Minn. 23.

50. Goods were ordered of plaintiffs by A., and, through mistake, sent to defendant, who received them. The mistake being discovered by plaintiffs, they notified A., to whom they were delivered by defendant. Subsequently plaintiffs sent a statement of account to A., and drew a draft on him for the amount. *Held* a ratification by plaintiffs of the delivery by defendant to A., and that defendant was not liable for the goods.—Foreman v. Barrie, 24 Minn. 349.

II. Warranty.

Express warranty—In general.

51. To constitute a warranty, neither the word "warrant" nor any equivalent word is indispensable. A clear and positive affirmation or representation of the quality of the thing sold, made by the seller as a part of the contract of sale, and relied upon by the purchaser, is a warranty. —Warder v. Bowen, 17 N. W. 943, 31 Minn. 335.

52. Upon a sale of sheep, representations as to their soundness, made by the vendor to the vendee for the purpose of inducing the latter to purchase, and which do induce him to purchase, amount to a warranty.—Marsh v. Webber, 13 Minn. 109, (Gil. 99.)

53. A contract for the construction of a specified kind of flouring-mill contained a clause, "machine to have capacity of 100 barrels per 24 hours; to have 5 pairs of corrugated rolls." *Held*, that this clause was not merely descriptive of the kind or size of the machine, but was a warranty of its capacity.—Cosgrove v. Bennett, 20 N. W. 359, 32 Minn. 371.

54. In an action for the price of apples defendant set up an express warranty of the quality of the apples, and a breach thereof. He testified that plaintiff applied to him to purchase the apples; that he offered to do so if plaintiff would give his word that they were first-class, both in fruit and package; and that after considering the matter plaintiff agreed to accept defendant's proposition, and stated that the apples

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should be in every respect equal to certain others specified. *Held*, that this was sufficient evidence of warranty to be submitted to the jury.—Scott v. Raymond, 18 N. W. 274, 31 Minn. 437.

55. In an action on an alleged warranty on the sale of two horses, the complaint alleged that "at the time of said purchase, and before the same was made, one of said horses was affected with what defendant said was a cold, which caused said horse to discharge at the nose; that, before this plaintiff bought said horses, the defendant told him, the plaintiff, that nothing ailed said horse but a cold, and that it was only such cold that caused said horse to discharge from the nose as aforesaid.' It further alleged that plaintiff relied on and believed what defendant told him, and was thereby led to purchase the horses, and that in fact the horse had a dangerous disease called "glanders," of which he afterwards died. *Held*, that the complaint did not allege a warranty.—Zimmerman v. Morrow, 10 N. W. 139, 28 Minn. 367.

56. In an action for the price of a mower, the answer alleged that, when defendant purchased the mower, plaintiff represented to him that it was a good machine, and would do good work; that the mower was worthless; that, immediately after discovering that it was incapable of doing good work, defendant offered to return it to plaintiff, who refused to receive it; that defendant has always been willing to return the mower; and that by reason of the premises he has been damaged, etc. *Held*, that the answer did not allege a warranty.—Torkelson v. Jorgenson, 10 N. W. 416, 28 Minn. 383.

Express warranty—By parol.

57. After a sale and delivery of personal property with a verbal warranty, the gratuitous delivery by the seller to the buyer of a writing containing a different warranty cannot supersede the verbal warranty.—C. Aultman & Co. v. Kennedy, 23 N. W. 528, 33 Minn. 339.

58. On a sale of personal property a warranty of its quality is an item and term of the contract, and not a separate and independent collateral contract, which can be added to the written agreement of sale by oral testimony. Distinguishing Healy v. Young, 21 Minn. 389.—Thompson v. Libbey, 26 N. W. 1, 34 Minn. 374.

59. The language of a writing entitled as an "agreement," and signed by T., by his agent, and by L., was as follows: "I have this day sold to L., of Hastings, Minn., all my logs marked 'H. C. A.,' cut in the winters of 1882 and 1883, for ten dollars a thousand feet, boom scale at Minneapolis, Minnesota. Payments cash as fast as scale-bills are produced." *Held*, that this purported to be a complete expression of the whole agreement of the parties, and that oral testimony of a warranty of the quality of the logs was not admissible.—Thompson v. Libbey, 26 N. W. 1, 34 Minn. 374.

60. In an action for breach of a warranty on a sale of goods through defendant's agent, proof of a written warranty, made by the agent in his own behalf, will not, upon the sole ground that parol evidence will not be heard to contradict or affect that which is written, exclude evidence of a verbal warranty made by such agent on behalf of his principal.—Kelly v. Clow Reaper Manuf'g Co., 20 Minn. 88, (Gil. 74.)

61. When the bill of sale of a horse contains a written warranty of title and pedigree, evidence of a prior or contemporaneous oral warranty of soundness is inadmissible.—Bradford v. Neil, (Minn.) 49 N. W. 193.

46 Minn. 347.

62. A contract of sale being completed and evidenced by a written bill of sale, prepared by the purchaser, embracing particular warranties as to the property sold, precludes the purchaser from recovering upon oral representations (as warranties) made in the course of the negotiations.—Humphrey v. Merriam, (Minn.) 49 N. W. 199.

46 Minn. 413.

Implied warranty—Of title.

63. One who sells for a fair price, and as his own, any personal property in his possession, impliedly warrants the title thereto.—Davis v. Smith, 7 Minn. 414, (Gil. 328.)

64. Where a person in the possession of personal property undertakes either to sell or to exchange it as his own, he impliedly warrants that he has title to it, and that it is unincumbered.—Close v. Crossland, (Minn.) 50 N. W. 694.

47 Minn. 500.

—— Of quality.

65. An implied warranty on the sale of provisions arises, if at all, only where such provisions are for consumption or the immediate domestic use of the vendee, and not where they are sold as merchandise.—Ryder v. Neitge, 21 Minn. 70.

66. Plaintiff having constructed a model of a device constituting an improvement in a machine, by which he undertook to illustrate its practical operation, defendant, after a personal examination of such model, and witnessing its operation, and after hearing plaintiff's description and explanation of the machine and its design, entered into a contract with plaintiff for the manufacture by plaintiff for him of a machine in conformity with the model. *Held*, that there was no implied warranty that such machine should be fit for the purpose intended, but only that it should be of good materials and workmanship.—Cosgrove v. Bennett, 20 N. W. 359, 32 Minn. 371.

67. On a purchase of a specific lot of logs in existence at the time no warranty is implied merely from the fact that the seller knew that the buyer intended to use them for the manufacture of lumber.—Thompson v. Libby, 29 N. W. 150, 35 Minn. 443.

68. Wheat sold for the express purpose of being used for seed for the production of a crop was designated in the written contract of sale as "Saskatchewan Fife wheat." *Held*, that there was an implied warranty as to its quality, that it was reasonably fit for the purpose for which it was sold, but not that it was pure, or absolutely free from other seeds; and, on conflicting evidence as to the amount of impurities in it, the questions what amount it contained, and whether

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it was thereby rendered unfit for the purpose contemplated, or failed to fulfill the requirements of the contract, were for the jury.—Shatto v. Abernethy, 29 N. W. 325, 35 Minn. 538.

69. Where a manufacturer fills an order for an auger for boring wells of a known and recognized description, there is no implied warranty that it will answer the purpose for which it is intended to be used.—Goulds v. Brophy, (Minn.) 43 N. W. 834.

42 Minn. 109.

What constitutes breach.

70. A warranty of the capacity of a machine is broken, although, while new and clean, or under specially favorable circumstances, it temporarily fulfills the requirements, if there are such inherent defects in it that ordinarily, under proper management, it cannot turn out the stipulated quantity of work.—Cosgrove v. Bennett, 20 N. W. 359, 32 Minn. 371.

71. On the sale of a mill, the sellers represented that it would grind 40 bushels of corn per hour. *Held*, that this representation was not shown to be untrue by proof that the mill would grind only 15 bushels of mixed corn and oats per hour.—Kerrick v. Van Dusen, 20 N. W. 228, 32 Minn. 317.

72. A warranty by the seller of stock of a corporation that there were no assessments "about to be made" upon the stock is not broken by the fact that shortly after the sale the stockholders, by agreement, issued new stock to be purchased by themselves, the proceeds to be applied in payment of debts.—Humphrey v. Merriam, (Minn.) 49 N. W 199.

46 Minn. 413.

Notice of breach.

73. A warranty on a sale of a threshing-machine required the buyer to give written notice of defects in the machine to the seller at its place of business in Michigan, and that reasonable time should be allowed to get to it and remedy the defect, unless it was of such a nature that the seller could advise by letter. *Held*, that the seller might waive the written notice; that the buyer might give the notice by an agent, writing in his behalf, and might for that purpose select one who, for other purposes, acted as agent of the seller; and that the notice might be given by mailing it.—Nichols v. Root, 29 N. W. 160, 35 Minn. 363.

74 A contract of warranty of an engine on a sale thereof was made subject to a condition that, if upon trial the engine failed to operate well, written notice should be given to the dealer through whom the engine was purchased, and also to the sellers at a place specified. *Held*, that the giving of seasonable oral notice to such dealer, and his acting upon it without objection, were sufficient to authorize the jury to find a waiver of the written notice required as to him; but that such an acceptance of oral notice given to another person alleged to have been sent by the sellers of the engine to visit and fix up engines which they had sold in different parts of the state, but who was not shown to have been authorized to receive the notice provided for, or to waive it, and where such notice was not shown to have been accepted or acted upon by the sellers, or his acceptance thereof to have been ratified by them, was wholly ineffectual to bind them.—Nichols, Shepard & Co. v. Knowles, 18 N. W. 413, 31 Minn. 489.

75. A written warranty of a harvesting-machine contained a stipulation that "if, on starting a machine, it should in any way prove defective, and not work well, the purchaser shall give prompt notice to the agent from whom he purchased it, and allow time for a person to be sent to put it in order." *Held*, that this condition was satisfied by the agent voluntarily inspecting the machine, and attempting to put it in order, soon after it was set up, he having notice of its defective condition, and by subsequent attempts by persons representing the seller of the machine.—Flatt v. D. M. Osborne & Co., 22 N. W. 440, 33 Minn. 98.

76. Where, in a written agreement of warranty on the sale of a threshing-machine, it is stipulated that if, within three days after the machine is set up and started, it shall not work as warranted, the buyer shall at once discontinue its use, and notify the seller in writing, and wait for the seller to send a man "to right it," and within that time an agent representing the company, and authorized to make necessary repairs or changes, appears and undertakes the same, the required notice is waived.—Massachusetts Loan & Trust Co. v. Welch, (Minn.) 49 N. W. 740.

47 Minn. 183.

Return of property.

77. Under an executory agreement to furnish a machine "guarantied to work satisfactorily," the buyer has a right to make a trial of it, reasonable as respects both time and manner, and to reject it if it does not work satisfactorily to him.—McCormick Harvesting-Mach. Co. v. Chesrown, 21 N. W. 846, 33 Minn. 32.

78. The purchaser of a harvester and binder machine, under a warranty and agreement that he should take it on trial, and that, if it did not fulfill the warranty, the sellers would take it back, expressed to their agent his dissatisfaction with the machine within two or three days after his grain was in a condition to try it, and after he began to try it. He thereafter continued the trial, at the solicitation of the agent, for a few days, and then distinctly informed the agent that it was not satisfactory, and he would not keep it, and offered then and there to return it if the agent wished; and in the course of two or three days afterwards he returned the machine to the agent, before the beginning of the wheat harvest. *Held* that, on these facts, the question of reasonable time for the return of the machine was one for the jury, and the court could not say, as matter of law, that there was an unreasonable delay.—Warder v. Bowen, 17 N. W. 943, 31 Minn. 335.

79. Where the purchaser of a chattel is to have 30 days to try if it be as represented, he is bound to keep and pay for it if he do not, within or at the end of that time, give notice to the seller that it is not as represented, and offer to return it, and an allegation that he "has duly offered to return and has been ready and willing to return said ——— to

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plaintiff ever since its insufficiency for the purposes aforesaid was ascertained" does not show compliance with this condition.—Latham v. Bausman, (Minn.) 38 N. W. 776.

39 Minn. 57.

80. A contract of sale of a harvesting-machine contained a warranty thereof, and provided that, if it could not be made to do good work, it should "immediately be returned to the agent of whom it was purchased, at his place of business." The agent who sold it was a traveling agent, and had no place of business; but the contract provided for the delivery of the machine to the purchasers at a certain railroad warehouse, and it was there delivered to them. *Held* that, on the machine failing to do good work, the purchasers were justified in returning it to such warehouse; but that they were bound, in order to rescind, to give prompt notice to the sellers.—Paulson v. D. M. Osborne & Co., 27 N. W. 203, 35 Minn. 90.

81. Where, by the terms of the warranty of a harvester, the purchaser has a right to rescind the contract of sale, and return the machine, a return of it to the railroad warehouse, where it was delivered for him by the manufacturer, and, the whereabouts of the agent who made the sale not being known, a written notice of the return and a demand for his purchase-money notes on the next nearest agent, is a sufficient rescission to support an action by the purchaser for the amount of the notes which he had been compelled to take up in the hands of an indorsee.—Paulson v. D. M. Osborne & Co., (Minn.) 33 N. W. 2.

37 Minn. 19.

82. For the purposes of rescission of a sale of personal property for breach of warranty it is sufficient if the vendee has notified the vendor of his intention to rescind, and has returned, or offered to return, the property.—Close v. Crossland, (Minn.) 50 N. W. 694.

47 Minn. 500.

Waiver of breach.

83. On a sale of a self-binding harvester machine, the vendor warranted it to be well built, and capable of cutting a certain amount per day. The contract also provided that, if the machine should in any way prove defective, and not work well, notice should be given to the vendor, and, if it could not then be made to do good work, the defective part would be replaced, or the machine taken back; and that keeping the machine during harvest, without giving such notice, should be deemed conclusive evidence that the machine filled the warranty. *Held*, that the warranty applied to the binding machinery, and was not limited to the harvesting machinery; and that, the binder having proved defective, and incapable of doing good work, and the vendee having given the required notice, he might recover damages for breach of warranty, although he thereafter retained the machine without offering to return it.—Tunnell v. D. M. Osborne & Co., 17 N. W. 944, 31 Minn. 343.

84. Under a contract for the construction of a machine, with an express warranty of its capacity, the receipt and retention of a machine otherwise answering the description in the contract is not a waiver of a right of action on the warranty, on a subsequent discovery of a breach thereof.—Cosgrove v. Bennett, 20 N. W. 359, 32 Minn. 371.

Distinguishing Haase v. Nonnemacher, 21 Minn. 486.

85. A written warranty on a sale of a harvesting-machine, to the effect that the machine was well built, of good material, and capable of a certain amount of work per day, stipulated that, if the machine should prove defective, the purchaser should give notice to the agent from whom he purchased it, and allow time for putting it in order, and that, if it could not then be made to do good work, the defective part would be replaced, or the machine taken back; but that keeping the machine during harvest, whether kept in use or not, without giving such notice, should be deemed conclusive evidence that the machine filled the warranty. The machine failed to work well on starting it the first season, and the purchaser at once gave notice of the fact, whereupon the seller tried to put it in order, but it still failed, of which the purchaser also gave due notice, and the seller again tried, but failed to make it work well. *Held*, that keeping the machine after the first harvest season was not, under these circumstances, conclusive evidence that it filled the warranty, and that, as evidence of a breach of warranty, it might be shown that the machine worked badly after the first season, in the same way in which it had worked badly from the beginning, and also that it wasted grain, and to what extent, if due to defects in the machine.—D. M. Osborne & Co. v. Marks, 22 N. W. 1, 33 Minn. 56.

86. On the purchase of a machine with a warranty, several notes were given by the purchaser for the price. *Held*, that a renewal of one of the notes without mention of a counter-claim for a breach of the warranty, although very strong evidence against the existence of such a counter-claim, could not operate as a waiver or a release thereof.—D. M. Osborne & Co. v. Marks, 22 N. W. 1, 33 Minn. 56.

87. The execution of notes for a part of the purchase price subsequent to the delivery and trial of a machine is not a waiver of defects therein, where the seller, at the time of the execution of such notes, promised and agreed to repair it, and make it satisfy the terms of the warranty.—D. M. Osborne & Co. v. Carpenter, (Minn.) 34 N. W. 163. 37 Minn. 331.

88. Plaintiff agreed to cut and bank for defendants a certain quantity of "good, smooth, sound" logs, which were to be subject to the inspection and approval of defendants when banked, and, if approved, plaintiff was to drive them into a certain boom, and defendants were to pay for them in installments, at times specified: and advances, to be made by defendants to plaintiff, were to be refunded in case the logs, on inspection by defendants, did not receive their approval. *Held*, that the words quoted, descriptive of the quality of the logs, while constituting a precedent to be performed by plaintiff, were not intended as a warranty which would survive acceptance of the logs; and that, although it did not appear whether the inspection provided for by the contract had been made by defendants, they must be deemed, after having settled with plaintiff, and paid him part of the contract price according to its terms, and having received the logs, making

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no objection, to have acquiesced in the quality as in accordance with the contract.—Maxwell v. Lee, 27 N. W. 196, 34 Minn. 511.

89. A contract for the sale of a specified lot of logs, so situated that they could not be examined by the buyer, for a fixed price per 1,000 feet, to be transported by the seller to a distant place of delivery and there measured, delivered, and paid for, is, upon its face, executory, and not an executed sale; and the implication, from the impossibility of an examination of the property by the buyer at the time of the contract, that it is of merchantable quality, is to be treated as a condition, rather than as a warranty, as to defects which were obvious upon inspection, or which were or might have been discovered on the delivery of the logs; and the receiving and retaining of the logs by the buyer under the contract, with knowledge of such defects, operates as a waiver of the implied condition as to quality.—Thompson v. Libby, 29 N. W. 150, 35 Minn. 443.

90. Where the agent of a threshing-machine manufacturer, under his general authority to make, or cause to be made, suitable repairs, has taken charge of a machine sold under a warranty, for the purpose of "righting" it, and, upon experiment thereafter, it continues to work badly, and not as warranted, and the buyer, under his direction, continues to use it in reliance upon his promise to fix it and put it in complete repair, which he fails to do, the manufacturer having ratified the agent's acts, the buyer does not forfeit his right to recover upon the warranty by reason of the expiration of the time limited in the contract for the trial of the machine before the repairs are fully made.—Massachusetts Loan & Trust Co. v. Welch, (Minn.) 49 N. W. 740.
47 Minn. 183.

Action for breach—When maintainable.

91. Where a buyer purchases goods with a warranty that they are of particular quality, and a stipulation that if they are not equal to the warranty he may rescind the contract and return the goods, he is not, in case the warranty prove false, confined to his remedy of rescission and return, but may bring an action for the breach.—Mandel v. Buttles, 21 Minn. 391.

92. A purchaser of personal property cannot recover against the seller on a warranty for any defects in the thing sold which were known to the seller at the time of the sale.—McCormick v. Kelly, 9 N. W. 675, 28 Minn. 135.

93. The purchaser of personal property may recover from the seller damages for breach of warranty on the sale, although the price was paid by promissory notes of the purchaser which remained unpaid.—Frohreich v. Gammon, 11 N. W. 88, 28 Minn. 476; Thoreson v. Minneapolis Harvester Works, 13 N. W. 156, 29 Minn. 341.

94. The recovery by the seller of personal property of a judgment on notes given by the buyer for the price does not bar an action by the buyer against the seller for breach of warranty on the sale, where the breach of the contract of warranty was not pleaded by the buyer in the action on the notes.—Thoreson v. Minneapolis Harvester Works, 13 N. W. 156, 29 Minn. 341.

95. On a sale and delivery of certain logs by defendant to plaintiffs, defendant, by an instrument in writing, covenanted "to warrant and defend the title" to the logs against the lawful claims of any person. Thereafter a third party, claiming to have been the owner of the logs at the time of such sale, brought an action against plaintiffs for converting them, and recovered judgment against them therefor. *Held*, that plaintiffs could recover from defendant on his covenant without showing that they had paid the judgment. — Hersey v. Long, 14 N. W. 508, 30 Minn. 114.

96. On the sale of a machine, paid for in money and notes, a warranty was given with a provision that, "if said machine will not bear the above warranty, it is to be returned, after a trial of two weeks, to the place of delivery, and another substituted that will answer such warranty, or the money and notes immediately refunded." *Held*, that the remedy thus agreed on was exclusive, and that the purchaser could not recover for a breach without returning or offering to return the machine.—Rowell v. Olson, 20 N. W. 227, 32 Minn. 288.

97. On a sale of goods with an express warranty of the quality, after the sale has been consummated by delivery to the buyer without examination or notice of the defective quality of the goods, and after payment of part of the purchase price, the buyer is not bound to accept a proposition of the seller to reship the goods to others. He may retain them, rely upon the warranty, and recoup or sue for his damages for the breach thereof.—Scott v. Raymond, 18 N. W. 274, 31 Minn. 437.

98. Where there is a breach of warranty of title or against incumbrances in the sale or exchange of personal property, the proper form of action therefor is for the breach, and the damages are the actual loss, which is the value of the property purchased.—Close v. Crossland, (Minn.) 50 N. W. 694.
47 Minn. 500.

99. Where property is exchanged as upon a sale, with a warranty of title, though a third person may afterwards show a paramount title, the warranty is not broken until an ouster or a surrender.—Close v. Crossland, (Minn.) 50 N. W. 694.
47 Minn. 500.

100. Where the vendee of mortgaged property does not surrender the same upon the demand of the mortgagee, but defends an action brought by him for the recovery thereof, an action by him against the vendor for damages or to recover the consideration paid is premature while the suit by the mortgagee is pending.—Close v. Crossland, (Minn.) 50 N. W. 694.
47 Minn. 500.

101. In such case the provisional taking of the property in claim and delivery before determination of the action decides nothing as to the title, and is not an eviction warranting an action by the vendee against the vendor.—Close v. Crossland, (Minn.) 50 N. W. 694.
47 Minn. 500.

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Action for breach—Limitation.

102. By a written warranty on a sale of a steam thresher engine the sellers warranted the engine as well made, of good materials, and that, if properly run, fired, and managed, it was capable of developing the rated power. Deficiencies in general adaptation for developing the rate of power were expressly agreed by the purchaser to be reported in writing within 10 days after starting the engine, and it was agreed that all warranty on the engine should terminate and expire, and all liability of the sellers for breach of warranty, damages, or otherwise should cease entirely, at the close of the year. *Held*, that the limitation by the last clause mentioned did not operate to prevent the bringing of any action on the contract of warranty after the close of the year, but only to limit the warranty, and the liability of the sellers to such defects warranted against in the engine existing at the time of sale and not being deficiencies in general adaptation for developing the rated power as might be discovered before the close of the year, and to such deficiencies in general adaptation for developing the rated power as might be discovered within 10 days after the engine was started.—Nichols, Shepard & Co. v. Knowles, 18 N. W. 413, 31 Minn. 489.

—— Evidence.

103. In an action upon a warranty, on the sale of a horse, the answer admitted the sale, but denied the warranty. *Held*, that under his pleading defendant could not show the contract was void because made on Sunday.—Finley v. Quirk, 9 Minn. 194, (Gil. 179.)

104. Where the complaint alleges a breach of warranty, and also fraudulent representations, in the sale of personal property, plaintiff may recover on the warranty, though the fraud be not proven.—Johnson v. Wallower, 15 Minn. 472, (Gil. 387.)

105. On a counter-claim for breach of warranty of a reaping-machine, the admission of evidence to the amount of grain defendant had to cut that year is error; it not being material to show the purpose for which he bought the machine, and being liable to prejudice the jury on the question of damages.—Johnston Harvester Co. v. Clark, 17 N. W. 111, 31 Minn. 165.

106. In an action for the price of a reaping machine defendant set up a counter-claim for a breach of warranty of the machine, consisting in the fact that one part of it was defectively made, and broke and fell apart when brought into use. *Held*, that evidence of the nature of the repairs required, and of the reasonable expense of repairing or replacing the part broken, was competent on the question of damages; and that evidence of the actual value of the machine in its unsound condition was also competent.—Johnston Harvester Co. v. Clark, 17 N. W. 111, 31 Minn. 165.

107. In an action for the price of a harvesting and binding machine, in which the defense was breach of a warranty of the machine, defendant, after proving what would have been the market value of the machine if it had been as warranted, asked his witnesses what the machine, in its actual condition, was worth as a harvester and binder. *Held*, that the question was improper, because limited to the value for a specific purpose; the inquiry should have been as to the market value generally.—D. M. Osborne & Co. v. Marks, 22 N. W. 1, 33 Minn. 56.

108. In an action for damages for breach of warranty of a machine, the question to the purchasers, "What was the machine worth in the condition it was at the time you bought it?" is competent, as calling for the value of the machine generally.—Wilson v. Reedy, 24 N. W. 191, 33 Minn. 503.

109. In an action for damages for breach of warranty of a harvesting-machine and binder it appeared that the binder was defective, and plaintiff and his witnesses testified that, as a binder and harvester combined, the machine was substantially worthless. *Held*, that it was proper, on cross-examination of the witnesses, to show the cost of changes and repairs reasonably practicable to make the machine work as a hand-binding harvester, and the value of the machine for such purpose.—Melby v. D. M. Osborne & Co. 24 N. W. 253, 33 Minn. 492.

110. In an action for breach of warranty of a harvesting-machine, where evidence on the part of plaintiff tends to show that the machine could not be made to do good work because of a defect in the design of a certain part, opposing evidence is admissible that other machines, exactly like that in question, did good work under the same conditions.—Paulson v. D. M. Osborne & Co., 27 N. W. 203, 35 Minn. 90.

111. In an action on a breach of warranty of a harvesting machine, evidence that the machine ran very hard is admissible as bearing upon the question whether it worked well; also proof that another machine worked well in the same grain where it failed is admissible, as tending to show that the difficulty was in the machine, not in the condition of the grain.—Paulson v. D. M. Osborne & Co., 27 N. W. 203, 35 Minn. 90.

112. Where damages are claimed by the purchaser of a harvester and binder, for breach of warranty that the binder would do as good work as other binders, evidence is properly received showing a comparison between the work of other machines and the one in question.—D. M. Osborne & Co v. Carpenter, (Minn.) 34 N. W. 163.

37 Minn. 331.

113. Evidence of the working of the machine during several harvests is properly received to show its intrinsic defects, and that, after a thorough trial, it was not as warranted.—D. M. Osborne & Co. v. Carpenter, 34 N. W. 163, 37 Minn. 331.

114. Upon the issue of the false and fraudulent warranty of a horse, testimony as to the result of a trial of the animal, *held* competent; and evidence of the price offered for it by a third party, not shown to be familiar with its character or habits, *held* properly ruled out.—Johnson v. Hillstrom, (Minn.) 33 N. W. 547.

37 Minn. 122.

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115. In an action for damages for breach of contract to deliver 4,000 cases of corn, of a guarantied quality, it appeared that the corn whose quality was in dispute was shipped in October. *Held*, that a letter written by defendants' agent in August, in which he expressed a doubt whether the quality would be equal to that of last season, was properly excluded, as it did not appear that he had examined or had any personal knowledge of the quality of the corn.—Smith v. Groneweg, (Minn.) 41 N. W. 939.

40 Minn. 178.

116. In an action on one of several notes given for the price of a machine, in which the defense was breach of warranty of the machine, evidence is admissible that defendant paid another such note without objection, and without any complaint that the machine did not work well.—D. M. Osborne & Co. v. Marks, 22 N. W. 1, 33 Minn. 56.

117. The only evidence tending to show a breach of warranty of a threshing-machine, set up as a counter-claim in an action on promissory notes for part of the price, was the testimony of one of the defendants. There was no direct evidence rebutting his testimony, but it appeared that defendants had made large payments on the machine, and that the notes in suit had been given two years and a half after the original purchase, in renewal of old notes, and the referee found that at that time defendants did not allege any defects in the machine, or make any claim for damages. *Held*, that a finding by the referee that the counter-claim was not established should be sustained on appeal.—Geiser Threshing-Mach. Co. v. Dresden, 12 N. W. 453, 29 Minn. 169.

118. In an action for the price of a harvesting machine sold defendant by plaintiff, where defendant has pleaded breach of warranty, and asked damages therefor, the admission of evidence as to statements made by defendant to plaintiff's agent when negotiating for the machine, as to the number of acres he had to harvest, is reversible error.—C. Aultman & Co. v. Falkum, (Minn.) 50 N. W. 471.

47 Minn. 414.

—— Damages.

119. The general rule of damages on a breach of warranty on a sale of personal property is the difference between the value of the article sold in its defective condition and the market value of the article at the place where it is to be used in its condition represented by the vendor.—Converse v. Burrows, 2 Minn. 229, (Gil. 191.)

120. In an action for breach of warranty a general allegation of damage is sufficient to admit proof of general damages, *i. e.*, such as necessarily accrue from the breach.—Meacham v. Cooper, (Minn.) 30 N. W. 669.

36 Minn. 227.

121. The general rule is that, upon the breach of a simple warranty upon the sale of a chattel, the measure of damages is the difference between the value of the property as it is represented and warranted and its actual value, with interest.—Merrick v. Wiltse, (Minn.) 33 N. W. 3.

37 Minn. 41.

122. In the case of a breach of warranty of a horse, no fraud appearing, subsequent expenses incurred by the vendee for medical examination or treatment *held* not recoverable as special damages, in addition to the general damages allowed under the rule stated.—Merrick v. Wiltse, 33 N. W. 3, 37 Minn. 41.

123. In an action for breach of warranty of a harvesting machine, the measure of damages is the difference between the value of the machine as it actually was, and its value as warranted, unless fraud or special circumstances are shown, such as the loss of a crop, which would entitle plaintiff to greater damages.—Frohreich v. Gammon, 11 N. W. 88, 28 Minn. 476.

124. In an action for breach of warranty of a harvester and binder, where the defects complained of were in the binding attachment solely, and the harvester is admitted to work satisfactorily, and may be separated at a moderate expense, or supplied with a new binder, testimony that the machine, as a harvester and binder, was worthless, will not justify a finding fixing the value thereof at a sum different and much less than the undisputed evidence shows it to be worth as a harvester.—D. M. Osborne & Co. v. Carpenter, (Minn.) 34 N. W. 163.

37 Minn. 331.

125. Where property is exchanged as upon a sale, with a warranty that it is unincumbered, and it is incumbered, the vendee cannot recover more than nominal damages until he has paid the amount of the incumbrance, or been deprived of the possession.—Close v. Crossland, (Minn.) 50 N. W. 694.

47 Minn. 500.

III. Rights and Remedies of Parties.

Rescission by seller—Nonpayment.

126. By the terms of an agreement by defendants to furnish certain materials to plaintiff, payments therefor were required to be made at times specified. *Held* that, on a refusal of payment after demand and notice that it would be insisted on as a condition of further deliveries, defendants might properly refuse to continue to deliver further materials.—Palmer v. Breen, 24 N. W. 322, 34 Minn. 39.

127. A side track was set apart for the use of an elevator. When it loaded cars they were put on this track by the railroad, and not moved until the elevator issued "shipping orders." Four cars were put on the side track loaded with wheat sold for cash by the elevator. It took the buyer's check and gave a receipted bill, and he then received bills of lading from the railroad, but no "shipping orders" were given by the elevator. The check was dishonored, and the elevator unloaded the wheat. A bank had made advances on the bills of lading, but neither it nor the railroad acted on faith of the receipted bill. In trover by the railroad against the elevator, *held* that, if there was a delivery of the wheat, it was conditional on payment of the check, on failure of which the elevator could retake the wheat even from a *bona fide* purchaser.—National Bank v. Chicago, B. & N. R. Co., 46 N. W. 342, 560, 44 Minn. 224; Same v. Wisconsin Cent. Ry. Co., Id.; Chicago, B. & N. R. Co. v. L. T.

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Sowle Elevator Co., Id.; Wisconsin Cent. Ry. Co. v. Same, Id.

Rescission by seller—Insolvency of buyer.

128. Goods, purchased with a preconceived intention not to pay for them, having been delivered to the defendant in payment of a debt which the latter held for collection against the purchaser, the seller may avoid the sale, and recover the goods or their proceeds which remain in the hands of the defendant.—Slagle v. Goodnow, (Minn.) 48 N. W. 402.
45 Minn. 531.

129. A dealer in lumber, who knew himself to be insolvent, bought $5,000 worth of lumber, and at once delivered it to certain creditors in payment of debts due them. He had no reasonable expectation of being able to pay for the lumber except from a sale of the same for cash. *Held* sufficient evidence to warrant a finding that he bought with a preconceived design not to pay for the lumber. —Slagle v. Goodnow, (Minn.) 48 N. W. 402.
45 Minn. 531.

—— Fraud.

130. A merchant, applying to purchase goods on credit, and being told that "it would be necessary to know how he stood," stated in response that he had a certain amount "in his business, consisting of merchandise and book-accounts," and a certain sum in cash. He did not disclose the fact that he was indebted to a considerable amount. *Held*, that his statement was fraudulent, and the sale of the goods obtained thereby was voidable, and might be rescinded by the seller.—Newell v. Randall, 19 N. W. 972, 32 Minn. 171.

131. In an action to recover personal property alleged to have been obtained by the false representations of defendant as to the solvency of a maker of a note taken by plaintiff in payment of the property, it is not necessary that these representations should have been the sole cause inducing plaintiff to take the note. It is enough if they constitute one of the substantial inducements to such action.—Moline Milburn Co. v. Franklin, (Minn.) 33 N. W. 323.
37 Minn. 137.

132. It is no defense to such an action that there are solvent indorsers on the note. The plaintiff has a right to a solvent maker as represented. and is not required to take his chances of collecting from the indorsers.—Moline Milburn Co. v. Franklin, 33 N. W. 323, 37 Minn. 137.

133. The recovery, by a vendor of goods, of a judgment against his vendee for the price, in ignorance of fraud on the part of the vendee sufficient to authorize a rescission of the sale, does not amount to an affirmance or ratification of the contract of sale, so as to preclude him from subsequently rescinding, upon discovery of the fraud. —Kraus v. Thompson, 14 N. W. 266, 30 Minn. 64.

Rescission by buyer.

134. Under an executory contract for sale of goods by description, the purchaser need not receive the goods unless they are of the kind and quality called for by the description.—Haase v. Nonnemacher, 21 Minn. 486.

135. The vendor in an executory contract for the delivery of certain lumber at a certain time failed to deliver the full amount required by the time stipulated. *Held*, that the vendee might treat the contract as at an end, and refuse to make the payment, and in such case was liable only upon the implied contract for the value of the lumber delivered, without regard to the contract price.—Robson v. Bohn, 22 Minn. 410.

136. Upon an executory contract for the sale of personal property of a particular quality, the vendee, when the property is tendered him, may receive and retain it long enough to make a fair examination thereof, and, if it be not of the quality described in the contract, may return it, and recover the price paid; but after delivery and acceptance, where there is no provision for a return if defective, the vendee cannot, where there has been no fraud, return the property and recover the price paid, but must resort to his action for damages on his warranty.—Knoblauch v. Kronschnabel, 18 Minn. 300, (Gil. 272.)

137. After title has passed upon the sale and delivery of a chattel, a rescission cannot be had for a breach of warranty simply. Following Knoblauch v. Kronschnabel, 18 Minn. 300.—Minneapolis Harvester Works v. Bonnallie, 13 N. W. 149, 29 Minn. 373.

138. The act of purchasers of grain by sample, in procuring, in good faith, a delivery of the grain to them, in ignorance that it is inferior to the sample, is not necessarily such a decisive and unequivocal act of acceptance thereof as to preclude them from rejecting it on discovering its inferior quality; and their omission to examine it before it arrived at the place for delivery under the contract cannot be construed as a waiver or conclusive acceptance.—Taylor v. Mueller, 15 N. W. 413, 30 Minn. 343.

139. Where certain personal property is in the hands of bailees, subject to charges for storage, and the vendor thereof agrees, as part of the consideration and inducement to a sale thereof, to pay the charges, and deliver the goods when requested by the purchaser, and upon the demand of the latter, refuses to pay such charges, and to deliver the goods in pursuance of such agreement, the purchasers may rescind, and refuse to pay the contract price.—Malone v. Minnesota Stone Co., (Minn.) 31 N. W. 170.
36 Minn. 325.

140. One who is induced to enter into a contract for the purchase of a chattel in payment of a precedent debt, and in reliance upon representations made by the vendor as to the character and quality thereof, which prove false and fraudulent, may rescind the contract, and return the chattel, and such rescission may be set up in the reply in an action brought by him to recover the original debt. —Johnson v. Hillstrom, 33 N. W. 547, 37 Minn. 122.

Seller's lien.

141. Where a locomotive was sold on condition that it be paid for on delivery, but was delivered without payment, and afterwards, without attempting to recover possession, the vendor sued for the price, and by judgment and garnishment secured partial satisfaction, the sale became absolute and

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the reserved lien was lost.—Manchester Locomotive Works v. Truesdale, (Minn.) 46 N. W. 301.
44 Minn. 115.

Stoppage in transitu.

142. The complaint in an action in the nature of trover alleged that plaintiffs sold on credit to S., P. & Co. certain lumber, and "employed" a certain railroad company to convey the lumber to S., P. & Co.; that the railroad company never delivered the lumber to S., P. & Co.; that afterwards S., P. & Co. became insolvent, and defendant was appointed their assignee in bankruptcy; that plaintiffs thereupon notified the railroad company not to deliver the lumber to S., P. & Co., or to the assignee, and demanded possession of it for themselves; that after this defendant, "with knowledge and due notice of the aforesaid orders and demand, * * * took all of said lumber from the possession of plaintiffs, and sold the same without the consent and against the will of plaintiffs, and converted the same." *Held*, that the complaint was insufficient, in that it failed to allege that the price of the lumber had not been paid, so that plaintiff would be entitled to stop the lumber *in transitu*.—Haven v. Place, 11 N. W. 117, 28 Minn. 551.

Action by seller — Refusal to accept goods.

143. If, during the time for delivery of goods sold, and to be paid for after delivery, the buyer notifies the seller that he will not pay the contract price, but only a less price, the seller may act on this as a repudiation of the contract, stop delivery, and sue for damages; and such conduct on part of the buyer is none the less a repudiation of the contract because not willful, but the result of an error as to its terms, or because accompanied with a profession of willingness to perform the contract according to his erroneous construction of it. 49 N. W. 233, affirmed.—Armstrong v. St. Paul & P. Coal Co., (Minn.) 50 N. W. 1029.

—— For price—When maintainable.

144. In an action for the price of goods sold, where it appeared that defendants agreed to buy the goods and pay for them at a specified time, it is immaterial whether, by the terms of the contract, the title vested in them on delivery of the articles.—Thomas v. Thompson, 28 N. W. 255, 35 Minn. 231.

145. Plaintiff and defendant, on May 19, 1873, entered into a contract by which plaintiff agreed to sell and deliver to defendant a quantity of lumber, some of which was to be stacked by plaintiff on defendant's land, and the residue was to be delivered on the cars. The delivery was to commence at once, was to be made at the rate of not less than 20,000 feet per week, and was to be completed by September 1st. Defendant agreed to deliver to plaintiff, on the execution of the contract, his note for $3,000, payable on July 10, 1873; to pay $2,000 on August 1st, and on full delivery of the lumber to pay the residue of the contract price. *Held*, that plaintiff's covenant to deliver lumber after August 1st was dependent on defendant's covenant to pay $2,000 on that day, and, on defendant's failure to make such payment, plaintiff could treat the contract as abandoned, and sue for the price of the lumber already delivered.—Robson v. Bohn, 7 N. W. 357, 27 Minn. 333.

146. Where there is a contract to deliver four hogs at the same time, and the purchaser declines to take one, but receives the others, plaintiff may recover for those so delivered and accepted; and the price agreed, in the absence of other evidence, is the basis for his damages.—Churchill v. Holton, (Minn.) 38 N. W. 611.
38 Minn. 519.

147. Plaintiff and defendant made a written contract by which defendant was constituted plaintiff's agent for the sale of agricultural machinery, and providing, among other things, that any machines on hand at the close of the season defendant would, if required by plaintiff, pay for in notes of a certain kind, all machines to be property of plaintiff until paid for. *Held*, that plaintiff could not recover the price of machines delivered under the contract, under a complaint alleging a sale and delivery before July 1, 1885, and a demand for payment January 1, 1886, and non-payment.—St. Paul Harvester Works v. Nicolin, (Minn.) 30 N. W. 763.
36 Minn. 232.

—— Defense of failure of consideration.

148. Parties to a contract for the sale of No. 1 wheat, agreed upon an inspector to inspect and grade it when desired by the purchasers, the seller to pay the difference between inferior grades and No. 1; it being left with the purchaser to call on the inspector when he desired. *Held*, that the purchaser could not be allowed any deductions for inferior wheat he neglected to have graded.—Brackett v. Edgerton, 14 Minn. 174, (Gil. 134.)

149. A note payable to plaintiff "for value received in two M. L. reapers," provided that "the express condition of the sale and purchase of the machine for which this note is given is such that the title, ownership, or right of possession does not pass from the said [plaintiff] until this note and interest is paid in full." The note also authorized plaintiff, should it deem itself insecure, to take possession of the machines and sell the same. *Held* that, plaintiff having taken the machines from the possession of the purchaser, and sold them, there was an entire failure of the consideration of the note, and no action could be maintained thereon.—Minneapolis Harvester Works v. Hally, 8 N. W. 597, 27 Minn. 495.

Distinguished in Beer v. Aultman-Taylor Co., 19 N. W. 388, 32 Minn. 91.

Questioned, but stated to have become a rule of property, in C. Aultman & Co. v. Olson, 45 N. W. 852, 43 Minn. 409.

150. Plaintiff and defendant, on May 13, 1873, entered into a contract by which plaintiff agreed to sell and deliver to defendant a quantity of lumber of specified kinds, some of which was to be stacked by plaintiff on defendant's land, and the balance was to be delivered on the cars. The delivery was to commence at once, was to continue at the rate of not less than 20,000 feet per week, and was to be completed by September 1st. Defendant agreed to deliver to plaintiff, on the execution of the contract, his note for $3,000,

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payable on July 10, 1873; to pay $2,000 on August 1st; and to pay the balance of the contract price when all the lumber should be delivered. *Held*, that the fact that plaintiff had delivered some lumber of a kind not called for by the contract, and which was rejected by defendant, was no excuse for defendant to refuse to pay the $2,000 on August 1st, where plaintiff had delivered on or before that day the agreed quantity and kind of lumber.—Robson v. Bohn, 7 N. W. 357, 27 Minn. 333.

151. Where plaintiff sells personal property to defendant, with a condition that the latter may return it within a stated time, and a part has been returned and kept by plaintiff, he cannot recover the price of the whole property.—Smith v. Minnesota Transfer Packing Co., (Minn.) 38 N. W. 204. 38 Minn. 450.

152. In an action on a non-negotiable note given for the price of property sold to defendant, a breach of warranty of the article sold may be pleaded and proved in reduction of damages as a partial want or failure of consideration.—Stevens v. Johnson, 9 N. W. 677, 28 Minn. 172.

Action by seller—Fraud.

153. Defendant, interposing the defense to a promissory note of fraud in the sale of personal property for which it was given, requested the instruction that, although the purchaser might have possessed himself of knowledge, if the representations of the seller diverted him from the means of information at hand, he has his remedy against false representations by which he has been injured. The court added the qualification: "A person may, if he choose, rely upon his own judgment; but it is not to be presumed, in the absence of express proof, that he neglected the means of observation or information at hand." *Held*, that the qualification was erroneous, as doing away with the fact that the purchaser was diverted by the seller from looking for himself.—Wilder v. De Cou, 18 Minn. 470, (Gil. 421.)

—— Counterclaim for breach of warranty.

154. In an action upon one of several notes given for the price of a chattel, defendant may recover by way of counter-claim his entire damage from a breach of warranty of the chattel.—Geiser Threshing-Mach. Co. v. Farmer, 8 N. W. 141, 27 Minn. 428; Minneapolis Harvester Works v. Bonnallie, 13 N. W. 149, 29 Minn. 373.

155. In an action for goods sold and delivered, the answer set up as a counter-claim that plaintiffs contracted, warranted, and represented that the goods should be of a certain quality, and that the goods delivered did not correspond with the contract, warranty, and representations. *Held*, that the court correctly charged that, "under the pleadings, defendants were bound to establish either an express warranty or fraud, or contract as to quality, in reference to the sales, before they will be entitled to any deduction by way of recoupment or counter-claim."—Day v. Raguet, 14 Minn. 273, (Gil. 203.)

—— Pleading.

156. A complaint which states that the defendants are indebted on account of goods sold and delivered, without alleging them to have been of any value, or alleging a promise to pay for them, is demurrable.—Foerster v. Kirkpatrick, 2 Minn. 210, (Gil. 171.)

Overruled in Solomon v. Vinson, 17 N. W. 340, 31 Minn. 205.

157. An answer setting up a counter-claim alleging that plaintiff is indebted to defendant in a certain sum for lumber sold and delivered to plaintiff at his request, but not alleging any value or promise to pay, states a mere conclusion, and is fatally defective.—Holgate v. Broome, 8 Minn. 243, (Gil. 209.)

Overruled in Solomon v. Vinson, 17 N. W. 340, 31 Minn. 205.

158. A complaint alleged that on a certain day "the defendants were indebted to the plaintiff on an account then past due for goods sold and delivered to the defendants [at a time and place specified] in the sum of $241.13, and that the same is now due and owing plaintiff, and no part thereof has been paid." *Held* that, on appeal from a judgment entered on defendants' default, objections that the complaint did not allege that the goods were sold and delivered by plaintiff, nor that defendants promised to pay the sum named, nor that the goods were of that value, were not available. Those facts were fairly inferable from the facts alleged. Overruling Foerster v. Kirkpatrick, 2 Minn. 210, (Gil. 171,) and Holgate v. Broome, 8 Minn. 243, (Gil. 209.)—Solomon v. Vinson, 17 N. W. 340, 31 Minn. 205.

159. Where a vendor agreed to release the goods sold from a lien for storage rent, and the purchaser accepted a draft for the price without obtaining delivery of the goods, an allegation in the answer in an action on such draft that the vendor, though often requested so to do, has failed to pay such charges, and has failed and refused to deliver the goods, or any part thereof, is, as against a motion for judgment upon the pleadings, sufficient to show a demand for the delivery of the goods.—Malone v. Minnesota Stone Co., (Minn.) 31 N. W. 170. 36 Minn. 325.

160. Plaintiff declared on a contract to manufacture goods for defendant, and deliver them on the cars at C., the place of manufacture. Defendant's answer alleged an unreasonable time consumed in the delivery, but with reference to delivery at M., defendant's residence; and it further alleged that two days from the commencement of the work was a reasonable time for the manufacture of the goods, but there was nothing to show a duty on plaintiff's part to begin the manufacture on the receipt of the order. *Held*, that the answer stated no defense.—Cleveland v. De Soto Boiler-Works, (Hitchcock v. Turnbull,) 47 N. W. 153, 44 Minn. 475.

—— Pleading and proof.

161. In an action for the price of goods, proof that the price was less than that alleged in the complaint does not constitute a material variance.—Iverson v. Dubay, (Minn.) 40 N. W. 159. 39 Minn. 325.

162. Under a general denial of the allegations in the complaint which set forth a parol agreement and part acceptance thereunder, plaintiff must

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prove both contract and acceptance.—Russell v. Wisconsin, M. & P. Ry. Co., (Minn.) 39 N. W. 302. 39 Minn. 145.

163. In an action for a balance due for goods sold and delivered, the answer alleged that plaintiffs were to accept in payment certain promissory notes secured by mortgage, executed by a third party, and held by defendants, and that defendants had duly assigned the notes and mortgage, and delivered them to plaintiffs, who refused to accept them. The reply denied that plaintiffs agreed to receive the notes in payment unless defendants should indorse them, and alleged that they indorsed them "without recourse," for which reason plaintiffs refused to accept them. *Held*, that the burden was on plaintiffs to prove an agreement to indorse.—Paine v. Smith, 24 N. W. 305, 33 Minn. 495.

164. The answer in an action for the price of horses sold alleged as a reason for refusing to accept the horses that "plaintiff's title to such horses was not satisfactory to defendants." *Held*, that under this allegation defendants might prove that a chattel mortgage by plaintiff was a lien on the horses.—Blaise v. Anderson, 28 N. W. 922, 35 Minn. 306.

—— Evidence.

165. An action for the price of goods sold and delivered cannot be maintained without proof of actual or constructive delivery —Jones v Schneider, 22 Minn. 279.

166. Where in the case of a verbal contract for the sale of property the price is disputed, evidence of the value of the property at the time of the sale or conveyance is proper. Kumler v. Ferguson, 7 Minn. 442, (Gil. 351,) and Schwerin v. De Graff, 21 Minn. 354, followed.—Miller v. Lamb, 22 Minn. 43.

167. In an action for the value of goods sold and delivered to defendant, evidence that plaintiffs have been fully paid for goods sold to a firm of which defendant was a partner, there being nothing to show that they were the same goods for which defendant was charged alone, is immaterial.—Torinus v. Matthews, 21 Minn. 99.

168. In an action for the price of wheat sold the controversy was wholly as to the grade of the wheat which was delivered. *Held*, that the admission of evidence as to the price received by plaintiff for certain other wheat, by which evidence the price of that in question was to be fixed, was competent, but in any view of the case its admission was not prejudicial.—Worden v. Hitter, 28 N. W. 503, 35 Minn. 244.

—— Amount recoverable.

169. The only evidence in support of an action for the price of certain horses was that defendants agreed to pay or allow plaintiff the sum claimed for the horses and other articles, which were never delivered; and it was undisputed that part of the sum was to be applied in satisfaction of a debt of plaintiff to defendants and the balance to be paid in stone. *Held*, that a verdict for plaintiff for the full amount claimed should be set aside.—Blaise v. Anderson, 28 N. W. 922, 35 Minn. 306.

170. Damages for breach of warranty of a machine, pleaded by the buyer in an action for the price, should be applied in reduction of the plaintiff's cause of action as of the date of the sale.—Wilson v. Reedy, 24 N. W. 191, 33 Minn. 503.

171. Where, in an action on two notes of $130 each given in part payment of a harvester and binder worth $525, defendant claimed recoupment for breach of warranty, the binder being defective, and testified that the harvester was worth nothing to him without the binder, but did not show its intrinsic value as it stood or the cost of a new binding attachment, *held* that the evidence was not sufficient to go to the jury, the value of such harvester not being a matter of common knowledge, and that a verdict assessing defendant's damages at $265 would be set aside.—D. M. Osborne & Co. v. Huntington, (Minn.) 33 N. W. 789.
37 Minn. 275.

Action by buyer—Failure to deliver.

172. A contract provided for the delivery of a quantity of paving plank during the season of 1887, without specifying any place of delivery. *Held* that, to put the seller in default for a failure to fill orders, the order must specify time and place of delivery.—Canney v. Brown, (Minn.) 42 N. W. 354. 40 Minn. 461.

173. Where defendants have disposed of iron, which they contracted to sell to plaintiff, before the time when it was to be delivered, plaintiff need not make a formal demand or tender of payment for it before bringing his action for breach of contract.—Lieberman v. Isaacs, (Minn.) 45 N. W. 8.
43 Minn. 186.

174. Where the purchaser notifies the seller that he will not pay the contract price for the property if delivered, but only a less price, it amounts to a repudiation of the contract, and absolves the seller from the duty of delivering the property; and he may have his action for the loss of profits on the sale.—Armstrong v. St. Paul & P. Coal & Iron Co., (Minn.) 49 N. W. 233.

175. Defendant agreed to sell to plaintiffs, local dealers, 10,000 tons of coal at certain prices. Afterwards, in order to enable them to meet competition, defendant modified the contract, and agreed to let them have the coal at lower prices; and further it was agreed that for one day defendant would furnish plaintiffs coal not to exceed 200 tons, for sale at still lower prices. Plaintiff T., with whom this arrangement was effected, telegraphed it to his partner. Defendant saw the messages, but failed to mention the 200-ton limit, and the partner took orders for an amount greatly in excess of it. *Held*, that defendant was not bound to supply that amount at the lowest agreed price, since the transaction was a sale, and plaintiffs were not defendant's agents in taking such orders.—Armstrong v. St. Paul & P. Coal & Iron Co., (Minn.) 49 N. W. 233.

176. Where a complaint alleges a contract for sale and delivery of personal property, and a breach thereof, a general allegation of damages is sufficient to admit proof thereof and a recovery therefor, and it is not a ground of demurrer that an allegation of special damage is insufficient.—Partridge v. Blanchard, 23 Minn. 69.

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Action by buyer — Recovery of price paid.

177. Defendants sold a machine to plaintiff with a warranty in respect to quality and capability, with the express agreement that, if it could not be made to perform as guarantied, it should be returned, and a new machine given in its place, or the notes given by plaintiff for its purchase price should be refunded. It could not be made to perform as guarantied, and plaintiff returned it, and demanded a settlement and the return of the notes. *Held*, that defendants, having the election to perform their agreement in one of the two ways agreed, waived that right by neglecting to exercise it, and that plaintiff might recover his notes without further demand therefor. —Turnbull v. Seymour, 17 N. W. 278, 31 Minn. 196.

178. In an action by purchasers of a machine to recover back the purchase money on a breach of warranty of the machine, and a return of it to the sellers, evidence of the value of the machine is immaterial. — Paulson v. D. M. Osborne & Co., 27 N. W. 203, 35 Minn. 90.

—— Damages for defects.

179. A traveling salesman took an order for goods of a specified kind and quality, but without exhibiting any sample or giving any warranty of the goods to be sent. *Held*, that the vendee, by keeping such goods for nearly two years without notifying the seller of any objection thereto, would be deemed to have admitted that the goods were such as were ordered, and estopped from afterwards claiming damages because of defects in the quality thereof.—Haase v. Nonnemacher, 21 Minn. 486.

Distinguished in Cosgrove v. Bennett, 20 N. W. 360, 32 Minn. 374.

—— Damages for fraud.

180. In the case of fraudulent sale and warranty of personal property, the vendee may rescind the contract, return the property, and recover the purchase price paid, or may affirm the contract, and recover damages for the fraud.—Marsh v. Webber, 16 Minn. 418, (Gil. 375.)

181. Where, in the case of a fraudulent sale and warranty of diseased sheep, the vendee affirms the contract, and brings an action for damages resulting from the fraud, he is entitled to recover all the damages of which the act complained of is the cause, whether direct, or consequential upon the communication of disease to other sheep of the vendee without fault on his part.—Marsh v. Webber, 16 Minn. 418, (Gil. 375.)

182. In an action for damages from fraud in the sale of diseased sheep, it is proper to ask a witness what is the difference in the value of the sheep as described by witnesses, and their value if sound.—Marsh v. Webber, 16 Minn. 418, (Gil. 375.)

183. Where a joint owner of property stands by, and, remaining silent, hears his co-owner make false representations in regard to such property to induce a sale thereof, he will be jointly liable for such false representations.—Johnson v. Wallower, 15 Minn. 472, (Gil. 387.)

184. Where the owner of a horse, knowing him to be unsound, sells him as sound, an intent to defraud necessarily follows.—Johnson v. Wallower, 15 Minn. 472, (Gil. 387.)

185. A complaint for breach of warranty and deceit, in the sale of a horse, alleged that the horse so sold gave the glanders to another horse belonging to plaintiff. The answer denied any such sickness of such other horse. *Held*, that defendant could not, under such answer, show that such other horse, at the time plaintiff purchased him, was affected with a disease that would run into glanders if not checked, or impeach the former owner of such horse, who testified it was sound when sold to plaintiff.—Johnson v. Wallower, 15 Minn. 472, (Gil. 387.)

186. In an action for breach of warranty and for deceit in the sale of a horse, the complaint charged him to be affected with glanders, but was broad enough to cover any unsoundness rendering him of no value. *Held*, there being evidence tending to show that he was warranted free from disease, that it was not error to charge the jury that if the horse had any disease that rendered him worthless they should find for the plaintiff.—Johnson v. Wallower, 15 Minn. 472, (Gil. 387.)

187. In an action for breach of warranty and deceit in the sale of a horse to plaintiff by defendant, represented as sound, which in fact was diseased, which disease was thereby communicated to another horse belonging to plaintiff, it is error to charge the jury that, if defendant knowingly represented to plaintiff that the horse sold was sound, when in fact it was afflicted with disease which it communicated to the other horse, whereby such horse was rendered worthless, they might find for plaintiff the value of such second horse, the burden being on plaintiff to show that the disease was communicated to the second horse without his fault; and such instruction is not remedied by a further, independent charge that plaintiff is entitled to recover if the disease was communicated to the second horse without plaintiff's fault.—Johnson v. Wallower, 15 Minn. 472, (Gil. 387.)

188. If a person who has been induced by fraud and deceit to enter into an executory contract for the purchase of personal property, to be delivered and paid for in the future, discovers the fraud while the contract is still wholly executory, and yet thereafter accepts the property under the contract, and uses it, he cannot maintain an action for damages for the fraud, or recoup them in an action against him for the purchase price of the property.—Thompson v. Libby, (Minn.) 31 N. W. 52. 36 Minn. 287.

189. In the case of fraudulent sale of goods the purchaser may retain the same, and sue for damages on account of the fraud; and the receipt of some of the goods, and the completion of the contract after discovery of the fraud, will not constitute a waiver of his claim, or defeat his action for damages.—Haven v. Neal, (Minn.) 45 N. W. 612. 43 Minn. 315.

Rights of third persons—Bona fide purchasers.

190. A purchaser of goods from a fraudulent vendee, who has paid nothing on his purchase,

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is not, as against the original vendor and his creditors, a *bona fide* purchaser.—Hicks v. Stone, 13 Minn. 434, (Gil. 398.)

191. A sale of personal property, where there is a delivery by the owner, induced by fraudulent acts and representations, is voidable only, not void; and such owner, if he desires to avoid the same, must do so before the property is sold to a *bona fide* purchaser for value. — Cochran v. Stewart, 21 Minn. 435.

Distinguished in Globe Milling Co. v. Minneapolis Elevator Co., 46 N. W. 307, 44 Minn. 155.

192. One who purchases goods or choses in action *bona fide* from a fraudulent vendee acquires a valid title, though the fraudulent acts of such first vendee amount to a statutory felony.—Cochran v. Stewart, 21 Minn. 435.

193. A purchaser of personal property is bound to exercise that degree of caution and diligence, in ascertaining the title of the vendor or assignor, which ordinarily prudent business men usually exercise in like circumstances, and is charged with constructive notice of such facts only as the use of such caution and diligence would probably have discovered.— Cochran v. Stewart, 21 Minn. 435.

194. The rule in Cochran v. Stewart, 21 Minn. 435, that in case of the sale and delivery by the owner of personal property, although induced by fraud of the purchaser, the latter may convey a good title to a bona fide purchaser, does not apply to a case where the second purchaser does not rely upon, or know of, any indicia of title with which the first vendor may have invested the first purchaser.—Globe Milling Co. v. Minneapolis Elevator Co., 46 N. W. 306, 44 Minn. 153.

Distinguishing Cochran v. Stewart, 21 Minn. 435.

195. In an action to declare the vendee of a note a trustee thereof for plaintiff, the burden rests upon such vendee, if he would avail himself of the rule in favor of *bona fide* purchasers, to bring himself within it, and he is bound to deny notice of the prior equity in order to raise the issue, which rule is equally applicable under the Code system of pleading.—Newton v. Newton, (Minn.) 48 N. W. 450.

46 Minn. 33.

196. Where the seller of personal property executes a bill of sale, and places it in escrow with a third person, to be delivered to the purchaser on receipt of the latter's note for the unpaid purchase money, the title passes on the deposit of the note by the purchaser to the person having possession of the bill of sale, and one who thereafter purchases the property from the seller with knowledge of all the facts is not a *bona fide* purchaser, though the property may have remained in the seller's possession.—Hayden v. Dwyer, (Minn.) 50 N. W. 200.

47 Minn. 246.

IV. Conditional Sale.

What constitutes.

197. O., holding a certificate of sale of land, on foreclosure of a mortgage assigned it to C., who at the same time agreed with O. to sell and convey the land to him by warranty deed, provided he shoul pay to C., on or before a fixed date, a certain sum of money, and also all taxes and assessments against the land due at the time of making the deed. In an action claiming that the transa tion was a mortgage, there was ample testimony, although contradicted, tending to show that there was no loan of money, but a positive refusal to make a loan; that the deed was not given or accepted as security; that it was, and was intended by both parties to be, an absolute conveyance, in pursuance of an absolute sale. *Held*, that a finding by the court that the transaction was a sale and not a mortgage must be upheld; the transaction constituting *prima facie* a conditional sale, as distinguished from a mortgage.—Buse v. Page, 19 N. W. 736, 20 N. W. 95, 32 Minn. 111.

198. An instrument reciting that the title and right of possession of a machine for which a note is given shall not pass from the seller until the note is paid, and that he, at any time before the maturity of the note, may take possession of the machine and sell it, if he deems himself insecure, constitutes a conditional sale, and no action can be maintained on the note after the seller has taken ba k the machine.—C. Aultman & Co. v. Olson, (Minn.) 45 N. W. 852.

43 Minn. 409.

Questioning Minneapolis Harvester Works v. Hally, 8 N. W. 597, 27 Minn. 495, but stating that it has become a rule of property.

Filing.

199. Gen. St. Minn. 1878, c. 39, § 15, requiring a conditional contract of sale, or, if oral, a memorandum thereof, to be filed, as against creditors and bona fide purchasers and mortgagees, applies to an exchange of horses, in which one party reserves the right to return the one delivered to him and retake his own, if the former should prove to have a certain disease.—Kinney v. Cay, 39 N. W. 140, 39 Minn. 210.

200. Gen. St. Minn. 1878, c. 39, §§ 15, 16, as amended by Laws 1883, c. 38, § 2, providing for the filing of contracts which, by their terms, preserve in the vendor the title of property sold conditionally, does not operate to avoid such a contract, although not filed as prescribed, as to creditors of the purchaser having actual notice of the state of the title at the time when a levy is made upon the property in behalf of such creditors.—Dyer v. Thorstad, 29 N. W. 345, 35 Minn. 534.

Waiver of condition.

201. Where machinery was to be delivered on cars consigned to a purchaser in another state, and on delivery the purchaser was to execute notes therefor, forwarding the machinery to the consignee before receipt of the notes did not necessarily waive the conditions or the right of the consignor to reclaim the property on default of the consignee to deliver the notes as agreed.—Pond Mach. Tool Co. v. Robinson, (Minn.) 37 N. W. 99. 38 Minn. 272.

Agreement of defeasance.

202. Where there is an absolute sale and delivery of personal property, an agreement by the purchaser to pay the vendor for the future use of

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the same, or deliver it up on demand, is repugnant to the sale, and void, and the receipt of the property furnishes no valid consideration for such agreement.—Domestic Sewing-Mach. Co. v. Anderson, 23 Minn. 57.

Sample.

Sale by, see *Sale*, 13-15, 49.

Satisfaction.

See *Accord and Satisfaction; Compromise; Payment; Release and Discharge.*
Of execution, see *Execution*, 136-142.
judgment, see *Judgment*, 210-226.
mortgage, see *Mortgages*, 131-153.

Savings Banks.

See *Banks and Banking*, 29; *Corporations*, 8.

Scaling.

Logs, see *Logs and Logging*, 39, 40.

Schedules.

On assignment for benefit of creditors, see *Assignment for Benefit of Creditors*, 35, 36.

School Lands.

See *Public Lands*, 92-98; *Schools and School-Districts*, 32-36.

SCHOOLS AND SCHOOL-DISTRICTS.

See, also, *Reform School.*
Constitutionality of statute directing contracts with state for school-books, see *Constitutional Law*, 171, 172.
Creation of special school-districts, see *Constitutional Law*, 59, 60.
Exemption of school property from taxation, see *Taxation*, 35-37.
Mechanic's lien on school-house, see *Mechanics' Liens*, 13.

Creation of districts.

1. Pursuant to Const. Minn. art. 11, § 3, which declares that "laws may be passed providing for the organization for municipal and other town purposes of any congressional or fractional townships in the several counties in the state," 12 townships were, by Sp. Laws Minn. 1879, c. 236, organized into the town of Moorhead. Gen. St. Minn. 1878, c. 36, § 94, provides that "any city, town, village, township, or school-district, now or hereafter organized, may be organized into and established as an independent school-district. Section 17 of the same chapter provides that "any school-district * * * may contain the entire township, * * * or a tract of land six miles square in different townships." *Held*, that the town of Moorhead could be organized into an independent school-district, though it contained more than 36 square miles of land.—State v. Sharp, 6 N. W. 408, 27 Minn. 38.

2. The board of county commissioners, to whom is intrusted the matter of forming school-districts, may appeal from an order of the district court reversing their action in establishing a new district. — Moode v. Board of County Com'rs, (Minn.) 45 N. W. 435.

43 Minn. 312.

Change of districts.

3. School-districts are *quasi* corporations, and under the control of the legislature. They may, at its will, be changed or divided, or the property transferred from one organization to another.—Connor v. Board of Education of City of St. Anthony, 10 Minn. 439, (Gil. 352.)

4. In 1857, school-district No. 2, county of Anoka, contracted a debt for the erection of a school-house. Under Act Minn. March 7, 1861, it became subdistrict No. 2, town of Anoka, and by the action of the trustees, under that act, was merged in and became a part of subdistrict No. 1 of that town. By the operation of Act Minn. March 6, 1862, which repealed the act of 1861, subdistrict No. 1 of the town of Anoka was changed to school-district No. 1, county of Anoka, this defendant. *Held*, that the act of 1862 merely merged the old corporation into the new, and did not dissolve the former, and therefore the latter was liable for the debt of school-district No. 2.—Robbins v. School-Dist. No. 1, Anoka County, 10 Minn. 340, (Gil. 268.)

5. School-district No. 3, St. Anthony, contracted for the conveyance to it of a lot as a site for a school-house. Afterwards the lot was included in the limits of St. Anthony, and the board of education of that city succeeded, under the act creating it, to the rights of school-district No. 3 therein, and entered upon and occupied the lot. The vendor then conveyed to the board, in pursuance of the original agreement, and took its agreement to pay for the same. *Held*, that this latter was not a purchase, within the section of the act incorporating the board and regulating such purchases, but merely a completion of the original purchase made by district No. 3, which such board was authorized to make under Laws Minn. 1860, c. 40, § 25, providing that such board should have the entire management and control of "all the houses, lands, and appurtenances" set apart for school purposes, etc.—Connor v. Board of Education of City of St. Anthony, 10 Minn. 439, (Gil. 352.)

Annexation of districts.

6. Sp. Laws Minn. 1878, c. 155, entitled "An act for the establishment of public schools in the city of Winona," established a school system for the city of Winona, whether enlarged or diminished in area by future legislation; and that part of the territory of another school-district which was annexed to the city by Sp. Laws 1887, c. 5, became a part of it for school as well as other municipal purposes, and ceased to be a part of the other school-district.—City of Winona v. School-Dist. No. 82, (Minn.) 41 N. W. 539.

40 Minn. 13.

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7. Sp. Laws Minn. 1887, c. 5, annexed a part of the territory of the defendant school-district to the city of Winona. *Held* that, as there was no provision made in the statute, the defendant school-district remained subject to all its liabilities, and retained its property, including that which, upon the change of boundaries, happened to fall within the limits of the city.—City of Winona v. School-Dist. No. 82, 41 N. W. 539, 40 Minn. 13.

Distinguished in Wellcome v. Town of Monticello, 42 N. W. 931, 41 Minn. 139.

Withdrawal by village from district.

8. Under Gen. St. Minn. 1878, c. 36, § 12 et seq., authorizing the change of boundaries of school-districts by the action of the county commissioners, a village constituting a part of an independent school-district is not authorized, at its own election, to withdraw therefrom, and to organize as a separate independent school-district.—State v. Independent School-Dist., (Minn.) 44 N. W. 120.
42 Minn. 357.

Grant of land for school purposes—Abandonment.

9. In 1861 the owner of land granted it to a school-district, "for the purpose of erecting the district school-house upon, and for holding the school of said district in," and provided that "when abandoned for such purposes" it should revert to the grantors. A school-house was immediately erected by the district, and a school was kept therein by it until 1887, when by an act of the legislature the land became part of a city, and the school-district ceased to exist, the city succeeding it. The building was then permitted to get out of repair, but in 1890 the city, on learning that the grantor's successors asserted title to the land, caused the building to be repaired. No school was maintained therein after 1887 until in 1890, after a suit was brought to declare the land abandoned, when school was opened and kept for about seven months. No taxes were ever assessed against the land, presumably because as school property it was exempt, and from 1887 continuously the city kept the building insured. *Held*, that a finding that the grant was not abandoned was warranted.—Rowe v. City of Minneapolis, (Minn.) 51 N. W. 907.

School meetings.

10. Under Laws Minn. 1860, c. 40, § 9, providing that whenever the board of education of the city of St. Anthony shall deem it necessary to erect a school-house or school-houses, or to purchase a site or sites therefor, they shall call a meeting of the legal voters of the district, who shall determine upon the erection of school-houses, their number, etc., the board passed a resolution, the preamble of which recited: "Whereas, it is deemed necessary by the board of education of the city of St. Anthony to purchase a site or sites, and to erect thereon a school-house or school-houses for the school-district," etc. *Held*, such preamble sufficiently showed that the board came to a conclusion as to the necessity of building houses or purchasing sites, so as to authorize it to call a meeting of the legal voters, the number of houses to be built or sites to be purchased being unimportant, as under this statute that was to be determined by the meeting of the voters, irrespective of the judgment of the board.—State v. City of St. Anthony, 10 Minn. 433, (Gil. 345.)

11. Laws Minn. 1860, c. 40, § 9, provided that the meeting of the legal voters of a certain district called by the board of education for that purpose should determine upon the erection of a school-house or school-houses, and the purchase of a site or sites therefor, and the amount of money to be raised, which should be certified to the city council, who should levy a tax for such amount. "At such a meeting the voters resolved to erect a school-house or school-houses, and to purchase a site or sites therefor, and that 2 per cent. on the assessment of the city should be raised for such purpose, the site or sites and kind of house or houses to be determined thereafter by the district." *Held*, that such a resolution was ineffectual to authorize the levy of a tax, as the number of school-houses to be erected, and sites to be purchased, was not definitely determined, so as to ascertain the "amount to be levied," nor was the amount to be raised designated by a gross sum.—State v. City of St. Anthony, 10 Minn. 433, (Gil. 345.)

12. It is not essential to the regularity of an annual meeeting of a school-district that the time for the same should have been designated at a previous annual meeting. The powers of the district being the same at a special meeting as at an annual meeting, a meeting called on due notice is regular, whether annual or special.—Sanborn v. School-Dist. No. 10, Rice County, 12 Minn. 17, (Gil. 1.)

13. Gen. St. Minn. 1866, c. 1, in relation to elections, does not apply to a meeting in a school-district called under Sp. Laws 1869, c. 92, § 14, in relation to voting bonds for school purposes, the provisions being conflicting.—Board of Education Sauk Centre v. Moore, 17 Minn. 412, (Gil. 391.)

14. Though Gen. St. Minn. 1878, c. 36, § 38, requires that a certain number of the signers of the notice of a special school meeting shall be freeholders, the mere fact that the notice fails to recite that they are so does not invalidate it.—Sturm v. School-Dist. No. 70, (Minn.) 47 N. W. 462.
45 Minn. 88.

15. A complaint alleged that there was a regular meeting of a certain school-district at a time stated, at which "the voters of said district, being then and there duly assembled," voted, etc. *Held*, that it might be presumed that the meeting was valid, and was properly composed, including the requisite number of voters.—Soule v. Thealander, 17 N. W. 373, 31 Minn. 227.

Officers—Eligibility of women.

16. Under the amendment to Const. Minn. art. 7, by section 8, that "the legislature may, notwithstanding anything in this article, provide by law that any woman, at the age of 21 years and upward, may vote at any election held for the purpose of choosing any officers of schools, or upon any measures relating to schools, and may also provide that any such woman shall be eligible to hold any office pertaining solely to the management of schools," the legislature has the power to make women eligible to any such office without giving them the right to vote for such officer; and under Gen. St. 1878, c. 36, § 13, women are eligible to the office of county super-

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intendent of schools, although no right is conferred upon women to vote for such superintendent.—State v. Gorton, 23 N. W. 529, 33 Minn. 345.

Officers—Liability to penalties.

17. Under Gen. St. Minn. 1878, c. 36, § 31, providing for the hiring for a school-district of such teachers only as have certificates of qualification, a school-district clerk, who issues an order upon the treasurer of the district for the payment of wages to a teacher known to him not to have had such a certificate, upon which the treasurer pays the amount of the order out of the school funds in his hands, is liable to the penalty, imposed by section 88 on "any school-district clerk who shall draw an order upon the district treasurer diverting the public school funds from their legitimate channel," of twice the amount of such order.—School-Dist. No. 10 v. Thealander, 17 N. W. 866, 31 Minn. 333.

18. Where, at a regular meeting of a school-district, it is voted to have a school kept for a specified time, and sufficient funds are provided, if the trustees neglect, without excuse, to provide the school for the specified time, they are liable to the penalty imposed by Gen. St. Minn. 1878. c. 36, § 86, as amended by Laws 1879, c. 41, on any such officer who shall "refuse or neglect to perform any of the duties prescribed by law."—Soule v. Thealander, 17 N. W. 373, 31 Minn. 227.

19. Under Gen. St. Minn. 1878, c. 36, § 86, as amended by Laws 1879, c. 41, imposing a penalty on an officer of the school-district who shall refuse or neglect to perform any of his duties, to be collected by an action "prosecuted by the director of said district, or by any freeholder in said district," such an action may be brought by a director or freeholder in his own name.—Soule v. Thealander, 17 N. W. 373, 31 Minn. 227.

20. The complaint, in an action for a penalty against a clerk and member of a board of directors of a school-district for failure to maintain a school, contained no express averment of the existence of a school-district. *Held* that, as the facts stated could not be true unless there was such a district, and no contrary inference could be drawn from them, the complaint was sufficient in that respect.—Soule v. Thealander, 17 N. W. 373, 31 Minn. 227.

School funds—Liability on treasurer's bond.

21. Under Gen. St. Minn. 1878, c. 36, § 107, which requires the treasurer of a school-district to give a bond with sureties conditioned for the faithful performance of the duties of his office, and to turn over to his successor in office all money in his hands belonging to the district, and which further provides that, for any breach of such bond, the board shall cause an action to be commenced thereon, a vote of the school-district, and of the board of education, without consideration, to discharge the legal obligation of a treasurer who has lost the school fund by burglary, without fault, is ineffectual.—Board of Education v. Jewell. (Minn.) 46 N. W. 914.

44 Minn. 427.

22. Under Gen. St. Minn. 1878, c. 36, § 107, requiring the treasurer of a school-district to execute a bond with sureties conditioned "for the faithful discharge of his duties as treasurer," and further requiring him to "pay to his successor in office upon demand * * * all money in his hands belonging to said district," the fact that such treasurer has lost the funds by burglary, although without his own fault, constitutes no defense to an action on his official bond for the failure to pay over to his successor the money received and not disbursed by him.—Board of Education v. Jewell, (Minn.) 46 N. W. 914.

44 Minn. 427.

Bonds of district.

23. Under Sp. Laws Minn. 1869, c. 92, authorizing the issue of bonds in pursuance of a vote of the electors of the school-district thereby created, a majority vote of those voting on the question is sufficient to authorize their issue. Laws 1866, c. 26, § 1, as amended by Laws 1867, c. 3, § 1, requiring a two-thirds vote, is inapplicable where special authority is given.—Board of Education Sauk Centre v. Moore, 17 Minn. 412, (Gil. 391.)

24. Authority given to issue bonds for the purpose of building a school-house implies the power to sell them.—Board of Education Sauk Centre v. Moore, 17 Minn. 412, (Gil. 391.)

25. The board of education created by Sp. Laws Minn. 1869, c. 92, were authorized by such act, on vote of the electors of the district, to issue bonds and negotiate them to the best advantage; the proceeds thereof to be used in building a school-house for said district. *Held*, that an agreement to sell such bonds at par, to be paid in brick and lumber for such school-house at current cost value at the time of delivery, was valid.—Board of Education Sauk Centre v. Moore, 17 Minn. 412, (Gil. 391.)

Promissory notes of district.

26. To make a promissory note executed by the trustees of a school-district, as such, a note of the district, it is necessary that it be made to appear that the note was given for an indebtedness that the trustees were authorized to contract.—School-Dist. No. 7 v. Thompson, 5 Minn. 280, (Gil. 221.)

27. Upon an accounting between the trustees of a school-district and a person who had performed labor for such district, instruments in the form of promissory notes were executed by the trustees for the district for the amount found due, payable at a future day, with interest beyond the statute rate. *Held*, that such notes were valid between the parties, at least as a contract for forbearance and promise to pay the amount specified, but that a judgment upon them could be enforced only against the fund raised by levying a tax for payment of the indebtedness.—Robbins v. School-Dist. No. 1, Anoka County, 10 Minn. 340, (Gil. 268.)

Distinguished in Sanborn v. School-District No. 10, 12 Minn. 33, (Gil. 9.)

—— Personal liability of trustees.

28. Trustees of school-districts are public agents, within the rule that such agents will not be held to a personal liability upon contracts executed in their official capacity, unless guilty of fraud or misrepresentation or expressly contract-

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ing to assume such liability.—Sanborn v. Neal, 4 Minn. 126, (Gil. 83.)

29. Defendants, being trustees of a school-district, made a note for a debt of the district, in which they promised as trustees of such district, but signed the same without any official designation. *Held*, that the language of the promise, if it did not show conclusively that the makers did not intend to promise in their individual capacity, at least rendered the nature of such promise doubtful, and parol testimony was admissible to show the surrounding circumstances, as indicating the intention.—Sanborn v. Neal, 4 Minn. 126, (Gil. 83.)

Distinguished in Rollins v. Phelps, 5 Minn. 467, (Gil. 377.)

30. Where trustees of a school-district execute a promissory note in form as individuals, simply annexing their title as trustees to their signature, the liability created thereby is an individual one. To relieve them from such liability, it must appear, from the instrument itself, that they executed it in their capacity of trustees.—Fowler v. Atkinson, 6 Minn. 578, (Gil. 412;) Bingham v. Stewart, 13 Minn. 106, (Gil. 96.)

31. An agreement made at the time of giving a promissory note, by the trustees of a school-district, that the same shall be the note of such district, and not of the defendants, is, if properly alleged and proven, a valid defense to an action thereon against the trustees as individuals.—Bingham v. Stewart, 14 Minn. 214, (Gil. 153.)

School lands and buildings.

32. The title to lands of a school-district is in the district, not the trustees: and they cannot, in absence of authority from the district, execute a valid mortgage thereon. — Sanborn v. School-Dist. No. 10, Rice County, 12 Minn. 17, (Gil. 1.)

33. The unauthorized act of school trustees in expending more funds on a school building than the limit voted may be ratified by the district at a district meeting.—Sanborn v. School-Dist. No. 10, Rice County, 12 Minn. 17, (Gil. 1.)

34. Trustees of a school-district have power to employ a portion of a dwelling-house for school purposes if, in their judgment, it is necessary and proper.—Gould v. Eagle Creek School-Dist., 7 Minn. 203, (Gil. 145.)

35. Comp. St. Minn. c. 23, §§ 64, 70, which authorize a school-district to purchase, lease, or build a suitable school-house, and to levy a tax for such purpose, "not exceeding six hundred dollars in any one year," does not limit the amount that it may expend for such purpose; and a debt of greater amount than that named in such statute, contracted in building a school-house, and payable at a future day, is binding on such district.—Robbins v. School-Dist. No. 1, Anoka County, 10 Minn. 340, (Gil. 268.)

36. A contract between a director and trustee of a school-district and the other trustees, for the erection by him of a school-house in the district, is against public policy, and is voidable by the trustees, irrespective of its fairness or unfairness.—Currie v. School-Dist. No. 26, 27 N. W. 922, 35 Minn. 163.

Supplies.

37. Contracts on behalf of a school-district, involving expenditures for labor, furniture, and supplies, must be authorized by the board of trustees at a meeting called for the transaction of such business, after due notice to all the members, as required by Laws Minn. 1881, c. 41, § 3. Permitting goods supplied under such contracts to remain in the school-room, if placed there without authority, is not a ratification of the contract, although accepting and retaining them would be; and the use of a school-house, built on land of the district with materials belonging to it, under a contract not duly authorized, is not a ratification of the contract.—Currie v. School-Dist. No. 26, 27 N. W. 922, 35 Minn. 163.

38. A contract by two trustees of a school-district for purchase of supplies for the district is not binding on the district unless authorized at a meeting of the trustees.—Andrews v. School-Dist. No. 4, 33 N. W. 217, 37 Minn. 96.

39. If such supplies are received and used for the benefit of the district under such circumstances and for such length of time as to raise the presumption that it was with the common consent of the district, it will be bound to pay for them.—Andrews v. School-Dist. No. 4, 33 N. W. 217, 37 Minn. 96.

40. Where supplies were bought by two directors without any authority, and used for about three weeks, and afterwards some of the articles were used by order of the clerk of the district, and others from time to time, by whose direction did not appear, the voters of the district having in the meantime repudiated the action of said trustees, the presumption of ratification was not necessarily raised.—Andrews v. School-Dist. No. 4, 33 N. W. 217, 37 Minn. 96.

Text-books.

41. Laws Minn. 1877, c. 75, providing for "uniform and cheap text-books for the public schools," is not repealed by Laws 1877, c. 74, except so far as the same is affected by subdivision 8, § 18, subc. 7, of said chapter 74, giving boards of education of independent school-districts power to prescribe text-books, etc.—Curryer v. Merrill, 25 Minn. 1.

Teachers—Licenses.

42. Under Gen. St. Minn. 1878, c. 36, § 67, making it the duty of a county superintendent to keep a record of re-examinations and revocations of licenses to teach, provided for in section 69, such record is the best and the proper evidence of a revocation.—School-Dist. No. 10 v. Thelander, 21 N. W. 554, 32 Minn. 476.

—— Contracts of employment.

43. Under Gen. St. Minn. 1866, c. 36, § 12, providing that the school trustees shall hire such teachers as have procured a certificate of qualification, and section 32, providing that no person shall be admitted to teach in the public schools except such as shall have passed the required examination and received certificates, a contract by trustees with

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a teacher for the teaching of a school, made before he has obtained the requisite certificate, is void.—Jenness v. School-Dist. No. 31, Washington County, 12 Minn. 448, (Gil. 337.)

44. A teacher having no license entered into a verbal contract to teach for three months, at a certain sum per month. After teaching three weeks, and about May 9th, he qualified and received a license, and then entered into a written contract to teach the school at the rate previously stipulated for three months from April 18th, preceding. *Held*, that he was entitled to recover at the rate stipulated for teaching done after making the written contract.—McKinney v. School-Dist. No. 45, 20 Minn. 72, (Gil. 57.)

45. A contract of employment as a teacher purporting to have been entered into between plaintiff and defendant school-district was signed "Q., Director," and "S., Treasurer." *Held*, that it was implied that Q. and S. were respectively defendant's director and treasurer, and as such were two of its board of trustees authorized by Laws Minn. 1879, c. 17, § 1, to make contracts for the district.—Ryan v. School-Dist. No. 13, 8 N. W. 146, 27 Minn. 433.

46. Under Gen. St. Minn. c. 36, § 31, a contract made between a teacher and the trustees of a school-district must be in writing, and in a suit by the teacher to enforce such a contract, where it is admitted that a majority of the trustees signed, and the only issue raised by defendant's testimony is a denial that plaintiff signed, it is proper to instruct the jury that the "statute makes it necessary that the contract for hiring a teacher must be in writing; but if the necessary trustees belonging to the district signed, it would be a compliance with the law," and to leave it to the jury to decide "whether there was a contract as stated by plaintiff at that time or not."—McGinness v. School-District No. 10, (Minn.) 41 N. W. 103.
39 Minn. 499.

Teachers—Actions for compensation.

47. An action may be maintained against trustees of a school-district upon orders on the treasurer of the district drawn and delivered by the proper officers in payment of an amount due to a teacher of the district school, after demand on the treasurer and refusal of payment, although plaintiff has a remedy by *mandamus* against the treasurer.—Martin v. Elwood, 29 N. W. 135, 35 Minn. 309.

48. The complaint in an action on a contract by which plaintiff was employed by defendant school-district as a teacher, alleged that plaintiff and defendant "entered into an agreement in writing." *Held*, that such allegation implied that the contract was made by the trustees at a meeting called for that purpose, of which due notice was given, as required by Laws Minn. 1879, c. 17.—Ryan v. School-Dist. No. 13, 8 N. W. 146, 27 Minn. 433.

49. In an action on a contract by which plaintiff was employed by defendant school-district as a teacher, the complaint, under Laws Minn. 1879, c. 17, § 2, providing that a common school district shall hire "such teachers only as have certificates of qualification," must allege that plaintiff had such certificate. Following Jenness v. School-District, 12 Minn. 448, (Gil. 337.)—Ryan v. School-Dist. No. 13, 8 N. W. 146, 27 Minn. 433.

50. The complaint in an action for services as a teacher in the public schools of a school-district alleged that plaintiff was "a duly-qualified teacher of and in the public schools of said state." *Held*, that this included the fact that he had received the certificate required by statute to entitle him to teach in such school. Distinguishing Ryan v. School-District, 27 Minn. 433.—Goetz v. School-Dist. No. 59, 17 N. W. 276, 31 Minn. 164.

Liabilities of school-districts for negligence.

51. School-districts and independent school-districts, being corporations with limited powers organized solely for public purposes, and the duties of the trustees or boards of education, intrusted with the management and care of the property of such districts, being public and administrative only, they are not liable for injuries to individuals caused by negligence in failing to make repairs.—Bank v. Brainerd School-Dist., (Minn.) 51 N. W. 814.

52. Nor is a right of action against a school-district for such negligence given by section 117, c. 36, Gen. St. 1878, which authorizes actions to be brought against trustees in their official capacity, for an injury to the rights of plaintiff arising from some act or omission of the officers or of the district.—Bank v. Brainerd School-Dist., (Minn.) 51 N. W. 814.

Judgment against district.

53. Under Gen. St. Minn. 1878, c. 36, § 119, which authorizes the treasurer of a school-district to pay a judgment against the trustees of the district only out of money not otherwise appropriated, he has no authority to do so out of moneys of the district applicable only to other specific purposes, as shown by his own report.—School-Dist. No. 1 v. Roach, (Minn.) 45 N. W. 1097.
43 Minn. 495.

54. Where judgment in an action against a school-district is entered by collusion between the plaintiff and one of the trustees, the court may, on the proper application of the other trustees, set aside the same and allow an answer upon the merits to be interposed.—Sturm v. School-Dist. No. 70, (Minn.) 47 N. W. 462.
45 Minn. 88.

Scienter.

Knowledge of vicious propensity of dog, see *Animals*, 2.

Seal.

Certificate of acknowledgment, see *Deed*, 47.
Contracts under seal, see *Contracts*, 14, 132, 133.
Enforcement of voluntary executory agreement under seal, see *Equity*, 66.
Of clerk, see *Clerk of Court*, 5.
corporation, see *Corporations*, 62.
court, required on warrants of attachment, see *Attachment*, 61-63.
notary, see *Notary Public*.

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Of probate court, see *Courts*, 17.
On bonds, see *Bonds*, 2.
contract by agent, see *Principal and Agent*, 41, 42.
—— to convey land, see *Vendor and Purchaser*, 5.
mortgage, see *Mortgages*, 35.
partnership contract, see *Partnership*, 30-32.
promissory note, see *Negotiable Instruments*, 24-26.
To certificate of taking deposition, see *Deposition* 19, 20.
writ of *habeas corpus*, see *Habeas Corpus*, 6.
When seal imports consideration, see *Contracts*, 31, 32.

SEARCH-WARRANT.

Malicious issue and execution, see *Malicious Prosecution*, 6, 7.

Issuance.

A proceeding for a search-warrant may be, but is not necessarily, a substantive criminal proceeding. It may be ancillary to a prosecution for larceny, though the warrant be issued upon a separate complaint, and at a subsequent stage of the prosecution.—Cole v. Curtis, 16 Minn. 182, (Gil. 161.)

Secretary of State.

Powers and duties, see *Constitutional Law*, 27.

SEDUCTION.

I. Civil Action, 1-8.
II. Criminal Prosecution, 9-22.

I. Civil Action.

Evidence.

1. In an action by a parent for the seduction of his child, testimony of the daughter as to promises of defendant, made during the continuance of his guilty visits, is competent.—Fox v. Stevens, 13 Minn. 272, (Gil. 252.)

2. In an action by a parent for the seduction of his daughter, the daughter testified as to propositions to procure abortion, made by defendant during the continuance of his guilty visits, and also requests made on his part, after she became pregnant, that she should marry his son, and nothing should be said about it. *Held* admissible, as tending to establish the fact of seduction.—Fox v. Stevens, 13 Minn. 272, (Gil. 252.)

3. In an action by a father for seduction of a daughter, evidence that defendant had exerted his influence to secure plaintiff's election to the office of chairman of town board is admissible to show the relation of confidence existing between the parties.—Fox v. Stevens, 13 Minn. 272, (Gil. 252.)

4. In an action for seduction, evidence of the conduct of defendant subsequent to the alleged seduction, in seeking to continue his illicit relations with the female, is admissible as corroborating the principal charge, and as matter of aggravation.—Russell v. Chambers, 16 N. W. 458, 31 Minn. 54.

Damages.

5. In an action by a parent for seduction, it is proper for the jury, in addition to the damages for loss of services, disbursements for medical attention, and other necessary expenses, to award such compensation for wounded feelings, mental suffering, and for dishonor to plaintiff and his family, as from the evidence is reasonable and proper, not exceeding in all the amount claimed in complaint.—Fox v. Stevens, 13 Minn. 272, (Gil. 252.)

6. In an action for the seduction of plaintiff's minor daughter, plaintiff may recover for his wounded feelings and sense of dishonor, and also exemplary damages.—Russell v. Chambers, 16 N. W. 458, 31 Minn. 54.

7. In an action by a father for the loss of services of his minor daughter resulting from her seduction by defendant, evidence of the ill health and depressed mental condition of the daughter following her confinement is admissible.—Russell v. Chambers, 16 N. W. 458, 31 Minn. 54.

8. In an action for the seduction of plaintiff's minor daughter, evidence of the amount of money which defendant had furnished the daughter from time to time is inadmissible, where it did not appear that such money was in any way applied to plaintiff's benefit or in reduction of any of his damages.—Russell v. Chambers, 16 N. W. 458, 31 Minn. 54.

II. Criminal Prosecution.

What constitutes the offense.

9. Under Pub. St. c. 96, § 6, making seduction under promise of marriage of an unmarried female of "previous chaste character" a misdemeanor, a woman may be of chaste character, within the meaning of the statute, although, previous to the seduction charged, she had had sexual intercourse with the accused, if she had reformed, in principle, before the time of the act charged.—State v. Timmens, 4 Minn. 325, (Gil. 241.)

10. Gen. St. Minn. 1878, c. 100, § 6, punishing the seduction, under promise of marriage, of "an unmarried female of previous chaste character," applies to the seduction of a woman who, although having a low standard of propriety, and permitting indelicate familiarities, has enough sense of virtue not to surrender her chastity except when induced to do so under promise of marriage.—State v. Brinkhaus, 25 N. W. 642, 34 Minn. 285.

Indictment.

11. An indictment alleged that defendant did, on May 11, 1878, under a promise to marry one A., "seduce and have illicit connection with her, the said A., and so promising to marry her, the said A., did carnally know the said A.; she consenting and agreeing to such knowledge of her person in the belief that said promise would be

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kept, and she, the said A., being then an unmarried female of chaste character previous to the date of said promises, and of chaste character previous to the said 11th day of May, 1878." *Held*, under Gen. St. Minn. 1878, c. 100, § 6, which provides that any man "who seduces and has illicit connection with an unmarried female of previous chaste character is guilty of a felony," that the indictment was insufficient as not alleging that A. was of chaste character up to the time of the act of seduction.—State v. Gates, 6 N. W. 404, 27 Minn. 52.

12. The allegation in an indictment for seduction, that the woman "was then and there an unmarried female of previous chaste character," is a sufficient allegation of chaste character at the time of the alleged seduction.—State v. Wenz, (Minn.) 42 N. W. 933.

41 Minn. 196.

13. Pen. Code Minn. § 242, provides that "a person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character shall be punished," etc. *Held*, that an indictment which alleges that defendant "willfully and feloniously, under promise of marriage to T., her, the said T., did then and there seduce, and have sexual intercourse with, said T. being then and there an unmarried female of previous chaste character," is sufficient, as it follows the language of the statute.—State v. Abresch, 42 N. W. 543, 41 Minn. 41.

14. Such indictment sufficiently alleges the seduction to have been "under promise of marriage."—State v. Abresch, (Minn.) 42 N. W. 543.

41 Minn. 41.

Evidence—Presumption.

15. Upon the trial of an indictment for seduction the usual presumption of chastity in a woman does not apply.—State v. Wenz, (Minn.) 42 N. W. 933.

41 Minn. 196.

—— Promise of marriage.

16. Under an indictment for seduction under promise of marriage, the proof of such promise may be sufficient, although the particular words used are not stated. It is enough if language is used which implied such a promise, and was intended to convey that meaning, and was in fact so understood by the prosecutrix.—State v. Brinkhaus, 25 N. W. 642, 34 Minn. 285.

17. In a prosecution for seduction under promise of marriage the female seduced may testify that she permitted the intercourse because of the promise of marriage.—State v. Brinkhaus, 25 N. W. 642, 34 Minn. 285.

—— Previous conviction for bastardy.

18. Upon the trial of an indictment for seduction, the record of a previous conviction of defendant upon a charge against him by the complaining witness for bastardy is not admissible.—State v. Wenz, (Minn.) 42 N. W. 933.

41 Minn. 196.

Corroboration.

19. Pub. St. c. 96, § 6, providing that on an indictment for seduction no conviction shall be had on the testimony of the female seduced unless corroborated, does not require proof of the material fact, independent of the female's testimony, but only proof of concomitant facts or circumstances, sufficiently strong and pertinent to satisfy the jury of the female's truthfulness as to the main fact.—State v. Timmens, 4 Minn. 325, (Gil. 241.)

20. In an action for the offense of seduction under promise of marriage, the consultations of the female with her parents concerning her marriage, and her preparations for the same, are in corroboration of her testimony as to the promise.—State v. Timmens, 4 Minn. 325, (Gil. 241.)

21. At the trial of an indictment for seduction under promise of marriage, besides testimony of the prosecutrix to the making of such a promise, there was evidence that defendant visited her as a lover several times a week, and was frequently alone in her company, and that, in talking with her brother, he had expressed an intention to marry her, notwithstanding his parents were opposed to his doing so. *Held*, that this was sufficient corroboration of her testimony as to the promise of marriage, under Gen. St. Minn. 1878, c. 100, § 6, providing that no conviction shall be had on the testimony of the female seduced unsupported by other evidence.—State v. Brinkhaus, 25 N. W. 642, 34 Minn. 285.

22. The prosecutrix further testified that she yielded to defendant because he gave her to understand that he was going to marry her, and that she had never before had sexual intercourse with any man. Other testimony showed that she was an inmate of the family of her father and that of her married sister in the neighborhood where she had lived since a child; that she was 23 years of age, and had been received in society of the social rank of her family; and some of her neighbors, who had known her for years, testified that they never saw anything improper in her conduct. *Held*, that this was sufficiently corroborative of her previous chaste character.—State v. Brinkhaus, 25 N. W. 642, 34 Minn. 285.

Seisin.

See *Adverse Possession; Covenants*, 20-23, 27, 28.

Self-Defense.

See *Homicide*, 24-27.

Sentence.

See *Criminal Law*, 124-133, 192; *Homicide*, 96.

Separate Estate.

Of married woman, see *Husband and Wife*, 14-59.

Sequestration.

Proceedings to enforce liability of stockholders for corporate debts, see *Corporations*, 157-168.

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Servant.

See *Master and Servant.*

Service.

Of notice of appeal, see *Appeal and Error*, 143-151, 701-706.
—— of foreclosure, see *Mortgages*, 223-230.
—— to redeem from tax sale, see *Taxation*, 195-198.
papers, see *Practice in Civil Cases*, 57-61.
pleadings, see *Practice in Civil Cases*, 57, 58.
process, see *Attachment*, 68-70.
—— by publication, see *Constitutional Law*, 156, 157.
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writ of *certiorari*, see *Certiorari*, 26.

Set-Off.

See *Counterclaim and Set-Off.*

Settlement.

See *Accord and Satisfaction; Compromise; Payment; Release and Discharge.*
By executors, etc., see *Executors and Administrators*, 86-88.
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Sewers.

Defective sewers, see *Municipal Corporations*, 190-201.
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SHERIFFS AND CONSTABLES.

I. Powers, Duties, and Liabilities, 1-47.
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I. Powers, Duties, and Liabilities.

Offer of reward.

1. A sheriff cannot bind his county by offering a reward for the recapture of a prisoner escaping from the county jail.—Bemis v. Board County Com'rs Rice County, 23 Minn. 73.

Powers in levying execution.

2. The fact that one uses his dwelling as a place for the transaction of his business does not render it lawful for an officer to break the outer door for the purpose of levying an execution; and no valid levy can be made by means of such unlawful entry.—Welsh v. Wilson, 24 N. W. 327, 34 Minn. 92.

Dealings with property levied on.

3. A sheriff, having levied an execution on grain in the stack or shock, caused it, before sale, to be threshed, and handled through an elevator. *Held*, that this was not such misapplication or abuse of his authority as to render him a trespasser *ab initio*.—Ladd v. Newell, 24 N. W. 366, 34 Minn. 107.

Rights as against receiptor.

4. Where a sheriff relinquishes possession of property, which has been seized and attached by him, to another, on the strength of a receipt for the same, the receiptor cannot question a judgment, obtained in the action in which the property was so seized and attached, as obtained by perjury and fraud.—Holcomb v. C. N. Nelson Lumber Co., (Minn.) 40 N. W. 354.

39 Minn. 342.

Failure to execute process.

5. Under Gen. St. Minn. 1878, c. 8, §§ 198, 199, providing that a sheriff guilty of misconduct in relation to the execution of a writ delivered to him may be proceeded against in the district court by order to show cause, a sheriff improperly neglecting and refusing to execute a writ of execution may be required to show cause before the district court from which the execution issued, on an order made by a judge of that court.—Breuer v. Elder, 22 N. W. 622, 33 Minn. 147.

6. In proceedings against a sheriff for misconduct in relation to the execution of a writ of execution delivered to him it appeared that he had failed to collect any part of the amount of the execution, though sufficient property of defendants was pointed out to him, out of which he could have made the execution, and that he had made return that he was unable to find property of defendants on which to levy, and thereupon returned the execution wholly unsatisfied, and that it had become wholly uncollectible, defendants no longer having any property on which it could be levied. *Held* that, under Gen. St. Minn. 1878, c. 8, § 199, providing that for such misconduct the court, "in addition to requiring the performance of the duty neglected, or the correction of the injury done," might impose on the sheriff a fine not exceeding $200, the court, besides requiring the sheriff to make good the loss occasioned by his misconduct, might impose such fine, and enforce its order by committing the sheriff to the common jail, unless such order was complied with within a reasonable time fixed by the court.—Breuer v. Elder, 22 N. W. 622, 33 Minn. 147.

7. In an action by a judgment creditor against a sheriff for failure to collect the judgment, which

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was valid, the judgment is conclusive evidence of the plaintiff's right to sue.—Armour Packing Co. v. Richter, (Minn.) 43 N. W. 1114.

42 Minn. 188.

8. In an action against a constable for the wrongful release of a levy, the issue made prominent on the trial was whether the execution defendant was the owner of the property levied on, and plaintiff's evidence showed that he was. *Held*, that a finding by the court that the allegations in the complaint were true was sufficient to warrant a judgment in plaintiff's favor, though there was no direct allegation in the complaint that the execution defendant owned the property seized and levied on, and though the court made no express finding to that effect.—Crosson v. Olson, (Minn.) 49 N. W. 406.

47 Minn. 27.

Delay in executing process.

9. It is the duty of the sheriff to execute writs of execution against the same debtor in the order received by him.—Albrecht v. Long, 25 Minn. 163.

10. The remedy of a creditor whose execution is first placed in the hands of the sheriff, but upon which levy is not made until after levy upon an execution subsequently delivered, so that the lien of the latter becomes prior to his, under Gen. St. Minn. 1866, c. 66, § 269, is against the sheriff.—Albrecht v. Long, 25 Minn. 163.

11. An execution was delivered by plaintiff to defendant sheriff about 4 o'clock in the afternoon to be levied on goods at a point about five miles distant. Defendant was told that it was very important that the levy should be made that afternoon, the reasons therefor being given by plaintiff, and promised that the levy should be made as plaintiff wished. Defendant, being engaged in other official duties, gave the writ to his deputy. The latter was too late for a train which he expected to take, because of a change in the time-table, but there was another train which he might have taken that evening, and he could have gone by private conveyance. *Held*, that a delay until 10 o'clock the next forenoon to levy the writ was unreasonable and negligent.—Guiterman v. Sharvy (Minn.) 48 N. W. 780.

46 Minn. 183.

Failure to collect money.

12. A sheriff who levies on personal property of the debtor, and sells and delivers it to the purchaser without receiving the price, may be proceeded against summarily under Gen. St. Minn. 1878, c. 8, §§ 198, 199, and compelled to pay to the person entitled to the surplus any excess of the selling price over the amount required to satisfy the execution and his fees and disbursements.—Kumler v. Brandenburg, (Minn.) 38 N. W. 704.

39 Minn. 59.

Failure to pay over money collected.

13. Under Gen. St. Minn. 1878, c. 8, § 198, providing for an order by the court to the sheriff to pay a person entitled thereto money collected by him by virtue of any execution, etc., "with twenty per centum thereon as damages for such failure," if no reasonable excuse for his failure to pay over is shown by the sheriff, the party entitled to the money has a legal right to such damages, and the court cannot relieve the sheriff from payment thereof.—Coykendall v. Way, 12 N. W. 452, 29 Minn. 162.

14. A judgment of foreclosure directed a sale and the payment of the proceeds to persons named. *Held*, that the sheriff, making such sale and payment according to the terms of the judgment, was protected from liability to another asserting a superior right to the proceeds, although notice of such claim was given to the sheriff before he paid over the money.—Hill v. Rasicot, 25 N. W. 604, 34 Minn. 270.

15. An officer making sale on foreclosure of a senior mortgage, and receiving the surplus, knowing of the junior mortgagee's right to the surplus fund, who immediately pays the surplus to the mortgagor, becomes liable to the junior mortgagee.—Fuller v. Langum, (Minn.) 33 N. W. 122.

37 Minn. 74.

Liability to lienor claiming attached property.

16. When property levied on under attachment or execution is subject to lien claims for wages, under Gen. St. Minn. 1878, c. 90, §§ 22, 23, the officer, when notice has been duly served on him, in case a sale is made by him upon execution, must pay over to such lienholders the amount found to be due each from the proceeds of the sale, not exceeding the statutory limit, and prior to a sale he is not liable to the lienholder, except for some wrongful act or omission in the disposition of the property, to the damage of the latter.—Liljengren v. Ege, (Minn.) 49 N. W. 250.

46 Minn. 488.

Wrongful seizure—In general.

17. Where a sheriff, under process against one, takes the property of another, such taking and subsequent detention by him are wrongful.—Caldwell v. Arnold, 8 Minn. 265, (Gil. 231.)

18. Where a sheriff, under process against A., levies upon and takes into his possession property of B. in the hands of C., his subsequent abandonment of the levy, and return of the property to C., will not relieve him from liability to B., unless it appeared that C., at the time of its return, was authorized to receive such property.—Caldwell v. Arnold, 8 Minn. 265, (Gil. 231.)

19. A sheriff is not liable in damages for a levy upon goods under an execution against the owner which is fair upon its face, although the judgment was fraudulently obtained, so long as it was not reversed, stayed, or enjoined.—Baker v. Sheehan, 12 N. W. 704, 29 Minn. 235.

20. Although a sheriff may levy on and sell the interest of the execution debtor in personal property, he is liable for taking property in which the execution debtor has no interest, although he assumes to levy only on the interest of the execution debtor therein.—Leonard v. Maginnis, 26 N. W. 733, 34 Minn. 506.

—— Sale of mortgaged goods.

21. When a sheriff, under an execution against the mortgagor in a chattel mortgage, assumes to sell, against the objection of the mortgagee, the en-

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tire property, and not merely the interest of the mortgagor, the mortgagee may treat it as a conversion of his interest, even though the purchaser knew of the mortgage.—Appleton Mill Co. v. Warder, (Minn.) 43 N. W. 791.

42 Minn. 117.

—— Claim or demand before action.

22. An action against a sheriff for goods levied upon while lawfully in possession of the one against whom the process runs, exercising acts of ownership over them, cannot be maintained by the real owner until after demand or notice to the officer. ATWATER, J., dissenting.—Vose v. Stickney, 8 Minn. 75, (Gil. 51.)

23. An attachment of property known to be exempt is unlawful, and no demand is necessary before suit brought for the unlawful taking.—Lynd v. Picket, 7 Minn. 184, (Gil. 128;) Murphy v. Sherman, 25 Minn. 196.

24. In an action against a sheriff for levying on plaintiff's personal property under an execution against another person, the plaintiff being present at the time the sheriff took the goods, a charge to the jury that, to entitle plaintiff to a verdict, she must prove, not only that the goods were hers, but "that at the time they were taken she asserted her title thereto," was erroneous, because it omitted the essential element of an estoppel, that the sheriff was influenced by her silence.—Hopkins v. Swensen, (Minn.) 42 N. W. 1062.

41 Minn. 292.

25. Where an attachment is regularly issued by a justice of the peace, and subsequent proceedings in the action divest the justice of jurisdiction to proceed, the person whose property was seized has no right of action against the officer for the possession of the property without a demand first made for its return on the officer.—Hines v. Chambers, 11 N. W. 129, 29 Minn. 7.

—— Defenses.

26. In an action against a sheriff for the seizure and sale of wheat under an execution against plaintiff's husband, it appeared that the wheat was grown on land conveyed to plaintiff several years before the debt sought to be enforced accrued, and managed and controlled by plaintiff for her own use and benefit. There was no evidence that the husband was in possession of the wheat, or that he managed the land or received the proceeds thereof. *Held*, that defendant could not show that the husband had transferred the land to plaintiff in fraud of his creditors.—Sanders v. Chandler, 3 N. W. 351, 26 Minn. 273.

27. Upon a simple issue of ownership, averred in the complaint and denied in the answer, between a plaintiff claiming title to personal property under a transfer from an insolvent debtor and a defendant in possession as sheriff under a valid process against the debtor in favor of a creditor, it is competent for the defendant to prove that such transfer was fraudulent and void, as against such creditor.—Tupper v. Thompson, 4 N. W. 621, 26 Minn. 385; Kenney v. Goergen, 31 N. W. 210, 36 Minn. 190.

28. In an action for wrongful attachment of exempt property, waiver of exemption must, if relied upon as a defense, be specially pleaded.—Murphy v. Sherman, 25 Minn. 196.

—— Evidence.

29. Where an officer levies upon property in the hands of one who has purchased from the execution defendant, the purchaser, in an action against the officer, need not show that the purchase was for a valuable consideration, unless the plaintiff in the process under which the levy was made was a creditor at the time of such purchase.—Buck v. Colbath, 7 Minn. 310, (Gil. 238;) Colbath v. Buck, 8 Minn. 85, (Gil. 60.)

30. In an action for the seizure and sale of property under an execution against a third person, plaintiff introduced evidence that the property taken was hers. Defendant introduced the execution in evidence, but offered no proof that the goods taken under it were the property of the execution debtor. *Held*, that the court properly withdrew the execution from the consideration of the jury and directed a verdict for plaintiff.—Sanders v. Chandler, 3 N. W. 351, 26 Minn. 273.

31. The return of a sheriff to a writ of attachment is conclusive on him as to the truth of all matters stated therein as between the sheriff or his legal representatives and the attaching creditor in an action by the creditor involving the liability of the sheriff in respect to the property attached or its proceeds.—State v. Penner, 6 N. W. 790, 27 Minn. 269.

32. At the trial of an action against an officer for taking property which plaintiff claims, on levy of an execution against another, on plaintiff adducing evidence of his right to the property, if the officer relies on the fact that the property was in the possession of such other person at the time of the taking, he must adduce evidence to show that it was in such possession, under circumstances raising a presumption of ownership in such person; and plaintiff, in reply thereto, if he relies upon an affidavit claiming the property under Gen. St. Minn. 1878, c. 66, § 154, or upon notice, must prove the same. He need not make such proof as a part of his case in chief.—Perkins v. Zarracher, 19 N. W. 385, 32 Minn 71.

33. In replevin against a sheriff for goods of plaintiff attached by defendant under a writ against a third person, issued by a justice of the peace, defendant justified under the writ, and pleaded that plaintiff's title was fraudulent as to creditors of the attachment defendant. *Held* that, in order to maintain such defense, defendant must show not only a writ of attachment fair on its face, but also the existence of an indebtedness from the defendant in the attachment to the plaintiff therein; and that for that purpose, in connection with testimony of the plaintiff in attachment to such an indebtedness on a note, the complaint and judgment in the justice's court, showing a cause of action on a note identical as to parties, date, amount, and a payment made on it, were admissible, and sufficient, in the absence of proof impairing their effect.—Hines v. Chambers, 11 N. W. 129, 29 Minn. 7.

34. In an action against a sheriff for attaching goods of plaintiff under a writ against a third person, defendant justified under the writ, and pleaded that plaintiff's title was fraudulent as

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to creditors of the attachment defendant, and showed by parol undisputed evidence the existence of an indebtedness from the defendant in attachment to the plaintiff therein. *Held*, that the subsequent admission of incompetent evidence to prove such indebtedness was harmless. —Hines v. Chambers, 11 N. W. 129, 29 Minn. 7.

35. In an action against a sheriff for the wrongful seizure of property under an attachment, where he justifies the taking of the property from the possession of plaintiff on the ground that it was the property of the debtor in an attachment, it is material for him to establish the relation of debtor and creditor between the plaintiff and defendant in such attachment suit.—Homberger v. Brandenberg, 29 N. W. 123, 35 Minn. 401.

36. The defendant in such attachment suit, examined as a witness, denied any indebtedness on the promissory note upon which he was sued, and his evidence tended to show that the note was fraudulent and invalid. *Held*, that the sheriff, defendant, might inquire into the consideration of the note, and the circumstances under which it was given.—Homberger v. Brandenberg, 29 N. W. 123, 35 Minn. 401.

37. Where an officer, in order to justify a seizure of goods under an attachment, attacks the plaintiff's title on the ground that it was acquired by a conveyance from the defendant in the writ which was fraudulent and void as to creditors, he must show, not only the indebtedness in favor of the plaintiff in the writ, and the writ itself, but the preliminary proceedings which authorized the issuing of it.—Howard v. Manderfield, 17 N. W. 946, 31 Minn. 337.

38. In an action by F. against a sheriff for an alleged wrongful seizure of wheat, the sheriff justified under a writ of attachment against J., the brother of F. F. testified that he bought the wheat of his sister; that she lived with J., their brother; that she had bought the land of J.; and that J. had raised the wheat for her. *Held*, that defendant was entitled, on cross-examination, to inquire fully into the consideration and circumstances of the alleged sale.—Homberger v. Brandenberg, 29 N. W. 123, 35 Minn. 401.

Wrongful seizure—Damages.

39. The ordinary measure of damages, in an action for the wrongful attachment and sale of exempt property, is the value of the property, with interest from the time of taking.—Murphy v. Sherman, 25 Minn. 196.

40. Knowledge upon the part of the officer that property levied upon by him is exempt from execution may properly go in aggravation of damages.—Lynd v. Picket, 7 Minn. 184, (Gil. 128.)

41. Injury to plaintiff's feelings from a wrongful levy upon his property by one knowing it to be exempt is an element of damage, which is not decreased by the fact that he had no use for the property at such time.—Lynd v. Picket, 7 Minn. 184, (Gil. 128.)

42. Where a sheriff wrongfully levies on and sells personal propery, and the owner, to protect himself, buys the property at the execution sale, he may recover as damages, in an action for the wrongful taking and detention of the property, what it so cost him to regain the property; and the sheriff cannot object that such sum exceeded the actual value of the property.—Leonard v. Maginnis, 26 N. W. 733, 34 Minn. 506.

43. Although, in an action against an officer for a wrongful seizure of goods under an attachment, he fails in an attempted justification on the ground that plaintiff's title was derived from the defendant in the writ by a transfer fraudulent and void as to creditors, he may show, in mitigation of damages, the fraudulent nature of plaintiff's title, and that, in an action by a creditor of plaintiff's grantor against the latter, the property, subsequent to the levy complained of, had been lawfully levied upon by attachment, and subsequently sold upon execution.—Howard v. Manderfield, 17 N. W. 946, 31 Minn. 337.

Distinguished in Welsh v. Wilson, 24 N. W. 328, 34 Minn. 93.

44. Every subsequent act of a sheriff based on an unlawful levy of execution is but a continuation of the original trespass; and in an action for such unlawful levy the fact that he sold the goods taken, and paid the proceeds to the execution creditor, is not available in mitigation of the damages.—Welsh v. Wilson, 24 N. W. 327, 34 Minn. 92.

Distinguishing Howard v. Manderfield, 17 N. W. 946, 31 Minn. 337.

45. A sheriff, after taking and selling under execution property of plaintiff, deposited, with the justice who issued the execution, the surplus proceeds, which plaintiff might, if he chose, have demanded and received. *Held*, that this did not affect plaintiff's right in an action against the sheriff for wrongfully taking the property, plaintiff not having received the money.—Allen v. Coates, 11 N. W. 132, 29 Minn. 46.

—— Substitution and liabilities of indemnitors.

46. Under Gen. St. Minn. 1878, c. 66, § 154, providing that, on a claim by affidavit by any person other than the defendant or his agent, of property levied on by a sheriff, the sheriff may release the levy unless the plaintiff indemnify him, and under section 155, providing that "if, in such case," the person claiming the ownership commence an action against the sheriff for taking it, the obligors in the bond shall, on motion of the sheriff, be impleaded with him in the action, such obligors may be so brought in, although, the property having been taken from the possession of the party so claiming it, he might have maintained an action therefor against the sheriff without the affidavit prescribed; and, as the purpose for which such obligors are brought in is to enable the sheriff to enforce against them his right of indemnity, not the enforcing in favor of the plaintiff of a liability in tort, their liability is measured by the terms of the contract of indemnity, and is limited to the penal sum named in the bond; and where several writs have been levied upon all the property, and several indemnity bonds executed to the sheriff, and the damages recovered for the taking exceed the amount of the penalties in all the bonds, the obligors in each bond should be charged to the ex-

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tent of the penalty thereof.—Lesher v. Getman, 15 N. W. 309, 30 Minn. 321.

Outgoing and incoming sheriffs.

47. Though Gen. St. Minn. c. 8, § 174, provides that "every sheriff going out of office by the expiration of his term, and having any attachment * * * in his hands, which he has begun to execute by a levy upon property, shall be authorized to proceed thereon and execute the same * * * in the same manner as if still in office," where a sheriff goes out of office after levying an attachment, his successor is the proper person to levy an execution issued on a judgment in the action in which the attachment issued.—Butler v. White, 25 Minn. 432.

II. Fees and Compensation.

Service of process.

48. As a sheriff is entitled, for diligent search, inquiry, and return not found on summons, to the fee of one dollar, for like services under subpœna he is entitled to the same fee, as Gen. St. Minn. c. 70, § 10, allows a sheriff to charge for services not therein enumerated the same fees allowed him by statute for similar services. —Barman v. Miller, 23 Minn. 458.

49. A sheriff or constable is entitled to mileage for traveling to serve a criminal warrant, although by no fault of his, he fails to serve it.—Davis v. County of Le Sueur, (Minn.) 35 N. W. 364.
37 Minn. 491.

Searching for criminals.

50. Gen. St. Minn. 1866, c. 70, § 10, fixing the fees of a sheriff, allows no *per diem* to a sheriff for services in searching for supposed criminals with view to their arrest, and the commissioners erred in allowing the same.—Thomas v. County Com'rs Scott County, 15 Minn. 324, (Gil. 254.)

Care of prisoners.

51. The provision of Sp. Laws Minn. 1876, c. 207, § 3, allowing the sheriff of Ramsey county a fee of one dollar for committing a prisoner to jail, applies to cases of prisoners committed to jail by the municipal court of the city of St. Paul, notwithstanding the provision of the city charter (Sp. Laws 1874, p. 100) that said city "shall be liable to pay for the support and keeping of said prisoners the same charges and allowances as are allowed for the support and keeping of prisoners committed under the authority of the state;" the two provisions not being inconsistent.—Richter v. City of St. Paul, 12 N. W. 532, 29 Minn. 198.

52. The sum of four dollars per week allowed the sheriff by Gen. St. Minn. 1878, c. 70, § 11, for "boarding prisoners," covers washing done for them, required of him by statute.—Connelly v. Board of Com'rs of Dakota County, 29 N. W. 1, 35 Minn. 365.

Caring for property.

53. On application, after levy, to open a judgment entered by default, the motion was granted, conditioned on the judgment, execution, and levy, standing as security for the claim, to abide the event of the action. *Held*, that the execution, during such time, performed the duty and was in the nature of a writ of attachment, and the sheriff was entitled to fees in caring for the property as on a writ of attachment.—Barman v. Miller, 23 Minn. 458.

Collections.

54. Gen. St. Minn. 1878, c. 70, § 11, allows a sheriff for collections on executions, when the same is collected or settled after levy, a certain percentage of the amount collected, and for "selling land on decree by foreclosure * * * $3," and provides that "for any services not herein enumerated" the sheriff "shall receive the fees herein allowed for similar services." *Held*, that for selling mortgaged personalty under a decree of foreclosure, the sheriff is entitled to $3 only.—Thompson v. First Div. St. P. & P. R. Co., 4 N. W. 603, 26 Minn. 353.

55. Under Laws Minn. 1885, c. 2, § 12, providing for the sheriff the same fees for collecting taxes as are given by law to constables, "for making levy and sale on execution," "which fees shall be added to the tax and collected," the sheriff is entitled to receive from the county the same compensation for services rendered in an attempt to collect a tax-warrant, which by no fault of his does not succeed, as the law allows to a constable on executions which he is unable to collect.—Schmid v. Board of Com'rs, (Minn.) 46 N. W. 145.
44 Minn. 67.

Attendance at court.

56. The *per diem* allowed to a sheriff as compensation by Gen. St. Minn. 1878, c. 70, § 11, for attendance upon terms of the district court, covers all services that may be required of him in and about the business of the term, such as bringing into court and removing prisoners whose presence is necessary for arraignment, trial, or sentence.—Connelly v. Board of Com'rs of Dakota County, 29 N. W. 1, 35 Minn. 365.

III. Actions on Bond.

Leave to sue.

57. Gen. St. Minn. 1878, c. 78, §§ 1–3, requiring leave from a district court or judge before bringing action on an official bond, applies to constables' bonds. The provision of chapter 10, § 42, authorizing any person aggrieved by acts or omissions of a constable to maintain an action on his bond is not inconsistent with, and does not supersede or dispense with, those sections.—Litchfield v. McDonald, 28 N. W. 191, 35 Minn. 167.

Pleading—Complaint.

58. The complaint in an action on a sheriff's bond, which sets forth that the sheriff was duly elected, that the bond was executed, and sureties approved by the county board, and that he took the oath of office, and entered upon the performance of his duties, shows the sheriff to be an officer *de facto*, and that his sureties were responsible on his bond for wrongful acts committed by him while so acting.—County Com'rs of Ramsey County v. Brisbin, 17 Minn. 451, (Gil. 429.)

59. A complaint on a sheriff's bond to recover money paid the sheriff for redemption alleged payment by one S., the day before the expiration

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of the period of redemption from execution sale, in redemption of said premises; that the same was made on a mortgage executed by the debtor, which was a lien upon the premises, and the redemption money was paid for the use and benefit of relator; that the sheriff executed and delivered a certificate of redemption, which was duly filed and recorded. *Held*, that such complaint, though indefinite and uncertain, was not bad on general demurrer.— County Com'rs of Ramsey County v. Brisbin, 17 Minn. 451, (Gil. 429.)

60. Where the complaint in an action on a sheriff's bond shows the bond to have been duly approved by the board of commissioners, a delivery will be implied, though it does not appear that the sheriff deposited it in the office of the register of deeds.— County Com'rs of Ramsey County v. Brisbin, 17 Minn. 451, (Gil. 429.)

IV. DEPUTIES.

Removal.

61. A district judge has no power under the laws of Minnesota to remove a deputy-sheriff.— State v. McIntyre, 25 Minn. 383.

Powers.

62. A sheriff and his deputy are, in law, one officer, so that the delivery of a writ to either is delivery to the sheriff.—Albrecht v. Long, 25 Minn. 163.

63. The duties imposed on a sheriff, by a decree of foreclosure directing him to make sale and a report thereof, are duties imposed upon him as an officer, and may be performed by deputy.—Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

Liability of sheriff for unofficial acts.

64. A sheriff is not liable for an unofficial act of his deputy in taking possession of mortgaged chattels at the request of the mortgagee, even though he approved of the same, supposing it to be an official act.—Dorr v. Mickley, 16 Minn. 20, (Gil. 8.)

Right to fees.

65. A sheriff may lawfully assign to a deputy all the sheriff fees that may be due, or become due, for services rendered by such deputy.— Pioneer Printing Co. v. Sanborn, 3 Minn. 413, (Gil. 304.)

SHIPPING.

Admiralty jurisdiction, see *Admiralty*.
Enforcing liens, see *Constitutional Law*, 166, 167; *Maritime Liens*.

Joint ownership.

1. Joint owners of a boat are tenants in common as to the property, but as to the business done by it they are copartners, and subject to the laws of copartnership.—Russell v. Minnesota Outfit, 1 Minn. 162, (Gil. 136.)

2. A commander of a boat, who was also part owner and agent of the other owners, sold and transferred a claim due the partnership from an individual owner and partner. *Held*, that his authority to make the assignment was sufficient, and the assignee might sue thereon in his own name.—Russell v. Minnesota Outfit, 1 Minn. 162, (Gil. 136.)

3. Plaintiff and defendant were part owners of a steamer, which they had employed for their common profit, under the management of defendant as master. Plaintiff brought suit for an accounting and a sale of the vessel and a division of the proceeds, and obtained therein an injunction restraining defendant from using the vessel during the pendency of the action; but this was, on motion of defendants, modified so as to permit him to run the vessel until the further order of the court, but he was forbidden to contract any debts which might become a lien on the vessel, or upon which plaintiff might become liable; and plaintiff also served a written notice on defendant, withdrawing from him all authority to represent plaintiff in the management of the vessel, and forbidding him to contract any debts for running it, and notifying him that plaintiff would resist the payment of any such claims incurred by defendant, either as part owner or master. Defendant then took possession of the boat, and ran it during the season. *Held*, that plaintiff, having dissented from the employment of the boat, and having refused to bear or be responsible for any part of the expenses or losses, was not entitled to any part of the earnings, nor to compensation for the use of his share of the vessel.—Swain v. Knapp, 25 N. W. 397, 34 Minn. 232.

Sale of vessel.

4. As between the parties a written bill of sale is not necessary to pass the title to a boat.—McMahon v. Davidson, 12 Minn. 357, (Gil. 232.)

Powers of master.

5. A master of a vessel may maintain an action in his own name for freights, or for injury to or conversion of goods intrusted to his care.— Houghton v. Lynch, 13 Minn. 85, (Gil. 80.)

Action against vessel—Jurisdiction.

6. Rev. St. Minn. c. 86, § 1, which provides that every vessel used in navigating the waters of the territory shall be liable, etc., has no application to a case where the contract sued upon was made, and the breach complained of occurred outside of the state.—The Reveille v. Landreth, 2 Minn. 175, (Gil. 146.)

7. Rev. St. c. 86, providing for the collection of demands against vessels navigating the waters of the state, is applicable to causes of action arising within the state, contracts made within and broken without the state, or contracts made without, to be performed within, the state, but not when the cause of action arises wholly without the state.—Irvine v. Steam-Boat Hamburg, 3 Minn. 192, (Gil. 124.)

Distinguished in Atkins v. Little, 17 Minn. 357, (Gil. 331.)

—— Who may maintain.

8. Under Pub. St. Minn. c. 76, providing that "any person" having a demand against a vessel may bring an action thereon against the vessel by name, the assignee of any such claim may maintain such action.—Reynolds v. The Favorite, 10

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Minn. 242, (Gil. 190;) Morin v. The F. Sigel, 10 Minn. 250, (Gil. 195.)

Sidewalks.

See *Municipal Corporations*, 132-134, 145-151, 158-160.

Signature.

By agent for principal, see *Principal and Agent*, 39-42.
Confession of judgment, see *Judgment*, 11.
Of affidavit, see *Affidavit*, 7.
contract, see *Contracts*, 10-13.
deed, see *Deed*, 7, 8.
deposition, see *Deposition*, 10.
promissory note, see *Negotiable Instruments*, 4-7.
summons, see *Summons*, 11-13.
will, see *Wills*, 21, 22.

Silence.

Estoppel by, see *Estoppel*, 59-74.

Slander.

See *Libel and Slander*.

Slander of Title.

See *Libel and Slander*, 97, 98.

Societies.

See *Associations; Benevolent Societies; Building and Loan Associations; Corporations; Religious Societies.*

Southern Minnesota Railroad Company.

Exemption from taxation, see *Railroad Companies*, 135.
Location of route, see *Railroad Companies*, 22, 24.
Power to operate ferry, see *Railroad Companies*, 4-6.

SPECIFIC PERFORMANCE.

I. JURISDICTION, 1-6.
II. CONTRACTS ENFORCEABLE, 7-57.
III. GOOD FAITH AND DILIGENCE, 58-77.
IV. PLEADING AND PRACTICE, 78-106.

Limitation of actions, see *Limitation of Actions*, 38, 39, 54.

I. JURISDICTION.

Adequate remedy at law.

1. A court of equity will not willingly interfere to enforce specific performance if the party can be adequately compensated in damages.—McClane v. White, 5 Minn. 178, (Gil. 139.)

2. Defendant deposited stone, earth, and *débris* in the Mississippi river opposite abutting land of plaintiff, and between such land and the center of the river, with plaintiff's consent thereto, given upon defendant's agreement to remove the same by a specified time. *Held*, that specific performance of such agreement by defendant could not be enforced, plaintiff having an adequate remedy by an action for damages for breach of the contract.—Minneapolis Mill Co. v. Bassett, 18 N. W. 100, 31 Minn. 390.

3. Defendants, in consideration of the extension of the plaintiff's railway to the city of S., contracted with plaintiff that the city would furnish right of way through certain real estate in the city, and that they would purchase certain land, and grant plaintiff a right of way through it. Such right of way was not so given or procured; and several parcels of land included within the limits of the right of way, as designated, were separately owned, subsequent to the contract, by some of the defendants, and conveyed to other defendants with notice of the contract. *Held*, in an action against the signers of the contract, and such grantees, for a specific performance, with compensation in damages, that plaintiff is not entitled to the relief sought, but must be left to its action at law for damages.—Chicago, M. & St. P. Ry. Co. v. Durant, (Minn.) 46 N. W. 676; Same v. Hospes, Id.; Same v. Staples, Id.; Same v. Union Depot St. Ry. & T. Co., Id.

44 Minn. 361.

4. Plaintiff agreed to assign and deliver to M. a certain note and mortgage, in consideration whereof M. was to cancel and deliver up certain notes of plaintiff which he held. *Held*, plaintiff having performed the contract on his part, that he was entitled to specific performance on the part of M., though the notes which M. refused to deliver up were overdue and incapable of transfer, to the prejudice of plaintiff.—Tuttle v. Moore, 16 Minn. 123, (Gil. 112.)

To compel void act.

5. A conveyance of a homestead by a married man, without the signature of his wife, being void, a contract to convey such homestead, executed by the husband alone, cannot be specifically enforced, as the judgment in such case could have no greater effect than the deed of the husband alone.—Barton v. Drake, 21 Minn. 299.

Power of probate court.

6. Where one, who is bound by a contract in writing to convey real estate, dies before making a conveyance, the proper probate court may, on the application of any person interested, under Gen. St. Minn. 1878, c. 58, direct the administrator or executor to make it, but, if not satisfied that it ought to be made, it cannot decide against the applicant on the merits, but must dismiss the petition, leaving him to his ordinary remedy by action.—In re Mousseau's Estate, (Minn.) 41 N. W. 977.

40 Minn. 236.

II. CONTRACTS ENFORCEABLE.

Parties to contract.

7. After defendant had entered into possession of a portion of premises without any claim of

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right, he discovered that a deed by P., the former owner, to H., was not recorded, and procured a verbal agreement from P. to deed such portion to him. P. subsequently sold the other portion of the lot to plaintiff, who knew all the facts, and entered into possession and made valuable improvements. In the mean time, however, H.'s deed had been recorded; and, to give plaintiff a good title, it was agreed between him and P. that H.'s title should be purchased at P.'s expense, and the part occupied by defendant conveyed to him. The purchase was accordingly made by plaintiff, the title being taken in his name. *Held* that, P.'s agreement to convey to defendant being without consideration, as was also the agreement by plaintiff with P. to convey to defendant, specific performance of the latter agreement could not be enforced. Nor was defendant entitled to the improvements made by him, in ejectment by plaintiff.—Towlerton v. Davidson, 7 Minn. 408, (Gil. 322.)

8. Plaintiff and defendant, N., entered into a verbal contract that N. should purchase certain lands of L., in his own name, with money to be furnished by plaintiff, and that all rights acquired by N. by such purchase should at once inure to plaintiff, and if it was consummated and a deed procured by N. he should at once convey to plaintiff. N. entered into a written contract for the purchase of the lands, making the first payment with money furnished by plaintiff; and plaintiff, in pursuance of the verbal contract, and with the consent of N., entered into possession, and made valuable improvements. N. subsequently repudiated his agreement, and refused to carry it out. *Held*, plaintiff not being in default, and L. not objecting, that the court would give effect to the verbal agreement by directing the conveyance from L. to be made directly to plaintiff; that the part performance of the verbal contract operated to transfer all the equitable rights acquired by the written agreement; that L., being notified of such verbal agreement, was bound by same; that N. could not object to the sufficiency of any tender of payment from plaintiff to L., L. not objecting; and that N. acquired no rights, either by tendering to plaintiff the amount he had paid, or to L. the balance of purchase money falling due after his repudiation.—Gill v. Newell, 13 Minn. 462, (Gil. 430.)

Distinguished in McCarthy v. Couch, 33 N. W. 778, 37 Minn. 125.

9. A. entered into an executory contract with B. for the purchase of land owned by the latter, and, before performance of the conditions on either side, contracted to sell the same land to C., and thereafter neglected or refused to complete his contract with B. so as to acquire the title. *Held*, that the contracts were independent, and that an action could not be maintained by C. against A. and B. to compel a specific performance of the first-named contract by A., to the end that B.'s title might be acquired and transferred to C.—McCarthy v. Couch, (Minn.) 33 N. W. 777.

37 Minn. 124.

Distinguishing Gill v. Newell, 13 Minn. 462, (Gil. 430;) Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

10. A contract for the sale of lands made with a firm, in the firm name, may be enforced in equity, and the deed will be decreed to be executed to the individual partners as tenants in common.—Townshend v. Goodfellow, 41 N. W. 1056, 40 Minn. 312.

Assent—Unaccepted offer.

11. In an action for specific performance of an agreement for the sale and conveyance of real estate it appeared that the minds of the parties never met as to several particulars, especially as to a requirement or condition that the cash payment should be deposited in bank, and as to the time within which another payment might be made. *Held*, that there was no such clear accession on both sides to one and the same set of terms as was requisite to make out an agreement entitled to be specifically enforced.—Hamlin v. Wistar, 18 N. W. 145, 31 Minn. 418.

12. An offer to sell real estate by one person to another imposes no obligation upon the former, so as to make him liable in action for specific performance, unless it is accepted by the latter according to the terms on which it is made, without qualification or the introduction of any new term.—Langellier v. Schaefer, (Minn.) 31 N. W. 690.

36 Minn. 361.

13. *Held*, in this case, that plaintiff's letter of acceptance, in answer to defendant's offer, fixed a different place for the delivery of the deed, and the payment of the purchase money, from that implied by the terms of the offer, and therefore was not an unconditional acceptance so as to bind the defendant.—Langellier v. Schaefer, 31 N. W. 690, 36 Minn. 361.

Execution.

14. A contract for the conveyance of land, under seal, upon a valuable consideration, and the fairness of which is not impeached, may be specifically enforced in equity, although not executed by the vendee.—Austin v. Wacks, 15 N. W. 409, 30 Minn. 335.

Certainty as to subject-matter.

15. To entitle one to specific performance of a contract for the conveyance of lands, the contract should be clearly proved, and so clear and specific in its terms as to leave no reasonable doubt as to its meaning.—Lanz v. McLaughlin, 14 Minn. 72, (Gil. 55.)

16. Upon demurrer to a complaint for reformation and specific performance of a title-bond, on the ground that it was void for uncertainty, the bond designated the lands as one-half of a parcel described as "lot 7, half of lot 8, so much of lot 10 as lies east of a line commencing at the center of the Minnesota river, at the center of the county road, running, * * * being in section 31, township 114, * * * reserving two acres on the east side of the creek." *Held*, that by one-half was meant an undivided half; that the half of lot 8 intended was identified by averment as the lot next to and joining lot 9 on the north; that, the Minnesota river being a well-known object, and the county road a matter of record, the place of the commencement of the line was certain; that the grantor's failure to make a valid reservation of the two acres would not deprive the grantee of any rights; and that, the range in which the township was situated not being specified, plaintiff might identify and prove the one intended.—Baldwin v. Winslow, 2 Minn. 213, (Gil. 174.)

17. Land was described in a written agreement for the sale thereof as "two and one-half

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acre tract of land, being the first half of the five-acre tract along by the fence just back of the Chicago Catholic burying-ground." *Held*, that this did not describe the land with sufficient definiteness to satisfy the statute of frauds, and the contract could not be specifically enforced.—Pierson v. Ballard, 20 N. W. 193, 32 Minn. 263.

18. A complaint alleged the making by defendant, by his agent, of the following agreement: "Received of Wilson J. Romans one hundred dollars, as earnest money and part purchase price of lot one, block ten, of Bazille and Roberts' addition to West St. Paul, being fifty feet front on Ducas street by sixty-nine feet on Fairfield avenue, which I have sold for the sum of eighteen hundred dollars, on the following terms: Assume a mortgage of $600 now on said lot, and pay the balance in cash. Abstract of title to be furnished. If title is not perfect, money is to be refunded," —which was signed in defendant's name by the agent. *Held*, that it was sufficiently certain as respects parties, terms of payment, and description of the land, to be specifically enforced.—Romans v. Langevin, 25 N. W. 638, 34 Minn. 312.

19. A description of land in correspondence constituting an agreement to convey, as the five acres owned by the vendor in section 2, township 28, and range 23, is sufficiently definite.—Sanborn v. Nockin, 20 Minn. 178, (Gil. 163.)

Distinguished in Nippolt v. Kammon, 40 N. W. 266, 39 Minn. 372.

20. A description of land, in an agreement to convey, as "five acres, lot 3, sec. 23," etc., there being nothing to show what five acres is intended, is not a good description, and the defect cannot be supplied by parol.—Nippolt v. Kammon, (Minn.) 40 N. W. 266.*

39 Minn. 372.

Distinguishing Sanborn v. Nockin, 20 Minn 178, (Gil. 163.)

21. Plaintiff sold to defendant a leasehold estate, in consideration of a certain sum, part of which was to be paid in cash, the balance in 5,000 acres of Georgia pine lands, also 320 acres of land in Dakota; said 320 acres of Dakota lands to be within nine miles of a railway station, and to be good, tillable land. In an action to cancel the contract, defendant in his answer demanded specific performance, and alleged that he had selected, set apart, and appropriated to the contract certain described tracts of land completely answering the requirements of the instrument as to quality, quantity, and location; and had executed proper conveyances thereof, tendered the same to plaintiff, and in all things stood prepared, and willing to perform, the contract on his part. *Held*, that he was entitled to a decree.—Brown v. Munger, (Minn.) 44 N. W. 519.

42 Minn. 482.

22. Where a written authority to sell real estate is so indefinite and uncertain as to the terms upon which the sale may be made that the court cannot tell whether a contract made by the agent comes within the terms of the power, such contract will not be specifically enforced.—Olson v. Erickson, (Minn.) 44 N. W. 317.

42 Minn. 440.

Definiteness as to performance.

23. A court of equity will enforce specific performance of a penal bond, conditioned for the conveyance of real estate, though it contain no express covenant or agreement to convey.—St. Paul Div. No. 1, Sons of Temperance v. Brown, 9 Minn. 157, (Gil. 144.)

24. Specific performance will not be enforced when all the material terms of the contract are not specific and clear, as when credit is given but no limit to time therefor stated.—Williams v. Stewart, 25 Minn. 516.

25. An agreement to pay, "from time to time," to the holder of a mortgage due on or before a certain day, a certain sum for the release of the mortgage, is an agreement to pay in such sums and at such times as the promisor should see fit on or before the date of the maturity of the mortgage, and is not too indefinite for specific enforcement. Distinguishing Williams v. Stewart, 25 Minn. 516.—Lankton v. Lamoreaux, 7 N. W. 360, 27 Minn. 346.

26. Defendants agreed to secure an indebtedness to plaintiff by executing to him a mortgage on certain land to run for 12 years, none of the amounts secured to be paid for the first 3 years, and after that to be paid in equal annual installments of $100 each, with 6 per cent. interest. *Held*, that the agreement might be specifically enforced, and that a decision giving defendants 40 days within which to pay the money, and, upon their default in so doing, a decree for specific performance to be entered, was not erroneous.—Irvine v. Armstrong, 17 N. W. 343, 31 Minn. 216.

27. Where the contract requires the assumption by the vendee of a mortgage on the premises for $4,000, and interest, of a certain date, and payable in installments, it is not a material variance that the same debt was in fact secured by two mortgages, amounting to the same sum, of the same date, and otherwise containing the same terms and conditions.—Williams v. Langevin, (Minn.) 41 N. W. 936.

40 Minn. 180.

28. A contract to convey real estate, by the terms of which the deed was to be delivered "upon receipt of balance of cash payments and the securities for deferred payments, herein stipulated" there being no other reference to securities, or statement of what they were to be, cannot, by reason of the indefiniteness in that particular, be specifically enforced.—Holliday v. Hubbard, (Minn.) 47 N. W. 1134.

45 Minn. 333.

29. An owner of land orally promised and agreed with defendants that, if they would erect a good custom mill at a certain point, he would give them the privilege of flowing his land so long as they would maintain such mill, and they, relying upon such promise and agreement, and in part induced thereby, erected a dam, and made expenditures on their own land adjoining. The owner of the land flowed under the agreement afterwards conveyed it to plaintiff, who took with notice of the facts and of the agreement. He brought an action to compel defendants to remove their dam. *Held*, that defendants were not entitled to equitable relief; the terms of the agreement were too indefinite, as neither the height of the dam nor the extent of flowage appeared; the improvements were not wholly in-

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fluenced by and referable to the agreement; and defendants had their statutory remedy to secure the right of flowage.—Johnson v. Skillman, 12 N. W. 149, 29 Minn. 95.

Mistake.

30. A lumber company should not be compelled to complete the purchase of land, which both its vendor and itself believed was well timbered, but which turns out to have been so far cleared that it is of no practical use for lumbering purposes.—Thwing v. Hall & Ducey Lumber Co., (Minn.) 41 N. W. 815.

40 Minn. 184.

31. Where there was no fraud, concealment, or misrepresentation on part of the plaintiff, and the terms of the writing were explicit, unambiguous, and not subject to any doubtful or double construction, so that there was no reasonable excuse for misunderstanding them, and the instrument was read over by defendant, or to him, before he signed it, the mere fact that he did not understand the meaning or legal effect of the language as written constitutes no ground for refusing specific performance.—Caldwell v. Depew, (Minn.) 42 N. W. 479.

40 Minn. 528.

Mutuality.

32. Where a married woman has gone into possession of real estate under a verbal contract to convey, and made valuable improvements thereon, a court will not refuse to compel specific performance on her behalf because she could not have been compelled to have performed upon her part.—Seager v. Burns, 4 Minn. 141, (Gil. 93.)

33. The execution by a vendor of lands of a bond for the conveyance thereof, and of promissory notes by the vendee for the unpaid portion of the purchase price, creates a mutuality of agreement and a mutuality of remedy.—Gill v. Bradley, 21 Minn. 15.

34. Specific performance will not be decreed when the complaint shows that the contract declared on did not create a power coupled with an interest, but a mere naked agency, by which defendant employed plaintiff as agent, the compensation to consist of a share of the results of execution of the agency, which the defendant had the power to revoke at any time; and as the contract calls for the future personal services of plaintiff, the performance of which the court has no power to compel, there is no mutuality of remedy.—Alworth v. Seymour, (Minn.) 44 N. W. 1030.

42 Minn. 526.

Title of vendor.

35. Upon a loan of money, the borrower procured to be made, and the lender received as security, a conveyance of real estate, and the lender gave a bond to convey it to the borrower, on payment of the loan and interest. *Held*, in an action to enforce specific performance of the bond, there being no fraud, mistake, or surprise alleged or shown, that whether the land was ever the property of the borrower or not was immaterial.—St. Paul Div., No. 1, Sons of Temperance v. Brown, 11 Minn. 356, (Gil. 254.)

36. A., being in possession of land which he had previously conveyed, of which conveyance B. was aware, contracted with B. to convey to him all his right, title, interest, and occupancy, improvement, possession, and right of possession, for a sum certain, in consideration of which he put B. into possession. *Held*, that A. could maintain an action to enforce such agreement and recover the purchase price.—Maxfield v. Bierbauer, 8 Minn. 413, (Gil. 367.)

37. An action will lie against an attorney in fact of the owners of land for the specific performance of a contract, made by him for the conveyance of the land, if he becomes vested with the title to the land either in his own name or that of some other person.—Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

Distinguished in McCarthy v. Couch, 33 N. W. 778, 37 Minn. 125.

38. Where the vendor has no interest in the land which he agrees to convey, but enters into it as a mere speculation or venture, he is not deemed a *bona fide* contractor, and a court of equity will not lend him its aid in enforcing it. But one who, even as subpurchaser, has acquired an equitable title or interest in the land under an executory agreement, may enter into another agreement for its sale to a third person, without waiting until he has obtained a deed, if the sale is made in good faith, and the title is fully perfected at the time specified for the completion of the sale.—Townshend v. Goodfellow, (Minn.) 41 N. W. 1056.

40 Minn. 312.

39. A will authorized the executors to sell or mortgage real estate at any time it may become necessary to do so, to pay any expenses or bequests therein provided for, or to save or improve any other portion of the property while undistributed. A report of the executors showed a balance of $904.93, to be provided for, but it did not appear whether this had been approved. Long before making this report the executors had contracted to sell the land in question to plaintiff's vendor for $6,000. They afterwards conveyed to plaintiff. *Held* not a marketable title, the power of the executors to convey the land being a doubtful question of fact.—Townshend v. Goodfellow, (Minn.) 41 N. W. 1056.

40 Minn. 312.

40. The vendee was sued for the specific performance of a contract, which he had refused to perform on the ground that vendor's title was doubtful and unmarketable. The title was derived through mesne conveyances from W., who had conveyed by warranty deed during coverture without his wife joining. W. afterwards died, leaving the widow surviving. It was afterwards decided that the said widow, by her election to take under W.'s will, had precluded herself from claiming dower. Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324. *Held*, that the widow's acceptance of the provisions made for her in W.'s will constituted a bar to her claim of dower in the land conveyed by him without her joining, and vendor's title was not doubtful or unmarketable, and specific performance was properly decreed.—Fairchild v. Marshall, (Minn.) 43 N. W. 563.

42 Minn. 14.

41. The vendor derived title from G., who had purchased the land as his homestead, but it had been abandoned by his going to live elsewhere

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with his family. After six years' absence, his wife and family returned to the land with intent to remain, he remaining in town where he was conducting a hotel, but in two months they returned to him. Shortly afterwards, contemplating an assignment for the benefit of creditors, he filed the notice required by the Minnesota statute, claiming the land in question as his homestead. After the assignment, three judgments were recovered against him, which would be liens on the land if his claim of homestead was not effectual. Shortly after that he sold to plaintiff in this suit. *Held* that, as there is a reasonable doubt about the actual existence of the homestead, which involves the risk of litigation, the vendor's title is not a marketable one, and specific performance will not be decreed.—Richmond v. Koenig, (Minn.) 45 N. W. 1093.

43 Minn. 480.

42. Plaintiff contracted personally to sell to defendant land to an undivided one-third of which she had title, title to the residue being in her infant wards. She then applied for, and obtained from the probate court, license to sell her wards' land at private sale. No sale was, in fact, made under the license, but a report was filed reciting a sale to defendant, which was confirmed and a guardian's deed ordered to be executed. Plaintiff tendered this deed to defendant, together with her own deed to the premises; but defendant refused to accept them. *Held*, that defendant would not be compelled to take the title offered, as it was doubtful whether there was such a compliance with the license to sell as would bind the wards. —Williams v. Schembri, 46 N. W. 403, 44 Minn. 250.

Claim by defendant against plaintiff.

43. That the vendor has an independent claim against the vendee, which by reason of the latter's insolvency he may be unable to enforce, is no reason for refusing specific performance on the application of the vendee.—Thompson v. Winter, (Minn.) 43 N. W. 796.

42 Minn. 121.

Oral contract to convey lands—Part performance.

44. A deposit of purchase money by a vendee with his agent, and notification to the vendor that such agent is ready to pay it over on delivery of the deed, will not have the effect of a payment, nor entitle the vendee to specific performance of a parol contract to convey land.—Lanz v. McLaughlin, 14 Minn. 72, (Gil. 55.)

45. Payment of purchase money, going into possession, and making valuable improvements upon lands, under a verbal contract for the purchase thereof, is sufficient part performance to take such contract out of the statute of frauds. —Bennett v. Phelps, 12 Minn. 326, (Gil. 216.)

46. Delivery and entry into the possession of land under a parol contract for the purchase thereof, paying part of the purchase price, and making valuable improvements thereon, as breaking land, is such part performance as will take the contract out of the statute of frauds, and entitle the vendee to specific performance.—Gill v. Newell, 13 Minn. 462, (Gil. 430.)

47. Payment and delivery of possession takes an oral sale of lands out of the statute of frauds. —Atkins v. Little, 17 Minn. 342, (Gil. 320.)

48. The erection of substantial improvements upon lands, upon an oral agreement for the purchase thereof, by a vendee in possession at the time of such agreement, is such part performance as will take the contract out of the statute of frauds.—Pfiffner v. Stillwater & St. P. R. Co., 23 Minn. 343.

49. Where there has been a manifest change in the relations of the parties, the holding over by a tenant on the expiration of a lease, under a verbal contract of sale, is a sufficient part performance to entitle him to an action for specific performance.—Place v. Johnson, 20 Minn. 219, (Gil. 198.)

50. Refraining from exercising a right of redemption until after its expiration, relying upon an oral agreement to convey land, is sufficient part performance to take such contract out of the statute of frauds.—Williams v. Stewart, 25 Minn. 516.

51. Acts relied upon to take an oral agreement for the sale of lands out of the statute of frauds, as constituting a part performance of the agreement, may be acts done by and to the prejudice of the party seeking to enforce the contract or those under whom he claims title; and any act which the party to the contract might have asserted and relied on as such part performance may be asserted and relied on by those claiming under him.—Brown v. Hoag, 29 N. W. 135, 35 Minn. 373.

52. To constitute such a part performance of an oral agreement for the sale of lands as to take it out of the statute of frauds, the acts relied on must have been done in reliance upon and in pursuance of the oral agreement, and must be related to and connected with it; but they are not confined to the doing of what the contract stipulated.—Brown v. Hoag, 29 N. W. 135, 35 Minn. 373.

53. Payment of purchase money alone is not such a part performance of an oral agreement for the sale of lands as will take the contract out of the operation of the statute of frauds, even where the vendor is unable, by reason of his insolvency, to repay the money. It is immaterial whether the insolvency existed at the time of making the agreement or occurred subsequently. —Townsend v. Fenton, 21 N. W. 726, 32 Minn. 482.

54. By an oral agreement between T., F., and D., D., who held the note of F., transferred it to T. and agreed to pay F. $100 upon his conveying certain land to T., and T. agreed that, on such conveyance, he would surrender the note to F., and F. agreed that, on the payment of the $100 and the surrender of the note to him, he would convey the land to T. D. afterwards paid $65 of the $100 to F. *Held*, that such payment of the purchase money was not a part performance, so as to take the agreement out of the statute of frauds, and entitle T. to specific performance thereof, as he had an adequate remedy at law.—Townsend v. Fenton, 16 N. W. 421, 30 Minn. 523.

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55. A verbal contract for the sale of land for use as a cemetery was entered into between plaintiff and defendant. In an action for specific performance, judgment was given for defendant on the ground that improvements made by plaintiff were made against the will of defendant. It appeared that the latter had assisted in staking out the land, and that the plaintiff had built a fence with the knowledge of defendant, and without objection from him. *Held*, that a new trial should be granted.—Evergreen Cemetery Ass'n v. Armstrong, (Minn.) 34 N. W. 32.

37 Minn. 259.

56. Where an instrument in the form of a bond for deed, but unsealed, was delivered, and the vendee went into possession and improved the land to an amount much larger than its value, with the vendor's concurrence, and afterwards tendered the price, he is entitled to specific performance.—Evans v. Miller, (Minn.) 36 N W. 640.*

38 Minn. 245.

57. Plaintiff and defendant were practically the parties opposed in interest in five actions. On the day of the trial of the most important, defendant promised orally, in consideration of a compromise and dismissal of the actions, to convey certain land to plaintiff on the day plaintiff married a certain lady. Plaintiff dismissed his actions, paid the agreed amounts in the others, and married the lady. *Held* sufficient part performance to take the agreement out of the statute.—Slingerland v. Slingerland, (Minn.) 39 N. W. 146.

39 Minn. 197.

III. Good Faith and Diligence.

In general.

58. A court of equity, when asked to lend its aid on behalf of a party, against the operation of the statute of frauds, and the acts of one who would take an unjust advantage of it, will scrutinize the conduct and acts of the party so invoking its aid, and demand of him the utmost good faith and fair dealing.—Evans v. Folsom, 5 Minn. 422, (Gil. 342.)

Fraud.

59. A court of equity will not lend its aid to enforce a contract tainted with fraud.—Evans v. Folsom, 5 Minn. 422, (Gil. 342.)

60. Fraud for the purpose of avoiding a written instrument or bargain cannot be predicated on a promise not performed.—Evans v. Folsom, 5 Minn. 422, (Gil. 342.)

Time as essence of contract.

61. Time, in the performance of contracts, in so far as it involves the good faith and diligence of the parties, will, in equity, be regarded as of the essence of the contract.—Gill v. Bradley, 21 Minn. 15; McDermid v. McGregor, Id. 111.

62. Though the time for making payment for land contracted to be conveyed will not ordinarily be regarded as of the essence of the contract, it is proper for a court of equity, in a suit for specific performance, to regard delay in making such payments or offer to perform as bearing on the question of good faith and diligence.—McDermid v. McGregor, 21 Minn. 111.

Performance by plaintiff—Tender and demand.

63. A contract stipulated that the first party, who held certain land scrip, should secure the title to the land on which it should be located to be vested in the second party; and that the second party, "in consideration of the premises and of the faithful performance of his agreement" by the first party, should pay him a certain sum one year after date, according to the condition of his promissory note of even date with the contract; and that the note should be secured on the land as soon as he acquired the title. *Held*, that payment of the note is not a condition precedent to the second party's right to specific performance.—Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

64. Defendant and others agreed in writing to donate to plaintiff certain property for use as an exposition building upon the performance of certain conditions. On the failure of the promisors to raise sufficient money to purchase the property, defendant agreed with plaintiff that the former should purchase the property, taking title in himself as security for the money so advanced. This was done, and plaintiff used the property for the purposes contemplated by the first agreement, performing all the conditions specified therein. *Held*, that under these agreements plaintiff is not entitled to a conveyance from defendant until the latter is reimbursed the money so advanced by him.—Minneapolis Industrial Exposition v. Brown, (Minn.) 44 N. W. 674.

43 Minn. 77.

65. After having given a penal bond conditioned for the conveyance of lands, the obligor holds the lands as a trustee for the obligee, with a lien thereon for the purchase money. Hence, when he conveys with notice, his grantee stands in his place, and is the proper party to whom tender should be made.—St. Paul Div. No. 1, Sons of Temperance v. Brown, 9 Minn. 157, (Gil. 144.)

66. Where there is no stipulation to that effect in an agreement for the conveyance of lands, the vendee is not bound to prepare and tender the conveyance to be executed.—St. Paul Div. No. 1, Sons of Temperance v. Brown, 9 Minn. 157, (Gil. 144.)

67. Where a bond is conditioned for a conveyance upon the payment of a certain sum, a tender of the money is all that is necessary. A demand for a deed need not be made.—St. Paul Div. No. 1, Sons of Temperance, v. Brown, 11 Minn. 356, (Gil. 254.)

68. A refusal by a vendor, in a contract to convey real estate, to receive the purchase price, when properly tendered, is equivalent to a refusal to make the deed, and therefore a demand for the deed is not necessary.—St. Paul Div. No. 1, Sons of Temperance, v. Brown, 11 Minn. 356, (Gil. 254.)

69. Where a vendor of lands puts it out of his power to perform his contract according to its terms by conveying to a subsequent purchaser, the first vendee need not tender nor offer to perform the consideration on his part of the contract of sale, before bringing an action to compel specific performance.—Smith v. Gibson, 15 Minn. 89, (Gil. 66.)

70. A contract for the conveyance of land was made by which the making of the deed, payment

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of a part of the purchase price, and giving security for the remainder were to be concurrent acts. *Held*, the vendor having unqualifiedly refused to perform, that no tender of money and security before suit was necessary to sustain a suit for specific performance.—Brown v. Eaton, 21 Minn. 409

Laches of plaintiff.

71. One holding land scrip as attorney in fact for its owners agreed that when the land was located he would secure the vesting of the title in plaintiff. The owners of the scrip were minors. Several years after the location of the land the attorney procured deeds from them to himself. Three years after this, plaintiff sued for specific performance of the attorney's contract. *Held*, that the suit was not barred by laches where it was not shown that the owners attained their majority before they conveyed to the attorney; for prior to such majority he could not procure a valid transfer of the title.—Thompson v. Myrick, 20 Minn. 205, (Gil. 184.)

72. Where either party to a contract for the sale of real estate fails or refuses to act under the contract, under such circumstances and for such length of time as to give just ground for believing that he has waived or abandoned the sale or purchase, and especially when, in addition, the facts justify the belief that his intention was to perform only, if at all, in case it suited his interest, a court of equity will not aid him.—McDermid v. McGregor, 21 Minn. 111.

73. Where one party to a contract for conveyance of land gives notice to the other that he will not perform the same, acquiescence by such other party, he not being in possession, for a space of between 12 and 13 months, in enforcing his right by an appeal to the courts for specific performance, the land, in the mean while, having passed into the hands of a third party, will operate as a bar to such relief.—McDermid v. McGregor, 21 Minn. 111.

74. Plaintiff, after purchasing a tract of land for $500, continued to improve and cultivate it for about three years, when he sold the fencing thereon, and abandoned the premises. Plaintiff had paid $200 cash, one of three notes of $100 each, and a part of the interest on the others. At the time he left the premises plaintiff sent his vendor $40 on account of purchase money, which the vendor returned, saying he considered the contract canceled. Plaintiff's vendor then sold the land to a third person, who took peaceable possession of the premises, and built a house thereon. More than a year after the return of the $40 plaintiff brought suit for specific performance. *Held*, that plaintiff was not entitled to relief.—McDermid v. McGregor, 21 Minn. 111.

75. The vendor of real estate consented that the purchase money might run on interest after maturity, without fixing a time for payment, and then removed from the state without having ever demanded the principal of the purchase money. *Held*, that the purchaser's failure to pay the purchase money, or the interest thereon accruing after the vendor left the state, did not amount to a forfeiture of her right to call for a specific performance of the contract.—Lovejoy v. Stewart, 23 Minn. 94.

76. Plaintiff for more than a year neglected to consummate a bargain to purchase real estate, and on two occasions expressly refused to perform, on the ground that there was a defect in the title, which objection was unsubstantial. *Held*, that specific performance must be denied.—Simpson v. Atkinson, (Minn.) 39 N. W. 323.*

39 Minn. 238.

77. Specific performance of an alleged oral agreement to convey land will not be granted where the proof of the agreement is uncertain, and no relief has been sought until after the lapse of 32 years from the time of the alleged agreement, nor until 6 years after the death of a party in interest whose land was its subject. Plaintiff was not exonerated from laches by the fact that, during 19 years of the intervening period, the party to be charged had kept his property out of his hands to avoid the claims of creditors, nor by frequent promises on his part to make the conveyance.—Northrup v. Stevens, (Minn.) 38 N. W. 810.* 39 Minn. 105.

IV. Pleading and Practice.

Who may sue—Parties.

78. It is no ground for demurrer to a complaint, in an action for specific performance, that the plaintiff is a married woman.—Seager v. Burns, 4 Minn. 141, (Gil. 93.)

79 In an action to enforce specific performance of a verbal contract for the conveyance of lands, judgment creditors of the vendor, obtaining their judgments subsequent to the vendee's possession, are proper parties defendant.—Seager v. Burns, 4 Minn. 141, (Gil. 93.)

80. Pending an action for specific performance of a contract to convey, judgments were recovered against defendant, execution issued, and the land sold. *Held*, that the purchasers were voluntary purchasers, took title subject to plaintiff's claim, and could not become parties to the action without his consent.—Steele v. Taylor, 1 Minn. 274, (Gil. 210.)

Pleading—Complaint.

81. Where parties are made defendants to an action merely because they claim an interest in the property sought to be reached by the action, the complaint will be sufficient if it show the plaintiff's own rights, and allege the mere fact that others claim an interest.—Seager v. Burns, 4 Minn. 141, (Gil. 93.)

82. In an action for the specific performance of a bond for the conveyance of lands, an allegation that the obligee offered to perform, and the obligor refused, is sufficient, when the acts to be performed were mutual and concurrent.—St. Paul Div. No. 1, Sons of Temperance v. Brown, 9 Minn. 157, (Gil. 144.)

83. A complaint in an action to enforce specific performance of a contract to convey land recited a written authority of an agent to sell on the terms specified, or such modifications thereof as the owner should thereafter accept, and that on a certain day thereafter the agent, in pursuance of such authority, "effected a sale" to plaintiff upon the terms set out in the written

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contract. *Held* sufficient after judgment.—Drake v. Barton, 18 Minn. 462, (Gil. 414.)

84. The complaint in an action to compel specific performance of a contract for the assignment of a lease of real estate for a term of years alleged the contract generally, and then added, in substance, that a memorandum of the contract was made in writing, in which the consideration was expressed, and was signed by the duly authorized agent of defendant, but did not allege further the contents of the memorandum, or the manner of its execution. *Held*, that while, although such a contract is within the statute of frauds, an allegation that the contract was in writing was not necessary, the allegation made did not so limit or qualify the preceding allegations of the complaint as to show affirmatively that no sufficient memorandum was made in writing, to fulfill the requirements of the statute.—Benton v. Schulte, 17 N. W. 621, 31 Minn. 312.

85. Where the contract set forth in the complaint contains a complete and certain description, on its face, it is a matter of defense that the description is false.—Williams v. Langevin, (Minn.) 41 N. W. 936.

40 Minn. 180.

86. In an action for the specific performance of a parol agreement for the sale and conveyance of land, under and in pursuance of which the vendee had entered and made valuable improvements, the agreement, as proved by the plaintiff and found by the court, did not conform strictly to that alleged in the complaint as respects the boundaries and the nature of the grant or conveyance to be made of a part of the premises. *Held*, that the pleadings might properly have been amended so as to conform to the proof, and that the variance should be disregarded in this court.—Cairncross v. McGrann, (Minn.) 33 N. W. 548.

37 Minn. 130.

87. In an action to compel the specific performance of an agreement to convey real estate, a complaint alleging such an agreement, without stating whether it was written or oral, and alleging also such a part performance as would take an oral agreement out of the statute of frauds, is sufficient to justify the relief sought, upon proof of a partly performed oral agreement.—Slingerland v. Slingerland, (Minn.) 48 N. W. 605.

46 Minn. 100.

Pleading—Answer.

88. In an action for specific performance of a contract to convey lands the complaint alleged that plaintiffs, after their purchase, went into possession and commenced the erection of buildings, and have ever since been in possession. The answer of defendant, who claimed as a subsequent *bona fide* purchaser, admitted that plaintiff had been in possession of the premises, and erected buildings and improvements thereon, and that they used and occupied the same, but denied any knowledge or information sufficient to form a belief as to when or what time they went into possession, or commenced making or made the improvements thereon, or what amount was expended. *Held*, that such answer was evasive and defective in not denying notice of plaintiffs' possession previous to defendant's purchase.—Minor v. Willoughby, 3 Minn. 225, (Gil. 154.)

89. In an action to enforce specific performance the defendant cannot, under a mere denial of the execution of a deed of homestead, assert the defense that the land was his homestead; that he was a married man; and that his wife did not join in the contract.—Brown v. Eaton, 21 Minn. 409.

90. In an action for specific performance, an answer alleging that plaintiff has never tendered performance on its part, or demanded performance of defendants, is immaterial, where plaintiff alleges that it is ready and willing to perform. It could, at most, only affect costs, and therefore presents no ground for setting aside a default.—St. Paul Land Co. v. Dayton, (Minn.) 40 N. W. 66.

39 Minn. 315.

91. In an action for damages for breach of a contract to exchange lands, the answer prayed that, in case the court should adjudge plaintiff's title to its lands to be good, so that defendant was bound to accept a conveyance of them, it decree a specific performance. *Held* defendant cannot complain that the court tried and decided the action as one for specific performance.—Mealey v. Finnegan, (Minn.) 49 N. W. 207.

46 Minn. 507.

92. In an action upon a written agreement to convey "Duluth property already agreed upon," the answer alleged that the "property already agreed upon" was not the land described in the complaint, as claimed by plaintiff, but only such interest therein as defendant had acquired under a contract. *Held* that, in the absence of any proof as to what property had been agreed upon, plaintiff was not entitled to recover as upon a breach of an agreement to convey the land.—Sawyer v. Wallace, (Minn.) 50 N. W. 366.

47 Minn. 395.

Evidence.

93. Where, in an action to enforce specific performance of an agreement to convey land, it appears that the description that may be gathered from the title-bond is equally applicable to several pieces of land, extrinsic evidence is admissible to identify the particular piece that the parties intended.—Baldwin v. Winslow, 2 Minn. 213, (Gil. 174.)

94. One is not entitled to specific performance of an alleged agreement for a lease made with agents of the owner, on the strength of their testimony that they were acting for the owner, where there is no evidence that they had authority to make an agreement for such a lease.—Huy v. Griswold, 19 Minn. 114, (Gil. 83.)

95. Where, in a suit for the specific performance of a contract to convey, it is shown that defendant made the contract in consideration of plaintiff's dismissing several actions against him, evidence as to whether or not plaintiff could have recovered in those actions, and as to the amount of the recovery, if anything, is inadmissible.—Slingerland v. Slingerland, (Minn.) 48 N. W. 605.

46 Minn. 100.

96. Specific performance of a contract for the conveyance of lands will be decreed where it is shown that the purchase money was tendered, tender kept good, a proper deed presented for execution, execution demanded, and a notary provid-

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ed to take the acknowledgment of the parties, and conveyance refused.—Sanborn v. Nockin, 20 Minn. 178, (Gil. 163.)

Judgment—Relief granted, generally.

97. Specific performance of an oral agreement to convey lands cannot be decreed on a finding of fact that the trial court is unable to determine from the evidence what the terms of the agreement are, such finding being, in effect, that the allegations of the complaint as to the terms of the agreement are untrue.—Burke v. Ray, (Minn.) 41 N. W. 240.*

40 Minn. 34.

98. A contract to convey stipulated for a "deed with good title." The decree of specific performance required the vendor to give a good and sufficient warranty deed, with full covenants, such and so as to vest the vendee with a good, sure, perfect, and indefeasible estate in fee-simple thereto; in default, the judgment to be a lien upon the premises uutil compliance, and until the further order of the court. *Held* not objectionable as requiring an impossibility,—*i. e.*, a transfer of the dower interest of the wife of B., in case she refused to join in the deed,—as the power was reserved to the court to change the judgment in such event, if the vendee would not accept the deed of the vendor with covenants.—Drake v. Barton, 18 Minn. 462, (Gil. 414.)

99. Where a married woman is not a party to the contract sought to be enforced, she should not be required by the judgment of the court to join in the conveyance decreed.—Cairncross v. McGrann, (Minn.) 33 N. W. 548.

37 Minn. 130.

100. In an action for specific performance, when the contract was based on a common and material mistake of the parties, the court may give affirmative relief by rescinding it.—Thwing v. Hall & Ducey Lumber Co., (Minn.) 41 N. W. 815.

40 Minn. 184.

—— Awarding damages.

101. In an action for specific performance, it is proper, under a prayer "for such other and further relief as to the court may seem meet," to decree not only such performance, but also to allow damages, in case the wife of the defendant should refuse to join in the execution of the deed.—Sanborn v. Nockin, 20 Minn. 178, (Gil. 163.)

102. When it appears that the contract was entered into by defendants under a mistake, and that its performance would be harsh and inequitable, if specific performance is refused plaintiff is entitled to an assessment of damages, and decree for the return of any purchase money paid by him, in the same action.—Buckley v. Patterson, (Minn.) 39 N. W. 490.

39 Minn. 250.

Distinguished in Thwing v. Hall & Ducey Lumber Co., 41 N. W. 816, 40 Minn. 187.

103. When specific performance is denied, and rescission granted on the ground of common and material mistake, plaintiff is not entitled to any damages for breach of the contract.—Thwing v. Hall & Ducey Lumber Co., (Minn.) 41 N. W. 815.

40 Minn. 184.

Distinguishing Buckley v. Patterson, 39 N. W. 490, 39 Minn. 250.

104. In an action for damages for breach of contract to exchange lands, it was stipulated that the action should be tried as one for specific performance, and the question of damages afterwards determined, if necessary. The court, having on the first trial decided that it was a case for specific performance, and that plaintiff had fully performed by bringing his deed into court to be delivered to defendant, directed that defendant be allowed to perform on his part within 30 days, and, if he failed to do so, the question of damages should be tried. *Held* defendant cannot complain that the court, instead of absolutely directing him to perform, left it optional with him.—Mealey v. Finnegan, (Minn.) 49 N. W. 207.

46 Minn. 507.

Rents and improvements.

105. After a contract to convey real estate, the vendee to have possession and to pay the consideration in money, or in crops raised on the land, the vendor wrongfully took possession of the land, and sold the same to a third person. *Held*, that the vendor was chargeable, in an action by the vendee for specific performance, with the fair rental value of the land, less taxes paid and expenses of keeping the fences in repair.—Smith v. Gibson, 15 Minn. 89, (Gil. 66.)

106. Defendants cannot complain of an alternative decree for a conveyance or a money judgment for improvements, on the ground that plaintiff should not recover for improvements as long as he is in possession, since they have the option to convey.—Evans v. Miller, (Minn.) 36 N. W. 640.

38 Minn. 245.

Spendthrift.

Accounting of guardian, see *Guardian and Ward*, 18.

Spirituous Liquors.

See *Intoxicating Liquors*.

Stamps.

See *Internal Revenue*.

STARE DECISIS.

Former decision, law of the case, see *Appeal and Error*, 645-647.

The rule.

1. The precise point at which laws cease to operate upon the remedy, and begin to infringe upon the right of a contract, must, in every case, be governed by the circumstances of the case, and no adjudicated case can be authority for another, unless the facts in both cases are identical. The positive authority of a decision is co-extensive only with the facts upon which it is made.—Grimes v. Bryne, 2 Minn. 89, (Gil. 72.)

Former judgment not pleaded.

2. A former judgment between the same parties, touching the same cause of action, though not pleaded in bar nor offered in evidence in the court below, will be taken by the supreme court

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as conclusive of the matter in controversy, upon the principle of *stare decisis*.—Knox v. Randall, 24 Minn. 479.

STATE PRISON.

Mandamus to prison officers, see *Mandamus*, 20.

Lease of shops, etc.—Covenants—Validity.

1. Laws Minn. 1866, c. 10, which authorizes the warden and inspectors of the state prison "to lease the prison shops and such vacant ground as the inspectors deem proper," authorizes them to lease only the shops, buildings, and ground owned by the state at the time of the execution of the lease, or during its continuance, and does not authorize them to bind the state to supply other or additional shops or grounds; and a covenant to that effect in a lease executed by such officer is *ultra vires* and void.—Reed v. Seymour, 24 Minn. 273.

2. But the illegality of such covenant, as in excess of authority of the warden and inspectors, does not vitiate the entire lease.—Reed v. Seymour, 24 Minn. 273.

3. Such covenant may be made binding upon the state by ratification by the legislature, but the intention to ratify it must be clear and unmistakable.—Reed v. Seymour, 24 Minn. 273.

STATES AND STATE OFFICERS.

Appeal by state in criminal cases, see *Criminal Law*, 142.
Executive powers under constitution, see *Constitutional Law*, 15-28.
Purchase of land by state at tax sale, see *Taxation*, 227-233.
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—— prison, see *State Prison*.
—— railroad bonds, see *Constitutional Law*, 112; *Garnishment*, 2.
—— roads, see *Highways*, 12-18.
—— university, see *University of Minnesota*.

Action by state.

1. The state of Minnesota has legal capacity to sue upon recognizances.—State v. Grant, 10 Minn. 39, (Gil. 22.)

2. In an action by a sovereign state upon an obligation, it is not necessary to allege its corporate character; and a demurrer on the ground of want of capacity to sue will be stricken out as frivolous.—State of Wisconsin v. Torinus, 22 Minn. 272.

3. In an action by a sovereign state on a promissory note indorsed to it, an allegation in the complaint that the note was duly indorsed and transferred to plaintiff was sufficient averment of the capacity of the state to take and hold such note, and bring suit thereon.—State of Wisconsin v. Torinus, 23 Minn. 272.

Officers or agents of state—Contracts.

4. An appropriation by the legislature of a sum of money for printing and publication ordered by a constitutional convention is a recognition and ratification of a contract made by its president for such printing, and gives no right to the state printer to do the work.—Goodrich v. Moore, 2 Minn. 61, (Gil. 49.)

5. Where the authority of a public agent is conferred by a public statute, every one dealing with him is bound to take notice of the extent of his powers.—Reed v. Seymour, 24 Minn. 273.

6. Act Wis. March 3, 1869, authorized the appointment of agents of the state to take possession of logs cut by trespassers on state lands, and sell the same at public auction for cash. *Held*, that a sale for anything but money, paid at once, was unauthorized and void; that a delivery of such logs without such payment passed no title; and that a promissory note, taken in lieu of such payment, was void, and could not be enforced.—State of Wisconsin v. Torinus, 24 Minn. 332.

Distinguished in State v. Galusha, 2 N. W. 941, 26 Minn. 241.

7. Contracts of an agent or officer of the state, beyond the authority given him by statute, can be ratified only by the legislature.—State of Wisconsin v. Torinus, 24 Minn. 332.

8. Act Wis. March 3, 1869, authorized the governor to appoint an agent to sell certain timber on behalf of the state to the highest bidder for cash. The agent sold the timber, taking the purchaser's note for the price. *Held*, that such sale was not void, but merely voidable, and could be ratified by the legislature.—State of Wisconsin v. Torinus, 49 N. W. 259, 26 Minn. 1.

Auditor—Settlement on behalf of state.

9. After one H. had unlawfully cut and carried away certain timber from land owned by the state, the state auditor had an accounting with him on which the value of the timber taken was agreed on, and H. promised to pay the same. On defendant's agreeing to guaranty such payment, the auditor extended the time of payment to a future day. *Held*, under Gen. St. Minn. 1878, c. 38, § 53, authorizing the auditor to seize any property unlawfully taken from state lands, and to dispose of the same "at public or private sale in such manner as will be most conducive to the interests of the state," that the auditor had authority to make such settlement, and the promise of H. to pay and defendant's guaranty were supported by a sufficient consideration.—State v. Galusha, 2 N. W. 939, 3 N. W. 350, 26 Minn. 238.

Distinguishing State of Wisconsin v. Torinus, 24 Minn. 332.

Statute of Frauds.

See *Frauds, Statute of*.

Statute of Limitations.

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STATUTES.

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I. Enactment and Approval.

Suspension of rules.

1. Where the journal of the house showed that an act was read the first time, and on motion read a second time and filed for third reading, it will be presumed that the motion was adopted, and the rules suspended by a requisite two-thirds vote, as required by Const. Minn. art. 4, § 20, relating to the passage of acts.—State v. Peterson, 36 N. W. 443, 38 Minn. 143; Same v. Oleson, 36 N. W. 446, 38 Minn. 150; Same v. Sannerud, 36 N. W. 447, 38 Minn. 229.

Taking yeas and nays.

2. In the printed journal of the senate it appears that on the final passage of Gen. Laws Minn. 1885, c. 129, "the roll being called, there were yeas 26, and nays, 7, as follows: Those voting in the affirmative were [here follow the names of 26 senators;] those voting in the negative were [here follow the names of 7 senators;] so the bill passed, and its title was agreed to." But in the written journal of the senate in the office of the secretary of state the record reads as follows: "The roll being called, there were yeas, 26, and nays 7, as follows: Those voting in the affirmative were,"—here follow the 7 names recorded in the negative in the printed journal, and the 26 names there recorded in the affirmative are omitted altogether. *Held*, that the law was validly passed, as the constitution only provides for the taking of the yeas and nays when it is required by the rules or by a member, and it will not be presumed that they were required in the absence of a showing in the journal to that effect.—Lincoln v Haugen, (Minn.) 48 N. W. 196.

45 Minn. 451.

Majority vote.

3. Const. Minn. art. 4, § 13, which provides that no law shall be passed unless voted for by a majority of the members of the legislature, and section 20, which provides that every bill shall be read on three different days in each house, unless in case of urgency, are mandatory, and must be strictly followed.—Board Sup'rs Ramsey County v. Heenan, 2 Minn. 330, (Gil. 281.)

Two-thirds vote.

4. The provision of Const. Minn. art. 6, § 1, for the creation of "such other courts inferior to the supreme court as the legislature may from time to time establish by a two-thirds vote," requires a vote in each house of the legislature of two-thirds of all the members of such house.—State v. Gould, 17 N. W. 276, 31 Minn. 189.

Enrollment.

5. An omission of words from an enrolled bill, which does not change the substance or effect of the statute as it passed the legislature, will not invalidate the act.—Sharp v. Merrill, 43 N. W. 385, 41 Minn. 492.

Journal records.

6. The journals of the legislature cannot be resorted to, to overthrow the presumption of the proper enrollment of a bill, arising from its authentication, except as to such facts relating to the enrollment as are required by the constitution to appear in the journals; and therefore the failure of the journals to show that a properly authenticated and enrolled bill was read, as required by Const. Minn. art. 4, § 20, which fact is not required to appear in the journals, cannot overthrow the presumption of its authenticity.—State v. City of Hastings, 24 Minn. 78.

Approval by governor.

7. Sundays are not to be included in the three-days time allowed by Const. Minn. art. 4, § 11, after the adjournment of the legislature, for the signing of bills by the governor.—Stinson v. Smith, 8 Minn. 366, (Gil. 326.)

8. Under Const. art. 4, § 11, authorizing the governor to sign, within three days after the adjournment of the legislature, any act passed during the last three days of the session, bills, though finally voted upon more than three days before the day of adjournment, if enrolled within the last three days, are to be deemed passed within that time, and may be signed by the governor.—Burns v. Sewell, (Minn.) 51 N. W. 224.

Publication.

9. In the absence of any allegation to the contrary, it will be presumed that a general law has been published.—Lowell v. North, 4 Minn. 32, (Gil. 15.)

10. Where publication of a law was required before it could go into effect, publication in a newspaper, as required by Comp. St. Minn. c. 3, §§ 4, 5, was all that was necessary, and it will be presumed that publication was made immediately in pursuance of such sections.—Stine v. Bennett, 13 Minn. 153, (Gil. 138.)

Acts for raising revenue.

11. An act of the legislature which merely makes an appropriation of public money, though it may necessitate taxation, is not a bill for raising revenue, that, under Const. Minn. art. 4, § 10,

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must originate in the house of representatives.—Curryer v. Merrill, 25 Minn. 1.

Presumption of validity.

12. The Minnesota act of November 22, 1881, to establish a municipal court in the city of Mankato, having been duly signed as an enrolled bill by the presiding officers of the two houses of the legislature, and having been approved by the governor, and the subject of it being within the constitutional power of the legislature, is *prima facie* a valid law, and the court created thereby is *prima facie* a legal court.—Burt v. Winona & St. P. R. Co., 18 N. W. 285, 289, 31 Minn. 472.

Questions of law and fact.

13. A question presented on trial as to whether a law has been properly passed by the legislature must be tried by the court, and not by the jury.—Board Sup'rs Ramsey County v. Heenan, 2 Minn. 330, (Gil. 281.)

II. Amendments.

Construction.

14. An act amending a public act is itself a public act.—State v. Welch, 21 Minn. 22.

15. Sp. Laws Minn. 1875, c. 13, § 1, further amending the amended charter of the city of Winona, (Sp. Laws 1867, c. 20,) enacts "that section 2 of chapter 1 of said amended charter be amended, so that the proviso at the end of the first subdivision shall read as follows: 'provided,'" etc. There were no subdivisions or provisos in the section 2 referred to, and the amendment attempted was not germane to the matter contained in that section, but was manifestly intended to refer to section 2 of chapter 4 of the charter, which contained a subdivision and a proviso to which the amendment was entirely appropriate. *Held*, that chapter 13, § 1, should be read by substituting "chapter 4" for "chapter 1," in the reference, in order to carry out the evident intent of the legislature.—City of Winona v. Whipple, 24 Minn. 61.

Effect.

16. Provisions of the former law, embodied in an amendment, are not to be deemed repealed and re-enacted, but continuing as part of the law, and the provisions of the changed portions are not to be taken to have been the law at any time prior to the passage of the amendment.—Kerlinger v. Barnes, 14 Minn. 526, (Gil. 398.)

17. The mere omission to embody in an amendment to a remedial statute some of the provisions of the original law, not conflicting, but which may exist independent of and in entire harmony with it, will not, as to existing rights, and in the absence of circumstances indicating an intention to repeal the omitted provision, be deemed to have the effect of repealing it.—Kerlinger v. Barnes, 14 Minn. 526, (Gil. 398.)

III. Titles of Acts.

Error in title.

18. Though the title of Act Minn. March 6, 1868, purports that it is an act authorizing the "village of Lake City" to issue bonds to aid a railroad, while in fact the act applies to the "town" of that name, there being no such village, this does not render the act void, it being apparent that the use of the term "village" was an inadvertence.—State v. City of Lake City, 25 Minn. 404.

Expressing subject-matter.

19. Where the title of an act is such that the legislature can be deemed to be fairly apprised of its general character by its subject, as expressed in such title, and all the provisions of such act have a just and proper reference thereto, and are such as by the nature of the subject so indicated are manifestly appropriate in that connection, and might reasonably be looked for in a measure of such character, it is sufficient, within Const. art. 4, § 27, requiring the subject of an act to be expressed in its title.—State v. Cassidy, 22 Minn. 312; State v. Klein, Id. 328.

20. Laws Minn. 1885, c. 149, entitled "An act to prohibit and prevent the sale or manufacture of unhealthy or adulterated dairy products," provides, in section 4, that no person shall manufacture out of any oleaginous substance, or compound of the same, or any compound other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese made from pure, unadulterated milk or cream. *Held*, that the provisions are not foreign to the title, within the intent and meaning of Const. art. 4, § 27, which declares that no law shall embrace more than one subject, which shall be expressed in its title.—Butler v. Chambers, 30 N. W. 308, 36 Minn. 69.

21. Gen. Laws Minn. 1883, c. 107, entitled "An act to authorize the organization of annuity, safe-deposit, and trust companies," is not unconstitutional as not having its subject expressed in its title.—Minnesota Loan & Trust Co. v. Beebe, (Minn.) 41 N. W. 232.

40 Minn. 7.

22. In Sp. Laws Minn. 1879, c. 316, entitled "An act relating to the Mississippi Boom Corporation," as the powers and duties of the corporation named extend only to logs in the Mississippi river below the Falls of St. Anthony, the provision of section 6, which imposes upon another corporation, having jurisdiction only above the falls, additional duties, not required by its charter, in respect of logs going below the falls, is unconstitutional, the subject-matter thereof not being expressed in the title of the act, as required by Const. Minn. art. 4, § 27.—Mississippi & R. R. Boom Co. v. Prince, 24 N. W. 361, 34 Minn. 79.

23. Gen. Laws Minn. 1877, c. 170, § 3, makes it criminal for a contractor for any building, etc., on which there is a right of lien under that law in favor of laborers or material-men, to himself receive full payment under his contract and neglect to pay laborers and material-men, so that the latter shall impose a lien on the property of the owner. *Held*, that the title is sufficient, namely: "An act giving labor the right of first lien, and material furnished a second lien, on all property."—State v. Brachvogel, (Minn.) 36 N. W. 641.

38 Minn. 265.

24. The title of Laws Minn. 1885, c. 147, to-wit, "An act to regulate the practice of pharmacy, the

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licensing of persons to carry on such practice, and the sale of poisons in the state of Minnesota," sufficiently expresses the subject of regulating the sale of drugs and medicines not poisons.—Hypophosphites and Borax Cases, (State v. Donaldson,) 42 N. W. 781, 41 Minn. 74.

25. Gen. Laws Minn. 1889, c. 204, provides generally that the wages of persons standing in the relation of servants or employes shall be exempt from process, and does not limit the exemption to toilsome and unskilled labor. *Held*, that the subject and purpose of the act were sufficiently indicated by the title, which is, "An act to fix the amount of wages of laborers exempt from process," etc.—Boyle v. Vanderhoof, (Minn.) 47 N. W. 396.

45 Minn. 31.

26. Laws Minn. 1860, c. 87, entitled "An act to regulate the foreclosure of real estate," providing for a waiver of the right of redemption, sufficiently expresses its object in the title.—Atkinson v. Duffy, 16 Minn. 45, (Gil. 30.)

27. Laws Minn. 1858, c. 61, entitled "An act to regulate the foreclosure of real estate," regulated rights of redemption from sales under executions, judgments, orders, or decrees, and upon foreclosures, by advertisement or otherwise, of any mortgage, contract, or liability. *Held*, that it had but one general subject, which was sufficiently expressed by its title, as required by Const. Minn. art. 4, § 27, providing that "no law shall embrace more than one subject, which shall be expressed in its title."—Gillett v. McCarthy, 25 N. W. 637, 34 Minn. 318.

28. An act of the legislature entitled "An act to incorporate the village of High Forest, in the county of Olmsted, Minnesota," in addition to incorporating the village, provided for a division of the town of that name, and organization of a new town. *Held*, that the provisions for a division of the town and organization of a new town violated Const. Minn. art. 4, § 27, providing that "no law shall embrace more than one subject, which shall be expressed in its title."—State v. Kinsella, 14 Minn. 524, (Gil. 395.)

29. Laws 1873, c. 10, entitled "An act to establish a fund for the foundation and maintenance of an asylum for inebriates," sufficiently expresses the subject thereof in its title.—State v. Cassidy, 22 Minn. 312; State v. Klein, Id. 328.

30. The subject of Gen. Laws Minn. 1887, c. 191, entitled "An act to regulate actions for libel," is sufficiently expressed in its title.—Allen v. Pioneer Press Co., (Minn.) 41 N. W. 936.

40 Minn. 117.

Plurality of subjects.

31. Act Minn. Aug. 13, 1858, relating to township organizations, which creates a system of town government and also of county government, is not in violation of Const. Minn. art. 4, § 27, providing that no law shall embrace more than one subject, which shall be expressed in its title.—Board Sup'rs Ramsey County v. Heenan, 2 Minn. 330, (Gil. 281.)

32. Laws Minn. 1858, c. 35, entitled "An act for a homestead exemption," though it also treats of exemptions of personal property, is not unconstitutional, as embracing more than one subject.—Tuttle v. Strout, 7 Minn. 465, (Gil. 374.)

33. The homestead act, (Gen. St. 1866, c. 68,) which provides for the exemption of a homestead from seizure and sale on execution or other process, is not rendered repugnant to Const. art. 4, § 27, providing that no law shall embrace more than one subject, etc., by a provision therein that any "mortgage or other alienation of such land by the owner, if a married man, shall not be valid without the signature of the wife to the same."—Barton v. Drake, 21 Minn. 299.

34. Sp. Laws Minn. 1865, c. 10, authorizing the Winona & St. Peter Railroad Company to consolidate with the Minnesota Central Railroad Company, and to bridge the Mississippi river, and also amending Laws Minn. 1862, c. 19, is invalid, being in conflict with Const. Minn. art. 4, § 27, providing that "no law shall embrace more than one subject, which shall be expressed in its title."—Winona & St. P. R. Co. v. Waldron, 11 Minn. 515, (Gil. 392.)

35. Gen. Laws Minn. 1867, c. 112, entitled "An act to change the titles of and regulate the holding of courts for counties unorganized for judicial purposes, and to regulate the manner in which the counties to which they are attached for such purposes are to provide for the transaction of the business of counties which have no board of county commissioners," one part of which is wholly devoted to regulating the holding of courts, etc., and the other part wholly to the regulation of county business, is not liable to objection under Const. Minn. art. 4, § 27, providing that no law shall embrace more than one subject, to be expressed in its title.—State v. Gut, 13 Minn. 341, (Gil. 315.)

36. Sp. Laws Minn. 1876, c. 208, providing for the disorganization of Cass county, attaching the same to Crow Wing, and turning the property and records of Cass county over to Crow Wing, and providing for a settlement of the indebtedness of the county, embraces but one distinct object.—State v. McFadden, 23 Minn 40.

37. Sp. Laws Minn. 1887, c. 333, entitled "An act to provide additional compensation to the auditor and assessor of Ramsey county for clerk hire during the years 1887 and 1888, in transcribing books * * * and for other purposes," which provides, in addition to the matter indicated in the title, for a change in the time for the election of the city attorney of St. Paul, and for the salaries of the city jailer and market master, is void, as in violation of Const. Minn. art. 4, § 27, which provides that "no law shall embrace more than one subject, which shall be expressed in its title."—State v. Murray, (Minn.) 42 N. W. 858.

41 Minn. 123.

38. Act Minn. April 2, 1891, entitled "An act to incorporate the city of Lakeside, to provide for its future annexation to the city of Duluth, and to the independent school-district of Duluth," incorporates the city of Lakeside, makes provisions for its temporary government, and provides (chapter 12) that the corporate limits of the city of Duluth shall, on December 31, 1892, be and are extended so as to include the city of Lakeside,

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which shall thereupon become a part of the city of Duluth, and subject to all the laws of the state in reference to the latter city, except as therein provided. *Held*, that the act does not embrace more than one subject, in violation of Const. Minn. art. 4, § 27.—State v. La Vaque, (Minn.) 49 N. W. 525.

47 Minn. 106.

39. Laws 1889, c. 46, entitled "An act to establish a probate code," which provides a mode of procedure in the probate courts, and also establishes the rights of property in estates of deceased persons, is not obnoxious to Const. art. 4, § 27, providing that "no law shall embrace more than one subject, which shall be expressed in its title."—Johnson v. Harrison, (Minn.) 50 N. W. 923.

47 Minn. 575.

Amendatory acts.

40. Laws Minn. 1874, c. 67, entitled "An act to amend chapter 84 of the General Statutes, relating to forcible entries and unlawful detainers," sufficiently expresses its subject.—Hoffman v. Parsons, 6 N. W. 797, 27 Minn. 236.

41. The provision of Laws Minn. 1881, c. 10, § 22, so far as it relates to the express repeal of Laws 1877, c. 6, § 37, which required service of notice of the expiration of the period for redemption from tax-sales, is unconstitutional, because the subject is not expressed in the title of the act, which is: "An act to amend chapter 1 of the General Laws of 1878, to provide for the assessment and collection of taxes, being chapter 11, General Statutes of 1878." Explaining Gaston v. Merriam, 22 N. W. 614, 33 Minn. 271.—State v. Smith, 28 N. W. 241, 35 Minn. 257.

42. Sp. Laws Minn. 1865, c. 16, p. 121, entitled "An act to amend the charter of the city of St. Paul," which contains a provision that the collector of taxes of Ramsey county, who is also collector of city taxes, should pay over his collections on account of the city to the city treasurer at certain times, is not in conflict with Const. Minn. art. 4, § 27, providing that no law shall embrace more than one subject, which must be expressed in its title.—City of St. Paul v. Colter, 12 Minn. 41, (Gil. 16.)

43. Laws 1873, c. 10, providing for the founding, etc., of an inebriate asylum, and requiring a license fee from all dealers in liquor for such purpose, is applicable to the city of St. Paul, as well as the rest of the state, though the purpose to amend the charter of that city is not expressed in the act, as required by the charter of the city of St. Paul. Prince v. City of St. Paul, 19 Minn. 267, (Gil. 226,) followed. — State v. Klein, 22 Minn. 328.

44. Sp. Laws Minn. 1887, c. 5, entitled "An act to amend the charter of the city of Winona," extended the city limits so as to include a part of another school district. *Held*, that the act was not in conflict with Const. art. 4, § 27, relating to the entitling of statutes, because the matter of the change in the boundaries of the school districts was not mentioned in the title.—City of Winona v. School-Dist. No. 82, (Minn.) 41 N. W. 539.

40 Minn. 13.

45. Sp. Laws Minn. 1889, c. 19, entitled "An act to amend chapter two (2) of the Special Laws of One Thousand Eight Hundred and Eighty-Seven, (1887,) entitled 'An act to define the boundaries of, and establish a municipal government for, the city of Duluth,'" is not in violation of Const. art. 4, § 27, because it might repeal by implication the act incorporating the village of Park Point, or might extinguish the village organization.—State v. Gallagher, (Minn.) 44 N. W. 529.

42 Minn. 449.

46. Sp. Laws Minn. 1889, c. 25, § 6, amending an act incorporating a city, which provides, among other things, that a fixed proportion of the fees for licenses for the sale of liquor granted under the act amended shall be paid over to the public school fund, is not in violation of Const. Minn. art. 4, § 27, providing that each act shall include but one subject, which shall be expressed in its title, though the title of neither act refers to intoxicating liquors or public schools, since the regulation in question is germane to the purpose of municipal government.—State v. Madson, (Minn.) 45 N. W. 856.

43 Minn. 438.

47. Laws 1889, c. 30, entitled "An act to amend an act entitled 'An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors,'" and providing that "the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," is not invalid on the ground that its subject is not sufficiently expressed in its title; and it is immaterial that the amendatory act does not refer to the chapter or year when the original act was passed, since there was no other act of the same title.—Willis v. St. Paul Sanitation Co., (Minn.) 50 N. W. 1110.

IV. Construction.

General rules.

48. A statute ought, on the whole, to be so construed, if possible, that no clause, section, or word shall be superfluous, void, or insignificant. — McNamara v. Minnesota Cent. Ry. Co., 12 Minn. 388, (Gil. 269.)

Legislative intent.

49. In construing a statute, the intention of the legislature is to be sought for, and the construction carrying out such intention given, even if it seem contrary to the letter itself.—Grimes v. Bryne, 2 Minn. 89, (Gil. 72;) Barker v. Kelderhouse, 8 Minn. 207, (Gil. 178.)

50. Laws Minn. 1881, c. 62, entitled "An act to amend section 34 of chapter 94 of the General Statutes of 1878, relating to [punishment of] manslaughter in the fourth degree," amended the statute referred to by increasing the punishment of manslaughter in the fourth degree; but section 2 of the act provided that the act should not extend to any act done or offense committed prior to the passage thereof, "but the provisions of law now in force prescribing the punishment for murder in the fourth degree shall continue in force as to all such offenses committed prior to the passage hereof." *Held* that, as it clearly appeared from the face of the act and from the

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statute amended that the word "murder" was used by mistake for "manslaughter," the act should be construed in accordance with the intention of the legislature; and that, so construed, the saving clause was valid, and authorized the punishment under the previous law of offenses already committed.—State v. Small, 12 N. W. 703, 29 Minn. 216.

Opinion of subsequent legislature.

51. The opinion of a legislature as to the meaning of a statute passed by a prior legislature is entitled to no more weight than that of the same men in a private capacity.—Bingham v. Board of Sup'rs Winona County, 8 Minn. 441, (Gil. 390.)

Statute adopted from other state.

52. The legislature having borrowed from another state and adopted a statute which had been judicially construed in such state, a presumption arises that the legislature intended to adopt the statute with that settled construction.—Nicollet Nat. Bank v. City Bank, (Minn.) 35 N. W. 577.

38 Minn. 85.

Declaratory or mandatory.

53. Sp. Laws Minn. 1889, c. 563, which "authorized and empowered" the city council of Minneapolis to pay plaintiff a specified sum, with interest, as compensation for work theretofore performed by him for the city, is mandatory as to both principal and interest, since the city was under a strong moral obligation to pay plaintiff's claim, which it was the purpose of the act to legalize.—Bowen v. City of Minneapolis, (Minn.) 49 N. W. 683.

47 Minn. 115.

Public or private laws.

54. Sp. Laws Minn. 1878, c. 191, legalizing and establishing as a public highway a traveled road in D. county, is a public and not a private law.—State v. Messenger, 6 N. W. 457, 27 Minn. 119.

V. Operation and Effect.

Time of taking effect.

55. A provision that an act of the legislature shall take effect and be in force from and after its passage is effectual, and *pro tanto* a repeal of Gen. St. 1866, c. 4, § 2, directing that no general law shall take effect until published.—State v. Welch, 21 Minn. 22.

56. A statute which provides that it shall take effect "from and after its passage," takes effect at the beginning of the next day after its passage.—Parkinson v. Brandenburgh, 28 N. W. 919, 35 Minn. 294.

57. All persons are required to take notice of the existence and terms of a public law from its approval, or at least from its publication, although it may not become operative for some time thereafter.—Stine v. Bennett, 13 Minn. 153, (Gil. 138.)

Retroactive operation.

58. Courts will not construe statutes so as to give them a retrospective effect, except where the intention is clearly expressed, or necessarily and unavoidably implied.—Kerlinger v. Barnes, 14 Minn. 526, (Gil. 398;) Giles v. Giles, 22 Minn. 348; Parkinson v. Brandenburgh, 28 N. W. 919, 35 Minn. 294.

59. Statutes which take away or impair any vested right acquired under existing laws, create a new obligation, impose a new duty, or attach a new disability in respect to transactions already past, are not to be deemed retrospective unless such is clearly the intention of the legislature.—Davidson v. Gaston, 16 Minn. 230, (Gil. 202.)

60. Act Minn. Aug. 3, 1858, (Comp. St. c. 35, § 24,) declaring that every conveyance by deed, mortgage, or otherwise, of real estate within this state, "hereafter made," shall be void as against attachments, judgments, etc., obtained before it is recorded, is not restrospective in its operation, and does not apply to conveyances made before its passage.—Dunwell v. Bidwell, 8 Minn. 34, (Gil. 18.)

Legalizing acts.

61. An act of the legislature legalizing a town and recognizing the record of a plat thereof, is evidence of the fact of the record of such plat, the presumption being that the statutory requisitions to entitle the plat to record were complied with.—City of Winona v. Huff, 11 Minn. 119, (Gil. 75.)

Waiver of statutory provisions.

62. In the absence of an express prohibition, a party may waive a statutory provision made for his benefit, no principle of public policy being violated.—Leighton v. Grant, 20 Minn. 345, (Gil. 298.)

VI. Repeal.

By implication.

63. Repeals by implication are not favored, and to constitute such a repeal the repugnancy must be clear and unmistakable.—Moss v. City of St. Paul, 21 Minn. 421.

64. Where a law, in terms, gives the right to appeal by simply filing notice thereof, this right cannot be taken away by a subsequent statute which does not clearly and unmistakably modify the right given in the previous statute.—Gurney v. City of St. Paul, (Minn.) 30 N. W. 661.

36 Minn. 163.

65. Gen. St. Minn. c. 81, § 24, relating to the foreclosure of mortgages, provides for the recovery of three times the amount of illegal interest embraced in a foreclosure. Laws Minn. 1879, c. 66, § 2, regulating interest and usury, provides that one who has paid illegal interest may recover the excess from the person receiving it. *Held*, that section 24 is not impliedly repealed by Laws 1879, c. 66.—Beal v. White, 8 N. W. 829, 28 Minn. 6.

Of special act by general law.

66. Act Minn. Feb. 18, 1887, (Gen. Laws 1887, c. 118,) detached from the unorganized county of Cass a part of its territory, and attached it to the organized county of Crow Wing, subject to the approval of the legal voters of the latter county. Act Feb. 25, 1887, (Gen. Laws 1887, c. 119,) provided that no change should be made in the lines of an unorganized, and no part thereof should be annexed to an organized, county, without first submitting the proposition for such change of line or annexation to the electors of the county or counties to be

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affected thereby, and an adoption of the proposition by a majority of the electors. It also provided "that all acts or parts of acts inconsistent with this act are hereby repealed." *Held*, that the latter, being a general law, was not in hostility to the act of February 18, 1887, which was a special law, and did not repeal the special law.—State v. Archibald, (Minn.) 45 N. W. 606.

43 Minn. 328.

Effect—Existing rights.

67. The general repealing clause of the Revised Statutes of 1851 (section 1, c. 137) operated only on such part of the old statutes as were not included in the new. It did not operate to destroy the lien of a judgment existing at the time of its passage.—Marshall v. Hart, 4 Minn. 450, (Gil. 352.)

68. Act Minn. March 7, 1861, for the reorganization of school-districts, etc., provided that such act should not "affect or prejudice any right of any party who may hold any contract, obligation, or right or lien upon any such district, or the property thereof." *Held* to save a right of action against such a district for trespass.—Gould v. Eagle Creek School-Dist., 7 Minn. 203, (Gil. 145.)

69. Laws Minn. Ter. 1857, c. 71, § 7, granting a ferry franchise, provided that the right granted should not extend beyond the lands owned by the grantee, and provided further that nothing contained in the act should be construed to affect the rights already granted to a specified railroad company. Sp. Laws Minn. 1858, c. 104, §§ 1, 2, after extending the limits within which the ferry franchise might be exercised, amended the act of 1857 so as to repeal all acts conflicting with such extension, except so much of the section containing said provisos as related to the rights of the railroad company named. *Held*, that the part of the former statute restricting the exercise of this franchise to the lands owned by the grantee of the franchise was repealed.—McRoberts v. Washburne, 10 Minn. 23, (Gil. 8.)

70. Where a distraint had been made, and the property taken possession of by the landlord prior to Laws 1877, c. 140, abolishing the right of distress, the rights of the parties were unaffected by such act, though the action to determine the validity of such distress was pending at the time of the passage of the act.—Dutcher v. Culver, 24 Minn. 584.

—— Revival.

71. The repeal, by the General Statutes of Minnesota of 1866, of laws existing prior thereto, did not operate to revive rights taken away by such prior laws.—Stine v. Bennett, 13 Minn. 153, (Gil. 138.)

VII. Pleading and Proof.

Pleading.

72. Where the charter of the city of Minneapolis is pleaded, the court will take judicial notice of all its provisions without further averment.—Shartle v. City of Minneapolis, 17 Minn. 308, (Gil. 284.)

Statutes of other states—Presumption.

73. Proof of the statutes of another state by production of a printed copy thereof, as prescribed by Pub. St. p. 682, § 56, may raise a presumption that the law has continued the same since the date of passage of such a statute, but raises no presumption as to what the law was before its passage.—State v. Armstrong, 4 Minn. 335, (Gil. 251.)

Statutes Cited, Construed, etc.

See table at end of text, pages 2097–2286.

Stay of Proceedings.

On appeal, see *Appeal and Error*, 628–635, 688, 689.
Until payment of costs, see *Costs*, 57.

Stillwater, City of.

Assessments for public improvements, see *Municipal Corporations*, 273, 274.
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See *Appeal and Error*, 13–16, 52; *Assignment*, 32; *Attorney and Client*, 8, 9; *Costs*, 14; *Practice in Civil Cases*, 1, 2, 45–52, 59.

Stock.

Corporate stock, see *Building and Loan Associations; Corporations*, 86–168.
In banks, see *Banks and Banking*, 26–28.
Live stock, injuries by railroad trains, see *Railroad Companies*, 230–247.
—— shipments, see *Carriers*, 38–41.
Stock in trade exempt from execution, see *Exemptions*, 11–14.

Stoppage in Transitu.

See *Sale*, 142.

Streams.

See *Waters and Water-Courses*.
As boundaries, see *Boundaries*, 1–4.

Street.

Dedication, see *Dedication*.
Control, see *Municipal Corporations*, 125–135.
Defects, see *Municipal Corporations*, 136–189.
Establishment of highways, see *Highways*, 12–52.
Improvement, see *Municipal Corporations*, 211–306.

Strict Foreclosure.

See *Mortgages*, 352–354.

Struck Jury.

See *Jury*, 48–51.

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Subcontractors.

See *Mechanics' Liens*, 171–175.

Submission.

To arbitration, see *Arbitration and Award*, 1–3.

SUBROGATION.

Of one of several joint judgment debtors to right of creditor, see *Contribution*, 1, 2.

Voluntary payment.

1. A mere voluntary payment does not entitle the one making such payment to subrogation. It must be by one legally liable.—Felton v. Bissel, 25 Minn. 15.

To rights of mortgagee—Payment of debt.

2. Where a surety redeems from a mortgage of his principal, in the absence of proof to the contrary it will be presumed that the act was done with the intent that would be most for the interest of the surety; that is, that he might be subrogated to the rights of the mortgagee.—McArthur v. Martin, 23 Minn. 74.

3. Where a surety pays notes, and takes an assignment of mortgages given by the principal and by the other surety to secure them, neither debts nor mortgages are thereby extinguished, as between the sureties, but the one who pays is subrogated to the creditor's rights in the mortgage given by the other.—Felton v. Bissel, 25 Minn. 15.

4. But, where one of such notes is not yet due, the right of subrogation does not become perfect, nor the assignment operative, until the time when it does fall due; and an attempted foreclosure of the mortgage securing it before that time is void.—Felton v. Bissel, 25 Minn. 15.

5. F. executed a mortgage to K., and afterwards sold the premises to C., who, in part payment of the price, assumed and agreed to pay the mortgage to K., and, to secure the balance, executed to F. a second mortgage, which F. subsequently sold and assigned to K. K. knew of, but was not a party to, this arrangement as to the payment of the first mortgage. When F. sold the second mortgage to K., no reference was made to the arrangement between F. and C., and no reservation made of any supposed rights of F. arising under it. *Held*, that F., upon payment of the first mortgage, would not be entitled (the second mortgage remaining unpaid) to be subrogated to the rights of K.; that K. had a right to have the money collected of F., the mortgagor, on the debt secured by the first mortgage, treated as payment, and not as a purchase of the mortgage.—Knoblauch v. Foglesong, (Minn.) 38 N. W. 366.*

38 Minn. 459.

6. Where one claiming title to land voluntarily discharges a mortgage thereon given by his grantor, and a third party is subsequently adjudged to be the owner in fee, the former is not entitled to have the amount so paid adjudged a charge upon the land as against the latter.—Wadsworth v. Blake, (Minn.) 45 N. W. 1131.

43 Minn. 509.

—— Assignment to mortgagor.

7. Where the mortgagor has sold his equity of redemption subject to the lien of the mortgage, he has the same right as any third person to purchase and take an assignment of the mortgage, and upon payment of a prior incumbrance to the holder thereof he would be entitled to be subrogated to his rights, and substituted in his place as respects the land, in the absence of any intervening rights of third persons.—Gerdine v. Menage, (Minn.) 43 N. W. 91.

41 Minn. 417.

8. Where the record shows all the proceedings, and the relation of the assignee of the second mortgage to the title, and the satisfaction by him of prior incumbrances after foreclosure of his mortgage, it is sufficient to put a purchaser upon inquiry as to his equitable rights.—Gerdine v. Menage, (Minn.) 43 N. W. 91.

41 Minn. 417.

—— Ineffective foreclosure.

9. Where a holder of a mortgage has foreclosed the same, and, under a mistake as to the correctness of the proceedings, and the consequent validity of the foreclosure, has paid prior incumbrances which he was equitably entitled to have kept alive for his protection, equity will relieve from the mistake except as against innocent grantees and purchasers without notice, and allow him to be subrogated to the rights of the holders of such prior incumbrances.—Gerdine v. Menage, (Minn.) 43 N. W. 91.*

41 Minn. 417.

Distinguished in Ahern v. Freeman, 48 N. W. 678, 46 Minn. 159.

10. The mortgagor of land having died, and the mortgage foreclosed against his administrator without making his heirs or devisees parties, the purchaser and his grantees will be subrogated to the rights of the mortgagee.—Jellison v. Halloran, (Minn.) 46 N. W. 332.

44 Minn. 199.

Of surety or guarantor to rights of creditor.

11. Upon payment of a debt by a surety, the surety becomes subrogated to all the rights of the original creditor; and as between principal and surety, and those claiming under the principal, such payment operates as an equitable assignment of the debt and securities.—McArthur v. Martin, 23 Minn. 74.

12. A surety upon a note given by his principal for the purchase price of a chattel, the title to which it was expressly stipulated should remain in the seller until full satisfaction of the debt, is entitled, upon payment of the debt by him, to be subrogated to all the rights and remedies of the creditor, and has the same rights as the equitable assignee of the latter, to take possession of the property for his security.—Torp v. Gulseth, (Minn.) 33 N. W. 550.*

37 Minn. 135.

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13. And the right of such surety to be so subrogated is not affected by the fact that he holds a mortgage upon the same property for another and prior debt.—Torp v. Gulseth, 33 N. W. 550, 37 Minn. 135.

14. Guarantors of the collection of a promissory note, which is not paid by the maker at maturity, have a right to pay the note thereafter, for their own protection, whether it is collectible from the maker or not, and on such payment are entitled to be subrogated to the securities held by the payee of the note to secure its payment.—Conner v. How, 29 N. W. 314, 35 Minn. 518.

15. The fact that the right of action of the guarantors against the maker on such payment of the note by them is barred by the statute of limitations, does not extinguish the lien of a mortgage given to secure payment of the note, against which the statute has not taken effect, nor take away their right of subrogation to it.—Conner v. How, 29 N. W. 314, 35 Minn. 518.

Actions—Pleading.

16. Defendant, as agent of A. in the purchase of land, took a deed therefor in his own name, and executed a note and mortgage to secure the purchase money. He then conveyed to A., who assumed payment of the note and mortgage. These latter the vendor transferred to plaintiff, who sued defendant on the note. *Held*, that tender of the note to defendant as security for the debt is not a condition precedent to plaintiff's recovery, and defendant, if he desires an assignment of such note to him, must ask for it in his answer.—Barton v. Moore, (Minn.) 47 N. W. 460. 45 Minn. 98.

Pleading—Requiring transfer of security.

17. Where a defendant, upon paying a debt sued for, will be subrogated to the rights of plaintiff in a security for the debt, he may in his answer allege the facts showing that he will be so entitled to subrogation; and the court, before rendering judgment, may require the plaintiff to execute and file a transfer to defendant of the security to be delivered on payment of the judgment.—Knoblauch v. Fogleson, (Minn.) 33 N. W. 865.*

37 Minn. 320.

Subscribing Witness.

To deed, see *Deed*, 9-13.
will, see *Wills*, 23, 24.

SUBSCRIPTION.

To corporate stock, see *Corporations*, 86-92.

Consideration.

1. Defendant was one of several persons signing an agreement to pay the sums opposite their names to one W., to aid him in constructing an hotel which he proposed to erect. He subsequently assigned his contract to plaintiff. *Held*, there was no consideration for defendant's subscription, and the fact that plaintiff relied on such subscription in going on and completing the work would not aid him.—Culver v. Banning, 19 Minn. 303, (Gil. 260.)

2. The plaintiff undertook to expend money in the erection of a manufactory in the city of St. Paul, upon the condition that certain sums should be subscribed and paid by citizens thereof in aid of the enterprise, and upon the faith of such subscriptions. *Held*, that this was a sufficient consideration for the subscriptions.—Bohn Manuf'g Co. v. Lewis, (Minn.) 47 N. W. 652.

45 Minn. 164.

Failure of consideration.

3. An agreement by subscribers to a paper to pay on demand the sums set opposite their respective names, for the purposes of building a public bridge, though a valid and binding contract, under which the subscriptions may be recovered at once, is not enforceable after failure to perform the contract to build the bridge.—Brimhall v. Van Campen, 8 Minn. 13, (Gil. 1.)

Conditions.

4. Where subscriptions to the removal and establishment of a manufactory elsewhere are upon the condition precedent that the manufactory should be completed by a day certain, time is essential, and the subscriptions are obligatory only upon the strict performance of the condition.—Bohn Manuf'g Co. v. Lewis, (Minn.) 47 N. W. 652.

45 Minn. 164.

5. The agreement by which subscriptions were made to the erection of a factory provided that the money should be paid to a trust company on August 1st, but should not be paid to the beneficiary, unless its factory was in operation by September 1st, failing which it was to be refunded to the subscribers. The time was afterwards extended to November 1st. *Held*, that the extension was subject to the same condition as to refunding the money subscribed.—Bohn Manuf'g Co. v. Lewis, (Minn.) 47 N. W. 652.

45 Minn. 164.

Substitution.

Of attorneys, see *Attorney and Client*, 3-5.
parties, see *Abatement and Revival*, 14-28; *Parties*, 31-40.

Suit.

See *Action*.

Summary Proceedings.

To eject tenant, see *Landlord and Tenant*, 77-95.

SUMMONS.

I. Issuance and Validity, 1-13.
II. Service, 14-28.
III. Publication, 29-52.
IV. Return, 53-56.

Death of defendant before completion of service by publication, see *Abatement and Revival*, 15.
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In justice's court, see *Justices of the Peace*, 37.
partition, see *Partition*, 8.
Record showing issue, see *Appeal and Error*, 236, 237.
Waiver of defects in service, see *Appearance*, 12, 14.

I. Issuance and Validity.

Form and style—In general.

1. Act March 5, 1853, (Comp. St. 1858, p. 480,) declared (section 1) that all equity and chancery jurisdiction should be exercised, and all suits or proceedings to be instituted for that purpose should be commenced, prosecuted, and conducted, "by the like process, pleadings, and proceedings as in civil actions;" and (section 2) that all suits authorized to be commenced, prosecuted, and conducted in chancery, including foreclosure of mortgages, should thereafter be commenced, prosecuted, and conducted "by the like process, pleadings, trial, and proceedings as in civil actions." *Held*, that it was intended to make both the form of process and the manner of its service in equity conform to that which obtained in civil actions.—Crombie v. Little, (Minn.) 50 N. W. 823.

47 Minn. 581.

2. A summons which, after the address to the defendant, proceeds, "You are hereby summoned and required, in the name of the state of Minnesota, to answer," sufficiently complies with Const. Minn. art. 6, § 14, requiring the style of all process to be "the state of Minnesota."—Cleland v. Tavernier, 11 Minn. 194, (Gil. 126.)

3. A summons, in Minnesota, is merely a notice given by the plaintiff's attorney to defendant that proceedings have been instituted against him, and that judgment will be taken if he fails to defend, and is not process, within the meaning of Const. Minn. art. 6, § 14, requiring all process to run in the name of the state.—Hanna v. Russell, 12 Minn. 80, (Gil. 43;) Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

Overruling Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55, (Gil. 44.)

4. A summons is not vitiated by the mere fact that it described the court as "third district, Minnesota territory," instead of "fourth district, state of Minnesota;" for such error is purely technical, and could not affect the substantial rights of defendant.—Hanna v. Russell, 12 Minn. 80, (Gil. 43.)

Blanks.

5. A summons issued by a justice of the peace required the defendant to appear before him "at 10 o'clock in the noon." *Held*, that the summons was void, under Gen. St. Minn. 1878, c. 65, § 12, requiring that such a summons "shall be entirely filled up, and have no blank, either in date or otherwise, at the time of its delivery to an officer to be executed," and declares that a summons "issued contrary to the provisions of this section shall be void."—Seurer v. Horst, 18 N. W. 283, 31 Minn. 479.

Contents.

6. A summons signed by the plaintiff, and requiring defendant to serve a copy of his answer on "the subscriber, at his office in the city of R., sufficiently designates the place at which service of the answer is required to be made. If the plaintiff has no office at the place designated it is a mere irregularity, and may be taken advantage of on motion to set aside the summons, but cannot be made the subject of collateral attack.—Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

7. A summons containing a notice to defendant that, in case he fails to answer the complaint within the time aforesaid, application will be made to the court for the relief demanded in the complaint, sufficiently notifies him that the plaintiff will so apply, and substantially complies with Gen. St. Minn. 1866, c. 66, § 45.—Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

8. A summons, in an action on a note, stating that plaintiff will apply to the court to have the amount he is entitled to recover "ascertained by the court, or under its decision," is sufficient compliance with Gen. St. Minn. 1866, c. 66, § 45, requiring a summons to contain a notice that the plaintiff will apply to the court to have the amount he is entitled to recover "ascertained by the court, or under its direction."—White v. Iltis, 24 Minn. 43.

Reference to complaint.

9. A copy of a complaint was left with the defendant, and thereafter a summons without a complaint, requiring him to answer the complaint, "a copy of which is herewith served on you," was also served. *Held*, that the court acquired no jurisdiction of the cause, and that judgment entered thereon was void.—Tuller v. Caldwell, 3 Minn. 117, (Gil. 67.)

Overruled in Millette v. Mehmke, 3 N. W. 700, 26 Minn. 306.

10. A summons was served with a copy of the complaint, but, instead of requiring defendant to answer such copy, it referred to the complaint "which has been filed in the office of the clerk," when no complaint had been filed. *Held* only an irregularity, which defendant waives unless he moves to set aside the service.—Millette v. Mehmke, 3 N. W. 700, 26 Minn. 306.

Overruling Tuller v. Caldwell, 3 Minn. 117, (Gil. 67.)

Subscription.

11. Under Comp. St. Minn. c. 60, § 49, requiring that the summons shall "be subscribed by" the plaintiff or his attorney, and chapter 3, § 16, which provides "that in all cases where the written signature of any person is required it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark," the signature to a summons must be written, and if printed the summons is void.—Ames v. Schurmeier, 9 Minn. 221, (Gil. 206.)

Distinguished in Hotchkiss v. Cutting, 14 Minn. 540, (Gil. 411.) Overruled in Herrick v. Morrill, 33 N. W. 849, 37 Minn. 251, 252.

12. The subscribing of the name of the plaintiff to a summons by another person, in the presence and by direction of the plaintiff, constitutes a sufficient subscription by him.—Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

Distinguishing Ames v. Schurmeier, 9 Minn. 221, (Gil. 206.)

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13. A summons in a civil action may be subscribed by the printed signature of the plaintiff or his attorney; overruling Ames v. Schurmeier, 9 Minn. 221, (Gil. 206.)—Herrick v. Morrill, (Minn.) 33 N. W. 849.

37 Minn. 250.

II. SERVICE.

By whom made.

14. When Sp. Laws Minn. 1877, c. 185, § 2, providing that summons to be served in Ramsey county shall be served by the sheriff, was repealed by Sp. Laws 1881, c. 371, the provisions of the general law on the subject, (Gen. St. 1878, c. 66, § 56,) allowing service by any one not a party to the action, took effect in that county.—Miller v. Miller, (Minn.) 40 N. W. 261.

39 Minn. 376.

Time of service.

15. Service on the 11th day of the month of a summons returnable on the 17th is in time, being six days before the time of appearance.—Smith v. Force, 16 N. W. 704, 31 Minn. 119.

On absent defendant—Leaving copy at place of abode.

16. A return of service of summons on defendant "by leaving a true and certified copy at his usual place of abode, with his wife, she being a suitable person of age and discretion, and then a resident therein," is sufficient, under Gen. St. Minn. c. 65, § 11, allowing service of summons to be made by leaving a copy at defendant's usual place of abode, etc., when defendant cannot be found.—Goener v. Woll, 2 N. W. 163, 26 Minn. 154.

17. The summons in an action was served during defendant's absence from the state by delivering a copy at the house which was his usual place of abode, to his clerk, who was not a resident of such house. *Held* that, under Gen. St. Minn. 1878, c. 66, § 59, providing that, except in cases otherwise not specially provided for, the summons is to be served by delivering a copy "to defendant personally, or by leaving a copy of the summons at the house of his usual abode, with some persons of suitable age and discretion then resident therein," the court acquired no jurisdiction over the person of defendant, and a judgment rendered against him by default was void.—Heffner v. Gunz, 12 N. W. 342, 29 Minn. 108.

18. Service was had on an absent defendant by leaving a copy of the summons at his boarding-house with a person of suitable age and discretion. Judgment went by default during his continued absence, and afterwards he moved to vacate on the ground that there was no proper service. The evidence tended to show that he had no place of abode except this boarding house, and that, when he left on the trip during which the judgment was rendered, he left personal property there, and expected to return to it. *Held*, that this was sufficient to support a finding that it was his usual place of abode.—Lee v. Macfee, (Minn.) 47 N. W. 309.

45 Minn. 33.

On foreign corporation.

19. Comp. St. Minn. c. 60, §§ 52, 53, providing that a summons may be served by the sheriff of the county where the defendant is found, by delivering a copy thereof, if the suit be against a corporation, to the president, etc., thereof, does not apply to "foreign corporations," as they have no legal existence in the state, and service can be made upon them "only by publication" under section 54 of the same chapter, which provides that the court or judge may grant an order that the service be made by publication when the defendant is a foreign corporation.—Sullivan v. La Crosse & Minn. Packet Co., 10 Minn. 386, (Gil. 308.)

20. Where a foreign corporation has no agency within the state of Minnesota, service of a summons on its general agent, who happens to be temporarily in the state, is sufficient, under Act Minn. Feb. 28, 1866, authorizing service of process on a corporation by delivering a copy thereof to its general agent, and notwithstanding Gen. St. Minn. 1866, c. 66, §§ 48, 56, limiting such service to cases where the company has property within the state, etc., and making the existence of an agency within the state essential to the jurisdiction of the court. WILSON, C. J., dissenting.—Guernsey v. American Ins. Co., 13 Minn. 278, (Gil. 256.)

Limited in State v. District Court, Ramsey Co., 2 N. W. 699, 26 Minn. 234.

On nonresident—Mailing summons.

21. A non-resident defendant in a civil action, to whom a copy of the summons has been mailed at his known place of residence in the manner provided in Gen. St. Minn. 1878, c. 66, § 64, has not been personally served with the summons, within the meaning of section 66 of the same chapter, providing for leave to defend after judgment where defendant was not personally served, although he fails to deny that he received such copy by due course of mail.—Bausman v. Tilley, (Minn.) 48 N. W. 459.

46 Minn. 66.

Decoying party into jurisdiction.

22. Where a person, by fraud and deceit, inveigles another into the jurisdiction of the court, for the purpose of suing him, and of obtaining service of summons upon him in that jurisdiction, the summons and the service thereof should be set aside as an abuse of judicial process.—Chubbuck v. Cleveland, 35 N. W. 362, 37 Minn. 466.

Privilege of parties and witnesses.

23. A resident of another state, who has in good faith come into this state to give evidence as a witness in a cause here, is exempt from service with a summons in a civil action against him, in coming, while in attendance, and for a reasonable time thereafter in which to return.—Sherman v. Gundlach, (Minn.) 33 N. W. 549.

37 Minn. 118.

24. A non-resident party to an action is privileged from liability to suits commenced by summons while attending the trial, or an examination therein before a referee or master in chancery, and such exemption extends to a summons to bind one by a judgment previously renderer in pursu-

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ance of Gen. St. Minn. c. 66, § 287.—First Nat. Bank v. Ames, (Minn.) 39 N. W 308.

39 Minn. 179.

Proof of service.

25. An affidavit of service of summons, made by a private person, sufficient in form under the statute, (Gen. St. Minn. 1866, c. 66, § 53,) is good, though it does not comply with district court rule No. 30, requiring him to state that he knew the person served to be the defendant, as the rule, so far as it is inconsistent with the statute, is void.— Young v. Young, 18 Minn. 90, (Gil. 72.)

26. The affidavit of a person serving a summons, that the persons served are members of the firm named in the summons as defendant, is sufficient to confer jurisdiction over such persons.—Gale v. Townsend, (Minn.) 47 N. W. 1064.

45 Minn. 357.

—— Admission of service.

27. Proof of service of a summons by written admission of the defendant is insufficient, unless the genuineness of his signature is proved.—Masterson v. Le Claire, 4 Minn. 163, (Gil. 108.)

28. Admission of service of a summons, made by an attorney, for his client, is insufficient without proof of his authority and of the genuineness of his signature. —Masterson v. Le Claire, 4 Minn. 163, (Gil. 108.)

III. Publication.

When allowable.

29. Foreign corporations having property in the state may be subjected to the jurisdiction of the courts thereof, and served with summons by publication, as provided by Comp. St. Minn. c. 60, § 54.—Broome v. Galena, D., D. & Minn. Packet Co., 9 Minn. 239, (Gil. 225.)

30. Since Rev. St. U. S. § 5046, vested in the assignee in bankruptcy all property conveyed by the bankrupt in fraud of his creditors, the judgment in an action by the assignee to set aside such conveyance affects the land only, and hence, under Gen. St. Minn. c. 66, § 64, subd. 5, a service of summons by publication on a non-resident defendant is proper in such action.—Lane v. Innes, (Minn.) 45 N. W. 4.

43 Minn. 137.

31. Though Pub. St. Minn. 1858, c. 72, § 36, relating to the jurisdiction of courts over natural persons, did not make it a prerequisite to such jurisdiction in the case of a non-resident that he should have property within the state "upon which the plaintiff has acquired a lien by attachment or garnishment," service by publication on a non-resident was only effectual where such property had been brought under the control of the court, or where judgment was sought as a means of reaching it, or an interest therein.—Lydiard v. Chute, (Minn.) 47 N. W. 967.

45 Minn. 277.

32. Gen. Laws Minn. 1881, (Ex. Sess.) c. 81, provides that, in actions to determine adverse claims to land, plaintiff may include as defendants, in addition to the names of such persons as appear of record to have, and other persons who are known to have, some interest in the land in controversy, "unknown claimants," and may have service by publication upon such unknown claimants. *Held*, that the statute must be strictly construed, and that unknown persons claiming the land in controversy under the patent title are not bound by the service prescribed by the statute, where the person in whose name the patent title appears of record is not named as defendant, and the only persons who are named specially as defendants are the holders of tax-titles.—Ware v. Easton, (Minn.) 48 N. W. 775.

46 Minn. 180.

33. An action to foreclose a mortgage upon real estate was within Laws 1864, c. 42, § 1, authorizing service by publication in actions the subject of which was real property, and in which the relief demanded consisted partly in excluding defendant from any interest therein.—Crombie v. Little, (Minn.) 50 N. W. 823.

47 Minn. 581.

Affidavit for publication.

34. Under Pub. St. Minn. c. 60, § 54, authorizing the service of a summons by publication, upon proof by affidavit that the defendant cannot with due diligence be found within the state, etc., an averment in an affidavit in the language of the statute, without setting out the facts and circumstances, is insufficient.—Mackubin v. Smith, 5 Minn. 367, (Gil. 296.)

Distinguished in Gemmell v. Rice, 13 Minn. 406, (Gil. 375.

35. Under Pub. St. Minn. c. 60, § 54, providing that an order for publication of a summons may be made when it appears by affidavit that "defendant, after due diligence, cannot be found" within the state, an affidavit stating facts not inconsistent with the presence or residence of defendant in the state at the date of the affidavit is insufficient to confer jurisdiction to grant the order for publication. Mackubin v. Smith, 5 Minn. 367, (Gil. 296.) followed. — Harrington v. Loomis, 10 Minn. 366, (Gil. 293.)

36. A statement in an affidavit for publication of summons, "that defendant is a corporation or company, established and doing business under and by virtue of the laws of the state of Illinois," sufficiently shows defendant's corporate character. —Broome v. Galena, D., D. & Minn. Packet Co., 9 Minn. 239, (Gil. 225.)

37. An affidavit for publication of summons which shows defendant to be a foreign corporation sufficiently shows that it cannot be found within the state.—Broome v. Galena, D., D. & Minn. Packet Co., 9 Minn. 239, (Gil. 225.)

38. The statute (section 64, c. 66, Gen. St. 1878) authorizing a constructive service of a summons by publication "upon the filing of an affidavit" of the non-residence of the defendant, etc., makes the filing of such an affidavit a condition precedent to an authorized publication. The publication of a summons, unless so authorized, is ineffectual to confer jurisdiction, and a judgment entered thereon is void, even though such an affidavit be filed *after* the publication, and on the day of entry of the judgment.—Barber v. Morris, (Minn.) 33 N. W. 559.

37 Minn. 194.

39. Under Gen. St. Minn. 1878, c. 34, § 15, before service by publication of the notice therein re-

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quired, on non-resident land-owners, or those whose residence is unknown, an affidavit must be filed, showing the fact of the non-residence, or that after diligent inquiry the residence of such owner is unknown, or cannot be ascertained, and one filed after publication, on presenting the petition, gives no jurisdiction.—Brown v. St. Paul & N. P. Ry. Co., (Minn.) 38 N. W. 698.

38 Minn. 506.

40. An affidavit in an action against a non-resident must state positively, and not on information and belief, that the defendant has property within the state.—Feikert v. Wilson, (Minn.) 37 N. W. 585.

38 Minn. 341.

41. In an action commenced against a non-resident by publication of the summons, where judgment for want of an answer is properly entered, except that the affidavit of publication is insufficient, if the summons was in fact duly published, and no facts appear to show that it would be unjust to the defendant, or would affect intervening rights of third persons, the court should allow a proper affidavit of publication to be filed *nunc pro tunc*, under Gen. St. Minn. 1878, c. 66, §§ 124, 125, allowing amendments of pleadings, process, etc., and modification of judgments.—Burr v. Seymour, (Minn.) 45 N. W. 715.

43 Minn. 401.

42. An affidavit for an order of publication is not void because entitled in an action not actually commenced when the affidavit was sworn to.—Crombie v. Little, (Minn.) 50 N. W. 823.

47 Minn. 581.

43. An affidavit for the publication of a summons need not be sworn to on the day on which the action is commenced, but may be sworn to within such reasonably brief period before the publication that no presumption can fairly arise that the state of facts has changed in the mean time.—Crombie v. Little, (Minn.) 50 N. W. 823. 47 Minn. 581.

44. Where an affidavit for an order of publication is sworn to before the deputy clerk of the district court, a jurat signed by him, "A. B., Clerk, by C. D., Deputy," is good.—Crombie v. Little, (Minn.) 50 N. W. 823.

47 Minn. 581.

45. If the affidavit for publication of a summons is filed with the clerk of the district court, the fact that he fails to keep his office at the county-seat will not invalidate the publication of the summons.—Crombie v. Little, (Minn.) 50 N. W. 823.

47 Minn. 581.

Order for publication.

46. Under Rev. St. Minn. 1866, c. 94, § 14, it was not necessary that the order before publication, directing absent defendants to appear, should be authenticated by the clerk.—Smith v. Valentine, 19 Minn. 452, (Gil. 393.)

47. Omission to enter a rule to plead and order for publication in a book, as required by rule of court, is a mere irregularity, not available in a collateral proceeding.—Smith v. Valentine, 19 Minn. 452, (Gil. 393.)

Time of publication.

48. An order for the publication of a summons, dated January 18th, directed that a copy of the summons and complaint be forthwith deposited in the post-office, addressed to the defendant. The first publication was on Sunday, the 19th, and copies were deposited in the post-office on the 20th. The summons was published again on the 22d, and once in each week for the statutory period thereafter. *Held*, that this was a sufficient compliance with the order, for the deposit was made before the first "legal publication."—Cleland v. Tavernier, 11 Minn. 194, (Gil. 126.)

49. Where an action before a justice against a non-resident is commenced by attachment duly levied, and the summons is ordered to be served by publication, but the return-day is fixed at less than six days after the expiration of the period of publication, as required by Gen. St. Minn. 1878, c. 65, § 102, a judgment rendered on such return-day in favor of plaintiff, defendant not appearing, is void.—Bird v. Norquist, (Minn.) 48 N. W. 1132.

46 Minn. 318.

Proof of publication.

50. Proof, by affidavit, of publication for "six successive weeks" does not show the publication to have been made "once in each week" for the period named.—Godfrey v. Valentine, (Minn.) 40 N. W. 163.

39 Minn. 336.

51. An affidavit of service of summons by publication which states that the summons was published "seven" weeks, once a week, the date of the first and last publication being shown, from which it appears that six weeks was intended, is sufficient, under Gen St. Minn. c. 66, § 65, requiring publication to be made for six weeks.—Lane v. Innes, (Minn.) 45 N. W. 4.

43 Minn. 137.

Presumption as to service.

52. The record of judicial proceedings stating that the summons was served by publication against a non-resident, who was beyond the jurisdiction of the court, it will not be presumed that other proof of service was made, nor that the court acquired jurisdiction, unless that is affirmatively shown.—Godfrey v. Valentine, (Minn.) 40 N. W. 163.

39 Minn. 336.

IV. Return.

Construction.

53. A return to a summons addressed to two defendants, that the defendants, naming them conjunctively, could not be found, will be construed as meaning that neither of the defendants could be found, and not that both of them could not be found.—Blinn v. Chessman, (Minn.) 51 N. W. 666.

Effect—Impeachment.

54. A return of an officer of the time of service of a summons is, in that action, conclusive, and cannot be contradicted. Tullis v. Brawley, 3 Minn. 277, (Gil. 191,) followed.—Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

Doubted in Jensen v. Crevier, 23 N. W. 541, 33 Minn. 372. Overruled in Crosby v. Farmer, 40 N. W. 71, 39 Minn. 306.

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55. The return of a sheriff showing personal service of a summons, even though not regarded as conclusive, is strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. Doubting Frasier v. Williams, 15 Minn. 288, (Gil. 219,) as to the conclusiveness of the sheriff's return.—Jensen v. Crevier, 23 N. W. 541, 33 Minn. 372.

56. The return of an officer of the service of a summons is not conclusive on defendant, but may be impeached by affidavit, on motion or other direct proceedings in the action to set aside the judgment on default.—Crosby v. Farmer, 40 N. W. 71, 39 Minn. 305; Burton v. Schenck, 41 N. W. 244, 40 Minn. 52.

Distinguishing Hutchins v. Commissioners of Carver County, 16 Minn. 13, (Gil. 1.)

Overruling Tullis v. Brawley, 3 Minn. 277, (Gil. 191;) Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

SUNDAY.

Sale of liquor on, see *Intoxicating Liquors*, 43.
Traveling on, see *Death by Wrongful Act*, 3.

Contracts—Execution on Sunday.

1. Under Comp. St. Minn. c. 96, § 19, providing that no person shall do "any manner of labor, business, or work," except only works of necessity or charity, on Sunday, under penalty of fine, a note executed on Sunday is void.—Brimhall v. Van Campen, 8 Minn. 13, (Gil. 1;) Finney v. Callendar, 8 Minn. 41, (Gil. 23.)

2. The sale of a horse, consummated on Sunday, is void, and an action on a warranty in such sale will not lie.—Finley v. Quirk, 9 Minn. 194, (Gil. 179.)

3. Plaintiffs and defendant agreed on Sunday that defendant should put up a quantity of ice for the southern market, giving his personal services in superintending the work without charge, and that plaintiffs should furnish the money necessary to pay the expenses of putting up the ice; that plaintiffs, who were about starting south, should look over the market and determine whether it was safe to put up the ice, and if they decided that it was safe to notify defendant, who was thereupon to commence the work. The profits and losses were to be equally shared between plaintiffs and defendant. *Held*, an agreement for the formation of a partnership *in præsenti*, and void because made on Sunday.—Durant v. Rhenier, 4 N. W. 610, 26 Minn. 362.

4. In an action to foreclose an informal assignment of real estate made to secure a promissory note, it appeared that the assignment was dated October 11th, a week-day; but defendant offered evidence tending to prove that the agreement in regard to the security was made on Sunday, October 14th, at which time the assignment was accepted by plaintiffs. *Held*, that the evidence justified an instruction that if the agreements were made on Sunday plaintiff could not recover.—Hanchett v. Jordan, (Minn.) 45 N. W. 617.

43 Minn. 149.

5. A bond signed and sealed on Sunday, not delivered until a following secular day, is not therefore invalid.—State v. Young, 23 Minn. 551.

6. A deed is not executed until delivery. Therefore, though signed and sealed on Sunday, yet, if not delivered until a succeeding secular day, it is valid. VANDERBURGH, J., dissenting — Schwab v. Rigby, 38 N. W. 101, 38 Minn. 395.

—— Performance on Sunday.

7. Demand for goods contracted for, made on Sunday, is illegal and a nullity.—Brackett v Edgerton, 14 Minn. 174, (Gil. 134.)

8. Under Gen. St. Minn. 1878, c. 100, § 20, providing that no person shall do any manner of labor, business, or work, except only works of necessity and charity, on Sunday, the issuing, publishing and circulating a newspaper on Sunday is unlawful.—Handy v. St. Paul Globe Publishing Co., 42 N. W. 872, 41 Minn. 188.

9. A contract by which plaintiff is to have full charge and control of the real-estate advertising business in the daily, Sunday, and weekly editions of a newspaper, the owner to receive certain rates, the plaintiff to have all above those rates that he may receive for advertising, the contract to continue for five years, is an entire and indivisible contract, and as it provides for publishing and circulating a newspaper on Sunday, the entire contract is void under the above statute.—Handy v. St. Paul Globe Publishing Co., (Minn.) 42 N. W. 872.

41 Minn. 188.

10. Such contract, having been entered into at the time such statute was in force, was incapable of being ratified so as to relieve it of the original taint of illegality, although by the provisions of Pen. Code Minn. § 229, which went into effect afterwards, newspapers may be sold in a quiet and orderly manner on Sunday.—Handy v. St. Paul Globe Publishing Co., (Minn.) 42 N. W. 872.

41 Minn. 188.

Supplemental Pleading.

See *Abatement and Revival*, 25–28; *Garnishment*, 49–53; *Pleading*, 182–185; *Quieting Title*, 27.

Supplementary Proceedings.

See *Execution*, 143–159.
Exemption of homestead, see *Homestead*, 34.
Imprisonment for disobedience of order, see *Constitutional Law*, 159.

Supreme Court.

See *Appeal and Error*, 1–680.
Constitutional provisions as to jurisdiction, see *Constitutional Law*, 39–41.
Issue of writ of prohibition, see *Prohibition, Writ of*, 15.
Jurisdiction of *certiorari* proceedings, see *Certiorari*, 19.
—— of *mandamus* proceedings, see *Mandamus*, 1–5.
—— of *quo warranto* proceedings, see *Quo Warranto*, 7.
—— to enforce regulations of railroad commissioners, see *Railroad Companies*, 19.
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Legislative request for opinion, see *Constitutional Law*, 36, 37.
Review of tax judgment, see *Taxation*, 153-156.

Suretyship.

See *Principal and Surety.*

SURFACE WATER.

What is.

1. Surface waters cease to be such after they reach and become part of a permanent body of water retained in a natural basin, forming a lake; and, where such a lake is situated on lands of different owners, neither can drain it without the consent of the other.—Schaefer v. Marthaler, 26 N. W. 726, 34 Minn. 487.

Distinguishing Bennett v. Murtaugh, 20 Minn. 151, (Gil. 135.)

Obstruction and flowage.

2. The common-law rule as to the disposition of surface water prevails in Minnesota, and, subject to the reasonable restriction that he must so use his land as not to injure his neighbor, a landowner, in the use and improvement of his land, may obstruct or hinder the natural flow of surface water, and is not bound to provide drains or waterways to prevent the accumulation thereof upon adjacent lands, except in the case of ravines in which surface water is gathered into streams in well defined channels.—Rowe v. St. Paul, M. & M. Ry. Co., 43 N. W. 76, 41 Minn. 384.

3. Where defendant has no easement to maintain a ditch it has constructed on plaintiff's land, it is not liable for damages to his crops, caused by closing the ditch on its own land, whereby the surface water runs over plaintiff's land as it would have done if the ditch was not in existence.—Olson v. St. Paul, M. & M. Ry. Co., (Minn.) 38 N. W. 490.
38 Minn. 479.

4. A railroad company which takes earth from one part of its premises for use in the construction of its road-bed, thus leaving an excavation, incurs no liability because the effect of such excavation is to accumulate surface water, and cause it to flow on the lands of an adjoining owner.—Jordan v. St. Paul, M. & M. Ry. Co., (Minn.) 43 N. W. 849. 42 Minn. 172.

5. Where a municipal corporation, for the purpose of improving its streets, raises or lowers the surface so as to interfere with the flow of surface water, it has no right, when not necessary to the proper improvement of such streets, to turn surface water in destructive currents upon the lands adjoining.—O'Brien v. City of St. Paul, 25 Minn. 331.

Distinguishing O'Brien v. City of St. Paul, 18 Minn. 176. (Gil. 163;) Lee v. City of Minneapolis, 22 Minn. 13; Kobs v. Same, Id. 159; Alden v. Same, 24 Minn. 254.

6. Where a municipal corporation, in improving its streets, accumulates surface waters, it is its duty to take care of them, if reasonably practicable, and prevent their injuring others.—O'Brien v. City of St. Paul, 25 Minn. 331.

7. Where the result of the change of grade of a street by a municipal corporation is to collect surface water into a stream and divert it upon the premises of an adjacent owner, an action will lie for the damages he sustains thereby.—Follmann v. City of Mankato, (Minn.) 48 N. W. 192.
45 Minn. 457.

8. One land-owner has no right, independent of a grant, to gather surface waters on his own land, and, by means of ditches, cause them to flow upon the land of another, where they would not otherwise go.—Hoganon v. St. Paul, M. & M. Ry. Co., 17 N. W. 374, 31 Minn. 224.

9. The owner of an upper estate, on which he has erected a house, has no right to collect the waters which fall upon his roof into gutters, and thence, by means of a conducting pipe, discharge them, although upon his own land, at such a place, and in such a manner, that necessarily they are precipitated upon lower premises in an unnatural, unusual, and injurious volume and quantity; and injunction will lie against such acts.—Beach v. Gaylord, (Minn.) 45 N. W. 1095.
43 Minn. 476.

Surgeons.

See *Physicians and Surgeons.*

Surplus.

Proceeds on foreclosure of mortgage, see *Mortgages*, 296-298.

Surprise.

As ground for new trial, see *Criminal Law*, 136; *New Trial*, 40-48, 136.

Surrender.

Of lease, see *Landlord and Tenant*, 29-35.
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Surveys and Surveyors.

Evidence of boundary, see *Boundaries*, 13, 14.
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—— referred to in deed, see *Deed*, 26-29.

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Swindling.

See *False Pretenses.*

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Tacking.

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TAXATION.

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I. Power to Tax—Constitutional Restrictions.

In general.

1. Except where restrained by constitutional limitation, the power of the legislature in the imposition and apportionment of taxes is absolute.—Sanborn v. Commissioners Rice County, 9 Minn. 273, (Gil. 258.)

Purposes.

2. The "county purposes" for which, under Laws Minn. 1867, c. 6, § 2, a maximum tax of three mills only could be levied by the commissioners, in certain counties named, without a vote of the people, includes only the ordinary expenses of the county. Neither the payment of county debt, interest thereon, nor the $1,000 authorized by such act for extraordinary expenses, are included in ordinary expenses, but the amount for these purposes may be levied by the commissioners under the general powers contained in the first clause of the section.—McCormick v. Fitch, 14 Minn. 252, (Gil. 185.)

3. Act Minn. February 25, 1887, authorized the village of Sauk Rapids to issue bonds in aid of the construction of a dam across the river, at that place, for the purpose of improving the water-power, and also provided that the village might secure the water-power for the use of the fire department, and that the piers of the dam might be the foundation of a public wagon bridge. *Held*, that the act provided for public taxation for private purposes, and as such was unconstitutional, and its unconstitutional character was not affected by the fact that public purposes were also incorporated in the act.—Coates v. Campbell, (Minn.) 35 N. W. 366.

37 Minn. 498.

Amount.

4. Laws Minn. 1861, c. 6, § 2, restricting the right to levy a tax of only three mills for county purposes to the counties therein named, operated to repeal the general limitation of three mills imposed by Laws 1860, c. 1, § 73. Hence the commissioners of Meeker county could, in 1865, levy a tax of four mills for current county expenses.—Piper v. Branham, 14 Minn. 548, (Gil. 418.)

Valuation of property—Penalties.

5. Laws Minn. 1860, c. 1, § 30, authorizing the auditor, as a penalty for refusal of owner to list property, to add 50 per cent. to the assessor's valuation, is in conflict with Const. Minn. art. 9, § 1, which provides that "all property on which taxes are to be levied shall have a cash valuation," and with section 3, which provides that all property shall be taxed "according to its true value in money."—McCormick v. Fitch, 14 Minn. 252, (Gil. 185.)

Equality.

6. Substantial and not perfect equality in imposing the burden upon those for whose benefit

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the money is raised is all that is required in the levy of taxes. —Comer v. Folsom, 13 Minn. 219, (Gil. 205.)

7. A tax cannot be imposed exclusively on any subdivision of the state to pay any claim or indebtedness not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision.—Sanborn v. Commissioners Rice County, 9 Minn. 273, (Gil. 258.)

8. Gen. St. Minn. 1878, c. 11, § 97, providing that where a sale of land for taxes is adjudged void, the amount paid by the purchaser or by the assignee of the state shall be returned to him out of the county treasury, does not violate Const. Minn. art. 9, § 1, which declares that "all taxes to be raised in this state shall be as nearly equal as may be," in that the statute makes no provision for charging back any part of the amount so paid out of the county treasury to the municipal bodies to which the county had paid it over.—State v. Cronkhite, 9 N. W. 681, 28 Minn. 197.

9. Laws Minn. 1881, c. 5, provides that "If any real or personal property shall be omitted in the assessment of any year or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax-books for the year or years omitted, and he shall assess the same, and extend all arrearages of taxes properly accruing against such property, with 7 per cent. interest thereon from the time said taxes would have become delinquent." *Held*, that the provision adding "back" interest to the tax was invalid, as being unequal taxation, for the reason that until the amount of the tax is ascertained the owner has no opportunity of paying it, and is not in default, and a person is chargeable with interest only upon contract to pay it, or for some default of legal duty on his part.—State v. Certain Lands in Redwood County, (Redwood County v. Winona & St. P. Land Co.,) 42 N. W. 473, 40 Minn. 512.

10. The statute (Gen. St. Minn. 1878, c. 7, §§ 5, 7-9, as amended by Gen. Laws 1885, c. 103) requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums, arbitrarily prescribed with reference to the value of the estate in question, is unconstitutional, as it is contrary to those clauses requiring equality of taxation, and the dispensation of justice freely and without purchase.—State v. Gorman, 41 N. W. 948, 40 Minn. 232.

Uniformity.

11. The action of the legislature, when regranting the franchises of the St. Paul & Sioux City Railroad Company in 1864, whereby the terms of the original charter were changed, so as to provide for payment of a certain per cent. of its gross earnings in lieu of all taxation, was not in conflict with Const. Minn. art. 9, §§ 1, 3, requiring taxes to be uniform, and to be imposed on all classes of property, with certain exceptions.—City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469.

Double taxation.

12. Under the constitutional requirement of equality and uniformity in taxation, tax-laws should be so construed as to avoid double taxation, unless a contrary construction is compelled by express provision or necessary implication of the statute.—Board County Com'rs Rice County v. Citizens' Nat. Bank of Faribault, 23 Minn. 220.

Exemption.

13. The levy of a poll-tax, under the city charter of Faribault, (Sp. Laws Minn. 1872, p. 114, § 8; p. 121, § 3,) is not repugnant to Const. Minn. art. 9, § 1, requiring equality of taxation, by reason of the exemption of members of fire companies.—City of Faribault v. Misener, 20 Minn. 396, (Gil. 347.)

14. Const. art. 9, § 3, providing that "laws shall be passed taxing * * * all real and personal property at its true value in money," does not prohibit or render void the transfer by the state to the Winona & St. Peter Railroad Company, by a law passed after the adoption of the constitution, of the immunity from taxation originally granted to its predecessor, the Transit Railroad Company. First Div. St. Paul & P. R. Co. v. Parcher, 14 Minn. 297, (Gil. 224,) followed.—State v. Winona & St. P. R. Co., 21 Minn. 315; State v. Trustees of Southern M. R. Co., 21 Minn. 344.

15. Gen. Laws Minn. 1866, c. 3, as amended by Gen. Laws 1867, c. 49, providing for the issue of orders on city, county, or town treasurers for amounts paid by soldiers, or their wives, widows, or minor children, for taxes for paying bounties, to such persons, to be received for taxes due, or to become due, is unconstitutional, as being an attempt, by evasion, to exempt from taxation property of certain classes of persons which does not fall within any of the exemptions allowed by the constitution.—Le Duc v. City of Hastings, (Minn.) 38 N. W. 803.

39 Minn. 110.

16. Under Const. Minn. art. 9, §§ 1, 3, all property, of which exemption is not permitted, must be taxed, and no other exemptions are allowed than those specified in section 3.—Le Duc v. City of Hastings, 38 N. W. 803, 39 Minn. 110.

Indian reservations.

17. The state has no authority to levy taxes upon personal property within Indian reservations.—Foster v. Board of County Com'rs Blue Earth County, 7 Minn. 140, (Gil. 84.)

II. Taxable Property.

Real property—Land subject to easement.

18. The grantee of a tract of land conveyed by metes and bounds, with the reservation of a strip along one end for an alley, takes the fee of such strip, and he, and not the owner of the easement to which it is subject, is liable for taxes thereon.—Winston v. Johnson, (Minn.) 45 N. W. 958.

42 Minn. 398.

—— Riparian rights.

19. The right of a riparian owner on a navigable river to use the water flowing past his land is real estate for the purposes of taxation.—State v. Minneapolis Mill Co., 2 N. W. 839, 26 Minn. 229.

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Real property—Public lands.

20. After land was purchased from the United States by locating upon it a land-warrant, the warrant was canceled, and the issue of a patent was suspended, on the discovery that the assignment of the warrant was forged. Subsequently, the grantee of the locator substituted money for the warrant, and a patent was issued relating back to the original location. *Held* that, as against the grantee of the original locator, the land was subject to taxation by the state from the date of the original entry.—Wheeler v. Merriman, 15 N. W. 665, 30 Minn. 372.

21. A pre-emption claimant under the laws of the United States made final proof, paid for his land, and received from the proper officer a final receipt or certificate. Subsequently the commissioner of the general land-office suspended further proceedings in regard to such entry because of an irregularity in the method of making said final proof, and directed that further proof be submitted. *Held* that, as against the pre-emptor the land was subject to taxation from the date of the receipt, notwithstanding the fact that the order in respect to further proof had not been complied with.—State v. Hunter, (Polk County v. Hunter,) 44 N. W. 201, 42 Minn. 312.

—— Railroad grants.

22. Act Cong. July 2, 1864, (13 St. at Large, 365,) granted to the Northern Pacific Railroad Company certain land to aid in the construction of the road. The act provided that whenever 25 miles of the road should be completed, patents should issue for a proportionate part of the land granted. *Held*, that compliance with the terms of the grant divested the interest of the United States in the land, and the same became taxable under the state laws.—Counties of Cass, etc., v. Certain Lands, 9 N. W. 761, 28 Minn. 257.

23. The "railroad land grant" lands reserved and retained by the state, and subsequently sold by it, pursuant to the provisions of Sp. Laws Minn. 1877, c. 201, § 9, are subject to taxation in the hands of the grantees of the state; and no one but the United States can raise the question of the authority of the state to dispose of these lands for the purposes expressed in the act referred to.—Morrison County v. St. Paul & N. P. Ry. Co., (Minn.) 44 N. W. 982.

42 Minn. 451.

Personal property—Credits, trust funds, etc.

24. A mortgage debt is taxable as personal property, though the mortgagor be wholly insolvent, and payment depends solely on sale of the mortgaged property, and though such property is taxed at its full value to the mortgagor.—State v. Jones, 24 Minn. 251.

25. Credits due from a resident of Minnesota to a resident of another state, for moneys loaned and invested by an agent of the creditor resident in Minnesota, and which are managed and controlled by such agent, are taxable in Minnesota.—Washington County v. Estate of Jefferson, (In re Estate of Jefferson,) 28 N. W. 256, 35 Minn. 215; Jefferson's Ex'rs v. Washington County, Id.

Distinguishing City of St. Paul v. Merritt, 7 Minn. 258, (Gil. 198.)

26. Certain persons agreed in writing with a corporation to sell and convey to it certain described real estate for a sum named, of which a small portion was paid down. The corporation agreed in the same writing to pay the balance of the price on certain specified days, with interest, payable annually, and was given possession of the property. It also agreed to pay the taxes on said property *Held*, that the debt thus arising from the corporation purchaser was an assessable credit, under Gen. St. Minn. 1878, c. 11, § 4, defining "credits" as meaning and including "every claim and demand for money or other valuable thing, and every security or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due." GILFILLAN, C. J., dissents.—State v. Rand, (Minn.) 40 N. W. 835.

39 Minn. 502.

27. Under Gen. St. Minn. 1878, c. 11, § 3, and § 16, subd. 23, providing for the listing and taxation of "credits," a credit consisting of part of the purchase price of land formerly owned in common should not be listed as a whole against the vendors, even though they all live in the same taxing district, but the interest of each should be listed against him. On a citation against all the vendors to show cause why they should not pay the tax, it is error to enter judgment for the whole amount against those who were served and have appeared.—State v. Rand, (Minn.) 40 N. W. 835.

39 Minn. 502.

28. Under Sp. Laws Minn. 1877, c. 244, whereby the governor was authorized "to convey" certain lands to the Cannon River Manufacturing Association, for "the purpose of developing the water-powers and manufacturing resources" of Cannon river, taking back from the company a bond in a specified penal sum, "conditioned for the faithful application of the proceeds of said lands," the title to the lands and the proceeds thereof passed absolutely to said association, and such proceeds are not held by it as trustee; and therefore such proceeds while held by the association are subject to taxation.—Cannon River Manuf'g Ass'n v. Board County Com'rs of Rice County, 21 N. W. 738, 32 Minn. 516.

29. A corporation organized for the general purpose of the "purchase, shipment, storage, and sale of wheat and other cereals" was engaged only in buying wheat for distribution among its members, making no profit thereby. The business was conducted by a general agent, in accordance with its by-laws, which provided that all wheat wanted by the members of the association, who were all engaged in operating flouring-mills in a certain county, should be purchased by the general agent "for the association," and divided among the members in a certain proportion, each member to pay to the agent the money necessary for the purchase of his proper share. *Held*, that wheat purchased by the association with such moneys, and unexpended moneys remaining in its hands received for the same purpose, were taxable as the property of the corporation.—State v. Minneapolis Millers' Ass'n, 16 N. W. 151, 30 Minn. 429.

—— Mortgages and funds of building association.

30. Gen. St. Minn. 1878, c. 11, § 4, declares that "all claims and demands secured by deed or mort-

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gage, due or to become due," shall be subjects of taxation. Gen. Laws 1885, c. 78, § 22, provides that building associations shall list all their property, real and personal, for taxation, but that mortgages which are represented in their stock, and assessed as stock, shall not be assessed as mortgages. *Held*, that the mortgages are taxable as such where the stock of the association has not been taxed.—State v. Redwood Falls Building & Loan Ass'n, (Minn.) 47 N. W. 540.

45 Minn. 154.

31. Gen. Laws Minn. 1885, c. 78, § 22, provides that "the monthly installments deposited in building associations, and subject to withdrawal on demand, or on 30 or 60 days' notice, as provided by the by-laws of such associations, are an indebtedness which may be deducted" from their taxable property. *Held*, that such installments, when loaned out, are not so subject to withdrawal; and hence no deduction can be made on account of them.—State v. Redwood Falls Building & Loan Ass'n, (Minn.) 47 N. W. 540.

45 Minn. 154.

Personal property—Of non-residents.

32. Under Comp. St. c. 9, § 9, providing that every person shall be assessed in the district in which he resides for all taxable personal estate owned by him, or under his control in a fiduciary capacity, no tax can be assessed upon the personal property of a non-resident, except upon goods, wares, and merchandise kept for sale, stock employed in mechanic arts, and capital and machinery employed in some branch of manufactures or other business, as provided by section 10.—City of St. Paul v. Merritt, 7 Minn. 258, (Gil. 198.)

Distinguished in Re Jefferson's Estate, 28 N. W. 258, 35 Minn. 218.

33. The provision in the charter of the city of St. Paul (Laws Minn. 1858, c. 8, § 1) "that all property, real or personal, within the city, except such as may be exempt by the laws of the state, shall be subject to taxation for the support of the city government," does not change or extend the rule prescribed by Comp. St. Minn. c. 9, so as to permit the taxation of the property of non-residents.—City of St. Paul v. Merritt, 7 Minn. 258, (Gil. 198.)

34. Property belonging to non-residents, and consigned to agents in this state for purpose of sale, and not merely "to be stored or forwarded," (Laws Minn. 1860, c. 1, § 11,) was subject to taxation here.—McCormick v. Fitch, 14 Minn. 252, (Gil. 185.)

III. Exemptions.

Property of schools, universities, etc.

35. Gen. St. Minn. c. 11, § 5, exempts from taxation all public school-houses, academies, colleges, universities, and seminaries, "and the grounds attached to such buildings necessary for their proper occupancy, use, and enjoyment, and not leased or otherwise used with a view to profit." *Held*, that the mere use and occupancy of premises for educational purposes by a school or seminary, under a lease from the owner, do not entitle him to claim the benefit of the exemption.—State v. Bell, (County of Hennepin v. Bell,) 45 N. W. 615, 43 Minn. 344.

36. Laws Minn. 1854, c. 43, incorporating "Hamline University of Minnesota," provided that "all corporate property belonging to the institution, both real and personal, is and shall be free from taxation." *Held*, that this exemption applies to all property of the corporation which it lawfully might acquire and hold under the terms of the act, and is not limited to property actually used and occupied by it as a site for the university.—State v. Hamline University, (Minn.) 48 N. W. 1119.

46 Minn. 316.

37. Laws of the territory of Minnesota for 1854, c. 43, exempting the property of a university from taxation, were within the power of the territorial legislature to enact, and are binding on the state.—State v. Hamline University, (Minn.) 48 N. W. 1119.

46 Minn. 316.

Church property used for religious purposes.

38. Laws Minn. 1860, c. 1, § 3, subd. 1, as amended by Laws 1861, p. 16, exempting from taxation houses used exclusively for public worship, books and furniture therein, and grounds attached to such building, necessary for the proper occupancy, use, and enjoyment of the same, etc., does not extend to the parsonage of the church, though situated on the same lot as the church.—St. Peter's Church, Shakopee, v. Board of County Com'rs Scott County, 12 Minn. 395, (Gil. 280.)

39. Under Const. Minn. art. 9, § 3, exempting from taxation "churches, church property used for religious purposes, and houses of worship," a rectory or parsonage used primarily as the residence of the priest or minister is not exempt, though the children from the parish school are taken into the rectory for morning prayers, and the sewing society and Sunday-school teachers meet there, and the rector there hears recitations by classes from the school.—Ramsey County v. Church of the Good Shepherd, (Minn.) 47 N. W. 783. 45 Minn. 229.

40. A building occupied as the place of residence of a parish priest is not exempt from taxation as church property used for religious purposes.—In re Grace, 8 N. W. 761, 27 Minn. 503.

Property of charitable institutions.

41. A building on lot 10 in a certain block is used for a hospital for the benefit of the public generally. Those who are cared for in the hospital pay if they are able from $2 to $6 per week, according to their ability, and those who are not able to pay are cared for without charge. Patients who are a legal charge on the county are charged to the county at the rate of $6 per week. All the income derived from private and county patients and from private contributions is used in the maintenance of the hospital. Lots 8 and 9, adjoining lot 10 and in the same inclosure, are used in connection with the hospital as a garden, etc., solely for the convenience of the hospital, and not for profit. *Held*, that lots 8 and 9 are exempt from taxation under Gen. St. Minn. 1878, c. 11, § 5, which provides that "all buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institutions, not leased or oth-

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erwise used with a view to profit," shall be exempt from taxation.—In re Lots 8 and 9, etc., in Nelson's Addition, 8 N. W. 595, 27 Minn. 460.

42. A building used solely as a parochial school, where children of Roman Catholic parents are instructed in the common branches of education, and in the principles of the Catholic religion, without compensation, and where children of Protestant parents are also received and instructed on equal terms, with or without religious instruction, as such Protestant parents may desire, and a reasonable amount of land used in connection with such building as a playground for the children, is exempt from taxation as a "purely public charity" under Const. Minn. art. 9, § 3.—In re Grace, 8 N. W. 761, 27 Minn. 503.

IV. ASSESSMENT AND EQUALIZATION.

Estimate by county commissioners.

43. In their estimate of taxes for county purposes, the commissioners of a county undertook to set apart, as a separate and distinct fund, the amount estimated as necessary for a particular road. *Held*, that the validity of the estimate or levy of the tax was not affected thereby.—Board County Com'rs St. Louis County v. Nettleton, 22 Minn. 356; Same v. Smith, Id.

44. Parol evidence is competent to show the items of a gross estimate by county commissioners, for road purposes.—Board County Com'rs St. Louis County v. Nettleton, 22 Minn. 356; Same v. Smith, Id.

Duty of assessor on failure of owner, etc., to list property.

45. Gen. St. Minn. 1866, c. 11, § 27, authorizing the assessor to list a tax-payer's property who refuses or neglects to do so, embraces all classes of failure, neglect, or omission, from intent or otherwise, of parties to make true statements of all personal property, as required by said chapter 11, and whether required to make such return in their individual or a representative capacity.—Thompson v. Tinkcom, 15 Minn. 295, (Gil. 226.)

46. An assessor may add to his assessment and embrace in his return personal property omitted by the tax-payer from the list required by Gen. St. Minn. 1866, c. 11, § 6, to be furnished the assessor, under section 27, which authorizes the assessor himself to list the property of a tax-payer who refuses or neglects to furnish the assessor with a statement of the same.—Thompson v. Tinkcom, 15 Minn. 295, (Gil. 226.)

47. The omission of the assessor to enter in his return, opposite the name of any one failing or refusing to list his property, the remark, "Refused to list," etc., required by Gen. St. Minn. 1866, c. 11, § 27, in no way affects his power to add to the return for taxation any property so omitted.—Thompson v. Tinkcom, 15 Minn. 295, (Gil. 226.)

Return of assessment—Presumption.

48. From a return of an assessment for taxes in the hands of the proper officer, and valid on its face, the presumption is that the tax is valid, and it is for the tax payer to rebut such presumption.—Thompson v. Tinkcom, 15 Minn. 295, (Gil. 226.)

—— Correction by auditor.

49. The plaintiff, a church corporation, was the owner of two town lots lying contiguous, upon the south end of which it built, in 1861, a parsonage, and some time in 1862 moved its church from another lot onto the north end. Taxes were assessed for 1861 and 1862 on both lots, and in 1863 and 1865 on the south half. Under Act Minn. 1860, c. 1, the assessor, in his biennial assessment, was required to state, where part of a lot was assessed, the number of feet on the principal street upon which it abutted, and to annually return a list of the real property becoming subject to taxation since his previous listing. Power was also given to the auditor to correct errors in the valuation, description, etc., and in case of omissions of land by the assessor to place the same on his list, and notify the assessor, who was then to ascertain the value, and upon his failure the auditor could do so. *Held*, that the provision in regard to the assessor describing land by reference to the number of feet on the principal abutting street only applied to biennial assessments, and the whole of the lots being properly assessed in 1865, and a portion thereof becoming exempt, the remainder could be returned in his annual list by any particular description; but upon his failure the auditor could properly place them on his list by any sufficient description.—St. Peter's Church, Shakopee, v. Board of County Com'rs Scott County, 12 Minn. 395, (Gil. 280.)

Assessment by auditor.

50. A determination by the proper authority of the purposes for which taxes should be raised for a given period, and fixing the rate or specifying the aggregate amount to be raised, constitutes a levy of the tax upon the district; but until the same is assessed by the auditor equally upon all property subject to taxes, and extended on the duplicate, there is no specific tax in existence.—McCormick v. Fitch, 14 Minn. 252, (Gil. 185.)

Description of property in assessment roll.

51. Under Laws Minn. 1860, c. 1, §§ 18, 19, requiring an assessor not only to assess but to list property whereof the owner neglects or refuses to return a statement, an assessment of a quantity of wheat as "household goods" is invalid and void.—Thompson v. Davidson, 15 Minn. 412, (Gil. 333.)

52. The description of land in an assessment roll was understood by both the owner and the assessor to include an entire farm belonging to the former, and the assessment and valuation were made accordingly in his name, and the taxes so levied were thereafter duly paid by him. *Held*, that the entire tract was discharged from any claim or lien of the state upon any part thereof for such taxes, although the description in fact covered only a portion of the farm.—Meller v. Hodsdon, 23 N. W. 543, 33 Minn. 366.

53. In a town consisting of lots and blocks, a description of the property assessed as the south half of a certain numbered lot in a certain numbered block sufficiently designates premises con-

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sisting of a parsonage erected on the south half of a lot, upon which a church was erected.—St. Peter's Church, Shakopee, v. Board of County Comr's Scott County, 12 Minn. 395, (Gil. 280.)

Board of review—Equalization.

54. Under Rev. St. Minn. 1851, p. 100, § 23 et seq., providing for the examination of the assessment rolls and the equalization of assessments by the county commissioners, the equalization and correction of the assessment rolls was essential to a valid tax, and an omission thereof rendered the assessment void.—Board of County Com'rs Dakota County v. Parker, 7 Minn. 267, (Gil. 207.)

55. A block of land was assessed as one tract,—$1,800 for the land, and $800 for the improvements, nearly all of which were on one-third of the block. The owner of that portion paid nine twenty-sixths of the tax, and the tax on his third was canceled. The remaining two-thirds were returned delinquent, and sold for the remainder of the tax. *Held*, that the sale was void, for the assessment was a violation of Const. Minn. art. 9, § 1, requiring taxes to be equal, and levied on a cash valuation.—Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

56. A county board of equalization, when assembled as required by Laws 1874, c. 1, § 69, requiring them to meet "on the fourth Monday in July annually, * * * and continue in session during that week if necessary" for the purpose of equalization, must continue in session until the equalization is completed, and an adjournment, except from day to day, is an irregularity that will let in the defense that the tax was "partially, unfairly, and unequally assessed," to the prejudice of the objecting party, as provided in Laws 1874, c. 1, § 119.—Board County Com'rs St. Louis County v. Nettleton, 22 Minn. 556; Same v. Smith, Id.

57. Gen. St. Minn. 1878, c. 11, § 39, requires that the board of tax review shall meet on the fourth Monday of June, shall immediately proceed to examine and correct the assessment, and may adjourn from day to day until they finish the hearing of all cases presented on that day. The assessors are required to return their assessment books to the county auditor on or before the first Monday in July. *Held* that, as to time, the statute is directory merely, and where plaintiff, in response to a notice from the board, appeared on the day after the first Monday in July, and requested a delay of three days, which was granted, and a hearing then had, he cannot complain of the late action of the board.—Faribault Water-Works Co. v. Board County Com'rs, (Minn.) 46 N. W. 143.

44 Minn. 12.

58. One who appears before a board of tax equalization in response to a notice of intention to increase the valuation of his personal property cannot afterwards object to the sufficiency of the notice.—Faribault Water-Works Co. v. Board County Com'rs, (Minn.) 46 N. W. 143.

44 Minn. 12.

59. Where a board of equalization increased an assessment of personal property under the classification in which it was returned by the owner, the latter cannot complain that it was improperly classified.—Faribault Water-Works Co. v. Board County Com'rs, (Minn.) 46 N. W. 143.

44 Minn. 12.

V. Collection and Payment—Penalties.

Authority of officers.

60. Under Act March 9, 1860, prescribing the duties of county treasurers, the county treasurer of Ramsey county has the authority to collect the city taxes of the city of St. Paul, as well delinquent as other taxes, and is entitled to the sale books and record of sales of lands sold for taxes of said city.—Morgan v. Smith, 4 Minn. 104, (Gil. 64.)

Verification of list filed with clerk.

61. A defect in the verification of the tax-list filed with the clerk of the court does not affect the jurisdiction of the court over the proceeding.—Bennett v. Blatz, (Minn.) 46 N. W. 319.

44 Minn. 56.

Certificate of auditor to tax-list.

62. A tax duplicate, duly certified by the county auditor, as required by Gen. St. Minn. 1878, c. 11, § 52, apparently to give such duplicate greater authenticity, is *prima facie* evidence of the due levy of the taxes included in it. Distinguishing Howes v. Gillett, 23 Minn. 231.—Washington County v. Estate of Jefferson, (In re Estate of Jefferson,) 28 N. W. 256, 35 Minn. 215; Jefferson's Ex'rs v. Washington County, Id.

Publication of tax-list.

63. The charter of the city of St. Anthony (Sp. Laws Minn. 1859-60, c. 8, § 13) provided that the collector of taxes should give notice by publication in the official paper of the city of the receipt of the tax-list by him, requiring payment to be made within 30 days, and made such publication equivalent to a personal demand, and failure to pay equivalent to a refusal to pay. *Held*, that where no personal demand was made, or notice by publication given, the taxes could not be delinquent, and proceedings for their enforcement as delinquent were therefore void.—St. Anthony Falls Water-Power Co. v. Greely, 11 Minn. 321, (Gil. 225.)

Payment.

64. An owner of land may pay the tax thereon for the current year and contest the taxes claimed to be against it for previous years.—In re Barber, (Olmsted County v. Barber,) 17 N. W. 473, 31 Minn. 256; In re Sedgewick, (Olmsted County v. Sedgwick,) Id.

65. Where taxes on property taxable only to a corporation have been assessed to and paid by individual members of the association, payment thereof by the corporation cannot be required.—State v. Minneapolis Millers' Ass'n, 16 N. W. 151, 30 Minn. 429.

Receipts.

66. Tax-receipts acknowledged payment of taxes upon a subdivision of a governmental tract, the description of which was followed by the words "Exc. Oakland," or "Ex. Lots." *Held* that, in the absence of any explanation of the meaning of these words, the receipts should not be taken as evidence of payment of taxes upon the whole body of land described.—Knight v. Valentine, 24 N. W. 295, 34 Minn. 26.

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67. Receipts of a county treasurer, acknowledging payments in full for redemption of land from all delinquent taxes and tax-liens for the years specified, have not the effect of the payment of taxes for other years, not actually paid; there being no proof that the party was misled, or that he supposed that he was paying all the taxes charged upon the land.—Knight v. Valentine, 24 N. W. 295, 34 Minn. 26.

Distinguishing Forrest v. Henry, 23 N. W. 848, 33 Minn. 434.

Penalties for non-payment.

68. Under Laws Minn. 1862, c. 4, a penalty for non-payment of taxes is the legal rate of interest on the amount of the tax and costs, which may be collected, under such chapter, in the same manner as the taxes.—Baker v. Kelley, 11 Minn. 480, (Gil. 358.)

69. "Penalties" for non-payment of taxes can only be imposed after the tax-payer has had an opportunity to pay, and fails to do so. Hence, where part of a tax is illegal, and the party has had no opportunity of paying the legal part alone, and he interposes and maintains a defense to the illegal part, the 10 and 5 per cent. penalties previously imposed under section 69 of the general tax law (Minn.) as amended, 1885, were wholly unauthorized and invalid, (the party not having been then in default,) and no part of them should be included in the judgment.—State v. Certain Lands in Redwood County, (Redwood County v. Winona & St. P. Land Co.,) 42 N. W. 473, 40 Minn. 512.

70. Gen. St. Minn. 1878, c. 11, § 113, as amended by Laws 1881, c. 5, § 1, providing for assessing taxes on property for past years in which such taxes had not been assessed, does not authorize the including in such assessment of penalties for such years.—State v. Winona & St. P. Land Co., (Brown County v. Winona & St. P. Land Co.,) 40 N. W. 166, 39 Minn. 380; State v. Winona & St. P. Land Co., (Redwood County v. Winona & St. P. Land Co.,) 41 N. W. 465, 40 Minn. 512.

Liability of sheriff for uncollected taxes.

71. The general tax law of Minnesota (section 62) provides that if a sheriff shall refuse or neglect to collect any personal property tax, or to file the list of delinquent taxes as prescribed, he shall be liable for the whole amount of uncollected taxes. Section 60 provides that no omission of anything required to be done by any officer prior to the issue of citation to delinquents shall invalidate taxes, unless such omission has prejudiced the party objecting. *Held*, that the mere failure of a sheriff to file the list of delinquent taxes until after the time prescribed by law would not make him liable for the uncollected taxes.—Gutches v. Board County Com'rs, (Minn.) 46 N. W. 673.

44 Minn. 383.

Enforcement of delinquent personal property taxes.

72. Query, whether a tax is a debt, and, in the absence of express statutory authority, can be collected in an action at law?—City of Faribault v. Misener, 20 Minn. 396, (Gil. 347.)

73. The county treasurer may, upon delinquent list of personal taxes being delivered to him for collection, proceed to collect the same by distress or otherwise, as if upon a duplicate. Gen. St. Minn. c. 11, § 75.—Piper v. Branham, 14 Minn. 548, (Gil. 418.)

74. An order sustaining a demurrer to an answer filed by a defendant in response to an issue under the provisions of Laws Minn. 1874, c. 1, in proceedings for the enforcement and collection of a personal property tax, is not appealable; the mode of review in such case being provided by the general tax-law, (Laws Minn. 1874, c. 1, § 120.)—State v. Jones, 24 Minn. 86.

75. Under Gen. St. Minn. 1878, c. 11, § 80, providing that a tax judgment may be reviewed on a certificate by the court below of the facts and its decision, a tax judgment can be reviewed only on such certificate. Following State v. Jones, 24 Minn. 86.—County of Washington v. German-American Bank, 10 N. W. 21, 28 Minn. 360.

VI. Remedies for Erroneous Taxation.

Restraining collection.

76. The collection of a personal tax will not be restrained at the suit of a private person unless there is some special circumstance attending it, showing that plaintiff has no adequate remedy at law, or that such remedy is practically valueless.—Clarke v. Ganz, 21 Minn. 387; Bradish v. Lucken, 36 N. W. 454, 38 Minn. 186.

77. In proceedings to restrain the collection of a personal tax, the complaint alleged that defendant, the collector, was about to proceed to enforce the tax by levy and sale of plaintiffs' personal property, thereby subjecting plaintiffs to great injury, costs, and expenses, and involving them in expensive and vexatious litigation, and multiplicity of suits, in order to keep control of their property and prevent an unjust sacrifice thereof. *Held*, that the complaint did not state traversable facts, entitling the party to an injunction, but only an inference as to the consequences of the threatened levy.—Clarke v. Ganz, 21 Minn. 387.

Certiorari.

78. Proceedings for the collection of a tax, equally affecting all tax-payers of a town, should not ordinarily be arrested by a *certiorari*, prayed by a part only, without notice to the others, or their having an opportunity to be heard.—Libby v. Town of West St. Paul, 14 Minn. 248, (Gil. 181.)

Distinguished in Sinclair v. Commissioners of Winona County, 23 Minn. 407.

Action to recover taxes paid.

79. An action will lie against a county to recover taxes illegally assessed and received into its treasury.—Foster v. Board of County Com'rs Blue Earth County, 7 Minn. 140, (Gil. 84.)

80. Where, in settlement with a tax collector, the county charges him with the taxes illegally collected, it will be liable for the amount to the person from whom they were so collected.—Board of County Com'rs Dakota County v. Parker, 7 Minn. 267, (Gil. 207.)

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81. In a proceeding attacking the validity of a tax, it is to be presumed legal, and the burden of showing its illegality is upon the plaintiff.—St. Peter's Church, Shakopee, v. Board of County Com'rs Scott County, 12 Minn. 395, (Gil. 280.)

82. Since, under Gen. St. 1878, c. 11, § 8, personal property is to be assessed for taxation at the place of residence of the owner, the action of taxing officers, in assessing to the owner, for the purposes of taxation at the place of his residence, personal property which is in another county, and has been there properly assessed, by reason of its relation to the business carried on by the owner in the latter county, is not void for want of jurisdiction, but erroneous merely, and can only be remedied by the mode of procedure prescribed by the statute.—Clarke v. Board County Com'rs Stearns County, (Minn.) 50 N. W. 615.

47 Minn. 552.

Action to test validity of forfeiture to state.

83. In an action under Gen. St. 1866, c. 11, § 154, as amended by Laws 1869, c. 23, to test the validity of a forfeiture of lands to the state for the non-payment of taxes, it will be presumed, in the absence of evidence to the contrary, that the title to such lands remains in the state, and it is not necessary to aver that the same have not been purchased from the state.—Willard v. Board County Com'rs Redwood County, 22 Minn. 61.

Estoppel.

84. An owner of property is not estopped by failure to object to an assessment thereon which the assessor has no authority to make.—City of St. Paul v. Merritt, 7 Minn. 258, (Gil. 198.)

VII. Lien.

Time of attaching.

85. Under Comp. St. Minn. c. 9, § 98, which provides that "all taxes assessed on any tract or parcel of land * * * shall be a lien on such land till paid," the lien of the state for taxes, embraced in Laws Minn. 1862, c. 4, attached to the real estate when such taxes were assessed thereon, or the amount was fixed and determined, and a separate lien was acquired for each year's taxes.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

VIII. Sale for Non-Payment.

Jurisdiction.

86. Where a list of delinquent taxes is actually filed by the county auditor with the clerk of the district court, as required by Laws 1874, c. 1, no defect in the affidavit verifying such list will operate to affect the jurisdiction of the court in the tax proceeding.—Board County Com'rs Mille Lacs County v. Morrison, 22 Minn. 178.

87. Where proceedings for a sale of land for taxes are authorized by the fact that the taxes thereon are delinquent, error in the amount of tax included in the published list and in the judgment is not jurisdictional, and does not affect the validity of the judgment; Gen. St. Minn. 1878, c. 11, § 73, expressly providing that such mistakes shall not affect the jurisdiction of the court, and section 75 providing that the owner may interpose on such ground by way of answer or objection.—Kipp v. Dawson, 17 N. W. 961, 18 N. W. 96, 31 Minn. 373; Coffin v. Estes, 20 N. W. 357, 32 Minn. 367.

88. Where a tax-sale of land has been properly made as respects a delinquent tax for a particular year, the fact that it has been made also, and improperly, for the paid tax of another year, goes not to the jurisdiction of the court to enter the judgment, but to its amount. The effect is the same as that of an overstatement of the tax for which judgment was properly rendered.—Stewart v. Carter, 18 N. W. 98, 31 Minn. 385.

89. In a proceeding to sell land for non-payment of taxes, the fact that the land is exempt from taxation does not deprive the court of jurisdiction, as that is one of the questions to be decided.—In re St. Paul & D. R. Co., (Chisago County v. St. Paul & D. R. Co.,) 6 N. W. 454, 27 Minn. 109.

90. In proceedings under Gen. St. Minn. 1878, c. 11, § 70, to enforce payment of taxes against real estate, the fact that the taxes upon such real estate have been previously paid does not affect the jurisdiction of the court, or render a judgment and sale for taxes void. Following In re St. Paul & D. R. Co., 6 N. W. 454, 27 Minn. 109.—Chauncey v. Wass, 25 N. W. 457, 30 N. W. 826, 35 Minn. 1.

91. The rule was not changed by the amendment of Gen. St. 1878, c. 11, § 97, by Laws 1881, c. 10, § 19, providing for the refunding of the amount paid on the sale or assignment from the state, without a judgment declaring the sale void.—Chauncey v. Wass, 25 N. W. 457, 30 N. W. 826, 35 Minn. 1.

92. The court acquires no jurisdiction to render a tax judgment against land if the published tax-list and notice by which judicial proceedings are sought to be instituted does not describe the land, and a judgment rendered upon a publication so defective is void, and the statute of limitations is inapplicable.—Smith v. Kipp, (Minn.) 51 N. W. 656.

Limitation.

93. Gen. St. Minn. c. 66, providing that the limitations "shall apply to the same actions when brought in the name of the state, or in the name of any officer or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens," (section 12,) and naming the several classes of actions, none of which are analogous to proceedings to enforce payment of taxes, is inapplicable to such proceedings.—State v. Webber, (County of Brown v. Winona & St. P. Land Co.,) 37 N. W. 949, 38 Minn. 397.

Overruled in State v. Certain Lands in Redwood County, (Redwood County v. Winona & St. P. Land Co.,) 42 N. W. 474, 40 Minn. 512. See note.

94. Gen. St. Minn. 1878, c. 66, § 12, provides that the limitations prescribed "shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens." Section 6 prescribes

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the limitation for "actions upon a liability created by statute" at six years. *Held*, that proceedings under the tax law to obtain judgment against the land are an "action upon a liability created by statute," and the six-years limitation applies. Overruling State v. Webber, 38 Minn. 397, 37 N.W. 949.—State v. Certain Lands in Redwood County, (Redwood County v. Winona & St. P. Land Co.,) 42 N. W. 473. 40 Minn. 512.

Delinquent list — What taxes included.

95. In proceedings to enforce payment of taxes against real estate under Gen. St. Minn. 1878, c. 11, § 79, which makes the delinquent list filed with the clerk *prima facie* evidence that the provisions of law in relation to the assessment and levy of taxes have been complied with, the list is evidence of the validity of the taxes therein contained, not only as to the taxes become delinquent in the current year, but as to all authorized to be placed upon it; but the facts authorizing the insertion in it of taxes for previous years must be proved, and, with regard to taxes refunded on the setting aside of a sale therefor authorized to be included in the next delinquent list by section 97, as amended by Laws 1881, c. 10, § 19, such tax may be so included, although there is no tax becoming delinquent in the current year.—In re Barber, (Olmsted County v. Barber,) 17 N. W. 473, 31 Minn. 256; In re Sedgewick, (Olmsted County v. Sedgwick,) Id.

96. The provision of Gen. Laws Minn. 1881, c. 135, § 1, for making a list of all taxes upon real estate which became delinquent in or prior to the year 1879, "at the time of making the list of delinquent taxes for the present year," refers to the time of making the delinquent list for the taxes of 1880, to be made in the year 1881, not to the taxes of 1881.—Knudson v. Curley, 15 N. W. 873, 30 Minn. 433; Kipp v. Dawson, 17 N. W. 961, 18 N. W. 96, 31 Minn. 73.

97. Taxes for several years, regularly assessed and levied and delinquent, but omitted from the delinquent lists for the proper years, filed with the clerk of the court, may be included in such delinquent list for a subsequent year.—State v. Webber, (County of Brown v. Winona & St. P. Land Co.,) 37 N. W. 949, 38 Minn. 397.

—— Certification.

98. Sp. Laws Minn. 1864, c. 18, providing for the return and collection of delinquent taxes in the city of St. Anthony, required that the city clerk should return to the county auditor a list of all taxes for certain years that were "unpaid and delinquent," etc., such list to be signed by the clerk, and certified by him and the mayor as a true and correct list of all "taxes assessed and levied in the said city, remaining delinquent and unpaid for the different years, as stated in said return." *Held*, that a list of taxes "delinquent or unpaid," even if properly certified by the clerk and mayor, did not comply with the statute, and was insufficient to authorize a sale of land by the auditor under such act.—St. Anthony Falls Water-Power Co. v. Greely, 11 Minn. 321, (Gil. 225.)

—— Delivery to auditor for publication.

99. It is not necessary that the original of the notice required by Laws Minn. 1881, c. 135, § 71, to be attached to a copy of the list given to the auditor for publication by the clerk of the court should be filed by the clerk in his office.—Bennett v. Blatz, (Minn.) 46 N. W. 319.

44 Minn. 56.

—— Designation of newspaper for publication.

100. Under Laws Minn. 1874, c. 1, § 112, providing that a copy of the delinquent tax-list, together with a notice attached thereto, shall be published in a newspaper to be "designated by resolution of the board of county commissioners of the county in which the taxes are levied, at their annual meeting," failure to make such designation vitiates the tax judgment rendered in the proceedings.—Eastman v. Linn, 2 N. W. 693, 26 Minn. 215.

101. The adoption by the board of a resolution "to give the printing of the delinquent tax-list to D., editor of the Litchfield News-Ledger," is not such a designation as is contemplated by the statute.—Eastman v. Linn, 2 N. W. 693, 26 Minn. 215.

102. The Minneapolis Tribune Company published two newspapers, one called the "Minneapolis *Daily* Tribune," and the other the "Minneapolis *Weekly* Tribune." The county board, acting under Gen. Laws Minn. 1874, c. 1, § 112, designated the Minneapolis Tribune as the paper in which the delinquent list and notice should be published. The publication was made in the Minneapolis Weekly Tribune. *Held*, that there was no sufficient designation of the newspaper, and no legal publication of the list and notice.—Russell v. St. Paul, M. & M. Ry. Co., 31 N. W. 692, 36 Minn. 366.

Distinguished in Fairchild v. City of St. Paul, 49 N. W. 327, 46 Minn. 547.

103. A resolution of the county commissioners designating "The Enterprise" as a newspaper for the publication of a delinquent tax-list, is a sufficient designation of the "Glencoe Enterprise;" that being the only newspaper bearing that name published in the county.—Knight v. Alexander, (Minn.) 37 N. W. 796.

38 Minn. 384.

104. Under Gen. Laws Minn. 1874, c. 1, § 136, providing that the county commissioners shall designate the newspaper making the lowest bid as the one in which the delinquent tax-list is to be published, the commissioners may designate one of several papers, whose bids are the same and lower than any other made.—Godfrey v. Valentine, (Minn.) 48 N. W. 325.

45 Minn. 502.

105. Under Gen. Laws. Minn. 1874, c. 1, § 111, providing that a certain notice shall be attached to the delinquent tax-list, and section 112, providing that both the list and the notice shall be published in a newspaper designated by the county commissioners, the notice need not be specifically mentioned in a resolution designating the newspaper in which the list is to be published.—Godfrey v. Valentine, (Minn.) 48 N. W. 325.

45 Minn. 502.

106. Under the Minnesota statutes, a tax judgment is void for want of jurisdiction when no

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newspaper had been designated in which to publish the delinquent list, and the absence of such designation may be proved by showing that there is no record on file in the office of the county auditor or the clerk of court of such designation.—Brown v. Corbin, 42 N. W. 481, 40 Minn. 508; Russell v. St. Paul, M. & M. Ry. Co., 31 N. W. 692, 36 Minn. 366; Merriman v. Knight, 45 N. W. 1098, 43 Minn. 493.

Distinguishing Bower v. O'Donnall, 12 N. W. 352, 29 Minn. 135.

107. The provision of Laws Minn. 1881, c. 135, § 1, for the sale of land for non-payment of taxes, requiring that the forfeited list shall be appended to the delinquent list, necessarily implies that the two shall be published together in the same newspaper, and a designation of the newspaper in which the delinquent list shall be published is sufficient for both.—Kipp v. Dawson, 17 N. W. 961, 18 N. W. 96, 31 Minn. 373.

108. Under Laws Minn. 1881, c. 135, providing that "the same proceedings shall be had with reference to advertisement, judgment, and sale of the property described" in the forfeited tax-lists as are required by the general tax-law in regard to property described in the regular delinquent lists, the omission of the county auditor to designate a newspaper for the publication of the delinquent list does not affect the validity of the publication of the forfeited list in the newspaper separately designated for the publication thereof, it being appended to the delinquent list; nor is the validity of such publication affected by the fact that the delinquent list was followed by a separate verification, and a separate heading and summons for the forfeited list.—Coffin v. Estes, 20 N. W. 357, 32 Minn. 367.

109. A resolution passed by a county board in January, 1884, designating the newspaper in which "the real estate delinquent tax list for the year 1883" should be published, means the list of delinquent taxes for 1883, and not of taxes for 1882, which had become delinquent in 1883.—Reimer v. Newell, (Minn.) 49 N. W. 865.
47 Minn. 237.

110. A certified copy of the resolution of the county board, designating the newspaper in which the delinquent tax list shall be published, is all that is required by Gen. St. Minn. c. 11, § 72, to be filed with the clerk of the district court; and it is not necessary to file a copy of the proceedings of the board showing the vote by which it was passed, and the validity of its passage.—Reimer v. Newell, (Minn.) 49 N. W. 865.
47 Minn. 237.

111. The mere fact that a newspaper, designated by the county board as the paper in which the delinquent tax list shall be published, changes its name between the time of the designation and the time of the publication of the list, does not destroy the identity of the paper, and render the publication invalid.—Reimer v. Newell, (Minn.) 49 N. W. 865.
47 Minn. 237.

112. Sp. Laws Minn. 1877, c. 205, which requires the county commissioners of Hennepin county, "on the first Monday in January," to designate the newspaper in which the delinquent tax-list shall be published, is, as to Hennepin county, a substitute for prior general statutes requiring county commissioners to make such designation on the "first Tuesday in January."—Reimer v. Newell, (Minn.) 49 N. W. 865.
47 Minn. 237.

113. Failure of the county commissioners to designate the newspaper in which the delinquent tax list shall be published as required by Laws 1874, c. 1, § 112, though going to the jurisdiction of the court over proceedings to enforce payment under that act, is not matter of defense to be set up by answer, but the objection should be raised before answer, by objection, or motion to dismiss the proceedings.—Board County Com'rs Houston County v. Jessup, 22 Minn. 552.

Delinquent list — Restraining publication.

114. Injunction, and not *certiorari*, is the proper remedy, and will be granted, at the suit of an individual tax-payer of the county, to restrain the publication of the delinquent tax-list in an unauthorized newspaper, or in a paper which, though designated by the commissioners, is not a legal newspaper.—Sinclair v. Board County Com'rs Winona County, 23 Minn. 404.

Distinguishing Scribner v. Allen, 12 Minn. 148, (Gil. 85;) Libby v. Town of West St. Paul, 14 Minn. 248, (Gil. 181.)

—— Sufficiency of publication.

115. The jurisdiction of the district court to render judgment against lands for delinquent taxes under Laws Minn. 1874, c. 1, depends on the publication of notice to all persons interested therein, as prescribed by section 111, amended by Laws 1875, c. 5, § 25, requiring them to file answers within 20 days from the last publication; and a notice requiring the filing of such answers within 10 days is insufficient to confer jurisdiction.—Board Com'rs Stearns County v. Smith, 25 Minn. 131.

116. The provision of Gen. St. Minn. 1878, c. 11, § 72, as to the time within which the county auditor shall cause the delinquent list to be published, is directory only, not mandatory, being in no way intended for the benefit of the tax-payer, but merely to insure the publication in time to allow the remaining proceedings to be had according to law. Hence the fact that the first publication of such list was made on July 22d, instead of July 15th, as required by statute, does not affect the validity of the judgment; the requisite two weeks' notice of application for judgment having been given.—Kipp v. Dawson, 17 N. W. 961, 31 Minn. 373.

117. Under Gen. Laws Minn. 1874, c. 1, § 111, requiring notice to be "attached" to the list of taxes delinquent, it is not material whether it precedes or follows the list, if it be attached to it when published.—Chouteau v. Hunt, (Minn.) 46 N. W. 341. 44 Minn. 173.

118. A certificate of sale upon a tax judgment entered in 1876, for taxes of 1875, where the record shows that the clerk's notice attached to the delinquent list, requiring all persons interested to file their answers, stating objections, etc., within "ten," instead of "twenty," days, as required by Gen. Laws Minn. 1874, c. 1, § 111, as amended by

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Laws 1875, c. 5, § 25, then in force, is void. Following County of Stearns v. Smith, 25 Minn. 132.—West v. St. Paul & N. P. Ry. Co., (Minn.) 41 N. W. 1031.

40 Minn. 189.

119. The affidavit of the auditor returned with the list of taxes delinquent is no part of the list, and need not be published with it.—Chouteau v. Hunt, (Minn.) 46 N. W. 341.

44 Minn. 173.

120. Laws Minn. 1881, c. 135, § 1, provides that at the time of making out the list of delinquent taxes for that year the county auditor shall make out and append to such list a list of all taxes which appeared to have become delinquent in 1879 or any prior year. *Held* that, where there was a publication of the list of forfeited lands for the taxes of 1879, and prior years, preceded by the proper notice, and followed by proper verification, the mere fact that such list was separated from the delinquent list for 1881 by a half a column of reading matter did not invalidate the publication.—McQuade v. Jaffray, (Minn.) 50 N. W. 233.

47 Minn. 326.

—— Proof of publication.

121. Where the delinquent tax list is filed with the clerk of the district court, and the list and notice prescribed by Laws 1874, c. 1, are published as thereby required, the court has jurisdiction of such proceedings, although no affidavit of such publication is filed; and the court may, at any time before judgment, allow proof of the publication to be filed.—Board County Com'rs Mille Lacs County v. Morrison, 22 Minn. 178.

122. An affidavit of the publication of the delinquent tax-list was attached to a copy of the M. Weekly Tribune, which contained a printed tax-list, and stated that the affiant was, during all the time mentioned in the affidavit, foreman and printer in the office of the Weekly Tribune, a newspaper printed and published at the city of M., and that, of his own personal knowledge, the delinquent tax-list, a printed copy of which is herewith filed, (in the copy of the M. Weekly Tribune, attached to the affidavit,) was printed and published for three successive weeks, giving the three dates of publication, one of which is the date of the copy of the newspaper attached. *Held*, that though the affidavit does not expressly state that the tax-list was published in the Weekly Tribune, that fact fairly appears from what is expressly stated, and the affidavit is sufficient under the laws of Minnesota relating to sales for delinquent taxes.—Irwin v. Pierro, (Minn.) 47 N. W. 154.

44 Minn. 490.

—— Name of owner.

123. In Minnesota, proceedings to enforce the collection of real-estate taxes are purely *in rem;* and hence Gen. St. Minn. 1878, c. 11, § 70, and Laws 1881, c. 135, § 1, requiring the owner's name to be given in the published list of delinquent taxes, and, if unknown, to state that fact, are merely directory; and an erroneous statement of the owner's name in such list will not avoid the tax judgment, where the land itself has been correctly described.—McQuade v. Jaffray, (Minn.) 50 N. W. 233.

47 Minn. 326.

Delinquent list—Description of land.

124. In tax proceedings, a designation or description of land by which it is commonly known is sufficient, although it be not technically or properly exact. The question whether the land is commonly known by such designation or description is a question of fact.—Gilfillan v. Hobart, 24 N. W. 342, 34 Minn. 67.

125. The purpose of the description of property in tax proceedings being to point it out distinctly, a description which leaves the public no room for mistake as to what property is intended is sufficient, although it is not the literally exact description found in the records; and testimony to identify such a description with the technically proper description is admissible, but must be such as to show that they necessarily refer to the same property.—Stewart v. Carter, 18 N. W. 98, 31 Minn. 385.

126. In a delinquent tax-list, figures placed in perpendicular columns, without any heading, to show what they refer to, do not constitute a sufficient description of the property upon which the taxes are claimed to be due.—Knudson v. Curley, 15 N. W. 73, 30 Minn. 433.

127. A published tax-list, under the Minnesota delinquent tax law of 1881, describing certain fractions of tracts of land indicated by numerals, under the column-heading "Lots," is not applicable and sufficient, as a description of parts of *sections* of land.—Kipp v. Fernhold. (Minn.) 33 N. W. 697. 37 Minn. 132.

128. A judgment against designated fractions of *sections*, entered upon the publication of such a tax-list, is void for want of jurisdiction, and does not set in operation the statute of limitations.—Kipp v. Fernhold, 33 N. W. 697, 37 Minn. 132.

129. The description in a published delinquent tax-list, "N ½ N E ¼ S E ¼ N E ¼ N E ¼ of N W ¼ section 23, township 114, range 30, 160 acres," does not sufficiently describe the N. ½ of the N. E. ¼, the S. E. ¼ of the N. E. ¼, and the N. E. ¼ of the N. W. ¼ of that section.—Knight v. Alexander, (Minn.) 37 N. W. 796.

38 Minn. 384.

130. In the publication of a delinquent tax-list, at the bottom of the ninth column, were the words, "Town 32, range 21." The land in controversy was located in said town and range, and its description appeared at the head of the tenth column, but no town and range were given. Lower down in the tenth column, and extending across it, were the words, "Town 32, range 22." *Held*, that the description of the land was not sufficiently certain to uphold a title claimed to have been acquired at the tax-sale.—Olivier v. Gurney, (Minn.) 44 N. W. 887.

43 Minn. 69.

131. Where certain tracts of land had been known as "Hoyt's Outlots" since 1852, and a plat was filed on which they were delineated and numbered, it was sufficient in tax proceedings to describe them as in "Hoyt's Outlots."—Godfrey v. Valentine, (Minn.) 48 N. W. 325.

45 Minn. 502.

132. In tax proceedings against an irregularly shaped tract of land, which could be described

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only by metes and bounds, a plat was made and recorded, and the tract in question was designated in the tax proceedings as "lot No. 2" of a certain governmental subdivision. The plat recorded embraced several tracts of land, and did not indicate any particular tract as "lot No. 2," nor show upon its face any means of ascertaining or identifying the tract referred to in the certificate as lot 2. *Held*, that this defective plat was not a compliance with Gen. St. Minn. 1878, c. 11, § 108, providing for the making and recording of such a plat in tax proceedings, and that "the description of the property in accordance with the number and description set forth in such plat shall be deemed a good and valid description of the lot or parcels of land so described," and that a judgment and sale founded on such proceedings was of no effect.—Williams v. Central Land Co., 21 N. W. 550, 32 Minn. 440.

133. In the publication of a list of lands to be sold for delinquent taxes, it is a sufficient description of the land to state the township and range in headings or cross-lines, instead of opposite the descriptions of the subdivisions of sections, provided it clearly appears from the published list whether the cross-line refers to the descriptions following or those preceding it. Olivier v. Gurney, 43 Minn. 69, 44 N. W. 887, distinguished.—McQuade v. Jaffray, (Minn.) 50 N. W. 233.

47 Minn. 326.

Delinquent list—Statement of amount.

134. The same strictness as to definiteness and certainty is not required in the statement of the amount of tax against a tract of land in the published list (which is merely notice to the landowner) as is required in the judgment which is the final determination of the law as to the amount to be enforced against the land.—Collins v. Welch, 35 N. W. 566, 38 Minn. 62.

135. In the published list at the head of the column denoting the amounts of taxes due there was a dollar-mark, and throughout this and each succeeding column denoting the amounts of such taxes the last two figures of each item or amount were separated from the others by a broad space, but there was no decimal-mark or perpendicular line between them and those which preceded. *Held* as sufficiently indicating that the last two figures in each item meant cents, and those preceding them dollars.—Collins v. Welch, (Minn.) 35 N. W. 566.

38 Minn. 62.

Limiting Tidd v. Rines, 2 N. W. 498, 26 Minn. 201.

136. Under Gen. Laws Minn. 1874, c. 1, it is essential to the jurisdiction of the court, as to any tract of land, that the published delinquent list state the amount of tax delinquent against such tract; and the placing of two figures opposite the description under a column headed "Amt," without any dollar or other mark, is insufficient to give jurisdiction.—Bonham v. Weymouth, (Minn.) 38 N. W. 805.

39 Minn. 92.

137. In a list of taxes delinquent, published as required by Gen. Laws Minn. 1874, c. 1, § 112, in the column headed "Amt.," and opposite a description of a lot, appeared the figures "7 03." *Held*, that they clearly indicated the amount of tax against the lot as $7.03.—Chouteau v. Hunt, (Minn.) 46 N. W. 341.

44 Minn. 173.

Application for judgment—Defenses.

138. In application for judgment in tax proceedings, under Laws Minn. 1874, c. 1, where defendant desires to object to the jurisdiction of the court on account of the insufficiency of the notice for judgment, it is proper to appear specially for that purpose only, and present his objection in writing signed by him.—Board Com'rs Stearns County v. Smith, 25 Minn. 131.

139. In proceedings under the Minnesota tax law of 1874, (Laws 1874, c. 1, § 119,) which provides for the relief of the tax-payer against taxes unequally assessed or levied to his prejudice, the owner of land may allege and show that a tax levied thereon is void for want of authority to levy it, without showing that he is prejudiced, or that such tax is unequally assessed.—Board County Com'rs St. Louis County v. Nettleton, 22 Minn. 356; Same v. Smith, Id.

140. County commissioners fixed the rate of taxation at five mills upon the valuation, as equalized by them. The state board of equalization increased the valuation, but the rate was left unchanged. *Held*, that the failure of the county commissioners to remit the increased tax caused thereby, as provided by Laws 1875, c. 10, was a defense *pro tanto* to such tax, that could be raised by answer in a proceeding to enforce payment thereof.—Board County Com'rs Houston County v. Jessup, 22 Minn. 552.

141. Gen. St. 1878, c. 11, § 75, gives the right, in general and unrestricted terms, to persons interested in land to file an answer setting forth their defense or objection to the tax for which judgment against the land is sought. Section 79 declares that if all the provisions of law in relation to the assessment and levy shall have been complied with, of which the list filed with the clerk shall be *prima facie* evidence, judgment shall be rendered for such taxes; but no omission of any of the things by law provided in relation to such assessment and levy, or of anything required by an officer or officers to be done prior to the filing of the list, shall be a defense or objection to the taxes "unless it be also made to appear to the court that the taxes upon such piece or parcel of land have been partially, unfairly, or unequally assessed; and in such case, but no other, the court may reduce the amount of taxes upon such piece or parcel, and give judgment accordingly." *Held*, that it was not intended to restrict the right of defense to cases in which there should be some omission of the statutory requirements, but that a land-owner may also show in defense of a tax that the statutory requirement of equality in the assessment has been intentionally disregarded, or that there is error in the assessment so gross that it cannot be accounted for on any ground of mere misjudgment of value, but must have resulted, if not from fraud, from a demonstrable mistake of fact.—Otter Tail County v. Batchelder, (Minn.) 50 N. W. 526.

47 Minn. 512.

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Judgment—Entry and form.

142. A judgment entered 20 days after the last publication of the list of taxes delinquent, is erroneous, but not void. The service is complete with the last publication, and jurisdiction then attaches.—Chouteau v. Hunt, (Minn.) 46 N. W. 341. 44 Minn. 173.

143. In a tax judgment entered on default, required, by Laws Minn. 1874, c. 1, § 116, to be "substantially in the following form," the omission of the recitals contained in the statutory form that no answer has been filed, and that more than 20 days have elapsed since the last publication of the list and notice, does not affect its validity. The judgment raises a presumption of jurisdiction in the court, which can be overcome only by proof that it has not jurisdiction. —Kipp v. Collins, 23 N. W. 554, 33 Minn. 394; Gilfillan v. Hobart, 24 N. W. 342, 34 Minn. 67.

144. In entering judgment for taxes against the lands described in the delinquent list in the tax judgment book, (which was a blank book in the form generally in use in Minnesota, each page having at the top and bottom a printed blank, as if designed for a separate judgment on each page,) the clerk filled up the blanks on the first and last pages, and signed the judgment on these two pages; but on the intervening pages (some 70 in number) he neither affixed his signature, nor filled up any of the blanks, except those intended for the description of the property, the name of the party to whom assessed, the amount of taxes, and the amount of judgment. *Held*, that this constituted a judgment only against the land described on the first and last pages, and not as to that described on the intervening pages.—German-American Bank v. White, 38 N. W. 361, 38 Minn. 471.

—— Opening default.

145. Laws Minn. 1877, c. 79, § 3, provides that, where the court shall find that one who applies to have a judgment of sale for unpaid taxes set aside has an interest in the land, either as owner or by virtue of any lien, and that, in addition, among numerous facts and circumstances of equal effect, the land is exempt from taxation, it may, in its discretion, make an order setting aside a judgment and allowing an answer to be filed. *Held* that, where the petition only alleges that petitioner has an interest in the land, and that the land is exempt, its denial by the lower court will not be disturbed on appeal.—Commissioners Aitkin County v. Morrison, 25 Minn. 295.

146. The record in proceedings to sell land for taxes showed that the citation was served on defendant on July 8th, requiring him to appear and show cause on November 11th following. Judgment was entered in the following March, but defendant made no appearance, and took no steps to have the judgment vacated until May 18th, and then the only excuse given for his failure to appear was the inadvertence of his attorney. *Held*, that it was not an abuse of discretion to deny an application made under Gen. St. Minn. 1878, c. 11, § 80, which provides that the court, "in its discretion, and for good cause," may open or vacate a tax judgment at any time before the expiration of the period of redemption.—County of Washington v. German-American Bank, 10 N. W. 21, 28 Minn. 360.

—— Land charged—Description.

147. In proceedings under chapter 135, Laws Minn. 1881, to enforce payment of taxes delinquent in and prior to 1879, a judgment charging land not described in the published delinquent tax-list is void, under Gen. St. Minn. 1878, c. 11, § 73, which enacts that when the last publication shall have been made, the notice shall be deemed to have been served, and the court to have acquired full and complete *jurisdiction* to enforce, against *each parcel of land in said published list described, the taxes*, etc., then delinquent.—Feller v. Clark, (Minn.) 31 N. W. 175.

36 Minn. 338.

148. A description in a tax judgment of the land against which the judgment purports to have been rendered as "S. ½ N. E. ¼, and N. W. ¼ S. E. ¼," is insufficient.—Keith v. Hayden, 2 N. W. 495, 26 Minn. 212.

149. In a county auditor's certificate of sale for taxes and in the tax judgment the land sold was described under a heading "Subdivision" as "S., 60 rods, W. ½, S. E. ¼," followed by other numbers under headings designating the section or lot, township or block, and range. *Held*, that these descriptions, being such as were commonly used and understood to denote a piece of land running across the subdivision mentioned from east to west, and 60 rods in width from north to south, measuring north from the south line of the subdivision, were sufficient.—Bower v. O'Donnell, 12 N. W. 352, 29 Minn. 135.

150. In a tax-judgment, in a column headed "Sec. or Lot" was given the figure 1, and in that headed "Township or Block," the figure 3, while the column headed "Range" was vacant. Opposite was written "town of St. Anthony." *Held* a sufficient description.—Chouteau v. Hunt, (Minn.) 46 N. W. 341.

44 Minn. 173.

—— Taxes included — Statement of amount.

151. Where the amount of a tax judgment is expressed in figures, without indicating what such figures represent, and without any reference to aid the omission, it is void for uncertainty.—Tidd v. Rines, 2 N. W. 497, 26 Minn. 201.

Distinguished in State v. Ring, 11 N. W. 236, 29 Minn. 83; Stewart v. Colter, 18 N. W. 99, 31 Minn. 389.

Limited by Collins v. Welch, 35 N. W. 567, 38 Minn. 64.

152. In a tax judgment, under a heading "Total amount of judgment," appeared three figures, the two at the right hand separated by a short perpendicular line. *Held*, that such line might be regarded as the decimal line commonly used to mark the separation of dollars and cents, and that the amount of the judgment was sufficiently expressed, although there was no dollar-mark.—Gutzwiller v. Crowe, 19 N. W. 344, 32 Minn. 70.

Review by supreme court.

153. Under Gen. St. Minn. 1878, c. 11, § 80, relating to the review of judgments for taxes by the supreme court, and providing that the district court shall "make a brief statement of the

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facts established * * * and of its decision," such statement of facts has the same effect as the findings of a trial court in ordinary cases.—Ramsey County v. Chicago, M. & St. P. Ry. Co., 24 N. W. 313, 33 Minn. 537.

154. Under Gen. St. Minn. 1878, c. 11, § 80, providing that in certifying to the supreme court proceedings for the enforcement of delinquent taxes the trial judge shall "make a brief statement of the facts established bearing on the point, and of its decision," the trial judge should state what points he certifies up, and also state the facts bearing on such points, and his decision thereon.—Morrison County v. St. Paul & N. P. Ry. Co., (Minn.) 44 N. W 982.

42 Minn. 451.

155. Under Gen. St. Minn. 1866, c. 8, § 181, which provides that the county attorney shall "appear in all cases where the county is a party, and prosecute or defend for the county," notice of appeal from an order refusing to vacate a tax judgment must be served upon the county attorney.—Board County Com'rs Nobles County v. Sutton, 23 Minn. 299.

156. Upon a case certified to the supreme court from a district court, in proceedings to enforce payment of taxes, under Gen. St. Minn. 1878, c. 11, § 80, no costs or disbursements are allowed to either party.—In re Barber, (Olmsted County v. Barber,) 17 N. W. 473, 31 Minn. 256. In re Sedgewick, (Olmsted County v. Sedgwick,) Id.

Authority to sell.

157. The delivery by the clerk to the county auditor of a certified copy of a tax judgment, as provided by Laws Minn. 1874, c. 1, § 121, is not essential to the authority of the auditor to sell, as that depends on the statute and judgment only.—Kipp v. Collins, 23 N. W. 554, 33 Minn. 394.

Notice of sale.

158. A notice of tax-sale embracing all lands assessed, and not restricted to those delinquent, and which designates no place of sale, is void.—Prindle v. Campbell, 9 Minn. 212, (Gil. 197;) Morehouse v. Bowen, 9 Minn. 314, (Gil. 297.)

159. The charter of the city of Wabasha (Sp. Laws Minn. 1858, c. 5, § 10) provided that the city marshal, on receipt of the tax-list, should give one week's notice thereof in the official paper, or should give 10 days' notice thereof by posting up notices in three of the most public places in the city; that such notices should specify that taxes on personal property should be paid within 30 days from the first day of the publication of such notice, or from the first day of posting the same, and said taxes and assessments on real estate before the 1st day of August following, or the 1st day of December following, and if not paid before August 1st certain penalties would accrue, etc.; that all taxes and assessments specified in the tax-list, upon which such taxes and assessments should not be paid by December 1st, should be sold at certain times and places, to be therein specified, for the payment of such taxes and assessments, and the publication and posting of such notices should be deemed a demand, and failure to pay them within the specified time a refusal; and also provided that the sale should commence on the day and at the time designated in said notice, and continue from day to day. *Held*, that such notice must be published one week, or posted 10 days, before August 1st; that such publishing or posting was essential to the validity of the sale; and that a sale under a notice posted on July 29th was void.—Prindle v. Campbell, 9 Minn. 212, (Gil. 197;) Morehouse v. Bowen, 9 Minn. 314, (Gil. 297.)

160. A notice of the sale of lands for delinquent taxes described the premises as "Robert & Randall's addition, lot 11, block 20, lot 12, block 20," and there was nothing to show in what county or place they were situated, except that the notice was headed: "Auditor's Office, Ramsey County, Minn., St. Paul, December 8, 1862." *Held*, that this did not sufficiently describe the lands, and the sale under such notice was void.—Bidwell v. Webb, 10 Minn. 59, (Gil. 41.)

161. A notice of a tax-sale, describing the property as "two-thirds of block four" in certain lots, is bad for uncertainty in not specifying what two-thirds was intended, and the sale under such notice is void, and passes no title.—Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

162. An assignment of the title of the state to land bid in at a tax-sale recited that the tax judgment was entered August 19th, and that the sale took place on September 29th following. *Held*, that this did not show an irregularity, in that the notice of sale must have been published within 20 days after entry of the judgment, as the provision of Laws Minn. 1874, c. 1, § 122, that "after 20 days from the date of any tax judgment * * * the county auditor shall sell," etc., does not forbid the auditor commencing publication of the notice within 20 days.—Everett v. Boyington, 13 N. W. 45, 29 Minn. 264; Stewart v. Carter, 18 N. W. 98, 31 Minn. 385.

163. A sale of lands delinquent for taxes commenced on Monday, September 19, 1881, and continued from day to day and closed on Saturday, September 24th. *Held*, that notice of a sale of the forfeited list for Monday, September 26th, was valid, under Laws Minn. 1881, c. 135, § 4, requiring the sale of the forfeited list to be made "immediately following the delinquent sale."—Kipp v. Dawson, 17 N. W. 961, 18 N. W. 96, 31 Minn. 373.

164. Under Laws Minn. 1881, c. 135, requiring that the sale of lands on the forfeited tax list shall immediately follow the sale of lands on the delinquent list, such a sale is not rendered void by the fact that the published notice of sale named the same day for the sale of both lists, the sale on the forfeited tax list having in fact immediately followed that on the delinquent list; and that any irregularity in it might be cured by the limitation clause in section 7 of the act, unless objection thereto should be properly taken within the time limited.—Coffin v. Estes, 20 N. W. 357, 32 Minn. 367.

165. Under Laws Minn. 1874, c. 1, § 122, requiring the notice of sale under a tax judgment to be published "once in each of two successive weeks, the last publication to be not less than 10 days before the day of sale," a publication on the 2d and on the 9th of the month, of notice of a sale appointed for the 26th of the month, is sufficient; and it will be presumed that the au-

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ditor performed his duty in selecting for the publication a newspaper of general circulation.—Kipp v. Collins, 23 N. W. 554, 33 Minn. 394.

Time and conduct of sale.

166. The charter of the city of Wabasha (Sp. Laws Minn. 1858, c. 5, § 10) required that the city marshal, upon receipt of the tax-list, should give notice thereof, and, if the taxes should not be paid by a certain day, the property should be sold at a time and place therein specified: provided, such sale should commence on the day or at the time designated in said notice. *Held* that, unless a sale was commenced on the day specified in such notice, the marshal had no authority to sell afterwards.—Prindle v. Campbell, 9 Minn. 212, (Gil. 197;) Morehouse v. Bowen, 9 Minn. 314, (Gil. 297.)

167. A tax-sale, held on a day other than that specified in the public notice of sale, is void.—Sheehy v. Hinds, 6 N. W. 781, 27 Minn. 259.

168. A tax judgment sale under Gen. Laws Minn. 1881, c. 135, was advertised for September 26th. On that day the auditor offered all the lands covered by the judgment, but did not sell the land in question. Nothing further was done that day. The sale was not adjourned. On October 4th, at the auditor's office, a person offered the auditor a certain sum for the land in question, and the offer was accepted, and the auditor issued a certificate of sale. *Held* without authority and void.—Burdick v. Bingham. (Minn.) 38 N. W. 489.

38 Minn. 482.

169. No combination to prevent competition at a tax sale is to be implied from the mere fact of a joint purchase by two persons of tracts of land struck off at such sale.—Kerr v. Kipp, (Minn.) 33 N. W. 116.

37 Minn. 25.

Sale in parcels.

170. Lands sold for delinquent taxes should be sold in parcels, as assessed; and where a block in a town, though subdivided into lots, is assessed as one tract, it must be sold as one parcel.—Moulton v. Doran, 10 Minn. 67, (Gil. 49.)

171. Under the provisions of Laws Minn. 1881, c. 135, for the sale of lands for taxes, by which the owner of the land sold is entitled to any surplus, the requirement that each parcel shall be sold separately is for his benefit, and a disregard of it vitiates the sale.—Farnham v. Jones, 19 N. W. 83, 32 Minn. 7.

172. Where a tax judgment under Laws Minn. 1881, c. 135, is against two blocks of land for one entire sum, a sale of the two blocks together as one tract is not invalid, as section 4 of the act directs the sale to be made by the description contained in the judgment.—Knight v. Valentine, 24 N. W. 295, 34 Minn. 26.

Unsold lands—Bidding in for state.

173. By section 2, c. 135, Gen. Laws Minn. 1881, all the provisions of the general tax law as to advertisement, judgment, and sale of property for taxes are incorporated into the act. *Held*, that the provision of sections 83, 86, of the general tax law requiring lands not sold to actual purchasers to be bid in for the state was applicable to proceedings under such act, notwithstanding section 9 of the act, which provides that all pieces or parts of land remaining unsold at such sale shall be stricken from the tax-list, etc.—Mulvey v. Tozer, 42 N. W. 387, 40 Minn. 384.

174. No right can be acquired by the state to land, under the judgment for taxes provided for in Laws Minn. 1881, c. 135, unless it was offered for sale by parcels as provided in section 4. The provisions of section 9, permitting the auditor to assign the rights acquired by the state, contemplate that the land remains unsold after it has been so offered.—Gilfillan v. Chatterton, (Minn.) 37 N. W. 583.

38 Minn. 335.

Proceeding to vacate sale.

175. In a proceeding under Laws Minn. 1862, c. 4, § 7, to test the validity of a tax-sale, only errors properly and peculiarly pertaining to the sale, as distinguished from those occurring anterior to the notice of sale, can be considered.—Moulton v. Doran, 10 Minn. 67, (Gil. 49.)

IX. Redemption.

Right to redeem, in general.

176. The right of redemption from a tax-sale is governed by the law in force at the date of the sale; it cannot be abridged or enlarged by subsequent legislation.—Merrill v. Dearing, 21 N. W. 721, 32 Minn. 479.

177. Where land is sold for taxes as one tract, a person who afterwards becomes the owner of a certain portion of such tract cannot redeem only the part claimed by him, as Gen. St. Minn. 1878, c. 11, § 90, merely gives the right to a person having an interest in land sold for taxes to redeem the land so sold, but makes no provision for the redemption of a separate part.—State v. Schaack, 10 N. W. 22, 28 Minn. 358.

Limitation of time.

178. The officers of H. county having failed to institute the proceedings prescribed by Laws Minn. 1874, c. 2, to enforce payment of delinquent taxes, Laws 1875, c. 7, provided, after reciting the omission, that the county auditor should on the third Monday in May, 1875, file the list required by the act of 1874, and that in all other respects proceedings to enforce payment of such delinquent taxes should "be as provided for in said act." Pursuant to this, the land of relator's intestate was sold on December 1, 1875, and bid in by the state. On August 31, 1876, one H. paid into the county treasury the amount for which the land was sold, etc., and received an assignment from the state, as provided by the act of 1874. *Held*, that all the provisions of the act of 1874, as well those provided after as before the sale, are, within the act of 1875, "proceedings in the matter of enforcing the payment" of taxes, and relator could redeem only within the time prescribed in such act of 1874.—State v. McDonald, 1 N. W. 832, 26 Minn. 145.

179. Under Gen. St. Minn. 1878, c. 11, § 91, which provides that insane persons "having an interest in or lien on land sold for taxes may redeem the same within two years after such disa-

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bility shall cease," the right to redeem is not suspended during the disability, but a suit therefor may be brought during such disability, or within two years after it ceases.—Goodrich v. Florer, 6 N. W. 452, 27 Minn. 97.

180. Gen. St. Minn. 1878, c. 11, § 90, provides that any person having an interest in land sold for taxes may redeem the same within two years from the date of the sale. Section 91 provides that any insane person "having an estate in or lien on lands sold for taxes may redeem the same within two years after such disability shall cease." Section 92 provides that any person who has or claims an interest in or lien on an undivided estate in land sold for taxes may redeem such undivided interest. *Held*, that an insane person having an undivided interest in land sold for taxes can redeem only such undivided interest.—Goodrich v. Florer, 6 N. W. 452, 27 Minn. 97.

181. The Minnesota act of March 6, 1877, (Gen. Laws Minn. 1877, c. 6, § 25,) which extends the time of redemption from tax sales to three years, applies to unforfeited lands bid in by the state at a tax sale held before the passage of the act, and not yet assigned to tax purchasers.—State v. Smith, (Minn.) 32 N. W. 174.

36 Minn. 456.

Notice of expiration of time of redemption—When requisite.

182. Laws Minn. 1877, c. 6, § 37, which requires every person holding a tax certificate to present the same to the county auditor 90 days before the expiration of the time to redeem, and requires the auditor to give notice to the person in whose name the land was assessed, does not apply to a person who acquired such certificate before the enactment of the statute.—State v. McDonald, 1 N. W. 832, 26 Minn. 145.

183. In the provision of Laws Minn. 1877, c. 6, § 37, requiring every person holding a tax certificate to present such certificate to the county auditor at least 90 days before the expiration of the time of redemption, and requiring the county auditor thereupon to cause notice to be served on the person in whose name the land is assessed, etc., the term "tax certificate" is equally applicable to the certificate of sale prescribed by section 84, and the certificate of assignment provided for in section 89, Gen. St. Minn. 1878, c. 11. The statute is to be construed liberally and beneficially, its object being to give the land-owner 60 days' time to redeem after the service of the required notice.—Merrill v. Dearing, 21 N. W. 721, 32 Minn. 479; Nelson v. Central Land Co., 29 N. W. 121, 35 Minn. 408.

184. Laws Minn. 1877, c. 6, § 37, requiring holders of certificates of sale of land for taxes to cause notice to be given, before the expiration of the period of redemption, to the person in whose name the property was assessed, was not repealed by implication by the general tax law of 1878, (Laws 1878, c. 1,) which was entirely silent on the subject of such notice, as was the act of 1874, of which it was a rearrangement and re-enactment; and the provision of the act of 1877 continued to be the law until repealed by Laws 1881, c. 10, § 22, and continued to modify or qualify the provisions regarding the time of redemption in the act of 1878, re-enacting similar provisions of the law of 1874. Following Merrill v. Dearing, 21 N. W. 721, 32 Minn. 479.—Gaston v. Merriam, 22 N. W. 614, 33 Minn. 271.

185. In Minnesota notice of the expiration of the time for redemption is not required to be served on behalf of the state.—State v. Smith, (Minn.) 32 N. W. 174.

36 Minn. 456.

186. Section 37, Gen. Laws Minn. 1877, c. 6, requiring notice of the expiration of the time of redemption by "persons holding tax certificates," *held* applicable to assignees of the interest of the state before forfeiture, but inapplicable to an assignee or grantee acquiring such interest after forfeiture, in which case, by the terms of the statute, the conveyance is absolute and without redemption.—State v. Smith, (Minn.) 32 N. W. 174.

36 Minn. 456.

—— Duty of auditor to prepare notice.

187. The notice to redeem from a tax-sale, required by Gen. St. 1878, c. 11, § 121, providing that the holder of a tax certificate shall present the same to the county auditor, and thereupon the auditor shall prepare the notice to redeem, may be made out without presentation of the certificate, where it has been destroyed, since the auditor can obtain the necessary *data* for preparing the notice from the records of his office, and since the certificate is required to be presented only to save him the trouble of looking to the records.—Hinkel v. Krueger, (Minn.) 50 N. W. 689.

47 Minn. 497.

—— Sufficiency.

188. Under Gen. St. Minn. 1878, c. 11, § 121, providing that a notice to redeem from a tax-sale shall specify when the period of redemption will expire, and that the time for redemption shall expire sixty days after the service of the notice, a notice, in which it is stated "that the time for redemption from said sale will expire sixty days after service of this notice," is sufficient, the other requirements of said section being observed.—Parker v. Branch, (Minn.) 43 N. W. 907.

42 Minn. 155.

189. A notice of the expiration of the time for the redemption of land from a tax-sale which states that the land was sold for taxes, "amounting, with penalties, to 67-100 dollars, which sum, with interest from the date last mentioned, at the rate of 18 per cent. per annum, and subsequent delinquent taxes and penalties and interest thereon, amounting to the sum, in all, of one and 51-100 dollars, which last-mentioned sum, and interest thereon from date, is the amount required to redeem said piece or parcel of land," etc., sufficiently shows the amount for which the land sold, and the amount required to redeem the same.—Robert v. Western Land Ass'n, (Minn.) 44 N. W. 668.

43 Minn. 3.

190. The notice was inaccurate in stating that interest was chargeable upon the amount therein stated from the date of the judgment, instead of from the date of the sale, which was less than six weeks subsequent to the judgment. It ap-

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peared from the record that the difference in the amount would be merely trifling. *Held*, that the inaccuracy was immaterial, under the maxim that the law does not regard trifles.—Western Land Ass'n v. McComber, 42 N. W. 543, 41 Minn. 20; Robert v. Western Land Ass'n, 44 N. W. 668, 43 Minn. 3.

191. Land bid in by the state for taxes having been assigned to a purchaser under Gen. St. Minn. c. 11, § 89, the sum paid by him is the "amount sold for" to be inserted in the redemption notice —Sperry v. Goodwin, (Minn.) 46 N. W. 328.

44 Minn. 207.

192. The county and state in which the land is situate, sufficiently appears from a redemption notice which describes a lot in a city named, and recites that it was sold under a judgment of the district court, county of H., state of Minn., and purports to be issued by the auditor of that county, in which the lot is in fact situate, and the plat of the city recorded.—Sperry v. Goodwin, (Minn.) 46 N. W. 328.

44 Minn. 207.

193. A published redemption notice sufficiently discloses the names of the owners, and the year the taxes were levied, the year appearing at the head of the list, and the names inserted opposite each tract. —Sperry v. Goodwin, (Minn.) 46 N. W. 328.

44 Minn. 207.

194. The notice of the expiration of the time of redemption from a tax-sale was issued by the auditor of Hennepin county, and described the land as "lot 8, block 4, of Penniman's Addition," without mentioning the state, county, or city, but stating that it had been sold pursuant to a tax judgment of the district court of the county. There was no other addition or subdivision of land in Hennepin county platted or known by any name embracing the word "Penniman's," except "Penniman's Addition to Minneapolis," which was commonly known to and designated by the inhabitants of Minneapolis and the general local public simply as "Penniman's Addition." *Held*, that the notice sufficiently described the property.—Reimer v. Newell, (Minn.) 49 N. W. 865.

47 Minn. 237.

—— Service.

195. Under Gen. St. Minn. 1878, c. 11, § 121, providing that a notice of the expiration of the time for redemption from a tax sale shall be served on "the person in whose name such lands are assessed," notice of expiration was caused to be issued by defendant's husband, who had bought at the tax sale, and service was made upon defendant, the wife, in whose name the lands were then assessed, and who was in possession. *Held*, that such service was properly made under the statute whether the defendant was the real owner of the land or not, at the time of issuing the notice.—Western Land Ass'n v. McComber, (Minn.) 42 N. W. 543.

41 Minn. 20.

196. Gen. St. Minn. 1878, c. 11, § 121, relating to notice of expiration of time of redemption from tax-sale, provides for its service upon the person in whose name the land is assessed, or if he cannot be found in the county upon the person in actual possession, if there be one, if neither of these conditions exist, of which facts the sheriff's return shall be evidence, the auditor shall cause the notice to be published. *Held* that, as the object of the statute is to give interested parties notice, and as the auditor can only act upon the return of the sheriff, the statute requires the notice to be issued in every case, and the case in which the holder of the tax certificate is the person in whose name the land is assessed, forms no exception.—Wakefield v. Day, (Minn.) 43 N. W. 71.

41 Minn 344.

197. A redemption notice directed to one in whose name the land was then assessed, as required by Gen. St. Minn. c. 11, § 121, is sufficient, though it does not state that it was then assessed in his name, and is also directed to one in whose name it was assessed when the tax was levied.—Sperry v. Goodwin, (Minn.) 46 N. W. 328.

44 Minn. 207.

198. The notice required to terminate the right of redemption from a tax-sale, under Gen. St. 1878, c. 11, § 121, providing that it shall be directed to and served on the person in whose name the land is assessed, must be served on such person, even though he is the holder of the tax-sale certificate.—Mitchell v. McFarland, (Minn.) 50 N. W. 610.

47 Minn. 535.

—— Publication.

199. Under Gen. St. Minn. 1878, c. 11, § 121, proof of publication of a notice of the expiration of the time of redemption is inadmissible without first proving that it is addressed to the person in whose name the land was assessed, and that it had been delivered to the sheriff for service, and that he had made return thereon to the county auditor.—Muller v. Jackson, (Minn.) 40 N. W. 565.

39 Minn. 431.

200. A redemption notice covered several pages of a paper headed, "Minneapolis Tribune," and "Minneapolis Tribune Supplement," while on the title page appeared "The Tribune." The affidavit of publication stated that the list was published in "The Tribune," a daily newspaper, printed and published in the county of H. *Held*, that it sufficiently appears that the list was published in a paper designated by the county commissioners as the "Minneapolis Tribune, a daily paper printed and published in the county of H."—Sperry v. Goodwin, (Minn.) 46 N. W. 328.

44 Minn. 207.

201. The redemption notice as published differing from the original only in the order in which the facts are stated, and containing all the essentials, the variance is not material.—Sperry v. Goodwin, (Minn.) 46 N. W. 328.

44 Minn. 207.

202. Gen. St. Minn. 1878, c. 11, § 121, requires notice of the expiration of the time of redemption from a tax-sale to be given to the person in whose name the property is assessed, and provides that the sheriff shall serve the notice, but that if the land is vacant, and the person in whose name the land is assessed cannot be found in the county, notice may be given by publication. *Held*, that the return of a deputy-sheriff showing the

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facts warranting publication of the notice was equivalent to a return by the sheriff himself; and the fact that the person in whose name the property was assessed was the person who purchased at the tax-sale does not affect the validity of the notice.—Reimer v. Newell, (Minn.) 49 N. W. 865. 47 Minn. 237.

Sufficiency of redemption — Amount paid.

203. Where land is sold at a tax-sale in a single parcel the county officers have no power to allow a redemption of a portion of the same without payment of the whole tax.—Moulton v. Doran, 10 Minn. 67, (Gil. 49.)

204. Payment in good faith of the amount stated by the county auditor as necessary to redeem land bid in for the state at a tax-sale is an effectual redemption, although the amount so stated is insufficient, by reason of mistake of the auditor. Even though such payment does not include the taxes for a year following the sale, which had become a charge upon the land, the redemption discharges the land from all claim of the state for the taxes for that year, and proceedings to enforce such taxes by judgment and sale are void.—Forrest v. Henry, 23 N. W. 848, 33 Minn. 434.

Distinguished in Knight v. Valentine, 24 N. W. 296, 34 Minn. 28.

Redemption moneys.

205. Where lands sold for taxes are redeemed under Laws Minn. 1862, c. 4, § 9, which provides that the amount for which the lands are sold, with interest to the time of redemption, shall be paid to the treasurer "for the use of the purchaser or his assigns," the treasurer cannot deduct his fees from the amount received, but must pay the whole to the purchaser.—Stuart v. Walker, 10 Minn. 296, (Gil. 234.)

X. Tax-Titles.

a. *In General.*

Illegality of tax.

206. Where land is sold for taxes, any portion of which is illegal, the sale is void.—St. Anthony Falls Water-Power Co. v. Greely, 11 Minn. 321, (Gil. 225.)

Informality in proceedings for sale.

207. The provision in the charter of the city of Wabasha, (Sp. Laws Minn. 1858, c. 5, § 10,) that no error or informality, not affecting the substantial justice of a tax, shall affect its validity or the title conveyed under a sale therefor, does not embrace errors or informalities which go to the jurisdiction of the officers, or the validity of their acts, or which affect the notice of sale.—Prindle v. Campbell, 9 Minn. 212, (Gil. 197;) Morehouse v. Bowen, 9 Minn. 314, (Gil. 297.)

Inconsistent title.

208. As, under the tax-laws, the owner of real estate may become the purchaser at a tax-sale, a claim of title under a tax-sale is not necessarily inconsistent with a claim of title antecedent to it.—Branham v. Bezanson, 21 N. W. 861, 33 Minn. 49.

Certificate of sale—Effect as evidence.

209. Laws Minn. 1874, c. 1, relative to the assessment and collection of taxes, contemplate that the auditor's certificate of tax-sale be executed at the time of the sale, or within such time thereafter as may be reasonably necessary for that purpose. A certificate not executed until many years after the sale is of no effect.—Stewart v. Minneapolis & St. L. Ry. Co., 31 N. W. 351, 36 Minn. 355; Gilfillan v. Chatterton, 33 N. W. 35, 37 Minn. 11; Kipp v. Hill, 41 N. W. 970, 40 Minn. 188.

210. In the provision of Laws Minn. 1874, c. 1, § 124, that a certificate of a tax-sale "may be substantially in the following form," the word "may" is equivalent to "shall," and such a certificate, which does not contain the date of sale, is not substantially in the prescribed form, and is invalid; such date being a substantial part of the certificate.—Gilfillan v. Hobart, 28 N. W. 222, 35 Minn. 185.

Distinguished in McQuade v. Jaffray, 50 N. W. 234, 47 Minn. 329.

211. Where there is a discrepancy as to the date of a tax-sale between the certificate of sale issued by the auditor and the entry made by him after the sale in the "copy judgment book," in the absence of any other evidence as to which is correct, the certificate of sale must control; at least, where no question is involved as to when the right of redemption expires. Gilfillan v. Hobart, 35 Minn. 185, 28 N. W. 222, distinguished.—McQuade v. Jaffray, (Minn.) 50 N. W. 233.

47 Minn. 326.

212. A tax certificate, issued under Laws Minn. 1881, c. 135, which purports to have been made in pursuance of "a real estate tax judgment entered August 15, 1881," on "the 31st day of December," (year not stated,) was dated December 31, 1881. It will be presumed that the sale was made December 31, 1881, and in the absence of any evidence or finding on the subject, it will not be held as matter of law that the special sale under that statute must necessarily have been completed prior to the date mentioned.—Sanborn v. Mueller, (Minn.) 35 N. W. 666.

38 Minn. 27.

213. On a tax judgment sale made by the county auditor under Laws Minn. 1874, it was necessary that the certificate issued to a purchaser or to the state should recite that each tract or parcel was first offered to the bidder who would pay the amount for which it was to be sold for the shortest term of years, etc. This was a matter of substance, and a certificate which did not show on its face that this provision had been complied with is invalid, and no evidence of title. It cannot be helped by parol evidence, and is insufficient to set the statute of limitations in motion. — Vander Linde v. Canfield, (Minn.) 42 N. W. 538.

40 Minn. 541.

214. When such certificate is admitted in evidence, and the particular defect overlooked at the trial, it is not error for the court to grant a new trial on the ground of the insufficiency of the evidence to show that the party claiming under such

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certificate had acquired title, though the adverse party had consented to its admission as evidence under a mistake as to its legal effect.—Vander Linde v. Canfield, (Minn.) 42 N. W. 538.
40 Minn. 541.

215. A certificate of sale of land for taxes under Laws 1874, c. 1, § 124, as amended by Laws 1875, c. 5, § 29, was in the form required by section 124 before such amendment, and stated that the land was first offered for the amount for which it was to be sold to the bidder for the shortest term of years, and that no person offered to pay such amount for a term of years. *Held*, that this, being mere surplusage, did not vitiate the certificate, which otherwise showed that the auditor did, as authorized by the amended statute, offer to sell, and did sell, the fee to the highest bidder, bidding not less than the amount for which the land was to be sold.—Kipp v. Collins, 23 N. W. 554, 33 Minn. 394.

216. A recital in a certificate for sale of taxes, that the land "was offered for sale to the highest bidder," is not inconsistent with the provisions of Laws Minn. 1881, c. 135, § 4, requiring it to be offered first for the total amount of taxes, etc., due thereon, and, if no bidder at that sum, then to the highest bidder who should bid not less than the state tax.—Kipp v. Dawson, 17 N. W. 961, 18 N. W. 96, 31 Minn. 373.

217. Under Laws Minn. 1881, c. 135, providing for the sale of lands for delinquent taxes, and requiring each piece or parcel to be sold separately, a certificate of sale showing on its face that many distinct tracts and parcels separately situated were sold as one parcel, for one price, is not *prima facie* evidence of title; and the limitation clause in section 7 of the act has no application to such a case.—Farnham v. Jones, 19 N. W. 83, 32 Minn. 7; Brown v. Setzer, 40 N. W 70, 39 Minn. 317.

218. A tax certificate issued under the sale made in pursuance of Laws Minn. 1881, c. 135, which shows on its face that several separate and distinct lots are sold together in gross for one price, is void; but where several village lots are contiguous, so that they may be used and assessed together as one tract, it will not be presumed from the certificate that such sale thereof was irregularly made in violation of the statute.—Sanborn v. Mueller, (Minn.) 35 N. W. 666.
38 Minn. 27.

219. It is no objection to certificates of sale of land for taxes that in naming the purchaser the middle name or initial thereof is omitted; such name not being a necessary part of a person's legal name.—Stewart v. Carter, 18 N. W. 98, 31 Minn. 385.

220. The fact that two certificates of sale have been issued by the county auditor,—one to the effect that he had sold a single tract for a certain sum, and the other to the effect that at the same sale he had sold to the same purchaser six separate tracts, including the one named in the first certificate, for a certain other and larger sum,—will not destroy the effect of the first-named certificate as *prima facie* evidence of the facts stated in it.—Bennett v. Blatz, (Minn.) 46 N. W. 319.
44 Minn. 56.

221. Under the general tax-law of Minnesota of 1874, § 125, as amended by Laws 1875, c. 5, § 30, providing that a certificate of sale for taxes or the record thereof shall be "*prima facie* evidence that all the requirements of the law in respect to the sale have been complied with," as the certificate is not made evidence of the tax judgment under which the sale purports to have been made, the certificate is not admissible in evidence without proof of such judgment. And this rule of evidence is not affected by the fact that the action in which the certificate is offered in evidence is not brought within the five years from the date of the sale, required by section 125, in case of an action "to set aside such certificate or to test the validity of such sale."—Sanborn v. Cooper, 17 N. W. 856, 31 Minn. 307.

222. A certificate of tax-sale has the *prima facie* effect given it by statute, even where, because of its loss or destruction, its contents are proved by parol.—Mitchell v. McFarland, (Minn.) 50 N. W. 610.
47 Minn. 535.

—— Proof of no redemption.

223. Under Gen. St. Minn. 1878, c. 11, § 85, providing that a certificate of tax-sale shall be "*prima facie* evidence * * * of title in the grantee therein after the time for redemption has expired," proof that there has been no redemption is not necessary to make the certificate such evidence. The auditor's certificate of no redemption, provided for in section 100, is only necessary as a prerequisite to record.—Stewart v. Carter, 18 N. W. 98, 31 Minn. 385.

224. The county auditor's certificate that the time for redemption of land sold for taxes has expired, is insufficient, by itself, to prove that the notice required by Gen. St. Minn. 1878, c. 11, § 121, has been duly given.—Jewell v. Truhn, (Minn.) 38 N. W. 106.
38 Minn. 433.

225. Title will not be presumed to have been acquired under a tax certificate, issued upon the tax judgment and sale, until notice of the expiration of the time of redemption has been served.—Sanborn v. Mueller, (Minn.) 35 N. W. 666.
38 Minn. 27.

226. The burden rests on a party asserting title in fee by virtue of a tax certificate, which is only evidence of title after the expiration of the time of redemption, to prove that notice, required by statute, to limit the time of redemption, has been duly served.—Nelson v. Central Land Co., 29 N. W. 121, 35 Minn. 408.

Assignment of purchase by state.

227. An assignment of the right of the state in land bid in at a tax-sale to one paying the amount for which it was so bid in, with subsequent taxes, etc., which the county auditor is directed by Laws Minn. 1874, c. 1, § 129, to execute to such person, is his official act, and is properly executed by him in his official capacity, and sealed with his official seal.—Everett v. Boyington, 13 N. W. 45, 29 Minn. 264.

228. When land sold for taxes is bid in by the state, there must be a certificate of sale issued to

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the state, and to sustain the title of the holder of a state assignment certificate issued under Laws Minn. 1874, c. 1, § 129, it is necessary for him to establish the execution in due form of a certificate of sale to the state, by the county auditor, as an essential muniment of title.—Philbrook v. Smith, (Minn.) 41 N. W. 545.

40 Minn. 100.

229. The evidence showed that no certificate to the state was delivered to plaintiff when he took his assignment, and that he had never seen or had any, not knowing one was necessary. The county auditor then in office testified that he thought it was the practice to issue the assignment of the state and the certificate to the state at the same time, both being delivered to the purchaser, but was unable to say that the practice was uniform. The business was sometimes transacted by a deputy, and it appeared that witness had no sufficient *data* or recollection to enable him to testify to the facts. *Held*, that the issuance of the certificate to the state was not established.—Philbrook v. Smith, 41 N. W. 545, 40 Minn. 100.

230. At a sale of land in 1880 for taxes of 1879 the land was bid in by the state. In 1881, and while the state still held the interest so acquired, the land was sold under Laws Minn. 1881, c. 135, providing for sales for taxes of 1878 and previous years, but, without authority of law, the sale was made for the taxes of 1879, as well as for the taxes of previous years. *Held* that, under the rule that a junior assessment of taxes and the tax-sale had thereon are paramount to and take precedence of a senior assessment and the sale had upon it, one claiming under the sale in 1880 held the land free from any lien for taxes prior to 1879, and unaffected by the sale for such taxes in 1881.—Wass v. Smith, 25 N. W. 605, 34 Minn. 304.

231. Parol evidence is admissible to prove the actual date when certificates of the assignment of the rights of the state in land bid in for it at tax sale were in fact delivered to the purchaser, and the date when he paid the purchase price into the county treasury.—Pigott v. O'Halloran, (Minn.) 35 N. W. 4.

37 Minn. 415.

232. On the fifteenth day of February, 1877, L. went to the county auditor's office, and selected a number of tracts which had been bid in for the state at tax sale, and requested the auditor to make out assignment certificates therefor, and, as an evidence of good faith, deposited with the county treasurer a check for a part of the amount necessary to be paid. The county treasurer did not at that time turn this into the county treasury, but held it until the transaction should be closed. In March, and *subsequent to the sixth, the date when Laws 1877, c. 6, went into effect*, L. paid to the county treasurer the balance of the purchase price, and thereupon the certificates were then delivered to him by the county auditor. *Held*, that L.'s rights as purchaser from the state vested only from the date at which the certificates were delivered to him, and consequently that he purchased subject to the provision of section 37 of the act cited, and his rights under the certificates would not ripen into title until after notice of the time of the expiration of the right of redemption had been given, as required by the section referred to.—Pigott v. O'Halloran, (Minn.) 35 N. W. 4.

37 Minn. 415.

233. A "state assignment certificate," executed pursuant to Gen. St. Minn. 1878, c. 11, § 89, is only evidence of title when accompanied by proof of service of the notice of the expiration of the time of redemption as required by Gen. St. 1878, c. 11, § 121; and the burden of proof of service of such notice rests upon the party asserting title in fee under the certificate.—Muller v. Jackson, (Minn.) 40 N. W. 565. 39 Minn. 431.

b. *Deed.*

Time of issuing.

234. Under Laws Minn. 1862, c. 4, §§ 5, 9, a tax-deed might be issued before the expiration of the period of redemption.—Baker v. Kelley, 11 Minn. 480, (Gil. 358.)

Validity and effect—In general.

235. A tax deed, to be valid, should disclose the authority of the auditor to make it, and recite the existence of material facts essential to its validity.—Cogel v. Raph, 24 Minn. 194.

236. Gen. St. Minn. c. 11, § 151, which makes "a tax-deed *prima facie* evidence in all cases of a legal and valid title in the party holding the same," has no application where the deed fails to show upon its face that the tax-sale was one made by authority of law.—Cogel v. Raph, 24 Minn. 194.

237. A tax-deed reciting enough to show authority to make it, and which is, in other respects, operative as a deed at common law, is regular on its face.—Madland v. Benland, 24 Minn. 372.

238. Under Gen. St. Minn. 1866, c. 11, §§ 118–122, authorizing the sale of land for delinquent taxes, the tax-deeds must show on their face that the taxes for which the land was sold were delinquent and unpaid at the time.—Sheehy v. Hinds, 6 N. W. 781, 27 Minn. 259; O'Mulcahy v. Florer, 8 N. W. 166, 27 Minn. 449; Sherburne v. Rippe, 29 N. W. 322, 35 Minn. 540; Gilfillan v. Chatterton, 37 N. W. 583, 38 Minn. 335.

The case of O'Mulcahy v. Florer, 8 N. W. 166, 27 Minn. 449, distinguishes Madland v. Benland, 24 Minn. 372.

239. A tax-deed which purports to convey property different from that authorized to be sold by the tax judgment and that described in the tax certificate, in pursuance of which it is given, is void.—Flint v. Webb, 25 Minn. 93.

240. The statutory presumption that a tax-deed is *prima facie* evidence of title has no effect where proof is made of all the facts and circumstances on which it rests.—Flint v. Webb, 25 Minn. 93.

241. Laws Minn. 1862, c. 4, is supplemental to, and not independent of, the general tax law; and a tax-deed issued in pursuance of its provisions is *prima facie* evidence of a valid title in the grantee therein named.—Baker v. Kelley, 11 Minn. 480, (Gil. 358.)

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242. Under Gen. St. Minn. 1866, c. 11, § 143, providing that a sale for delinquent taxes of lands charged on the duplicate in the name of one other than the rightful owner shall not be invalid if the land is in other respects sufficiently described on the duplicate, and the taxes for which it is sold are due and unpaid at the time of sale, a party relying on the tax-deed of such lands as *prima facie* evidence of title must show that the taxes for which the sale was made were due and unpaid at the time of sale.—Greve v. Coffin, 14 Minn. 345, (Gil. 263.)

Distinguished in Madland v. Benland, 24 Minn. 379.

243. A tax-deed, to be *prima facie* evidence of title, under Gen. St. Minn. 1866, c. 11, §§ 139, 140, must be one of lands not redeemed at the time the deed is made; and the party relying on such deed must, before it can be received as *prima facie* evidence under such sections, show that the land has not been redeemed.—Greve v. Coffin, 14 Minn. 345, (Gil. 263.)

244. A party relying on a tax-deed executed by a county auditor under Gen. St. 1866, c. 11, §§ 139, 140, which provide for the execution of such deed, and that it "shall be received in all courts as *prima facie* evidence of a good and valid title in such grantee," etc., need do no more than offer the deed and show that the land has not been redeemed, the deed, in such case, being *prima facie* evidence of title in the grantee until impeached for irregularities in prior proceedings.—Broughton v. Sherman, 21 Minn. 431.

Distinguished in Madland v. Benland, 24 Minn. 379.

245. Though Laws Minn. 1862, c. 4, declares that a tax-deed made under the provisions of that chapter, and regular on its face, is *prima facie* evidence of title, where defendant in ejectment claims under such a deed, which is not regular on its face, the burden is on him to show that all the requirements of the law in relation thereto were complied with.—Taylor v. Winona & St. P. R. Co., (Minn.) 47 N. W. 453.

45 Minn. 66.

—— Forfeited lands.

246. The effect of tax-deeds executed under Gen. St. c. 11, § 138, as *prima facie* evidence of title, is not affected by the repeal of such chapter by Laws 1874, c. 1, § 168, their effect as such being saved by the provision of that section that "all rights heretofore acquired under any act hereby repealed" shall not be affected.—Madland v. Benland, 24 Minn. 372.

247. Gen. St. 1866, c. 11, § 138, provides, with respect to tax-sales, that "upon a sale of any such lands by the state" the county auditor shall execute a deed which shall be *prima facie* evidence of title, etc. *Held*, that to make such a deed, properly framed, *prima facie* evidence of title, it is only necessary to show that the sale evidenced was directed by the state auditor.—Madland v. Benland, 24 Minn. 372.

Distinguishing Greve v. Coffin, 14 Minn. 345, (Gil. 263;) Broughton v. Sherman, 21 Minn. 431.

248. A recital in a tax-deed that lands have been duly forfeited for non-payment of taxes is a sufficient recital of the levy, assessment, and delinquency of the tax.—Madland v. Benland, 24 Minn. 372.

Distinguished in O'Mulcahy v. Florer, 8 N. W. 167, 27 Minn. 452.

249. A tax-deed recited that lands were duly forfeited to the state for non-payment of taxes; that they remained unsold at the expiration of the period of redemption, and under certain sections of the statute became, and still were, the absolute property of the state; and recited a direction of the state auditor for their sale; an offer by the grantee to purchase; that his was the highest bid; and that the amount was paid into the treasury, etc., and was otherwise sufficient as a deed at common law. *Held*, that the deed was "regular on its face," within the meaning of Laws 1873, c. 55, providing that a person holding land under such a deed regular on its face should not be ejected until compensation should be tendered him for improvements made by him on the land previous to actual notice of defects invalidating the deed.—Madland v. Benland, 24 Minn. 372.

250. A tax deed of "forfeited lands," executed under Gen. St. Minn. 1866, c. 11, § 138, or § 156, relating to the sale of land forfeited to the state, is not *prima facie* evidence of title, without preliminary proof *aliunde* the deed of authority from the state auditor to the county auditor to make the sale recited in the deed.—Bonham v. Weymouth, (Minn.) 38 N. W. 805.

39 Minn. 92.

251. Such deed must recite a compliance with the power, and the existence of such facts as are essential to its validity; and no such fact not embraced in the recitals will be presumed. Where the instructions to the county auditor were to sell a tract of land "to such persons as will pay therefor the amount of taxes, interest, and charges due thereon," and the deed recited that the purchaser offered to pay for the land a specified sum, "which offer was accepted, being the highest offer therefor," without stating that this sum was equal to the amount of taxes, interest, and charges due on the land, the instructions did not prove any authority to the county auditor to make the sale recited in the deed.—Bonham v. Weymouth, 38 N. W. 805, 39 Minn. 92.

252. Where a tax-deed of land forfeited to the state under St. Minn. 1866, c. 11, § 156, issued to a purchaser by the county auditor at private sale, fails to show by its recitals that the instructions of the state auditor for the sale of such lands were complied with, it is insufficient to establish a valid legal title to the land.—West v. St. Paul & N. P. Ry. Co., 41 N. W. 1031, 40 Minn. 189.

—— Lands in another state.

253. A tax-title derived under the tax-laws of Wisconsin, relied upon and in issue, cannot be proved by introduction of the tax-deed and certificate of sale, but a levy of the taxes, and other acts necessary to be done before a tax-sale could be had under the laws of Wisconsin, must also be shown.—Bisbee v. Torinus, 22 Minn. 555.

Distinguished in Bronson v. St. Croix Lumber Co., 46 N. W. 571, 44 Minn. 352.

254. A tax-deed of lands in Wisconsin, in accordance with the statutes of that state and the decis

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ions of its supreme court, is conclusive evidence of title in the grantee, after the lapse of the statutory period of limitations; the land being unoccupied, but constructively in the possession of the grantee in the tax-deed.—Bronson v. St. Croix Lumber Co., (Minn.) 46 N. W. 570.

44 Minn. 348.

Distinguishing Bisbee v. Torinus, 22 Minn. 555; Musser v. McRae, 38 N. W. 103, 38 Minn. 409.

Description—What lands included.

255. In the judgment, order, and certificate of sale in tax proceedings, the land was described as "lot 12, block 7, Rice & Irvine's addition, south side of Fourth street." In the tax-deed it was described as "lot number twelve, (12,) in block number seven, (7,) Rice & Irvine's addition to the city of St. Paul, Ramsey county, Minnesota." Such lot was in fact on the north side of and adjoining Fifth street. *Held*, that the tax-deed was void.—Flint v. Webb, 25 Minn. 93.

256. A tax-deed issued to plaintiff described the land conveyed generally as lying between a certain street and "the Mississippi river." *Held* not to include land conveyed by plaintiff's grantors to defendant, to be used in connection with the water-power of the latter, the land being under water, and extending from low water-mark to the margin of the river or water-line as permanently raised by defendant's dams.—Eastman v. St. Anthony Falls Water-Power Co., (Minn.) 44 N. W. 882.

43 Minn. 60.

c. *Actions to Try and Confirm Title.*

Who may maintain.

257. Mere failure to redeem land, or neglect to pay taxes, will not *per se* divest the title, so as to prevent the owner from maintaining an action against the purchaser at a tax-sale to test the validity of the proceedings prior to such sale.—St. Anthony Falls Water-Power Co. v. Greely, 11 Minn. 321, (Gil. 225.)

258. Where the holder of school land certificates abandons all claim to the lands, and for more than 10 years utterly neglects to comply with the conditions of the certificates, one who acquires the lands at a void tax-sale, and who, on compliance with the requirements of the law, subsequently receives a patent for the lands, has an equity in the lands superior to the holder of the certificates, and the latter is in no position to attack the validity of the tax-sale.—Murphy v. Burke, 49 N. W. 387, 47 Minn. 99; Same v. McGuire, 49 N. W. 388, 47 Minn. 103.

Limitation.

259. Laws Minn. 1862, c. 4, §§ 6, 7, providing that no action testing the validity of a tax-sale shall be brought after one year from the time of recording the tax-deed is a statute of limitations, and does not apply to an action of ejectment by the original owner against the grantee in the tax-deed; for in such case it would make the commencement of the time within which the action must be brought antedate the injury complained of, which is the unlawful taking and holding of the property, and not the registration of the tax-deed.—Baker v. Kelley, 11 Minn. 480, (Gil. 358.)

260. The owner of land may, in an action of ejectment against one in possession under a tax-deed, impeach the tax-deed under which the defendant claims possession, although such action is not brought within one year from the registry of the tax-deed, as required by Laws Minn. 1862, c. 4, §§ 6, 7; for such statute, in barring forever the right of the owner to test the validity of the tax deed after the lapse of the period prescribed, is in contravention of the clause in the constitution prohibiting the legislature from denying to any person a certain remedy in the laws for an injury or wrong which he has suffered in his property.—Baker v. Kelley, 11 Minn. 480, (Gil. 358.)

Distinguished in Hill v. Lund, 13 Minn. 453, (Gil. 422;) Burk v. Western Land Ass'n, 42 N. W. 479, 40 Minn. 507.

261. An action to remove a cloud upon title to land created by a tax-deed issued under Laws Minn. 1862, c. 4, and Laws 1863, c. 5, and Laws 1864, c. 5, is an action to "test the validity of the tax-sale" within Laws 1862, c. 4, § 7, and is barred after one year from the time the deed is recorded.—Hill v. Lund, 13 Minn. 451, (Gil. 419.)

Distinguishing Baker v. Kelley, 11 Minn. 480, (Gil. 358.)

262. The limitation prescribed by Gen. St. Minn. 1866, c. 11, § 154, for the bringing of an action to test the validity of tax proceedings, begins to run from the time of the sale, and not from the time of the forfeiture to the state.—Lambert v. Slingerland, 25 Minn. 457; Langemoe v. Same, Id.

263. The provision of Gen. St. Minn. 1866, c. 11, § 154, as amended by Laws 1869, c. 23, requiring actions to test the validity of any proceeding under that chapter for the sale or forfeiture of land for non-payment of taxes, or to determine any claim made under such a proceeding, to be commenced within three years after such sale or forfeiture, operated only to bar, after three years, the remedies or forms of action mentioned, leaving the property rights of the parties wholly unaffected, and subject to be tested in other forms of action. Hence, the repeal of the provision by Laws 1874, c. 1, § 168, revived the right to bring an action to test the validity of the proceedings referred to, although a period of three years had run before the repeal. The saving clause in the repealing statute did not apply, as the mere immunity from certain forms of action was not a right within the meaning of that clause saving "all rights heretofore acquired under any act hereby repealed." And for the same reason the act repealed was not revived by the repeal of the repealing act by Laws 1875, c. 5, § 52, nor by the provision of Laws 1878, c. 1, § 120, (Gen. St. 1878, c. 11, § 120,) that all rights theretofore acquired under the act repealed should be revived and continued in force.—Kipp v. Johnson, 17 N. W. 957, 31 Minn. 360.

264. Under Laws Minn. 1875, c. 5, § 30, limiting the time for bringing an action to set aside or test the validity of a tax-sale to five years from the date of the sale, a tax-sale made in 1875, upon a tax judgment regular on its face, cannot be set aside in an action brought in 1881.—Bower v. O'Donnell, 12 N. W. 352, 29 Minn. 135.

265. Laws Minn. 1875, c. 5, § 30, limits actions to set aside tax-sales to five years from the date of the sale. Act March 11, 1878, § 85, limits the

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time for bringing such actions to three years, but does not expressly repeal the act of 1875. *Held*, that the act of 1878 applies only to tax-sales made after its enactment.—Mulcahy v. Florer, 8 N. W. 166, 27 Minn. 449.

266. A sale under a void judgment, rendered in proceedings under Laws Minn. 1881, c. 135, to enforce payment of taxes delinquent in and prior to 1879, does not set in motion the limitation provided in section 7 of the act cited, which declares that the judgment and sale under the act shall not be questioned, except the action in which the question is raised be brought within nine months of the date of the sale.—Feller v. Clark, (Minn.) 31 N. W. 175. 36 Minn. 338.

267. Where a county auditor does not attempt to sell land for taxes at public sale under the statute on the day appointed, but sells at a later day at private sale, the limitation of nine months from the date of sale for beginning an action to test the validity of the sale under Gen. Laws Minn. 1881, c. 135, § 7, never begins to run.—Burdick v. Bingham, (Minn.) 38 N. W. 489.

38 Minn. 482.

Possession of land.

268. An action brought under Laws Minn. 1887, c. 127, to test the validity of an adverse claim under a tax deed or certificate, may be maintained by the land-owner, without alleging or proving either that the land is vacant or in the possession of himself or another.—Sanborn v. Mueller, (Minn.) 35 N. W. 666.

38 Minn. 27.

269. Gen. Laws Minn. 1887, c. 127, confers on the owners of land the right, without regard to the facts as to possession or occupancy, to prosecute an action against one asserting an adverse claim under tax proceedings to determine such adverse claim. In such an action, the complaint need not set forth specifically, as in a suit to remove a cloud, the particular tax deed or proceedings upon which the hostile claim is based.—Lewis v. Bartleson, (Minn.) 38 N. W 707.

39 Minn. 89.

Evidence—Payment of tax.

270. To sustain a sale under a tax judgment it is not necessary to show that the judgment had not been paid.—Kipp v. Collins, 23 N. W. 554, 33 Minn. 394.

271. A judgment and sale of land for taxes for several years cannot be avoided by proof of payment of the taxes for some of those years only.—Knight v. Valentine, 24 N. W. 295, 34 Minn. 26.

272. Want of jurisdiction of the court to render a tax judgment may be shown by evidence *de hors* the record.—Brown v. Corbin, (Minn.) 42 N. W. 481. 40 Minn. 508.

Judgment—Operation and effect.

273. A judgment in an action between the owner of land and the holder of a certificate of sale thereof for taxes, involving the validity of the tax and the sale, is not evidence of the facts on which it was based, as against the state, in proceedings to enforce the tax under Gen. St. Minn. 1878, c. 11, the provisions of statutes governing the two proceedings differing as to the effect of omissions or irregularities in the assessment or levy.—In re Barber, (Olmsted County v. Barber,) 17 N. W. 473, 31 Minn. 256; In re Sedgewick, (Olmsted County v. Sedgwick,) Id.

274. A judgment by default against the apparent record owner, quieting the tax-title holder's title against him, is *res inter alios acta* as to a prior grantee from said owner, under an unrecorded warranty deed, since the judgment is not such a one "against the person in whose name the title to such land appears of record" as is protected by the recording act of 1858, (St. Minn. 1878, c. 40, § 21,) that act merely giving the same preference to attachments and judgments creating a specific or general lien as conveyances had over prior unrecorded deeds.—Windom v. Schappel, (Minn.) 38 N. W. 757.

39 Minn. 35.

d. *Reimbursement of Defeated Purchasers.*

Enforcement of lien of state for taxes.

275. A complaint in an action, under Laws Minn. 1862, c. 4, § 8, entitling a purchaser at a tax-sale, whose title is "adjudged invalid" for irregularities in the sale, to the lien of the state for such taxes, and an action to enforce the same, which does not set forth the facts showing the invalidity of the tax-title, but alleges that the title of the plaintiff is invalid from an irregularity in the notice of such tax-sale, is bad as pleading conclusions of law.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

276. If, in such an action, it is sought to enforce liens for several years' taxes upon the same land, and the complaint states the aggregate amount of the taxes for the several years, but not the amount for each year, it is not sufficiently definite, and may be made more definite and certain on motion. Such defect cannot, however, be reached on motion for judgment on the pleadings.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

277. The words "adjudged invalid," as used in such section, embrace only a judgment of a court of competent jurisdiction, and plaintiff must plead the judgment of such court in his complaint, determining the invalidity of the title, or set out fully the facts showing such invalidity, and claim judgment declaring such title invalid, and decreeing plaintiff's lien.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

278. The complaint in such case should definitely set forth each lien of the state which the plaintiff claims to have acquired under the provisions of the act, and which he seeks to enforce, by stating the nature and amount of each year's taxes embraced in the sale, and the particular lot or parcel of land on which they were assessed.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

279. In such a case, the power to tax appearing from the complaint, and the taxes and property upon which they are a lien being averred with sufficient certainty, an allegation that such taxes were "duly levied and assessed" is a sufficient averment of the assessment of such taxes; and, if

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issue is taken thereon, proof of everything essential to the assessment of the tax is admissible.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

280. In an action under Gen. St. Minn. 1866, c. 11, § 142, to recover of the proprietor of town lots delinquent taxes, penalty, and interest for which the lots have been sold at a tax sale which has proved invalid, and taxes paid subsequent thereto, the tax duplicates of the county are not evidence of the assessment and levy of such taxes, or any steps anterior to such duplicate.—Howes v. Gillett, 23 Minn. 231.

Distinguished in Re Jefferson's Estate, 28 N. W. 258, 35 Minn. 217.

Refunding purchase money.

281. Gen. St. 1878, c. 11, § 97, as amended by Gen. Laws 1881, c. 10, § 19, relating to the recovery of the purchase money for land purchased at void tax-sales, and the taxes subsequently paid thereon with interest, is by its terms retroactive, and is valid.—Schoonover v. Galernault, (Minn.) 47 N. W. 654.

45 Minn. 174.

282. Gen. St. Minn. 1878, c. 11, § 97, prescribes the form of a judgment declaring a tax-sale void, and provides that "where any sale has been or hereinafter [hereafter] shall be so declared void, the money paid by the purchaser at the sale, or by the assignee of the state," shall be returned to him out of the county treasury. *Held*, that the statute applies where a tax-sale was made before its passage, but the judgment declaring the sale void was rendered afterwards.—State v. Cronkhite, 9 N. W. 681, 28 Minn. 197.

283. Gen. St. Minn. 1866, c. 11, § 142, which provides that where a tax-sale "proves to be invalid on account of any irregularity in the proceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale is entitled to receive from the proprietor of such land or lot the amount of taxes and penalty and interest legally due thereon, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot is bound for the payment thereof," does not apply to a tax-sale which proves invalid by reason of an illegality in the assessment of the property and the levy of the tax.—Barber v. Evans, 6 N. W. 445, 27 Minn. 92.

284. The provision of Gen. St. Minn. 1866, c. 11, § 155, for the return to a purchaser of the money paid by him "when a sale of any lands, as provided in this chapter, is declared void by judgment of court," applied to a purchase of lands forfeited to the state at a tax-sale, and sold, under sections 137, 138, as well as to purchases at tax-sales, and it applied to any case where the sale or forfeiture was declared void by judgment of court in any form of action, not merely an action brought under section 154, by a person interested, to test the validity of the sale or forfeiture. And the right of the purchaser to a return of his money could not be affected by the passage of Laws 1881, c. 10, § 19, if construed as limiting such right to the case of a tax-sale.—Fleming v. Roverud, 15 N. W. 119, 30 Minn. 273.

285. Where the decision of a court states, as its ground, that no valid judgment was entered against the land for taxes, this constitutes a sufficient compliance with the requirement of Gen. St. Minn. 1878, c. 11, § 97, that, when a sale of land for taxes is declared void, the judgment shall state the reason, and entitles the purchaser to recover the money he paid from the county.—German-American Bank v. White, (Minn.) 38 N. W. 361.

38 Minn. 471.

286. The right to recover money paid on a void tax sale from the county under Gen. Laws Minn. 1881, c. 10, § 97, does not depend on a statement in the judgment therein mentioned of the reason for which a tax sale has been set aside; nor is it essential that there should have been a valid tax levied.—Easton v. Hayes, (Minn.) 38 N. W 364.

38 Minn. 463.

287. Under Laws Minn. 1878, c. 1, § 97, (Gen. St. 1878, c. 11, § 97,) as amended by Laws 1881, c. 10, providing for reimbursement from the county treasury of the purchase price paid at void tax sales, to the purchaser "or to the party holding his right," a grantee of the land from the purchaser is entitled to such reimbursement.—Easton v. Hayes, 29 N. W. 59, 35 Minn. 418.

288. The heirs or devisees of a purchaser entitled to recover taxes paid, by virtue of that statute, are "persons holding his right," within the meaning thereof; and it is not material that, during the minority of one of such devisees, the money to pay such taxes is furnished or advanced and paid for him by a parent or guardian, who is also tenant in common of the same with such devisee.—Schoonover v. Galernault, (Minn.) 47 N. W. 654.

45 Minn. 174.

289. The proceeding under Gen. St. Minn. 1878, c. 11, § 148, amended by Laws 1881, c. 10, upon the application of a holder of a tax-sale certificate to have the amount paid by him for the certificate and subsequent taxes refunded out of the county treasury, is not judicial in its nature, and the duties thereby imposed may be performed by other than judicial officers.—State v. Dressel, (Minn.) 35 N. W. 580.

38 Minn. 90.

290. After the time to redeem from a tax judgment sale has expired, the former owner cannot be heard to question the regularity of the proceedings, under Gen. St. Minn. 1878, c. 11, § 148, to refund, upon an application made on the ground that the tax judgment and sale were void for want of jurisdiction in the court, nor to object to proceedings to enforce the taxes if they were properly levied; for if the sale was void, the taxes were not satisfied by it; if it was valid, the former owner has ceased to have any interest in the land.—State v. Dressel, 35 N. W. 580, 38 Minn. 90.

291. Where a tax sale of one piece of land has been adjudged void, even upon a ground common to all the lands sold under the same general tax judgment, the purchaser is not entitled, under Gen. St. Minn. 1878, c. 11, § 97, as amended by Laws 1881, c. 10, to a return of the money paid by him on account of another piece sold under the same tax judgment, as to which the tax-sale has not been adjudged void, and a demand on the auditor for a warrant for the moneys paid on account

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of both pieces is bad.—Corbin v. Morrow, (Minn.) 49 N. W. 201.

46 Minn. 522.

292. A person applying to a county auditor for his warrant upon the treasurer for money paid by him upon a void tax-sale, and subsequent taxes paid on the land, under Gen. St. Minn. 1878, c. 11, § 97, as amended by Laws 1881, c. 10, must furnish to the auditor proof of his right to a return of his money.—Corbin v. Morrow, (Minn.) 49 N. W. 201. 46 Minn. 522.

293. An action may be brought against a county auditor, by a person entitled to require him to issue his warrant upon the county treasurer for money paid on a tax-sale subsequently adjudged void, to compel him to issue it.—Corbin v. Morrow, (Minn.) 49 N. W. 201.

46 Minn. 522.

Recovery of taxes paid—Lien.

294. Defendant purchased land at a tax-sale and received a certificate of sale, and afterwards a tax-deed, without notice of any claim of plaintiff, an insane person, to any interest therein. Afterwards plaintiff brought an action to redeem the land, as provided by Gen. St. Minn. 1878, c. 11, § 91, where the land of an insane person is sold for taxes. *Held* that, on redemption of the land, defendant was entitled to compensation for the taxes paid and improvements made by him, under Gen. St. Minn. 1878, c. 75, § 15, providing that any person who, in good faith, and for a valuable consideration, has purchased land, shall not be ejected therefrom until payment has been made for taxes paid and improvements made by him.—Goodrich v. Florer, 6 N. W. 452, 27 Minn. 97.

295. In an action to foreclose a mortgage and enforce a lien for taxes paid by the mortgagee the court found specially the existence of certain irregularities and defects in the tax proceedings, which it held to be fatal to the right to the relief sought. *Held*, that the case was within the provision of Laws Minn. 1885, c. 261, for reimbursement of taxes paid by mortgagees in certain cases where such taxes are adjudged void, although the taxes in question were not in express terms "adjudged void."—Coles v. County Com'rs of Washington County, 27 N. W. 497, 35 Minn. 124.

296. Where a tax sale is absolutely void, no rights accrue to the purchaser, and the lien for taxes does not pass, and the court cannot require payment of them, as a condition of adjudging the sale void.—Burdick v. Bingham, 38 N. W. 489, 38 Minn. 482.

297. Where a purchaser at a tax-sale, whose title is void, seeks to enforce a lien on the land for the amount of taxes paid subsequent to his purchase, under Laws Minn. 1874, c. 1, § 138, the county treasurer's receipt is only evidence of the fact of payment, but not of the existence of any tax against the land.—Brown v. Corbin, (Minn.) 42 N. W. 481. 40 Minn. 508.

298. Under Gen. St. Minn. 1878, c. 11, § 90, which permits a purchaser of land at a tax-sale to tack to the amount of his claim against the land "any subsequent delinquent taxes" paid by him, a purchaser cannot so tack the amount of taxes for the year succeeding his purchase, voluntarily paid by him. The language of sections 88 and 98, referring to the payment by such purchaser of the taxes for subsequent years, must be construed with and limited by section 90.—Sprague v. Roverud, 26 N. W. 603, 34 Minn. 475.

299. In Minnesota the holder of the state's lien on real estate for taxes, acquired by purchase of the real estate at a void tax sale, cannot, independent of the "occupying claimants'" law, defend his possession of the real estate upon the lien, even though he enter with the acquiescence of the owner. His rights are not like those of a mortgagee in possession.—Taylor v. Slingerland, (Minn.) 40 N. W. 575.

39 Minn. 470.

300. Under the Minnesota "occupying claimants' law," (Gen. St. Minn. 1878, c. 75, § 16,) the interest to be allowed for taxes paid is 7 per cent. per annum. The sum which the judgment in favor of the owner requires him to pay the occupant, under section 17, as a condition to the issuing of execution, does not bear interest.—Taylor v. Slingerland, (Minn.) 40 N. W. 575.

39 Minn. 470.

301. The refunding out of the county treasury, to an assignee of a tax-sale certificate, upon the sale proving invalid, of the amount of taxes, etc., paid by him, under Gen. St. Minn. 1866, c. 11, does not operate as a reassignment to the state of the state's claim and lien for the taxes, so that the state is bound, as in privity with him, by the judgment against him in the action between him and the owner of the land involving the validity of the tax and the sale.—In re Barber, (Olmsted County v. Barber,) 17 N. W. 473, 31 Minn. 256; In re Sedgewick, (Olmsted County v. Sedgwick,) Id.

Compensation for improvements.

302. A person who is in possession of land under a tax-deed, which is irregular on its face, is not entitled to the benefit of Gen. St. Minn. 1878, c. 75, § 15, which provides that any person who, in good faith, and for a valuable consideration, has purchased land, shall not be ejected therefrom until payment has been made for improvements put on the land by him.—Mulcahy v. Florer, 8 N. W. 166, 27 Minn. 449.

303. Under Gen. St. Minn. 1878, c. 75, § 15–18, the *bona fide* occupant, under color of title in fee derived from tax sale, is entitled to an election to be paid the value of his improvements as a condition of the recovery of possession by a successful claimant, unless the latter shows that he had no notice, actual or constructive, of the possession of the former in time to disclose or assert his claim before the improvements were made, and the burden rests on the claimant, in the first instance, to bring himself within the exception, in order to entitle himself to an election to sell the land, instead of reimbursing the occupant for his improvements; and a general finding that the occupant entered, and made improvements of a specified value, is insufficient to charge the claimant with constructive notice within the meaning of the act.—Jewell v. Truhn, (Minn.) 38 N. W. 106.

38 Minn. 433.

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304. Plaintiffs did not seek to recover possession, but to have the validity of the tax titles under which defendants claim determined. *Held*, that it was not error to refuse to assess or allow the value of defendants' improvements.—Sanborn v. Mueller, (Minn.) 35 N. W. 666.

38 Minn. 27.

Taxation of Costs.

See *Costs*, 18–41.

Teacher.

See *Schools and School-Districts*, 42–50.

TELEGRAPH COMPANIES.

Injuries from telegraph wires, see *Negligence*, 13. Telegrams as evidence, see *Evidence*, 250.

Transmission of message—Liability for negligence.

1. July 12th, plaintiff, residing in St. Paul, wrote a wholesale pork dealer, residing in Dubuque: "Have you any more north-western mess pork or prime mess; also extra mess? Telegraph price on receipt of this." He telegraphed in reply: "Letter received. No light mess here; extra mess, twenty-eight seventy-five, ($28.75.)" Plaintiff received the message July 15th, and about 6 o'clock in the evening handed defendant, a telegraph company, the following dispatch to the wholesale dealer, with request to forward same without delay: "Dispatch received. Will take two hundred extra mess at price named." Defendant had no other knowledge of the nature or object of such message than was contained therein, and negligently failed to forward the same until July 19th. From the morning of July 16th to 19th pork advanced in price, and plaintiff was obliged to purchase at advanced rates. *Held* that, as the delivery of the message would not have effected any contract for the delivery of the pork at the price named, the measure of plaintiff's damage against defendant was the price paid for the message.—Beaupre v. Pacific & Atl. Tel. Co., 21 Minn. 155.

2. A message delivered to a telegraph company for transmission was written on one of its blank forms in common use, under printed terms and conditions, one of which was: "No claim for damages shall be valid unless presented in writing within 30 days after sending the message;" and beneath the message and signature was printed the following: "Read the notice and agreement at the top." *Held*, that the sender of the message must be presumed to have had notice of such condition, and that it became part of the contract between him and the company, and that such condition was reasonable, and binding on the sender.—Cole v. Western Union Tel. Co., 22 N. W. 385, 33 Minn. 227.

Fraud of agent.

3. The local agent of a telegraph company, who was also agent of an express company, sent a forged dispatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in buying grain. The dispatch was duly received, and the money in good faith forwarded by express, but was intercepted and converted by the agent. *Held*, that the telegraph company was liable for the loss, whose proximate cause was the forged dispatch.—McCord v. Western Union Tel. Co., 39 N. W. 315, 39 Minn. 181; St. Paul Roller-Mill Co. v. Western Union Tel. Co., 39 N. W. 318, 39 Minn. 186.

TELEPHONE COMPANIES.

Right of eminent domain.

The erection and maintenance of telephone poles and wires in a city street, the fee of which is in the adjacent proprietor, is an infringement of the property rights of such proprietor, notwithstanding that the proper public authorities had consented to such a use of the street. (Affirmance by divided court.)—Willis v. Erie Telegraph & Telephone Co., (Minn.) 34 N. W. 337.

37 Minn. 347.

Tenancy.

See *Landlord and Tenant.*

TENANCY IN COMMON AND JOINT TENANCY.

Actions between cotenants, see *Action*, 26.
Adverse claims to common property, see *Adverse Claim*, 4.
Grant to husband and wife, see *Husband and Wife*, 1.
Partnership between tenants in common, see *Partnership*, 1.
Rights and liabilities of mortgagee, see *Mortgages*, 95, 96.

Ouster and adverse possession.

1. The possession of one tenant in common is not to be presumed unlawful or adverse to his cotenants.—Berthold v. Fox, 13 Minn. 501, (Gil. 462.)

2. Where one tenant in common is in lawful possession of an undivided moiety of land, he will, in the absence of facts showing an ouster, be presumed to be in lawful possession of the remainder for his co-tenant.—Holmes v. Williams, 16 Minn. 164, (Gil. 146.)

3. Where a deed is made to run to two grantees jointly, and one only enters into actual possession, such possession is not to be deemed adverse to the other joint owner or his heirs, until an ouster or the assertion of some hostile claim denoting an intention to hold adversely.—Lindley v. Groff, (Minn.) 34 N. W. 26.*

37 Minn. 338.

Redemption from mortgage foreclosure.

4. One of two tenants in common of mortgaged premises, which had been sold under the mortgage, "for the purpose of effecting a redemption" from the foreclosure sale, and after an "understanding" with his co-tenant that he would make such redemption, paid the amount necessary to redeem, and took to himself an assignment of the purchas-

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er's certificate of sale. *Held* that, as to the co-tenant, the transaction will be treated in equity as a redemption, and not as divesting the co-tenant of his estate.—Holterhoff v. Mead, 29 N. W. 675, 36 Minn. 42.

5. One of several co-tenants of real property agreed with the mortgagee of the property that the latter should foreclose and purchase the property and convey it to the former, after the expiration of the time for redemption, on being paid the mortgage debt and costs of foreclosure, and the agreement was carried out. *Held*, that the other co-tenants were entitled to share in the benefits of the transaction on making contribution to the expense.—Oliver v. Hedderly, 21 N. W. 478, 32 Minn. 455.

6. One of two co-tenants of lands that have been sold at foreclosure sale, who has acquired the legal title to the lands by redemption on an understanding with his co-tenant, cannot divest the latter of his equity in the lands by a tax-title, acquired at his own request through a third person with money furnished by himself.—Holterhoff v. Mead, 29 N. W. 675, 36 Minn. 42.

Charges on the property.

7. Taxes paid by a tenant in common on the common property, or an amount paid to procure a conveyance from one who claimed title to the same adversely and under a tax-deed, cannot be made a charge upon the estate of a co-tenant after it has passed into the hands of a purchaser without notice; and the record of the tax-deed and of the conveyance from the grantee therein named is not notice of such a claim.—Welch v. Ketcham, (Minn.) 51 N. W. 113.

Waste.

8. One tenant in common cannot, as a general rule, have an action of trespass against his co-tenant, but may have an action on the case, in the nature of waste, for misfeasance injurious to the common property.—Booth v. Sherwood, 12 Minn. 426, (Gil. 310.)

Conversion by co-tenant.

9. One tenant in common cannot maintain an action against his co-tenant for the conversion of the joint property, unless the same has been actually converted or destroyed by him. The possession of one is the possession of both.—Strong v. Colter, 13 Minn. 82, (Gil. 77.)

10. A sale and delivery as his own, by one of several co-tenants, of personal property owned jointly or in common with others, is a conversion as to the other co-tenants.—Person v. Wilson, 25 Minn. 189.

11. Refusal by one tenant in common to deliver joint property, in his exclusive possession, upon demand therefor made by other co-tenants, on the ground that they are the exclusive owners thereof, is no evidence of conversion, though accompanied by a claim of exclusive ownership in himself.—Person v. Wilson, 25 Minn. 189.

Use and occupation.

12. The owner of an undivided moiety of land, in possession of the whole, is not liable to his co-owner, in an action for use and occupation, where there has been no demand of possession, or knowledge of the latter's title.—Holmes v. Williams, 16 Minn. 164, (Gil. 146.)

13. A complaint by a tenant in common against his co-tenant, for use and occupation, which fails to aver a demand on defendant for possession, or knowledge on his part of plaintiff's title, is insufficient.—Holmes v. Williams, 16 Minn. 164, (Gil. 146.)

14. Where one of two equal co-tenants of property is ousted by the other, the tenant so ousted may, after obtaining partition of the premises, and having his portion set off in severalty, recover of his co-tenant the value of the use and occupation of his undivided portion during the period he was excluded from the premises; such action being in the nature of a common-law action of trespass for mesne profits.—Cook v. Webb, 21 Minn. 428.

15. Plaintiff and defendant, in February, 1866, as partners, took a lease of certain premises, owned by two tenants in common, to expire April 1, 1871, plaintiff and defendant owning the building thereon. In October, 1866, plaintiff purchased an undivided half of the land, plaintiff and defendant attorning and continuing as tenants. Plaintiff and defendant dissolved in February, 1870, defendant taking the lease. Subsequently defendant procured a lease from the owners of the other undivided half for a term commencing April 1, 1871. After that time defendant refused to let plaintiff into the use and occupation of the premises. Proceedings for partition were instituted, and in June, 1873, final judgment for partition was entered and plaintiff's portion was set off in severalty. *Held*, that defendant, in excluding plaintiff from the premises, had acted wrongfully, and was liable to plaintiff for the use and occupation of the premises during the time plaintiff had been excluded.—Cook v. Webb, 21 Minn. 428.

16. Defendant, as tenant of one tenant in common of land, wrongfully excluded another tenant in common from the enjoyment of the premises, and was sued for the value of the use and occupation of such undivided portion during the period of exclusion. *Held*, that defendant could not complain that the jury were instructed that, in ascertaining the rental value, they were not confined to the value for a term of the precise length they were occupied by defendant, but must give a verdict for the rental value of the property generally for such period, and that it was proper for them to estimate the rental value of the whole premises, and then give judgment for one-half the amount.—Cook v. Webb, 21 Minn. 428.

Products of common property.

17. Though Gen. St. Minn. 1866, c. 75, § 24, provides that "one joint tenant or tenant in common * * * may maintain an action against his co-tenant for receiving more than his just proportion of the rents and profits," a tenant in common is not, in the absence of an agreement of the parties, and where he has not excluded his co-tenant from the enjoyment of the common property, liable to such co-tenant for an appro-

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priation directly to his own use of the products of the joint property, which is in his exclusive occupancy.—Kean v. Connelly, 25 Minn. 222.

18. Where one tenant in common recovers of another for receiving more than his proportion of rents and profits, the defendant should be allowed to offset taxes paid by him within six years upon plaintiff's share of the estate, as such claim constitutes an equity such as defendant is allowed to set up in his answer by Gen. St. Minn. 1866, c. 66, § 79, subd. 3.—Kean v. Connelly, 25 Minn. 222.

19. One of two tenants in common of real property cannot recover from his co-tenant for the appropriation by the latter to his own use of the products of the common property used and possessed by him, where there is no agreement between the parties making the latter liable to the former on account of such appropriation, and where the latter has not excluded the former from the enjoyment of the common property. The fact that the tenant who has received such products has sold part of them is immaterial. Following Kean v. Connelly, 25 Minn. 222.—Hause v. Hause, 13 N. W. 43, 29 Minn. 252.

20. Trees cut by one co-tenant of land without the consent of the other, although they become personal property on being so severed from the land, remain the property of the co-tenants; and, if the wrong-doer sells the logs as his own without the consent of the co-tenant, he is liable to the latter for converting them, as in case of other personal property.—Shepard v. Pettit, 14 N. W. 511, 30 Minn. 119.

21. Gen. St. Minn. 1878, c. 75, § 43, providing for an action by one joint tenant or tenant in common against his co-tenant "for receiving more than his just proportion of the rents or profits of the estate owned by them," does not apply to an action by one co-tenant against another for a conversion by the latter of logs cut from the land and sold by him without the consent of the plaintiff, and plaintiff need not show that defendant cut more than his proportionate share of the trees on the land.—Shepard v. Pettit, 14 N. W. 511, 30 Minn. 119.

22. In an action by one co-tenant against another for a conversion by the latter of logs cut from the land owned by them in common, and sold without the consent of plaintiff, plaintiff is entitled to recover the enhanced value of the logs, with interest from the date of conversion by the sale. No deduction should be allowed for the sum expended by defendant in preparing the logs for and bringing them to market. Nor can the damages be limited to the value of the trees on the land, it not appearing that defendant acted in good faith, or in the belief that he had a right to cut the trees. Following Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.—Shepard v. Pettit, 16 N. W. 271, 30 Minn. 481.

Improvements.

23. A tenant in common, making improvements on the common property, cannot, in the absence of any agreement or undertaking with his co-tenant to that effect, recover from the latter any part of their cost or value, either in an action therefor or by way of set-off.—Walter v. Greenwood, 12 N. W. 145, 29 Minn. 87.

24. Even if a tenant in common could be allowed, as against his co-tenant, for the increase in rents from the common property due to improvements made by him, an offer of proof on that question, which does not show how much the rent was increased thereby, is immaterial.—Walter v. Greenwood, 12 N. W. 145, 29 Minn. 87.

Actions.

25. A tenant in common is entitled to possession of the entire tract held in common as against every one except his co-tenants, and he may maintain ejectment for the entire tract against a stranger to the common title.—Sherin v. Larson, 11 N. W. 70, 28 Minn. 523.

26. Where plaintiff in ejectment claims an undivided interest in the premises, and the complaint does not show that defendant is not a tenant in common with plaintiff, defendant must allege and prove that he is such co-tenant before he can require of plaintiff a denial of his rights or acts amounting to an ouster.—Sherin v. Larson, 11 N. W. 70, 28 Minn. 523.

27. One tenant in common of personal property may separately maintain an action against a stranger for a wrong done to it, if his co-tenants refuse to join with him as plaintiffs, and they are non-residents of, and are out of, the state.—Peck v. McLean, (Minn.) 30 N. W. 759.

36 Minn. 228.

TENDER.

Of amount due on mortgage, see *Mortgages*, 454–456.
—— on pledge, see *Pledge*, 4, 5.
compensation awarded for property taken for public use, see *Eminent Domain*, 153, 154.
deed, see *Vendor and Purchaser*, 35–40.
performance of condition of chattel mortgage, see *Chattel Mortgages*, 89–92.
purchase money, see *Specific Performance*, 65–70.
To redeem from mortgage, see *Chattel Mortgages*, 109, 110; *Mortgages*, 414–423.

Necessity.

1. Where no place of payment is designated, in a contract for the payment of money, the debtor is not bound to go into another state to tender payment to the creditor.—Gill v. Bradley, 21 Minn. 15.

Tender of payment—What is legal tender.

2. The acts of congress of 1862 and 1863, making treasury notes a legal tender for debts contracted subsequent to their passage not specifically payable in coin, are constitutional and valid.—Breen v. Dewey, 16 Minn. 136, (Gil. 123.)

3. Upon a contract for the payment of a sum of money in dollars, coin not being specified, made since the passage of the legal-tender acts of congress of 1862 and 1863, a tender of the

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amount in treasury notes is good.—Breen v. Dewey, 16 Minn. 136, (Gil. 123.)

4. A tender of payment of a debt contracted before the passage of the legal tender act was made in treasury notes prior to a decision of the supreme court of the United States, afterwards overruled, holding such tender as to debts contracted before the passage of the act invalid. *Held* that, the tender having been made before the promulgation of the decision of the supreme court, the creditor could not have been misled by such decision, and that the tender was good. —Lovejoy v. Stewart, 23 Minn. 94.

—— Overdue note of creditor.

5. A debtor owning an overdue promissory note of his creditor cannot tender the same in payment of his indebtedness.—Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

—— Amount.

6. There having been seven different deliveries of wheat to secure separate advances, plaintiff tendered a sum sufficient to cover the whole amounts due for four of the advances, including the expenses. *Held*, that this was a good tender, and entitled plaintiff to recover the value of the wheat delivered as security therefor. —Nelson v. Robson, 17 Minn. 284, (Gil. 260.)

7. Plaintiff delivered wheat to defendant to secure advances, which were to be repaid, with interest and charges. Afterwards plaintiff, being ignorant of the amount of the charges, asked to be informed thereof, which defendant refused. Plaintiff thereupon tendered a sum of money not sufficient to cover the whole sum due, but defendant refused to receive it, saying that he had bought the wheat. *Held*, that plaintiff was entitled to go to the jury on the question whether this was not a waiver of tender of a larger sum. —Nelson v. Robson, 17 Minn. 284, (Gil. 260.)

8. A note stipulated that, if the sum named therein should not be "paid when due and the same is sued," $10 additional to defray the expenses of the suit should be entered up as part of the judgment. Before suit was brought on the note, the debtor tendered the amount due on the note, which the creditor refused to receive. Afterwards suit was brought on the note, though no subsequent demand was made. *Held*, that plaintiff was not entitled to the $10 additional, though it did not appear that the debtor, at all times after the tender, had the money ready to pay.—Pinney v. Jorgenson, 6 N. W. 376, 27 Minn. 26.

—— Production of money.

9. Where a tender is pleaded, and the evidence shows that the money was not produced, but the debtor offered to pay, and informed the creditor that he had the money with him, but the creditor refuses to take the amount offered, it is error to exclude evidence that the debtor then had the money with him ready to pay.—Pinney v. Jorgenson, 6 N. W. 376, 27 Minn. 26.

—— Keeping tender good.

10. A tender of payment of a note payable at a particular bank, but not left there for collection, to operate as a bar to subsequent interest and costs, must be kept good by leaving the money at the bank, or in some other place, so that the same shall be accessible to the holder of the note.—Balme v. Wambaugh, 16 Minn. 116, (Gil. 106.)

11. Tender of the amount due upon a promissory note secured by a chattel mortgage, though made after the note has matured, extinguishes and discharges the lien of the mortgage, and it is not necessary to keep the tender good by bringing the money into court in case an action is thereafter brought by the mortgagee to obtain possession of the chattels.—Moore v. Norman, (Minn.) 45 N. W. 857.

43 Minn. 428.

Pleading.

12. A tender is sufficiently pleaded if the amount tendered is so alleged that it can be made certain.—St. Paul Div. No. 1, Sons of Temperance v. Brown, 9 Minn. 157, (Gil. 144.)

Payment into court.

13. In order to constitute a payment into court such payment must be under a rule or order of court to that effect.—Davidson v. Lamprey, 16 Minn. 445, (Gil. 402.)

Bringing amount into court.

14. In an action on a life insurance policy which has never been delivered, the premiums on which have been tendered, but refused, it is not necessary to bring the amount of the tender into court, for, if plaintiff is entitled to recover, it could be deducted from the amount recovered. —Schwartz v. Germania Life Ins. Co., 18 Minn. 448, (Gil. 404.)

Territories.

Judgments of territorial courts, see *Judgment*, 208, 209.

Threats.

See *Duress*.

As evidence, see *Assault and Battery*, 31; *Homicide*, 60, 61.

Timber.

Damages for cutting, see *Damages*, 65-70.

Entry of public lands under timber culture act, see *Public Lands*, 11-14.

Replevin for, see *Replevin*, 2-5.

Rights of mortgagee, see *Mortgages*, 87.

—— of purchaser on foreclosure, see *Mortgages*, 313, 314.

TIME.

Discharge of surety by extension of time to principal, see *Principal and Surety*, 14-19.

Essence of the contract, see *Specific Performance*, 61, 62; *Vendor and Purchaser*, 41-49.

Judicial notice of calendar, see *Evidence*, 16-18.

Laches, see *Equity*, 74-81; *Specific Performance*, 71-77.

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Of application for new trial, see *New Trial*, 3-5.
delivery of goods sold, see *Sale*, 34-43.
filing claim for mechanic's lien, see *Mechanics' Liens*, 96-105.
—— pleadings, see *Practice in Civil Cases*, 53, 54.
issuing bonds in aid of railroads, see *Railroad Companies*, 76.
making requests for instructions to jury, see *Trial*, 77, 78.
motion for change of venue, see *Venue in Civil Cases*, 13, 14.
payment of promissory note, see *Negotiable Instruments*, 11, 150.
performance of contracts, see *Contracts*, 98-102.
publication of summons, see *Summons*, 48, 49.
redemption from mortgage, see *Mortgages*, 448-453.
sale of land for nonpayment of taxes, see *Taxation*, 166-169.
—— on foreclosure, see *Mortgages*, 216-218.
service of papers, see *Practice in Civil Cases*, 57-61.
—— of summons, see *Summons*, 15.
taking appeal, see *Appeal and Error*, 134-142.
—— effect of statutes, see *Statutes*, 55-57.
—— proceeding by *certiorari*, see *Certiorari*, 21, 22.
Statute of limitations, see *Limitation of Actions*.

Computation.

Though Gen. St. Minn. 1878, c. 66, § 82, is a section of the Code of Civil Procedure, its provision that time shall be computed by excluding the first day and including the last is not confined to matters of practice, but is a general rule for the construction of statutes.—Spencer v. Haug, 47 N. W. 794, 45 Minn. 231.

Title.

Abstracts of, see *Abstracts of Title*.
By adverse possession, see *Adverse Possession*.
Cloud on title, see *Quieting Title*.
Deposit of title deeds, see *Mortgages*, 2.
Effect of patent to pass title, see *Public Lands*, 110.
Of city ordinance, see *Municipal Corporations*, 54, 55.
mortgagor to lands mortgaged, see *Mortgages*, 83.
vendor, to land sold, see *Specific Performance*, 35-42.
On conveyance of land, see *Vendor and Purchaser*, 22-34.
sale of goods, see *Sale*, 21-33.
Tax-titles, see *Taxation*, 206-304.
Title of statutes, see *Statutes*, 18-47.
To fee of highway, see *Highways*, 77-80; *Municipal Corporations*, 125-128.
lands granted in aid of railroads, see *Public Lands*, 65-71.
—— of state insane asylum, see *Insane Asylum*.
—— of state university, see *University of Minnesota*, 1, 2.
office, see *Quo Warranto*.
real estate, as affecting jurisdiction, see *Courts*, 23-25.
support ejectment, see *Ejectment*, 1-3.
Warranty, see *Sale*, 63-69.

Tolls.

For driving, etc., logs, see *Logs and Logging*, 20, 21.

TORTS.

See, also, *Assault and Battery; Conversion of Personal Property; Death by Wrongful Act; Deceit; False Imprisonment; Forcible Entry and Detainer; Libel and Slander; Malicious Prosecution; Malpractice; Negligence; Nuisance; Seduction; Trespass; Waste.*
Joint wrongdoers, see *Contribution*, 4; *Nuisance*, 24.
Measure of damages, see *Damages*, 51-79.
Of servant, see *Master and Servant*, 18-24.
wife, see *Husband and Wife*, 12, 13.

Joint liability—Separate answer.

1. Where, in tort, the wrong complained of was joint and several as to several defendants, the separate answer of one, showing a good defense as to all, will inure to the benefit of all.—Williams v. McGrade, 13 Minn. 46, (Gil. 39.)

Mutilation of corpse.

2. The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and the right of the surviving wife, if living with her husband at the time of his death, is paramount to that of the next of kin. This right is one which the law recognizes and will protect, and for any infraction of it, such as an unlawful mutilation of the remains, an action for damages will lie.—Larson v. Chase, (Minn.) 50 N. W. 238.

47 Minn. 307.

TOWNS.

See, also, *Municipal Corporations; Schools and School-Districts.*
Action against town to restrain acts of supervisors, see *Highways*, 28.
Entry of town sites, see *Public Lands*, 15-53.
Indebtedness for bounties, see *Bounties*, 2, 3.
Liability for expenses of construction of bridges, see *Bridges*, 5, 6.
Powers of supervisors respecting highways, see *Highways*, 53, 54, 63, 64.

Organization.

1. The township organization act of August 13, 1858, (Laws 1858, c. 75,) was properly passed and adopted.—Board Sup'rs Ramsey County v. Heenan, 2 Minn. 330, (Gil. 281.)

2. Laws Minn. 1862, c. 67, which amends Laws 1860, c. 14, art. 1, § 1, by providing that whenever a majority of the legal voters of any township, etc., shall petition to be organized as a town, the county board shall fix boundaries, etc., does not repeal section 23 of the earlier act, which provides that no town shall be vacated or divided without first submitting the question to a vote of the electors of a town. — Supervisors of Town of Maple

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Lake v. Board of Com'rs Wright County, 12 Minn. 403, (Gil. 287.)

3. County commissioners cannot, upon petition of a number of the inhabitants of an organized town containing no more than 36 sections, set off a portion of the territory and organize the same into a separate town, under Gen. St. Minn. 1866, c. 8, § 104, which in such case requires a vote of the people, nor under chapter 10, § 2, which requires that the petition must be by the town as a corporation, not by the electors.—State v. Mantor, 14 Minn. 437, (Gil. 327.)

Town plats—Recording.

4. A town plat, signed by certain persons and recorded, contained the certificate that on February 28, 1849, "personally appeared before me the undersigned owners of lots in the town of St. Paul, and acknowledged the annexed to be a true plat of the town aforesaid, according to the survey made by me," and was signed by the surveyor, and also by 2 persons as justices of the peace, after which followed 14 names, among which were the names of the justices. *Held*, that such acknowledgment was not sufficient, under the statute relating to town plats, (Comp. St. Minn. c. 26,) to entitle the plat to record.—Baker v. City of St. Paul, 8 Minn. 491, (Gil. 436.)

Officers—Appointment.

5. Gen. St. Minn. 1878, c. 10, § 48, provides that, whenever there is a vacancy in a town office, "the justices of the peace of the town, together with the board of supervisors, or a majority of them, shall fill the vacancy by appointment, by warrant under their hand." Section 49, relating to officers composing the board of appointment of town officers, provides that "in case of a vacancy the remaining officers of such appointing board shall fill any vacancy thus occurring." *Held*, that the justices and supervisors act as a board in filling such vacancies, and unless notice of a meeting for that purpose is given, the appointment is invalid, though a majority of the board meet and concur in the appointment.—State v. Guiney, 3 N. W. 977, 26 Minn. 313.

Town meetings.

6. After a special town meeting has been held, pursuant to sufficient notice, it will be presumed, in the absence of evidence to the contrary, that such notice was properly posted in the requisite number of places.—State v. Sup'rs Town of Lime, 23 Minn. 521.

7. The question whether the persons subscribing a written statement for a special town meeting, under the provisions of Gen. St. Minn. 1866, c. 10, § 16, are legally freeholders, is one of fact for the town-clerk to determine, before giving notice of the meeting, and his decision is conclusive upon any town officer upon whom is imposed any act or duty as a result of such meeting.—State v. Sup'rs Town of Lime, 23 Minn 521.

Issue of bonds—Liability of agents.

8. Under a special act, a town issued bonds to supply seed wheat to sufferers from the ravages of grasshoppers. The agents of the town sold the bonds to the plaintiff. Notes were taken from those to whom wheat was furnished. These notes were collected by the agents, and paid to plaintiff, except a sum retained to pay the expenses of certain litigation, the nature of which is not disclosed. The case was tried by all parties on the theory that the special act was void. *Held*, that the agents were personally liable for the amount retained to pay expenses.—Powell v. Heisler, (Minn.) 48 N. W. 411. 45 Minn. 549.

9. Town bonds having been issued under a void statute, the agents of the town, who sell the bonds, and dispose of the proceeds as directed by the statute, are not personally liable for the price paid by one who purchased with notice of the act under which the bonds were issued, and the purpose for which the money would be used.—Powell v. Heisler, (Minn.) 48 N. W. 411.

45 Minn. 549.

Liability for negligence in maintaining highways.

10. A statutory town is not liable in a civil action for damages resulting from the disrepair of a public highway, although by statute it is made the duty of towns to keep highways in repair. The rule of liability applicable to municipal corporations having special charters with provisions imposing the care of streets upon them is not applicable to such towns.—Altnow v. Town of Sibley, 14 N. W. 877, 30 Minn. 186.

Distinguishing O'Gorman v. Village of Morris, 3 N. W. 349, 26 Minn. 267.

Distinguished in Peters v. Town of Fergus Falls, 29 N. W. 587, 35 Minn. 551.

Application of road taxes.

11. Where a town, organized from a congressional township previously forming a part of another town, seeks to make the town from which such township had been detached liable for conversion of road taxes collected within the territory so detached, under Gen. St. Minn. 1866, c. 10, § 15, as amended by Act March 5, 1869, providing that "where more than one entire congressional township is included within an organized town" such taxes must be expended within the limits of the town in which they were raised, the complaint must show when the conversion took place, and that it was subsequent to the separation.—Town of Clayton v. Town of Bennington, 24 Minn. 14.

Indebtedness.

12. Towns have no powers except those expressly conferred, and neither towns nor supervisors of towns have any authority to appropriate money, levy taxes, or issue any evidences of indebtedness of the town to indemnify individuals who have advanced money for the payment of bounties to volunteers.—Cover v. Town of Baytown, 12 Minn. 124, (Gil. 71.)

13. A board of county commissioners voted $200 for the construction of a bridge in the town of Stanton, county orders to be issued thereon on the order of the chairman of board of supervisors, town of Stanton. The town voted $700 for the bridges, especially the one mentioned by the commissioners and another. A contract was then made by the town authorities for the construction of these bridges for $900, payable in town and county orders. *Held*, that the contract would

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be presumed to have been made with reference to these two appropriations, and was not void as one incurring a town debt for an amount greater than was authorized by the vote of the town meeting.—Evans v. Town of Stanton, 23 Minn. 368.

TRADE-MARKS.

What will be protected.

1. The Cigar-Makers' Union, having many thousands of members, adopted a symbol or device to be used by their several members by placing it on boxes of cigars made by members; such device not indicating by what persons the cigars are made, but only that they are made by some member of one of such unions, the right to use the device belonging equally to each of all the members, and continuing only while the person remains a member. *Held* not a legal trade-mark. MITCHELL and VANDERBURGH, JJ., dissenting.—Cigar-Makers' Protective Union v. Conhaim, (Minn.) 41 N. W. 943.*

40 Minn. 243.

Infringement—Right to sue.

2. A complaint in an action brought by Louis E. Allen and others, as "officers and members of the Cigar-Makers' Protective Union No. 98, of the state of Minnesota, a branch and member of the Cigar-Makers' International Union of America, composed of local union societies," to restrain defendant from putting up, selling, stamping, or offering for sale any boxes containing any cigars whatever, having posted, placed, or put thereon a label or trade-mark in imitation of plaintiffs' label, and having thereon the words "Union-Made Cigars," shows a proprietary interest in plaintiffs in the trade-mark or label entitling them to maintain the action. (Affirmance by divided court.)—Allen v. McCarthy, (Minn.) 34 N. W. 416.

37 Minn. 349.

Train-Wrecking.

Criminal liability, see *Wrecking Trains.*

Transactions with Decedents.

Testimony to, see *Witness*, 16-32.

Transit Railway Company.

Land grants, see *Public Lands*, 60, 68.

TREASON.

Petit treason.

The crime of petit treason has no existence in Minnesota.—State v. Bilansky, 3 Minn. 246, (Gil. 169.)

Treasurer.

County, see *Counties*, 29-45, 55-61.

Trees.

Bounties for growing, see *Bounties*, 6.
Damages for cutting, etc., see *Damages*, 65-70.

TRESPASS.

By agent, see *Principal and Agent*, 97.
Damages for taking away animal held as estray, see *Animals*, 8.
—— for taking lands for public use without compensation, see *Eminent Domain*, 245-258.
—— for trespass to lands, see *Damages*, 57-64.
Injunction against, see *Injunction*, 11.
Liability of railroad company for injury to trespasser, see *Railroad Companies*, 214-217.

Possession of plaintiff.

1. In trespass, possession, actual or constructive, at the time of the commission of the injury complained of, and not at the commencement of the action, must be shown.—Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

2. A plaintiff cannot recover in trespass *quare clausum* when he negatives possession in his pleadings; for without possession, actual or constructive, trespass cannot be maintained.—Moon v. Avery, (Minn.) 44 N. W. 257.

42 Minn. 405.

3. Actual possession is sufficient evidence of title to support trespass against a stranger.—Witt v. St. Paul & N. P. Ry. Co. (Minn.) 35 N. W 862.

38 Minn. 122.

4. The actual possession of personal property by a bailee is sufficient to sustain an action for an injury thereto by a mere trespasser.—Laing v. Nelson, (Minn.) 43 N. W. 476.

41 Minn. 521.

Justification.

5. One who wrongfully enters upon lands in the possession of the owner cannot justify his act upon the ground that he has color of title thereto; and in an action of trespass against him it is proper to exclude a void tax-deed offered to show such color of title.—Sanborn v. Sturtevant, 17 Minn. 200, (Gil. 174.)

Who liable.

6. One who, previous to a trespass, consents thereto, or requests its commission, is liable as a trespasser.—Sanborn v. Sturtevant, 17 Minn. 200, (Gil. 174.)

7. Plaintiffs owned and were in possession of a leasehold estate in certain mill property on Hennepin island, at the Falls of St. Anthony. Defendants, for their own purposes, excavated a tunnel under the whole length of the island, and for 300 feet under the river and pond above it. The water from the river broke through the roof of the tunnel, and flowed through the tunnel with such violence as to wash out and undermine the land on which plaintiffs had a right of way, and on which their mill stood, injuring their mill, machinery, and warehouse. *Held*, that defendants were liable for such injury without negligence on their part in the construction and main-

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tenance of the tunnel, and their liability was not affected by the fact that they did not own the soil through which the tunnel was dug, or that they gave the excavation to others, nor by the fact that, after the water first broke in, the owners of the soil took possession, and endeavored to keep the water out of the tunnel, and conducted themselves with such negligence that after a temporary stoppage the water again broke into the tunnel, and caused the injury complained of. —Cahill v. Eastman, 18 Minn. 324, (Gil. 292;) Knapheide v. Same, 20 Minn. 478, (Gil. 432.)

8. The taking of a "supplemental" lease from the lessor of land adjoining that held under the first lease, in which second lease the lessor reserves to itself and parties under it the right to construct a tunnel under such premises, the lessees to construct their buildings in such manner as not to interfere with the building of the tunnel or its operation, does not operate as an agreement, consent, or license, as far as concerns the premises constructed under the first lease, which will relieve the persons building the tunnel from liability for injuries caused thereby.—Knapheide v. Eastman, 20 Minn. 478, (Gil. 432.)

9. Where one having a valid title to land, which is in the possession of another under a void title, peaceably enters and takes possession, he is not a trespasser.—Sharon v. Wooldrick, 18 Minn. 354, (Gil. 325.)

Parties.

10. As joint trespassers are each severally liable, it is immaterial that some of them are not made parties.—Heartz v. Klinkhammer, (Minn.) 40 N. W. 826.

39 Minn. 488.

Pleading.

11. A complaint in trespass for the wrongful taking of personal property, if it allege facts showing the wrongful taking, is good, even if it does not, in terms, allege that such taking was wrongful.—Buck v. Colbath, 7 Minn. 310, (Gil. 238;) Colbath v. Buck, 8 Minn. 85, (Gil. 60.)

12. A complaint alleged, in substance, that on or about October 21, 1868, defendant unlawfully took, or caused to be taken, from plaintiff's possession, and carried away, a buck, the plaintiff's property, of the value of $25; that on or about the 23d day of said October plaintiff was entitled to the possession of the buck, and defendant, being then and there in possession of it, unlawfully converted and disposed of it to his own use, thereby depriving plaintiff of the possession, and also the use, of it, to plaintiff's damage in the sum of $75. *Held*, that the second statement might be disregarded, as surplusage; and the complaint sufficiently stated a cause of action in the nature of an action of trespass *de bonis asportatis*. —Clague v Hodgson, 16 Minn. 329, (Gil. 291.)

13. A complaint which alleges a trespass on plaintiff's land, that plaintiff was thereby deprived of the use of such land, and that such use was reasonably worth a certain sum, is sufficient, though it does not allege in terms that plaintiff was damaged.—Weaver v. Mississippi & Rum River Boom Co., 11 N. W. 113, 28 Minn. 542.

14. In an action against a railroad company for trespass defendant answered that the acts complained of were done by subcontractors of the railroad company, with which defendant had contracted for the construction of a certain railroad which defendant was engaged in constructing, and that, in order to construct the same, it was necessary to enter upon plaintiff's land, etc. *Held*, that this was, in effect, an admission that defendant had directed the acts complained of to be done, and that its liability was the ordinary liability of one who commands or directs the commission of a trespass.—Leber v. Minneapolis & N. W. Ry. Co., 13 N. W. 31, 29 Minn. 256.

Evidence.

15. In trespass upon unoccupied lands, constructive possession is established by proof of title.—Booth v. Sherwood, 12 Minn. 426, (Gil. 310.)

16. Defendant A. sold the stumpage of certain lands, of which plaintiff was the owner, to B. and C., who entered upon the land and cut the timber thereon. They joined in an instrument of sale of such timber to a third person, reciting the cutting of the timber, the purchase of the right by B. and C. from A., and guarantying the title to such timber. *Held*, that these acts by A. rendered him liable as co-trespasser with B. and C., and, in an action by plaintiff against them for such trespass, such instrument was competent as an admission of the facts stated therein.—Sanborn v. Sturtevant, 17 Minn. 200, (Gil. 174.)

17. The trespass complained of was the construction by defendant of a boom in a river which flowed past plaintiff's land, whereby the land was overflowed and logs deposited thereon, thus entirely depriving plaintiff of the use of such land. Plaintiff, to show the value of the use, introduced a lease in which defendant agreed to pay plaintiff a certain sum for a like use of the same premises for a term immediately preceding the alleged trespass. Defendant offered to show in rebuttal that it executed the lease when an injunction was pending against it in plaintiff's favor, and that it had no alternative but to accept plaintiff's terms, or to let its logs go down the river and lose them. *Held*, that the offer was improperly excluded, as defendant had a right to show the circumstances under which the lease was executed.—Weaver v. Mississippi & Rum River Boom Co., 11 N. W. 113, 28 Minn. 542.

18. In an action for a trespass on land by which plaintiff was deprived of the use thereof, it is competent to show what defendant had agreed to pay plaintiff for the use of the land in question for a term immediately preceding the trespass, as an admission of the value of such use.—Weaver v. Mississippi & Rum River Boom Co., 11 N. W. 114, 28 Minn. 534.

19. In trespass for entering on plaintiff's premises and carrying away her grain, where defendants justify under the authority of plaintiff's husband, the fact that some of defendants had been present at the trial of the husband for removing other grain, where plaintiff's right of ownership was fully discussed, is competent to prove defendants' knowledge and willfulness, and warrants an instruction on exemplary damages. —Heartz v. Klinkhammer, (Minn.) 40 N. W. 826.

39 Minn. 488.

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20. In trespass for carrying away plaintiff's grain, where defendants justify under authority from plaintiff's husband, receipts given by third persons to said husband for such grain, whose proceeds he volunteered to use in part to pay debts connected with the expenses of the farm, are incompetent and immaterial, since his offer would be no defense to the action, and the receipts as to plaintiff are mere hearsay.—Heartz v. Klinkhammer, (Minn.) 40 N. W. 826.

39 Minn. 488.

Verdict.

21. Where, in trespass *de bonis*, two defendants are found jointly liable for a portion of the goods, and one severally liable for the balance, the verdict may be according to the facts as found.—Beyersdorf v. Sump, (Minn.) 41 N. W 101.

39 Minn. 495.

Damages.

22. If, while an actual trespasser is in plaintiff's close, he commits other trespasses, such acts and their consequences may be shown in aggravation of the original trespass.—Spencer v. St. Paul & S. C. R. Co., 22 Minn. 29.

23. In an action in the nature of trespass *de bonis asportatis*, plaintiff cannot recover damages for his expenses in recovering possession of the property, unless such expenditures are alleged as special damages.—Gray v. Bullard, 22 Minn. 278.

24. Defendants unlawfully entered on plaintiff's farm, and dug two parallel ditches, 30 feet apart, and threw up earth between them into a turnpike, erroneously claiming that the *locus in quo* was a public highway. *Held*, that the acts constituted a single trespass, and gave only a single cause of action, in which plaintiff was entitled to recover all damages, present or prospective, resulting from the trespass.—Ziebarth v. Nye, (Minn.) 44 N. W. 1027.

42 Minn. 541.

25. The difference in value is not to be estimated on the basis that the strip of land is to be permanently devoted to highway purposes; nor on the assumption that the ditches and turnpike are always to remain, for, if it appears that the cost of restoring the land *in statu quo* would be less than the injury that would result to the land by letting the nuisance remain, such cost would be the amount to which the value of the land would be deemed to have been lessened. But the court cannot assume that the cost of restoring the property would be less than the diminution in the value of the land from the trespass; if such is the fact, it is incumbent on the defendants to prove it.—Ziebarth v. Nye, (Minn.) 44 N. W. 1027.

42 Minn. 541.

26. The court instructed the jury that the measure of damages was "the difference in the value of the farm with the ditches and turnpike and without them." *Held*, that as a general statement of the rule this was correct, and if defendants desired more specific instructions, they ought to have so requested.—Ziebarth v. Nye, (Minn.) 44 N. W. 1027.

42 Minn. 541.

27. The measure of damages would be the diminution of the value of the land by reason of the tortious acts.—Ziebarth v. Nye, (Minn.) 44 N. W. 1027.

42 Minn. 541.

—— Treble damages.

28. A servant, without express orders from his master, the defendant, entered plaintiff's field and took hay to feed defendant's team. *Held*, that Gen. St. Minn. 1878, c. 66, § 269, providing for treble damages in trespass where the trespasser carries off hay or grass, does not apply against one who is in law deemed guilty only by reason of his relation to the actual trespasser. — Potulni v. Saunders, (Minn.) 35 N. W. 379.

37 Minn. 517.

29. Where treble damages are allowable under the statute for trespass, (Gen St. c. 75, § 28,) the court may instruct the jury to assess the actual damages, and treble the amount, or that they may return single damages, and determine whether the trespass was willful or involuntary, when the court may treble the damages found where a verdict is general; but, if no instructions are given, and a general verdict is returned, the presumption will be that it includes all to which plaintiff is entitled.—Tait v. Thomas, 22 Minn. 537.

TRIAL.

I. Conduct of Trial, 1-5.
II. Reception of Evidence, 6-19.
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See, also, *Case and Bill of Exceptions; Continuance; Evidence; Judgment; Jury; New Trial; Practice in Civil Cases; Witness.*
In criminal cases, see *Criminal Law*, 43-53, 104-107; *Homicide*, 80-96.
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Right to jury trial, see *Constitutional Law*, 130-155; *Jury*, 41-47.

I. Conduct of Trial.

Requiring physical act by party.

1. In an action for personal injuries the court has power, in a proper case, to require the plaintiff to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. But the propriety of such an order must usually rest largely in the discretion of the trial court.—Hatfield v. St. Paul & D. R. Co., 22 N. W. 176, 33 Minn. 130.

2. In an action for personal injuries plaintiff testified that she had thereby been rendered lame, and caused to limp in walking, and this was corroborated by several others, her neighbors, or members of her family, who had seen

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her almost daily since the accident. *Held*, that it was not error to refuse a request on behalf of defendant that plaintiff be directed to walk across the court-room in presence of the jury.—Hatfield v. St. Paul & D. R. Co., 22 N. W. 176, 33 Minn. 130.

View by jury.

3. In an action for damages from an obstruction in the street to lots abutting thereon, where a view of the premises is allowed to the jury, it is error to instruct them that they may use their own examination and judgment, as well as the judgment of the witnesses, in estimating the damages. Following Chute v. State, 19 Minn. 271, (Gil. 230.)—Brakken v. Minneapolis & St. L. R. Co., 11 N. W. 124, 29 Minn. 41.

4. A refusal to allow a jury to witness experiments with street-cars outside the court-room, as bearing upon the question of the nature of an alleged collision, is not error, not being within statutory provisions allowing a view by the jury.—Smith v. St. Paul City Ry. Co., 18 N. W. 827, 32 Minn. 1.

Taking pleadings to jury room.

5. It is not error to permit the jury to take with them, into the jury-room, the pleadings in the case.—Brazil v. Moran, 8 Minn. 236, (Gil. 205.)

II. Reception of Evidence.

Offer of evidence.

6. It is not error to exclude evidence offered by defendant tending to prove facts which, if true, would not be inconsistent with plaintiff's claim.—Tozer v. Hershey, 15 Minn. 257, (Gil. 197.)

7. Where evidence is offered as a whole, and part thereof is inadmissible, the whole offer is properly rejected.—Stees v. Leonard, 20 Minn. 494, (Gil. 448;) Muller v. Jackson, 40 N. W. 565, 39 Minn. 431; Beard v. First Nat. Bank, 43 N. W. 8, 41 Minn. 153; Reynolds v. Franklin, 49 N. W. 648, 47 Minn. 145.

8. An offer of testimony must be sufficiently full to enable the court to see that it is material; otherwise it may be rejected, even though the adverse party does not object to it.—Austin v. Robertson, 25 Minn. 431; Lucy v. Wilkins, 23 N. W. 861, 33 Minn. 441; Wolford v. Farnham, 49 N. W. 528, 47 Minn. 95.

9. A general offer to prove the facts stated in a pleading is not proper. The offer should specify the facts proposed to be proved.—Alexander v. Thompson, (Minn.) 44 N. W. 534.

42 Minn. 498.

10. A question, on cross-examination, not specific enough to show that the answer would throw any light on the matter in controversy, where there is no offer to show by the answer any facts bearing on the matter, is properly excluded.—State v. Herrick, 12 Minn. 132, (Gil. 75.)

Order of proof.

11. The order in which the proofs shall be made on a trial is in the discretion of the court.—Foster v. Berkey, 8 Minn. 351, (Gil. 310;) Groff v. Ramsey, 19 Minn. 44, (Gil. 24;) Griffiths v. Wolfram, 22 Minn. 185; Crandall v. McIlrath, 24 Minn. 127; McDonald v. Peacock, 35 N. W. 370, 37 Minn. 512.

12. The admission of declarations of a pretended agent before the establishment of the agency is not improper, being a mere matter of order of proof, discretionary with the trial judge.—Woodbury v. Larned, 5 Minn. 339, (Gil. 271.)

13. It is discretionary with the court whether a witness shall be allowed to testify to the correctness of a copy of an alleged lost instrument before testifying to the prior existence of the original.—Groff v. Ramsey, 19 Minn. 44, (Gil. 24.)

14. The order in which preliminary proof of the existence and loss of a paper should be received as a foundation for secondary evidence of its contents is discretionary with the trial court, and will not be reviewed except for abuse of discretion.—Groff v. Ramsey, 19 Minn. 44, (Gil. 24.)

15. The admission in rebuttal of testimony which should have been offered in chief rests in the sound discretion of the court.—Plummer v Mold, 22 Minn. 15.

16. A party cannot introduce a part of his own case in chief by cross-examination of his opponent's witnesses.—Schmidt v. Schmidt, (Minn.) 50 N. W. 598.

47 Minn. 451.

Preliminary examination of expert.

17. The preliminary examination of a proposed "expert" witness by the opposite party before permitting him to give his opinion is not a matter of right, and may be permitted or denied by the court in its discretion.—Finch v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 915.

46 Minn. 250.

Recalling witness.

18. The matter of recalling a witness after he has been examined and dismissed is within the discretion of the court.—Lynd v. Picket, 7 Minn. 184, (Gil. 128;) Keating v. Brown, 13 N. W. 909, 30 Minn. 9.

19. After counsel had partially summed up, he was informed that a witness who had sworn that the consideration for a certain deed was not paid would, if allowed to explain, testify that such consideration was in fact a precedent debt. Leave to recall him was made and denied. *Held* that, as the fact might have been called out by proper cross-examination, such denial was not error.—Baze v. Arper, 6 Minn. 220, (Gil. 142.)

III. Objections to Evidence.

Sufficiency of objections.

20. An objection to evidence for which no ground of objection is stated is properly overruled.—Tozer v. Hershey, 15 Minn. 257, (Gil. 197;) Weide v. Davidson, 15 Minn. 327, (Gil. 258.)

21. If testimony is admissible for any purpose, it is not error to receive it upon a general offer and against a general objection.—Stearns v. Johnson, 17 Minn. 142, (Gil. 116.)

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22. Where a party offers evidence for a specific purpose, and it is objected to, the court, in ruling upon the admissibility, is not obliged to take into consideration any other view than the one advanced by the party offering it.—Bond v. Corbett, 2 Minn. 248, (Gil. 209.)

23. An objection to testimony must be so definite as to enable the court to intelligently rule upon it, and the adverse party, if he so desires, and the case will permit, to remove the objection by other evidence.—Gilbert v. Thompson, 14 Minn. 544, (Gil. 414.)

24. If evidence offered is competent for any purpose, or in favor of any defendant, a general objection thereto should be overruled.—Schell v. Second Nat. Bank of St. Paul, 14 Minn. 43, (Gil. 34.)

25. An objection to the admission of a deed in evidence, "that it was not executed in form to admit to record; that in form the deed was an absolute nullity, as it was not in the form required for conveyances of real estate," does not point out the specific objection to the deed, and is insufficient.—Gilbert v. Thompson, 14 Minn. 544, (Gil. 414.)

26. The point that a question is too general or leading cannot be raised by simply objecting that it is incompetent and irrelevant.—Clague v. Hodgson, 16 Minn. 329, (Gil. 291.)

27. In an action for damages to plaintiff by ill-treatment from defendants, with whom plaintiff had been living, plaintiff testified to blows inflicted by defendants on one of her arms, without specifying which arm. Plaintiff's arms being exhibited to the jury, one of them appeared to have sustained some injury, and she was asked to state what was "the matter with that arm." *Held*, that an objection to the question as "incompetent and immaterial" was not sufficiently specific to present the objection that it did not appear which arm had been struck by defendants.—Cannady v. Lynch, 8 N. W. 164, 27 Minn. 435.

28. On an issue as to whether plaintiff was in possession of certain premises as the tenant of defendant, plaintiff introduced in evidence a notice to quit, purporting to be signed by defendant, and which had been served on plaintiff. It appeared that the notice had not been signed by defendant himself, but had been written and caused to be served on plaintiff by a person who was acting as agent for defendant. Defendant objected to the notice as "irrelevant and inadmissible." *Held*, that such objection was not sufficient to raise the question as to whether the notice had in fact been authorized by defendant.—Craig v. Cook, 9 N. W. 712, 28 Minn. 232.

29. An objection that a written instrument offered in evidence is incompetent, irrelevant, and immaterial, does not involve the point that preliminary proof of its execution had not been made.—McDonald v. Peacock, (Minn.) 35 N. W. 370.
37 Minn. 512.

30. The proper objection to a general offer to prove facts stated in a pleading is that it is not sufficiently definite and specific. The objection that it is incompetent, irrelevant, and immaterial is insufficient.—Alexander v. Thompson, (Minn.) 44 N. W. 534.
42 Minn. 498.

31. After a specific objection to evidence as incompetent has been once made and properly sustained, the court may afterwards sustain a mere general objection to an offer of substantially the same evidence.—Griswold v. Edson, 21 N. W. 475, 32 Minn. 436.

32. Where evidence is objected to as incompetent for certain specified reasons, the objection is to be deemed limited to the grounds specified, and will not cover others not specified.—Triggs v. Jones, (Minn.) 48 N. W. 1113.
46 Minn. 277.

Joint objection.

33. Where evidence admissible as to one defendant is offered, a joint objection by all is properly overruled.—Appleton Mill Co. v. Warder, (Minn.) 43 N. W. 791.
42 Minn. 117.

Evidence partly admissible.

34. A general objection to evidence will not avail where any part of such evidence is not subject to the objection.—Craig v. Cook, 9 N. W. 712, 28 Minn. 232.

Disclosing purpose of question after objection.

35. On an objection to a question asked a witness, if it is not apparent that a favorable answer would be material, and there is no offer of further evidence to make it material, the question may properly be excluded.—Norris v. Clarke, 24 N. W. 128, 33 Minn. 476; McAlpine v. Foley, 25 N. W. 452, 34 Minn. 251; Scofield v. Walrath, 28 N. W. 926, 35 Minn. 356.

36. In an action for the price of a map which plaintiffs alleged they duly delivered to defendant upon his written order, signed in their order book, defendant, testifying on his own behalf, on being shown the order book, which had been received in evidence, denied the genuineness of the signature, and stated that he did not write his name in a book, but on a paper. Thereupon his counsel asked him, "What did you write your name for, and what induced you to write your name on the paper?" On objection to the question as immaterial under the answer, it was excluded. *Held* that, as the answer admitted that defendant did sign the order "in a book," the exclusion of the question could not be regarded as error, in the absence of any further statement or offer showing the connection of the question with the defense alleged, that the signature was procured by fraud.—Warner v. Fishbach, 13 N. W. 47, 29 Minn. 262.

37. An offer to produce evidence, the nature of which was not particularly disclosed, being objected to, obviously upon the assumption that the proposed evidence related to transactions with a decedent, and the objection being sustained, it was incumbent upon the party offering the evidence to obviate the objection by such further offer or statement as would show that in fact it was not of the objectionable character specified in the objection.—Rhodes v. Pray, (Minn.) 32 N. W. 86.
36 Minn. 392.

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Receiving evidence subject to objection.

38. Where evidence is received, "subject to the objection" of the other party, it is not in the case, but is subject to the ruling of the court on the objection.—Perkins v. Morse, 13 N. W. 911, 14 N. W. 879, 30 Minn. 11.

Striking out testimony.

39. Striking out evidence received without objection, upon the ground that the same is not warranted by the pleadings, is discretionary with the trial court. State v. Johnson, 23 Minn. 569, followed.—Brady v. Brennan, 25 Minn. 210.

40. Improper evidence, admitted without objection, may, on application of the party against whom the same is given, and in the discretion of the court, be excluded from the jury.—Russell v. Schurmeier, 9 Minn. 28, (Gil. 16.)

41. Where the answer of witness to an interrogatory is objectionable as not being responsive, the party desiring to avail himself of the objection must move to strike out.—Marsh v. Webber, 16 Minn. 418, (Gil. 375.)

42. Where on cross-examination in garnishment proceedings a witness stated, of his own accord, certain matters of hearsay evidence, the fact that the same was not objected to is no objection to a motion to strike out.—Davis v. Mendenhall, 19 Minn. 149, (Gil. 113.)

43. After testimony by defendant to a verbal warranty, it appeared on his cross examination that a written warranty had been subsequently delivered to him, whereupon plaintiffs moved to strike out the evidence of the verbal warranty. *Held*, that the motion was properly denied, as a party aware of an objection to the competency of evidence cannot wait until the ground of it appears to the court in the progress of the trial, but is bound to make the objection when the evidence is offered.—C. Aultman & Co. v. Kennedy, 23 N. W. 528, 33 Minn. 339.

44. Where testimony given upon direct examination as if upon personal knowledge is shown on cross-examination to be hearsay, it should be stricken out on motion.—Wolford v. Farnham, (Minn.) 46 N. W. 295.

44 Minn. 159.

45. Where a party testifies to a conversation with a deceased person, the opposite party waives his right to have the evidence stricken out by cross-examining as to the details of the conversation.—Brown v. Morrill, (Minn.) 48 N. W. 328.

45 Minn. 483.

46. A motion to strike out "all" the testimony of a witness should not be allowed, where any part of the same had been properly received, and was material.—Bennett v. Minneapolis & P. Ry. Co., (Minn.) 44 N. W. 10.

42 Minn. 245.

Effect of failure to object.

47. Failure to object to one of the parties to a contract testifying in reference thereto, on the ground that the other party is dead, until after such party has testified, will be deemed a waiver of such objection.—Levering v. Langley, 8 Minn. 107. (Gil. 82.)

48. Where evidence is given of items of damage not included in the complaint, and no objection is made thereto until the evidence is closed, the court may direct the jury to consider such items, though not alleged in the complaint.—Isaacson v. Minneapolis & St. L. Ry. Co., 8 N. W. 600, 27 Minn. 463.

IV. Arguments of Counsel.

Right to open and close.

49. Gen. St. Minn. 1878, c. 66, § 227, providing that the plaintiff in an action shall open the case, and conclude the argument to the jury, unless for special reasons the court otherwise directs, leaves it to the sound discretion of the court to say when defendant may open and close the argument.—C. Aultman & Co. v. Falkum, (Minn.) 50 N. W. 471.

47 Minn. 414.

Reading law-books to jury.

50. Counsel should not be allowed to read from law-books in arguing a case to the jury.—Steffenson v. Chicago, M. & St. P. Ry. Co., (Minn.) 51 N. W. 610.

Comment on matter not in evidence—Instructing jury to disregard.

51. In proceedings to ascertain the damages to premises by reason of the condemnation of a portion thereof for railroad purposes, plaintiff offered evidence of the cost of the building, which was excluded. His counsel in arguing the case to the jury referred to the description of the buildings, and said: "I ask you to say whether they could be put there for $7,000." *Held*, that such reference to matter as to which evidence had been excluded did not prejudice defendant in view of the emphatic charge of the court to the jury, that the cost of the buildings was not in issue, and that they were to disregard any statement made in regard to it, except as the cost was involved in the market value.—Johnson v. Chicago, B. & N. R. Co., (Minn.) 35 N. W. 438.

37 Minn. 519.

V. Instructions.

Questions of law.

52. Whether a question of reasonable time is one of fact or of law must depend on the particular facts of each case. If it can be determined by the application of well-settled legal principles, it is one of law; but otherwise if the circumstances are such as to prevent such application.—Derosia v. Winona & St. P. R. Co., 18 Minn. 133, (Gil. 119.)

53. In a charge to the jury the court instructed them that they were to accept and act upon a principle of law as applicable to the case, because it had been agreed upon by the attorneys for both parties; but this instruction was accompanied by statements to the effect that the weight of authority and of reason was opposed to the proposition charged, and that the court did not believe it to be the law. *Held* that, the rule in question being a correct statement of the law, the accompanying statements indicating that in the opinion of the court the law was

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otherwise were erroneous, and ground for reversal.—Fitzgerald v. St. Paul, M. & M. Ry. Co., 13 N. W. 168, 29 Minn. 336.

54. In an action to recover for services as bookkeeper and general manager, a charge that plaintiff could recover only by showing "the best of faith," while not pertinent to the issue, is not prejudicial where the jury finds a verdict for plaintiff for a large amount.—Dunlap v. May, (Minn.) 44 N. W. 119.

42 Minn. 309.

Matters of fact—Reviewing evidence.

55. An instruction which assumes as true a fact disputed is erroneous. — Schwartz v. Germania Life Ins. Co., 21 Minn. 215.

56. In an action for a balance due on a sale of goods, defendant set up a breach of warranty of value, and that a portion of the goods only were delivered, which were invoiced by him at a certain amount. *Held*, that a charge that the measure of damages was the difference between the amount warranted and the invoice was improper, as assuming the existence of controverted facts, and was ground for reversal.—Smith v. Dukes, 5 Minn. 373, (Gil. 301.)

57. Where a fact is established by the evidence beyond any reasonable doubt, the assumption by the court of its existence in its charge is not error.—Alden v. City of Minneapolis, 24 Minn. 254.

58. An instruction based upon an hypothetical statement of facts relevant to the issue is not erroneous, where there is sufficient evidence in its support to go to the jury.—Chandler v. De Graff, 25 Minn. 88.

59. In an action against a sheriff to replevy a piano, plaintiff claimed title through a sale and delivery by the execution debtor. The judge charged the jury that he "knew nothing that went to show that the delivery was not valid under all the circumstances." *Held*, that the charge was improper in expressing an opinion upon the facts, without informing the jury that they were the exclusive judges of the facts, as required by Pub. St. Minn. c. 61, § 22.—Caldwell v. Kennison, 4 Minn. 47, (Gil. 23.)

Overruled in Ames v. Cannon River Manuf'g Co., 6 N. W. 789, 27 Minn. 248, by reason of repeal of statute.

60. In charging the jury the court instructed them that certain facts, if proved, raised a strong presumption that could only be overcome by "strong and convincing proof" to the contrary. *Held*, that such expressions, taken in the connection in which they occurred, were equivalent only to the term "strong evidence," and were not objectionable on the ground of expressing an opinion on the part of the judge as to the facts of the case.—McArthur v. Craigie, 22 Minn. 351.

61. The trial court in its charge to the jury may express its opinion on a question of fact, and, if a party fears that the jury will be unduly influenced by such opinion, his remedy is to request a charge that the jury are exclusive judges of the facts. Overruling Caldwell v. Kennison, 4 Minn. 47, (Gil. 23.)—Ames v. Cannon River Manuf'g Co., 6 N. W. 787, 27 Minn. 245.

62. Instructions to the jury as to the effect of a particular fact in the case, "independently of any other testimony," and other suggestions as to the insufficiency of such fact for a particular purpose, without other evidence, are not to be regarded as erroneous, although there was other evidence on the point in question, where the court in other parts of the charge distinctly referred such evidence to the jury, and there was no request for further or more specific instructions, nor any suggestion that the case had been so presented as to lead the jury to overlook or disregard such evidence.—Wass v. Atwater, 22 N. W. 8, 33 Minn. 83.

63. Where defendant alleged that he had been damaged by the injudicious use by plaintiff of a certain dam, the court properly refused to charge "that there is no evidence of any damage to the defendant by reason of the manner in which the dam was operated, and the jury will not allow any damages to the defendant by reason of any alleged improper use of the dam," as such charge would mislead the jury.—Beard v. Clarke, (Minn.) 39 N. W. 63.

38 Minn. 547.

64. In its instructions to the jury the trial court is not bound, at the request of either party, to go over the evidence on behalf of such party, and it cannot be assigned as error that it declines to do so.—Lowe v. Minneapolis Street Ry. Co., (Minn.) 34 N. W. 33.

37 Minn. 283.

65. In an action on the first of a series of notes given to plaintiff by defendant for the price of a machine, defendant pleaded breach of warranty, and asked damages therefor. *Held*, that a charge that whatever sum was awarded defendant for breach of warranty should be given in the present action was proper, and was not equivalent to directing a verdict for defendant.—C. Aultman & Co. v. Falkum, (Minn.) 50 N. W. 471.

47 Minn. 414.

Directing verdict.

66. When the evidence on both sides is closed without any motion to dismiss, it is not error in the court to decline to pass on the evidence and direct a verdict for defendant.—Price v. Phœnix Mut. Life Ins. Co., 17 Minn. 497, (Gil. 473.)

67. Although the evidence on the part of the plaintiff, standing alone, would justify submitting a case to the jury, yet if, on the whole evidence, the court could not permit a verdict for the plaintiff to stand, it may direct a verdict for the defendant.—Abbott v. Chicago, M. & St. P. Ry. Co., 16 N. W. 266, 30 Minn. 482; Thompson v. Pioneer Press Co., 33 N. W. 856, 37 Minn. 285; Giermann v. St. Paul, M. & M. Ry. Co., 43 N. W. 483, 42 Minn. 5.

68. In an action for libel in charging embezzlement by a book-keeper, and a subsequent attempt by him to blow open his employers' safe and steal their books, the evidence of such attempt was given by one witness, circumstantially corroborated, and was contradicted by plaintiff. *Held*, that the court was not justified in directing a verdict for defendants. GILFILLAN, C. J., dissenting.—Thompson v. Pioneer Press Co., (Minn.) 33 N. W. 856.

37 Minn. 285.

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69. Where the evidence on the issue as to whether fixtures were sold to plaintiff or to defendant's assignor shows that the bill of sale was made to plaintiff, and that he provided the money for fixing up a saloon in which the fixtures were placed, but that defendant's assignor leased the saloon, took out licenses, and carried on the business alone, listing the property for taxation as his own, and insuring it, and that, when he became insolvent, he inventoried it as his own, it is error to direct a verdict for plaintiff, and the question is for the jury.—Dailey v. Linnehan, (Minn.) 40 N. W. 250.

39 Minn. 346.

70. A direction to a jury to find that a certain deed was executed is not improper where its execution is so well proved, and the testimony to the contrary is so worthless, that, if the jury should find against the execution, it would obviously be the duty of the court to set aside the verdict.—Dawson v. Helmes, 14 N. W. 462, 30 Minn. 107.

71. Where, in the course of a charge which covers three printed pages the court states and reiterates that the jury are the sole judges of the facts, and states what facts must be found before a verdict can be given for plaintiff, but afterwards, at plaintiff's request, gives a charge that "your verdict should be for the plaintiff in this action for such damages as you shall assess," it will be presumed that this language was inadvertently used, and that the jury did not understand it as a direction to find for plaintiff.—Klimple v. Boelter, (Minn.) 46 N. W. 306.

44 Minn. 172.

72. If, when the evidence on both sides is closed, plaintiff is entitled, as a matter of law, to a verdict, the proper practice is to request the court to direct a verdict in his favor; but to order judgment, instead of directing a verdict, is, at most, an irregularity without prejudice, and no ground for a new trial.—Duluth Chamber of Commerce v. Knowlton, (Minn.) 44 N. W. 2.

42 Minn. 229.

Distinguishing Woodling v. Knickerbocker, 17 N. W. 387, 31 Minn. 268.

Requests to charge—Necessity.

73. Where a party apprehends danger to himself from the generality of an instruction or charge, he should ask for more specific instructions on the point.—Warner v. Myrick, 16 Minn. 91, (Gil. 81;) Jaspers v. Lano, 17 Minn. 296, (Gil. 273;) Egan v. Faendel, 19 Minn. 231, (Gil. 191;) Le Clair v. First Div. St. P. & P. R. Co., 20 Minn. 9, (Gil. 1.)

74. If parties have reason to suppose that the jury will be misled by any testimony in a case, they should request the court to properly instruct them with reference thereto.—Nininger v. Knox, 8 Minn. 140, (Gil. 110.)

75. Where an instruction as a whole is correct, but it is desired to prevent possible misapprehension from the omission of a proper qualification in a part of the charge, the court's attention should be called to the omission.—McKnight v. Chicago, M. & St. P. Ry. Co., (Minn.) 46 N. W. 294.

44 Minn. 141.

76. In an action against an officer for wrongfully taking plaintiff's oats upon an execution against her son, defendant claimed that the son, who lived with plaintiff and worked her farm, was a renter for a share of the crop, and the oats belonged to him. The only witnesses were the mother and son, who both denied any agreement as to renting. The jury were instructed that they must judge what the agreement was, or, if there was no express agreement, what was the implied agreement, but were not told what effect their finding was to have upon their verdict. *Held*, that plaintiff cannot complain of the omission when he asked no additional charge.—Bowe v. Hyland, (Minn.) 46 N. W. 142.

44 Minn. 88.

—— Time of making.

77. The rule of court that "the points on which a party desires the jury to be instructed must be furnished in writing to the court before he commences his argument to the jury, or the same may be disregarded," is permissive only, and may be waived by the court.—Sanborn v. School-Dist. No. 10, Rice County, 12 Minn. 17, (Gil. 1.)

78. The court may, in its discretion, properly refuse to give a charge requested in addition to points previously submitted, and which was not presented until after the close of the general charge, which contained proper instructions on the point.—Shartle v. City of Minneapolis, 17 Minn. 308, (Gil. 284.)

—— Submission to opposing counsel.

79. Requests to charge should be submitted to the opposite counsel.—Roehl v. Baasen, 8 Minn. 26, (Gil. 9.)

—— Several propositions.

80. Where several requests to charge, embodying separate propositions, some one or more of which are erroneous, are submitted to the court, it is not error for the court to reject the whole. It is only bound to look far enough to see if there is error in the request, and not to sift out the good from the bad. Per FULLER, J.—Castner v. The Dr. Franklin, 1 Minn. 73, (Gil. 51;) Bond v. Corbett, 2 Minn. 248, (Gil. 209;) Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243;) Simmons v. St. Paul & C. Ry. Co., 18 Minn. 184, (Gil. 168.)

—— Not involving questions of law.

81. A refusal to instruct the jury to consider whether certain inferences should not be drawn if a certain state of facts should be found is not error, as such instruction involves no legal question.—Kellogg v. Village of Janesville, 24 N. W. 359, 34 Minn. 132.

—— Not applicable to issues.

82. Refusing or qualifying requests to charge, upon issues not made by the pleadings, is not error, or ground for a new trial.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

83. It is not error for the court to refuse a request to charge, based upon an unqualified offer to perform, where the evidence showed only a conditional offer.—Cowley v. Davidson, 13 Minn. 92, (Gil. 86.)

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84. It is not error to refuse an instruction relevant only to a question about which there is no dispute. — Shartle v. City of Minneapolis, 17 Minn. 308, (Gil. 284.)

85. A request to charge, which, in itself, is abstractly correct, but relating to the sufficiency of proof as to a fact not within the issues, should be refused.—Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269.

Requests to charge—Assuming disputed facts.

86. Instructions which assume as facts matters in dispute are properly refused.—Lake Superior & M. R. Co. v. Greve, 17 Minn. 322, (Gil. 299;) Hocum v. Weitherick, 22 Minn. 152; Starkey v. De Graff, 22 Minn. 431; Chandler v. Same, 25 Minn. 88; Jones v. Town, 2 N. W. 473, 26 Minn. 172; Faber v. St. Paul, M. & M. Ry. Co., 13 N. W. 902, 29 Minn. 465; Macy v. St. Paul & D. Ry. Co., 28 N. W. 249, 35 Minn. 200.

87. A request which calls upon the court to determine any controverted fact is improper, and its refusal not error.—Siebert v. Leonard, 21 Minn. 442.

88. A request to charge, which, in effect, withdraws from the jury a controverted question proper for their consideration, should be refused. —Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269.

89. In an action on a contract, defendant set up a counter-claim, to which plaintiff replied payment. *Held*, the evidence being contradictory as to whether there was anything due on the counter-claim, that a request to charge that defendant is entitled to all that the jury "find from the evidence to be proved" was correctly refused, as implying that nothing had been paid. —Conehan v. Crosby, 15 Minn. 13, (Gil. 1.)

90. In an action for defendant's failure to comply with an agreement to furnish plaintiff with all the ice he might need in his business, the court, after instructing the jury fully what facts would entitle plaintiff to a verdict, at the request of plaintiff further charged that the fact that the plaintiff required more ice in his business in the warmer months, and requested defendant to furnish him a greater quantity than he had furnished during the preceding months, would not release the defendant from the contract, or from damages sustained by the plaintiff, unless defendant was willing to furnish the amount required by the contract, and plaintiff refused to receive it. *Held* that, taken with other portions of the charge, it would not mislead the jury by assuming the liability of defendant.—Egan v. Faendel, 19 Minn. 231, (Gil. 191.)

91. In an action for the price of wheat, it appeared that defendant had orally agreed to buy a lot of wheat in a pile in defendant's warehouse. Plaintiff's evidence tended to show that defendant was satisfied with the wheat, and agreed to take it as it was. Defendant's evidence was to the effect that the wheat was to be of the same quality throughout the pile as it appeared on top. Defendant was to clean, sack, and weigh the wheat in the warehouse, and remove it therefrom. Plaintiff delivered the key of the warehouse to defendant, who proceeded to clean and sack it. After he had cleaned and sacked about 15 bushels, he notified plaintiff that he would not take the wheat, because it was not of the same quality as it appeared on top. Defendant requested the court to charge, on the question of acceptance, that "defendant could receive the wheat to see whether he would accept it or not: and, if he then refused to accept it," the jury must find for defendant. *Held*, that such request was properly refused as assuming that there was no acceptance prior to or contemporaneously with the receipt of the wheat.—Simpson v. Krumdick, 10 N. W. 18, 28 Minn. 352.

92. The refusal of a request for an instruction to the jury on the subject of the measure of damages for a breach of warranty of a machine, consisting in a defect causing a part of it to break, that the actual damage was the cost of the repairs, is not error, where the cost of the repairs was not shown.—Johnston Harvester Co. v. Clark, 17 N. W. 111, 31 Minn. 165.

93. In an action to recover the balance for cutting certain hay, alleged to be due after a payment by defendant on the basis of a measurement by one G., an instruction that the parties were bound by G.'s measurement unless it was waived by both, is properly refused, where there is no evidence that they ever agreed to submit the measurement to G.—Weber v. McClure, (Minn.) 47 N. W. 150. 44 Minn. 407.

—— Misleading or indefinite.

94. It is not error to refuse to give instructions which are fairly liable to a construction that would mislead the jury as to a principle of law applicable to the case.—Shartle v. City of Minneapolis, 17 Minn. 308, (Gil. 284.)

95. It is not error to refuse a request embodying a correct proposition, but so worded that unless qualified or explained it will mislead the jury.—Hayward v. Knapp, 23 Minn. 430.

96. A request for an instruction to the jury, in a civil action, which leaves in doubt the question whether the jury are to find according to preponderance of evidence, or must be satisfied beyond a reasonable doubt, should be refused. —Hocum v. Weitherick, 22 Minn. 152.

—— Repetition.

97. Refusal to give an instruction requested is not error when the subject is fully covered by the general charge.—O'Leary v. City of Mankato, 21 Minn. 65; Hocum v. Weitherick, 22 Minn. 152; State v. Mims, 2 N. W. 494, 683, 26 Minn. 183; Wright v. Ames, 10 N. W. 21, 28 Minn. 362; Sherman v. St. Paul, M. & M. Ry. Co., 15 N. W. 239, 30 Minn. 227; Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651, 31 Minn. 526; Kolsti v. Minneapolis & St. L. Ry. Co., 19 N. W. 655, 32 Minn. 133; Ladd v. Newell, 24 N. W. 366, 34 Minn. 107.

—— Compliance with request—Modification of instructions.

98. A party has a right to have his legal propositions, if correct, submitted to the jury in the very terms selected, although covered by the instructions already given. The court may refuse

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his requests or qualify them, and if given in a qualified form ought to immediately follow a refusal. Per EMMETT, C. J.—Selden v. Bank of Commerce, 3 Minn. 166, (Gil. 108.)

Declared to be *obiter* and disapproved in State v. McCartey, 17 Minn. 88, (Gil. 66.) See, also, following cases.

99. Where requests to charge are made they may be given or refused, or given with such explanations and modifications as justice may require.—Dodge v. Rogers, 9 Minn. 223, (Gil. 209.)

100. A charge given substantially, though not literally, as requested, is a sufficient compliance with the request.—Dodge v. Rogers, 9 Minn. 223, (Gil. 209.)

101. The court may modify a request to charge, abstractly correct, so as to make it applicable to the case.—Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

102. In an action seeking to charge a defend ant as a partner upon an admission made by him under circumstances calling for an explicit admission or denial, his counsel requested an instruction to the jury that "admissions are the lowest class of proof, and should be received and considered by the jury with great caution," which the court refused to give, but substituted a charge that, "with respect to verbal admissions, they ought to be received with great caution." *Held*, that this was proper.—Tozer v. Hershey, 15 Minn. 257, (Gil. 197.)

—— Adding sarcastic comments.

103. It is improper for a judge, having given an instruction asked in the very terms of the request, to weaken its force by sarcastic comment, so as to leave the jury in doubt as to whether the instruction was given or refused. — Horton v. Williams, 21 Minn. 187.

Personal remarks.

104. In an action for damages for an alleged indecent assault, it is not error to caution the jury in the course of the charge not to lose their heads, and return a verdict for a lady (the plaintiff) on general principles.—Bingham v. Bernard, 30 N. W. 404, 36 Minn. 114.

Construction as a whole—Contradictory instructions.

105. In charging the jury it is not necessary that all exceptions and modifications of a legal proposition be stated in the same connection, but if made in the charge, and there is nothing in the charge so obscure, absurd, or contradictory as to mislead or confound the jury, it is sufficient.—Gates v. Manny, 14 Minn. 21, (Gil. 13.)

106. Where a proposition, standing alone, in a charge to the jury, is bad, yet if, taking the charge as a whole, the correct rule is stated, no objection can be made to the charge.—Spencer v. Tozer, 15 Minn. 146, (Gil. 112.)

107. The whole charge must be considered together; and an omission to state the whole law of the case in one instruction is not error, if the omission is fully supplied elsewhere, so that the charge, as a whole, fully and fairly presents the law applicable to the issues.—Peterson v. Chicago, M. & St. P. Ry. Co., (Minn.) 39 N. W. 485.
38 Minn. 511.

108. The giving of contradictory instructions is reversible error.—McCormick v. Kelly, 9 N. W. 675, 28 Minn. 135.

109. Where a general proposition in a charge is incorrect, but the court in another part of its charge states the correct rule, as applied to the facts of the case, in such terms that the jury could not have misunderstood it, the error in the general proposition will be disregarded.—Simpson v. Krumdick, 10 N. W. 18, 28 Minn. 352.

Modifying or withdrawing instructions.

110. Where a request to charge is qualified, but afterwards substantially given, or the qualification is such that, considered in connection with the general charge, the jury cannot reasonably be misled, there is no ground for exception.—Bartlett v. Hawley, (Minn.) 37 N. W. 580.
38 Minn. 308.

111. Where, upon an exception to a proposition in a general charge, the court withdraws it, and instructs the jury to disregard it, it will be presumed that the jury accepted and acted on the correction.—Goodsell v. Taylor, (Minn.) 42 N. W. 873. 41 Minn. 207.

Giving further instructions.

112. Upon an application by the jury for further instructions both parties consented that they might take the minutes of all the testimony upon the disputed point. Through an inadvertence the court failed at the time to give them a portion of such testimony, but afterwards recalled them and read the omitted portion. *Held* not error. —Coit v. Waples, 1 Minn. 134, (Gil. 110.)

113. It is not error for the court, when the jury return for further instructions, to answer the questions propounded, in open court, though plaintiff and his counsel are absent.—Hudson v. Minneapolis, L. & M. Ry. Co., (Minn.) 46 N. W. 314.
44 Minn. 52.

114. An exception to instructions on the ground that they were given in the absence of counsel cannot be sustained where it appears that, after the adjournment of the court for the day, the jury desired further instructions which the court gave after returning to the court-room, and that counsel had left the court-room on adjournment without informing the court where they could be found, or making any arrangement for their being called in case of need.—Reilly v. Bader, (Minn.) 48 N. W. 909.
46 Minn. 212

Sufficiency of exceptions.

115. Numerous instructions having been asked, and some given and others refused or qualified, a general exception to the refusal of instructions asked is insufficient.—Carroll v. Williston, (Minn.) 46 N. W. 352.
44 Minn. 287.

116. An exception to a portion of a charge embracing several distinct propositions, some of which are unobjectionable, will not be considered. —Main v. Oien, (Minn.) 49 N. W. 523.
47 Minn. 89.

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117. Exceptions to instructions given by the trial court to a jury in a cause, made after trial and verdict, are ineffectual, and are not available on a motion for a new trial, or upon appeal.—Barker v. Todd, (Minn.) 34 N. W. 895.

37 Minn. 370.

118. In an action for the wanton and malicious tearing down of plaintiff's house, the court charged that if defendants had acted maliciously plaintiff was entitled to recover three times the value of his house; thereby failing to take into account the value of the materials composing it, which remained in plaintiff's possession. *Held*, that an exception to the charge, on the ground "that there is no evidence to support such a finding," is insufficient to point out the real error in the instruction, since the exception is based on a denial of plaintiff's right to recover treble damages.—Carlson v. Dow, (Minn.) 50 N. W. 232.

47 Minn. 385.

119. The court having assumed to incorporate in its charge to the jury several requested instructions, and having announced to counsel that such requested instructions have been given, an exception to "any qualification" of the requested instructions is not sufficient to call attention to the fact that a qualifying word has been added in giving one of such requests.—Bishop v. St. Paul City Ry. Co., (Minn.) 50 N. W. 927.

VI. Verdict.

Jurors' knowledge of facts.

120. Jurors are not permitted to decide matters in issue upon their own private knowledge of the facts, but may be aided by their general knowledge and experience upon such subjects.—Johnson v. Hillstrom, (Minn.) 33 N. W. 547.

37 Minn. 122.

Compromise verdict.

121. It is irregular for a jury to make up a verdict by agreeing to each name a sum, and then divide the aggregate by 12; but, if the sum thus found is afterwards agreed upon as their verdict, it is good.—St. Martin v. Desnoyer, 1 Minn. 156, (Gil. 131.)

Receiving and recording.

122. Where there is no agreement as to receiving the verdict, the judge, after adjournment of court, has no authority, in the absence of parties, to receive a verdict until the court is again opened.—Kennedy v. Raught, 6 Minn. 235, (Gil. 155.)

123. A verdict in a civil action was received and recorded by the clerk, in the absence of the presiding judge, but before the adjournment of the court, and in pursuance of a stipulation of the parties. *Held*, that neither party should be permitted to object to it for such irregularity merely.—Bedal v. Spurr, 22 N. W. 390, 33 Minn. 207.

124. The form of the verdict as recorded by the clerk must control in case of variance between it and the written verdict brought into court by the jury.—Leftwich v. Day, 21 N. W. 731, 32 Minn. 512.

Polling jury.

125. Neither party has a right to poll the jury after a verdict is recorded.—Steele v. Etheridge, 15 Minn. 501, (Gil. 413.)

126. In a proper case for a sealed verdict the bringing in of such a verdict does not affect the right of the parties to poll the jury.—Steele v. Etheridge, 15 Minn. 501, (Gil. 413.)

Sealed verdict.

127. A sealed verdict (the jury having separated after agreeing upon and sealing it) may be submitted again to the jury for correction, when they bring it into court, and declare that it is not as agreed upon.—Loudy v. Clarke, (Minn.) 48 N. W. 25.

45 Minn. 477.

Sending jury back.

128. A jury came into court with a sealed verdict, they having separated after having sealed the same, and announced that they had agreed, but had made a mistake in figuring, whereupon the court, without opening the same, directed them to again retire and reconsider their verdict, which they did. *Held* no error.—Nininger v. Knox, 8 Minn. 140, (Gil. 110.)

129. Where the jury return into court, and hand the judge a paper designed as a verdict in favor of plaintiff, but informal and defective, the court may, in its discretion, in ordering them to return and reconsider their finding, require them to return a written finding on a particular question of fact; but refusing to require them to find on a question irrelevant or immaterial, or too uncertain or indefinite to admit of a categorical answer, is not error.—Jaspers v. Lano, 17 Minn. 296, (Gil. 273.)

130. Under the instructions of the court, and with the consent of the parties, the jury sealed up their verdict, and, after separation overnight, brought it into court the next morning, and, after the clerk had reduced it to form, and entered it upon his minutes, and had read the same to the jury, but before they had been asked if it was their verdict, counsel called attention to the fact that they had not found upon a question submitted. *Held*, that the court, in the exercise of its discretion, could again send out the jury to find upon such question.—Tarbox v. Gotzian, 20 Minn. 139, (Gil. 122.)

Form and sufficiency.

131. A verdict was in the following form: "The jury find and return a verdict for said plaintiffs, and against said defendants, and costs of suit." *Held* not necessarily void for uncertainty, and that the words "and costs of suit" might be rejected, as surplusage.—Coit v. Waples, 1 Minn. 134, (Gil. 110.)

132. A verdict was in the following words: "The jury in the above case return a verdict for the plaintiff in the sum of one thousand dollars. N. B. O. F. Jenkins and Joseph Moody excepted in the above action." The persons named were originally defendants in the action, but there had been no service upon one of them, and the action had been dismissed as to the other. *Held*,

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that there was no irregularity in the form of the verdict.—Desnoyer v. McDonald, 4 Minn. 515, (Gil. 402.)

133. In the title to a verdict and in the verdict itself the party for whom it was rendered was described as "Adam Sture, appellant," instead of "Andrew Sture, appellant." *Held*, that the verdict was sufficiently certain as a verdict for the appellant by reference to the record; the name of the party being superfluous.—Red River & Lake of the Woods R. Co. v. Sture, 20 N. W. 229, 32 Minn. 95.

134. In an action against J. and E. for services, E. denied that the services were rendered for her. J. admitted that the services were rendered for him, and alleged that he had settled with plaintiff therefor, and had given a certain note, describing it, for the amount found due, which plaintiff accepted. The jury found "in favor of the plaintiff and against J. and E. for the amount set forth in the note, with interest to date, and said note to be canceled." *Held*, that the verdict was void for uncertainty as to amount.—Fryberger v. Carney, 1 N. W. 807, 26 Minn. 84.

Distinguished in Jones v. King, 15 N. W. 671, 30 Minn. 371.

135. The only issue under the pleadings in an action was whether defendant or a third party was liable to plaintiff, the amount to which plaintiff was entitled being admitted; and the case was tried on that issue alone. The verdict was, "We, the jury, find for the plaintiff," *Held*, that the verdict was sufficient to sustain a judgment for the amount sued for, being responsive to the whole issue, and capable of being made certain as to the amount by reference to the pleadings. The requirement of Gen. St. Minn. 1878, c. 66, § 238, that upon a verdict for plaintiff in an action for the recovery of money "the jury shall also assess the amount of the recovery," is not indispensable where such amount is not in issue; and in such a case the omission is at most a harmless irregularity. Distinguishing Fryberger v. Carney, 26 Minn. 84.—Jones v. King, 15 N. W. 670, 30 Minn. 368.

136. The complaint set forth a cause of action arising on contract, and admitted a payment of $25. The answer alleged the contract made to have been entirely different, denied the payment, and contained two counter-claims, one being a loan of $25 to plaintiff. This loan was put in issue by the reply, and there was nothing in the record to show that the payment admitted by the plaintiff and the loan alleged by the defendant were the same transaction. The verdict was: "We, the jury in the above-entitled action, find a verdict in favor of the plaintiff in the sum of the (twenty-five) $25 dollars, now in his possession;" and on this verdict judgment was entered against the plaintiff. *Held*, that the verdict was too uncertain to sustain the judgment.—Moriarty v. McDevitt, (Minn.) 48 N. W. 684.

46 Minn. 136.

137. From the mere fact that, by their verdict, the jury assessed plaintiff's damages at a specified sum, "plus" another specified sum, which latter amount was the same as that demanded in the complaint for special damages, it is not to be inferred that the latter sum was awarded by the jury as special damages.—Bishop v. St. Paul City Ry. Co., (Minn.) 50 N. W. 927.

138. In a cause submitted to a jury generally, a verdict for the plaintiff on one only of several issues will not sustain a judgment in his behalf.—Meighen v. Strong, 6 Minn. 177, (Gil. 111;) Armstrong v. Hinds, 9 Minn. 356, (Gil. 341.)

When special verdict required.

139. A party desiring a special verdict as to any particular facts must request the court to instruct the jury to find specifically.—Board of County Com'rs Dakota County v. Parker, 7 Minn. 367, (Gil. 207.)

140. Under Gen. St. Minn. 1866, c. 66, § 218, providing that the court "may instruct" the jury to find upon particular questions of fact, it is discretionary with the court to direct the jury to find a special verdict.—McLean v. Burbank, 12 Minn. 530, (Gil. 438.)

141. In the exercise of its discretion the court may refuse to submit special findings to the jury.—Iltis v. Chicago, M. & St. P. Ry. Co., (Minn.) 41 N. W. 1040.

40 Minn. 273.

142. Where the principal issue was as to whether, as against an unrecorded deed of property, held by plaintiffs, the defendants were purchasers of the same in good faith and for a valuable consideration, it was error for the court to order judgment against the plaintiffs without finding as a fact that the defendants were purchasers in good faith, and for a valuable consideration, or facts equivalent to such a finding.—Roussain v. Patten, (Minn.) 48 N. W. 1122.

46 Minn. 308.

Sufficiency of special findings.

143. Where there is no general verdict, but special findings only, all the material issues must be passed on to authorize a judgment.—Coleman v. St. Paul, M. & M. Ry. Co., 36 N. W. 638, 38 Minn. 260; Lane v. Lenfest, 42 N. W. 84, 40 Minn. 375; Crich v. Williamsburg City Fire Ins. Co., 48 N. W. 198, 45 Minn. 441.

144. Objections that special findings are not sufficiently direct and definite are waived unless taken when the verdict is rendered.—Varco v. Chicago, M. & St. P. Ry. Co., 13 N. W. 921, 30 Minn. 18.

145. Where a special verdict, including findings upon particular issues, is rendered, and there is no general verdict, an omission to find upon some of the issues is not waived by a failure to except by either party.—Crich v. Williamsburg City Fire Ins. Co., 48 N. W. 198, 45 Minn. 441.

146. Where the issues not passed upon in special findings are entirely distinct from those that are answered, the court may order a retrial of those particular issues only, or in proper cases, where there can be no doubt or dispute, and the defect is merely formal, or resulting from inadvertence, the court may amend the verdict.—Crich v. Williamsburg City Fire Ins. Co., (Minn.) 48 N. W. 198.

45 Minn. 441.

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147. A finding at variance with the issues made by the pleadings will not be treated as erroneous, unless it appears from the record that the evidence in support thereof was objected to.—Abbott v. Morrissette, (Minn.) 48 N. W. 416
46 Minn. 10.

148. A finding that there was no evidence as to a particular issue is a finding against the party having the affirmative of the issue.—Watson v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 1129.
46 Minn. 321.

Construction and effect of general and special findings.

149. In an action to recover land from a defaulting purchaser, the jury found that plaintiff should have possession of certain of the property, and that defendant should retain possession of another part thereof, unless plaintiff should pay defendant a certain sum. *Held*, that the verdict was neither general nor special, within Gen. St. 1866, c. 66, § 217, which provides that a special verdict is one in which the jury "find the facts only, leaving the judgment to the court," but partook of the character of an award of arbitrators or decree in chancery, and should be set aside.—Cummings v. Taylor, 21 Minn. 366.

150. Where there is a general verdict and also a special finding of fact, and the court, if it desires to reserve the case for further consideration, fails to make such order on the coming in of the verdict, as required by Gen. St. 1866, c. 66, § 222, the party in whose favor the general verdict is rendered may enter judgment thereon, and the other party may raise the question only by appeal, whether the special finding shall prevail over or modify the general verdict.—Newell v. Houlton, 22 Minn. 19.

151. In an action by an employe for damages resulting from defective machinery the jury found a general verdict for defendant, and, in answer to certain specific questions, found that defendant was guilty of negligence causing the injury, and that plaintiff was not guilty of negligence or want of ordinary care. *Held*, in view of the fact that the court had instructed the jury that there was a difference between commissive contributory negligence and such as might be imputed to plaintiff for voluntarily submitting himself to known dangers and risks arising from defendant's negligence, that, while such distinction might not be of practical value, the special findings were not inconsistent with the general verdict.—Goltz v. Winona & St. P. R. Co., 22 Minn. 55.

152. Where the jury are directed to find specially in answer to certain material questions submitted to them for their consideration, and the jury bring in a general verdict without answering them, the court is not at liberty without the consent of the parties to withdraw or disregard them, and if not finally answered it will be held equivalent to a finding, as to the matters involved therein, against the party having the burden of proof.—Nichols, Shepard & Co. v. Wadsworth, (Minn.) 42 N. W 541.
40 Minn. 547.

153. Where the jury find a general verdict in favor of the plaintiff, but fail to agree upon a specific question submitted to them, the general verdict is properly received, unless a finding in favor of the defendant on the specific question submitted would be conclusive against plaintiff's right to recover.—Schneider v. Chicago, B. & N. R. Co., (Minn.) 43 N. W. 783.
42 Minn. 68.

154. When there is a general verdict, and also special findings of fact, it is not proper practice to move to set aside one of the findings of fact as contrary to the evidence, without asking for a new trial of the whole issue or of that particular question of fact, especially if setting it aside would require a judgment different from what would be required if it were allowed to stand.—Jordan v. St. Paul, M. & M. Ry. Co., (Minn.) 43 N. W. 849.
42 Minn. 172.

Correcting verdict.

155. Under Pub. St. c. 61, § 32, providing that an informal or insufficient verdict may be corrected, it cannot be corrected after it has been recorded, and no statement of the court below as to what was intended by it will be received in explanation.—Dana v. Farrington, 4 Minn. 433, (Gil. 335.)

Setting aside verdict—Time.

156. After judgment is entered, a motion to set aside the verdict cannot be entertained.—Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

—— Impeachment by jurors.

157. Two days after a verdict had been rendered and the jury discharged, the jurors came into court and stated that the verdict was not such as they had intended. *Held*, that the verdict would not be set aside on such ground, as it could not be impeached by the jurors.—Stevens v. Montgomery, 6 N. W. 456, 27 Minn. 108.

158. Ordinarily, the affidavit of a juror is not admissible, on motion to set aside the verdict, to show that the officer in charge was guilty of misconduct affecting the verdict.—Knowlton v. McMahon, 13 Minn. 386, (Gil. 358.)

159. Affidavits of jurors that the bailiff conversed with them during their deliberations, and that he stated to them the amounts of former verdicts in plaintiff's favor on previous trials of the action, are not admissible to impeach their verdict.—Gardner v. Minea, (Minn.) 50 N. W. 199.
47 Minn. 295.

160. A verdict cannot be impeached by the affidavits of individual jurors. State v. Mims, 2 N. W. 494, 683, 26 Minn. 183; Bradt v. Rommel, 5 N. W. 680, 26 Minn. 505.

161. It is not admissible to impeach a verdict to show by affidavit of the jurors that the amount was arrived at by each man naming a sum, and then dividing the aggregate by 12.—St. Martin v. Desnoyer, 1 Minn. 156, (Gil. 131;) Bradt v. Rommel, 5 N. W. 680. 26 Minn. 505.

VII. Trial by Court.

Submission of issues to jury—Special findings.

162. In that class of cases which, by Gen. St. Minn. 1886, c. 66, § 199, are triable by the court, it

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has the same power to try the issue itself, or send it to a jury, as when courts of law and equity were separate; and may, on its own motion, or that of a party, send an issue to the jury. When done, it should be by formal order, before the trial is entered upon, stating the issue to be tried.—Berkey v. Judd, 14 Minn. 394, (Gil. 300.)

163. In an action to reform an insurance policy, and to enforce it as reformed, a jury was impaneled, and, without any order or consent as to the issues they should try, the plaintiff introduced evidence on both branches of his case. *Held*, that the question of reformation was for the court, and, until it decided this question in the affirmative, there was nothing for the jury to try.—Guernsey v. American Ins. Co., 17 Minn. 104, (Gil. 83.)

Distinguished in Finch v. Green, 16 Minn. 364, (Gil. 323.)

164. An action to abate a mill-dam as a nuisance, and to recover damages for its overflow, being not within the exceptions of Gen. St. Minn. 1866, c. 66, § 198, is properly triable by the court, unless parties otherwise consent; and acquiescence in the calling and swearing of the jury is a substantial consent to the trial of the issues of fact in the case by jury, and their verdict for plaintiff, ascertaining his damages, will sustain a money judgment in his favor in such case.—Finch v. Green, 16 Minn. 355, (Gil. 315;) Brown v. Lawler, 21 Minn. 327.

The case of Finch v. Green, 16 Minn. 355, (Gil. 315,) distinguishes Guernsey v. American Ins. Co., 13 Minn. 278, (Gil. 256.)

165. Where, in a case triable by the court, subject to the right of the parties to consent, or of the court to order, that the case be tried by a jury, if either party allow a jury to be impaneled without objection, it will be *held* a consent that the jury should try the case instead of the court.—Brown v. Lawler, 21 Minn. 327; Brown v. Nagel, 21 Minn. 415.

166. In an equity case, the court may of its own motion submit specific questions of fact to the jury.—Jordan v. White, 20 Minn. 91, (Gil. 77;) Russell v. Reed, 19 N. W. 86, 32 Minn. 45; Cobb v. Cole, 46 N. W. 364, 44 Minn. 278.

167. It is error to refer to a jury the settlement of partnership accounts.—Berkey v. Judd, 14 Minn. 394, (Gil. 300.)

Distinguished in Cummings v. Taylor, 24 Minn. 432.

168. In an action to recover damages for waste and detention of real property, a special interrogatory may be submitted to the jury, as to whether plaintiff has been damaged by reason of the waste and detention charged. Such interrogatory does not involve the taking of accounts, nor the submission of books of account to the jury.—Cummings v. Taylor, 24 Minn. 429.

Distinguishing Berkey v. Judd, 14 Minn. 394, (Gil. 300.)

169. In an action to restrain defendants from diverting the waters of a natural water-course, and turning them upon plaintiff's land, the jury specially found that defendants had, simply by digging a ditch and removing materials from the water-course, removed artificial obstructions, such as sand, gravel, and wood, which had washed into the natural channel, and constituted an obstruction of the natural bed of such water-course, and they also specially found that defendants had obstructed the said natural water-course so as to cause more of the said waters to flow upon the premises of plaintiff than would flow over them if said water-course was in its natural condition. *Held*, that the findings were too ambiguous and inconsistent to support a judgment for defendant.—Pint v. Bauer, 16 N. W. 425, 31 Minn. 4.

170. Specific issues having been tried before a jury by order of the court, leaving other material issues untried, the court, upon the verdict of the jury, ordered judgment for defendant. *Held*, that plaintiffs were not entitled to a new trial for such error, but only to a trial of the untried issues, upon motion being made therefor. — Cobb v. Cole, (Minn.) 46 N. W. 364.

44 Minn. 278.

171. In an action for reformation of a written contract the court cannot, by its judgment, make the contract different from the one found by a special verdict, but must follow such verdict.—Wilson v. McCormick, 10 Minn. 216, (Gil. 174.)

172. The verdict of a jury upon a specific question of fact submitted in an equitable action, not having been set aside or vacated, controls the determination of that question in the trial court.—Niggeler v. Maurin, 24 N. W. 369, 34 Minn. 118.

173. In an action triable by the court specific questions of fact were submitted to a jury, but, though the whole case was presented, the questions submitted to the jury were not sufficient for the determination of one of the issues as it was developed. On the return by the jury of their verdict no order was made reserving the case for further consideration, but the court long afterwards made findings of fact upon questions not included in the findings of the jury, and, upon such findings, with those of the jury, directed judgment to be entered. *Held*, that this was not error.—Schmitt v. Schmitt, 16 N. W. 543, 31 Minn. 106.

Findings by court—Duty to make.

174. Under Rev. St. c. 71, § 41, which provides that in a trial without a jury the court shall give its decision in writing, stating the facts found and conclusions of law separately, a judgment entered in such cause, without such written decision, is irregular. Bazille v. Ullman, 2 Minn. 134, (Gil. 110,) followed. — Baldwin v. Allison, 3 Minn. 83 (Gil. 41.)

175. In the trial of a cause by the court without a jury it is its duty to find upon all the material issues in the case.—Lowell v. North, 4 Minn. 32, (Gil. 15.)

176. Where an action before a referee or court is dismissed for insufficiency of evidence, no findings of fact are necessary.—Thompson v. Myrick, 24 Minn. 4.

177. In a cause tried by the court the action may be dismissed without stating findings of fact, if the case does not justify findings and judgment in favor of plaintiff.—Miller v. Miller, (Minn.) 50 N. W. 612.

47 Minn. 546.

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Findings by court—Scope of issues.

178. A trial court need not make further findings upon matters not within the pleadings, unless the parties have by consent litigated such matters as though they were within the issues.—Dean v. Hitchings, (Minn.) 41 N. W. 240.

40 Minn. 31.

—— Evidence to support.

179. In an action tried by the court the plaintiff introduced evidence which would have supported a decision of the issues of fact in his favor, and rested. Thereupon the court, on motion of defendant, "ordered judgment in favor of defendant upon the evidence introduced by the plaintiff." *Held* error.—Chickering & Son v. White, (Minn.) 44 N. W. 988.

42 Minn. 457.

—— Sufficiency of findings.

180. A complaint averred certain specific facts, and a general conclusion of mixed law and fact based entirely upon such facts. The specific facts were put in issue by the answer. The court found the specific facts against, and the general conclusion in favor of, plaintiff, and ordered judgment according to the general conclusion. *Held* erroneous.—Dana v. Porter, 14 Minn. 478, (Gil. 355.)

181. The facts required to be found by the court are the ultimate facts forming the issues presented by the pleadings, and not those merely evidentiary of them. Neither evidence, argument, nor comment has any legitimate place in findings of fact.—Conlan v. Grace, (Minn.) 30 N. W. 880.

36 Minn. 276.

182. Under Gen. St. Minn. 1878, c. 66, § 242, providing that in case of trial by the court "the facts found and the conclusions of law shall be separately stated," a finding of the ultimate fact of a payment of a certain amount, so described as to identify it, is sufficiently specific, and the court is not required to state when, where, to whom, or how, or in what manner, or for what purpose, the payment was made.—Butler v. Bohn, 17 N. W 862, 31 Minn. 325.

183. A finding of fact to the effect that a person "sold" his interest in a mill implies that he received value therefor, when there is nothing to indicate the contrary.—Atkins v. Little, 17 Minn. 342, (Gil. 320.)

184. Findings on a trial by the court which contain mere statements of evidence, with no finding on any issuable fact, are insufficient to sustain a judgment.—Wagner v. Nagel, 23 N. W. 308, 33 Minn. 348.

185. On trial by the court of an action to recover a trunk and its contents, the only findings relative to the taking or detention of the property were, in substance, that plaintiff was indebted to defendant; that one B., named as defendant's partner, but not distinctly found to be such, removed the trunk from the place where it had been left by plaintiff, without plaintiff's knowledge; that plaintiff demanded possession of it from defendant, who said he knew where it was, and would return it if plaintiff would pay what he owed or give security, which, being refused, defendant refused to give up the trunk. *Held*, that from these facts responsibility on the part of defendant could not be affirmed, the findings being of evidence merely, not of issuable facts; and a judgment for plaintiff could not be sustained.—Schneider v. Ashworth, 26 N. W. 233, 34 Minn. 426.

186. When a pleading specifically sets forth facts which, if established, entitle the party pleading to relief, as a legal conclusion, a finding by the court of the truth of the allegations of the pleading is sufficient.—School-Dist. No. 73 v. Wrabeck, 16 N. W. 493, 31 Minn. 77.

187. A finding by the court that all the allegations of the complaint are true is insufficient to support a judgment for plaintiff, where the complaint does not state facts sufficient to constitute a cause of action.—Knudson v. Curley, 15 N. W. 873, 30 Minn. 433.

188. A finding on trial by the court "that the allegations of fact in the complaint are not proved" is sufficient to sustain a judgment for defendant on appeal; no objection that the finding was not sufficiently specific having been taken in the trial court.—Hewitt v. Blumenkranz, 23 N. W. 858, 33 Minn. 417.

189. Findings are sufficient if they cover all the issues made by the pleadings, and are sufficient as a foundation for a judgment; and the court is not required to set forth or explain the means or process by which he arrived at such findings.—Conlan v. Grace, (Minn.) 30 N. W. 880.

36 Minn. 276.

190. Findings of fact must be sufficient in themselves to support the judgment, and the evidence cannot be resorted to to supplement the findings.—Hodge v. Ludlum, (Minn.) 47 N. W. 805.

45 Minn. 290.

191. In an action tried before a court without a jury, after finding the facts, the decision concluded, "Ordered, that plaintiff have judgment as prayed for in his complaint." *Held*, that this was a sufficient compliance with the statute requiring conclusions of law to be stated.—Von Glahn v. Sommer, 11 Minn. 203, (Gil. 132.)

—— Modification or correction.

192. A court may on motion, after its findings have been filed, and before the entry of judgment thereon, change or modify its conclusions of law from the facts found, without ordering a new trial.—Jones v. Wilder, 9 N. W. 707, 28 Minn. 238.

193. A trial court has jurisdiction, after appeal from a judgment, until the return is transmitted to the supreme court, to correct mistakes and omissions in its findings, so as to make them conform to the decision actually made.—State Sash & Door Manuf'g Co. v. Adams, (Minn.) 50 N. W. 360.

47 Minn. 399.

Omission to make or file findings.

194. The remedy for failure of the court to find upon a material issue, in a cause tried before it, is by motion for an amendment of the findings.—Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

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195. The failure, after judgment has been ordered, to file findings of fact and conclusions of law, as prescribed by Gen. St. Minn. 1878, c. 66, § 242, is an omission which the trial court can supply under section 125 of that act by a *nunc pro tunc* order, and is not ground for vacating the judgment.—Swanstrom v. Marvin, 37 N. W. 455, 38 Minn. 359.

196. Where an action is tried by the court, and it fails to find specifically on all the material issues, the proper remedy is not a motion for a new trial, but an application to the court for further findings.—Warner v. Foote, (Minn.) 41 N. W. 935. 40 Minn. 176.

197. Where a cause is tried by the court without a jury, and is fully submitted for adjudication, and the court thereupon directs a judgment on the merits, without making any express findings upon the issues, the remedy for this omission of the court is by application to the court to correct it, and not by appeal from the judgment.—Williams v. Schembri, 46 N. W. 403, 44 Minn. 250.

Time of filing decision.

198. Comp. St. Minn. c. 61, § 41, requiring a judge, before whom a cause is tried without a jury, to file his decision within 20 days after the term, is directory merely.—Vogle v. Grace, 5 Minn. 294, (Gil. 232.)

Trover.

See *Conversion of Personal Property.*

Trust Companies.

Power to act as guardians, see *Constitutional Law*, 53; *Insanity*, 3, 4.

TRUSTS.

I. Express Trusts, 1-12.
II. Implied Trusts, 13-33.
III. Trustees, 34-40.
IV. Remedies, 41-46.

See, also, *Executors and Administrators; Guardian and Ward; Wills.*
Limitation of actions, see *Limitation of Actions*, 40, 41.
Oral agreements, see *Frauds, Statute of*, 49, 50.
Powers in trust, see *Powers.*
Resulting trust for creditors, see *Fraudulent Conveyances*, 27-35.
Secret trusts, see *Fraudulent Conveyances*, 36-41.
Trustee of town site, see *Public Lands*, 29, 41-50.
Who may sue as trustee of express trust, see *Principal and Agent*, 101, 102.

I. Express Trusts.

What constitute—Validity.

1. Plaintiff, in pursuance of previous negotiations with certain members of a religious association known as the "Trustees of M. E. Church" for E., and at their request, executed a deed of a lot of land for a church building, which on its face purported to convey the land to certain persons described as "trustees of M. E. Church," who were, with one exception, trustees of said association, "in trust that said premises shall be used, maintained, and disposed of as a place of divine worship for the use of the ministry and membership of the Methodist Episcopal Church in the United States," etc. Thereupon the members of such religious association, acting in its behalf, took possession under the deed, and in good faith proceeded to erect a church building thereon, with the knowledge and approval of the plaintiff, and thereafter continued in possession, with his acquiescence. *Held*, that no title passed by the deeds to the association, not being made to it or its members, or in trust for them, but upon a trust public and general in its character, not authorized by statute.—Little v. Willford, 17 N. W. 282, 31 Minn. 173.

2. An absolute deed of land, made with the intention of creating a trust, and an agreement properly executed by the parties declaring the trust, may be construed together as parts of one transaction, and as establishing the trust. And where the trust sought to be created is not among those permitted by the statute of uses, but otherwise would be valid as an express trust, if it is intended to authorize "the performance of any act which may be lawfully performed under a power," as provided by Gen. St. Minn. 1878, c. 43, § 14, it may be valid as a power in trust, although the instrument is not in form a power in trust, as defined by the statute. — Randall v. Constans, 23 N. W. 530, 33 Minn. 329.

3. Under Comp. St. Minn. c. 32, § 31, subd. 5, requiring a trust to be "fully expressed and clearly defined upon the face of the instrument creating it," a conveyance of real estate to certain persons in trust for an unincorporated association, and "for the use and benefit of the several members thereof, according to their respective interests," is void for uncertainty as to the beneficiaries, and cannot be enforced even after the incorporation of such association.—German Land Ass'n v. Scholler, 10 Minn. 331, (Gil. 260.)

4. The owner of land conveyed it in trust, directing that the trustees should sell it, and pay over the net proceeds for the endowment of a specified hospital, to be used for the support of the charity patients therein, in case the Episcopal churches in the city where the hospital was situated should prove to the satisfaction of the trustees that they would permanently sustain it as a church hospital; and, in case said churches should not so satisfy the trustees, then to pay the proceeds over to another specified hospital. *Held*, that the trust is not void on the ground that the conditions are indefinite, and the trust undefined, nor on the ground that the provisions of the deed are so vague and uncertain as to be incapable of enforcement by judicial decree.—Atwater v. Russell, (Minn.) 51 N. W. 629.

5. The owner of land conveyed it in trust, directing the trustees to sell it, and appropriate the proceeds to the endowment of a certain hospital, to be used for the support of charity patients therein, if certain churches should prove to the satisfaction of the trustees that they would permanently sustain the hospital; and, in case the churches should not fully so satisfy the trus-

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tees, then to pay over the proceeds to another specified hospital. *Held*, that either one or the other of the hospitals was the beneficiary, and not the charity patients of the first specified hospital, and the trust was not void for indefiniteness of the beneficiary. — Atwater v. Russell, (Minn.) 51 N. W. 629.

6. The owner of land conveyed it in trust, and directed the trustees (1) to take possession, collect the rents and profits, and apply the same to pay the taxes, and the expenses of carrying out the trust, and, if there should be any deficiency, to charge the same on the land; (2) to sell the land, and to pay over any portion of the proceeds that might remain in their hands to the beneficiary. *Held*, that the subject-matter of the trust was not indefinite, though the amount to be paid over to the beneficiary could not be determined until the time for paying it over.—Atwater v. Russell, (Minn.) 51 N. W. 629.

7. A conveyance of land in trust, directing that the trustees shall sell the land as soon as, in their judgment, it can be sold for a reasonable price, compared with other lands in the vicinity, and expressly requiring that the sale shall be made "within the next ten years," does not suspend the power of alienation.—Atwater v. Russell, (Minn.) 51 N. W. 629.

8. The owner of land conveyed it in trust, and directed the trustees to sell it as soon as, in their judgment, it could be sold for a reasonable price, and, in any event, within the next 10 years, and to appropriate the net proceeds for the endowment of a certain hospital, if the Episcopal churches in a certain city should prove to the satisfaction of the trustees that they would permanently sustain the hospital as a church hospital, said proceeds to be used for the support of the charity patients; and provided that in case the churches should not fully satisfy the trustees that they would sustain the hospital, they should pay over the proceeds to another specified hospital, whenever they should be satisfied that the churches were not disposed to carry out the trust. *Held*, that the ownership of the proceeds of the land was not unlawfully suspended.—Atwater v. Russell, (Minn.) 51 N. W. 629.

9. After foreclosure of a mortgage, the mortgagor had "a secret understanding and agreement" with C., by which the latter was to purchase the property after the period of redemption had expired, and hold it for the benefit of the mortgagor. C. purchased the property with her own funds, and subsequently conveyed to a third party. It was not shown that the mortgagor refrained from redeeming in reliance upon the understanding with C., or that the mortgagee was a party thereto, or conveyed to C. in pursuance thereof, or that C. obtained the conveyance for a less price than she would otherwise. *Held*, that the facts were not sufficient to create a trust in favor of the mortgagor.—Jacoby v. Crowe, 30 N. W. 441, 36 Minn. 93.

10. A parol agreement that a grantee of lands will hold them for the grantor until sold, and then pay over the proceeds, is void as an attempt to create a trust by parol, and the land and the money obtained for it belong to the grantee; and a mere intention to pay over the money to the grantor, or to invest it for him, does not make him the owner of it.—Wolford v. Farnham, (Minn.) 46 N. W. 295. 44 Minn. 159.

Construction and effect.

11. In an action to have defendant declared trustee of certain lots, which it was alleged he had agreed to purchase and convey to plaintiff, the only positive evidence as to the existence of the agreement was that of the parties, who flatly contradicted each other. A memorandum of agreement, executed at the date of the agreement in question, stated the terms of a contract by which defendant was to convey to plaintiff certain lots, but was silent as to the lots in question. When plaintiff first made a claim to the latter lots he put it upon the ground that they were covered by a quitclaim deed of all of defendant's interest in the addition in which they were located. *Held*, that a finding for defendant would not be disturbed. — Dearing v. Merrill, (Minn.) 42 N. W. 695.

41 Minn. 1.

12. E. conveyed land to a trustee, in trust for his heirs, to whom it was to descend upon his death; plaintiff, his heir, being then *in ventre sa mere*. Subsequently the trustee, for the expressed purpose of terminating the trust, reconveyed to E. *Held* that, upon the execution of the trust-deed, a future vested estate in the heirs of E. was created; that the trust could not be destroyed, either by a revocation by the grantor, or by a violation of the trust by the trustee, or both, and hence that the deed of reconveyance, being not in execution of the trust, but in contravention of it, was void.—Ewing v. Warner, (Minn.) 50 N. W. 603.

47 Minn. 446.

II. Implied Trusts.

Resulting trusts.

13. Where plaintiff settled upon government land, and improved the same, and afterwards, and while in possession, allowed defendant to enter it at the land-office in his (defendant's) name, upon a parol agreement that he should convey it to plaintiff upon repayment to him of the purchase price, no trust arose in his favor, whether the land was paid for by his money or defendant's.—Wentworth v. Wentworth, 2 Minn. 277, (Gil. 238.)

14. The facts that plaintiff continued to improve and cultivate the land, and to reside thereon with his family, did not constitute a part performance sufficient to take the case out of the statute.—Wentworth v. Wentworth, 2 Minn. 277, (Gil. 238.)

15. The presumption of a resulting trust in favor of one furnishing the consideration for the purchase of land, the title to which is taken in the name of another, may be rebutted.—Irvine v. Marshall, 7 Minn. 286, (Gil. 216.)

16. Comp. St. Minn. c. 32, concerning uses and trusts, applies to real property only, and does not prevent the application, to a case of the purchase of personal property with the funds of another by one who takes the title in his own name, of the equitable rule that a trust results in favor of the party furnishing the consideration.—Baker v. Terrell, 8 Minn. 195, (Gil. 165.)

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17. Where a deed purports to have been made upon a valuable consideration, as by acknowledging the receipt of such consideration, the fact of such receipt cannot be contradicted for the purpose of raising a resulting trust for the grantee.—McKusick v. County Com'rs Washington County, 16 Minn. 151, (Gil. 135.)

18. Real estate was purchased by the husband, and the title taken in the name of the wife, for the sole purpose, known and assented to by her, of providing her with a home in case she should survive him, and with a mutual understanding and agreement, intended to be but never in fact put in writing, that, in case she should die first, the title should vest in him and descend to his heirs. *Held*, that no trust, express or implied, was created or resulted in favor of the husband, and that specific performance of such agreement could not be enforced.—Johnson v. Johnson, 16 Minn. 512, (Gil. 462.)

19. After the expiration of the period of redemption of land of a husband sold on foreclosure, the wife purchased the same with money borrowed upon her own credit, secured by a mortgage on such land, and subsequently paid the mortgage off from the rents and profits of the land. *Held*, that no trust arose in favor of the husband upon the conveyance of such land to the wife.—Baker v. Baker, 22 Minn. 262.

20. Gen. St. Minn. 1866, c. 43, § 7, provides that, "when a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result" therefrom, except in favor of the creditors of the person by whom such payment is made. *Held*, that such trust could only arise upon some deed or conveyance; and that, therefore, when A. verbally agreed with H. to convey to H. certain real estate whereof H. paid the consideration, and directed a conveyance to whomsoever B. should direct, and B. directed the property to be conveyed to P., no trust resulted in favor of the creditors of H. until the conveyance to P. by A.—Durfee v. Pavitt, 14 Minn. 424, (Gil. 319.)

21. Gen. St. Minn. c. 43, § 7, provides that whenever a grant is made to one person, another paying the consideration, no trust can result in favor of the latter, but that the title shall vest in the person named as the alienee, an exception, however, being made where the alienee has taken the conveyance in his own name without the knowledge or consent of the person paying the consideration. *Held*, that no resulting trust arose where land was conveyed to R., and the consideration was paid by J., in pursuance of a verbal agreement by which R. was to hold the land in trust for H., although the latter had no knowledge of the agreement.—Connelly v. Sheridan, (Minn.) 42 N. W. 595.

41 Minn. 18.

22. If an agent employed to purchase lands for his principal, and with his money, upon the purchase thereof, takes the title thereto in his own name without the knowledge or consent of the latter, he will be adjudged to hold the title as trustee for his principal, and, if sold and transferred by him, the proceeds in his hands will be impressed with a similar trust, and the court will compel him to account therefor.—Kraemer v. Deustermann, 35 N. W. 276, 37 Minn. 469.

23. A guardian of an infant having purchased land chiefly with the money of his ward, he, however, contributing a portion, and taking title in his own name, a trust results in favor of the infant, who may claim afterwards, not merely a lien as security for the money, but a proportionate share of the land, and, on death of the guardian, the court may compel a transfer of the legal title. The ward is not debarred from enforcing such transfer by having filed a claim against the guardian's estate for the money invested, that proceeding having been discontinued without any action upon the claim.—Bitzer v. Bobo, 38 N. W. 609,* 39 Minn. 18.

24. Plaintiff, incorporated for the purpose of conducting a female seminary, proposed to purchase and improve a certain lot, to belong to the subscribers in proportion to their subscription. Defendant, one of the subscribers, purchased the lot, and took title in his own name, paying therefor out of the proceeds of a mortgage executed thereon. The subscriptions of the stockholders were all paid up, and used in improving the lot. Thereafter defendant purchased the entire stock of the corporation, and was authorized by the stockholders to sell and dispose of the property. *Held*, that no trust attached to the property in defendant's hands in favor of plaintiff.—Bennett Female Seminary v. Whitney, 49 N. W. 58, 46 Minn. 353.

25. In ejectment for land claimed by plaintiff through L., his father, who had located land warrants thereon and received patents, defendants claimed through P., claiming that the land warrants had been entered in his own name by L., but in reality in trust for P. Several witnesses who were uncontradicted testified to facts showing that P. had given land warrants to L., who was an attorney, to locate for him; that L. had said he had land warrants to locate for P.; and it did not appear that any warrants were entered in P.'s name. It also appeared that during 38 years, for more than half of which a claimant under P. was in possession of the land, no claim was made under L. *Held*, that the evidence required a finding that L. had located the warrants as agent and trustee for P.—Lambert v. Stees, (Minn.) 49 N. W. 662.

47 Minn. 141.

Constructive trusts.

26. A person obtaining property by fraud acquires no title to it, but it is held by him, and all persons claiming under him with notice, in trust for the original owner.—Third Nat. Bank v. Stillwater Gas Co., 30 N. W. 440, 36 Minn. 75.

27. A., who owned 160 acres of land, conveyed 40 of it to plaintiff. Before the deed was recorded, A., without plaintiff's consent, mortgaged the whole 160 acres to B., who had no notice of plaintiff's deed, and who recorded his mortgage before the deed was recorded. B. foreclosed, and purchased the land. Before the time to redeem expired, A. sold the tract, excluding plaintiff's 40 acres, to defendant, who, as part of the consideration, agreed to discharge the lien of the mortgage, and relieve the 40 acres therefrom. This he failed to do, but he allowed B.'s title to become absolute, and then took a deed from him for the whole 160 acres. *Held*,

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that he holds the 40 acres in trust for plaintiff. —Jordan v. White, 20 Minn. 91, (Gil. 77.)

28. Sp. Laws Minn. 1862, c. 56, granted to certain persons 10,000 acres of swamp lands within certain limits. Afterwards one of the grantees conveyed to plaintiff so much of his share of the grant as would amount to 800 acres. He then acquired the entire interest of the other grantees, and received from the state a conveyance of all the swamp lands within the designated limits, which was less than 10,000 acres, whereupon he conveyed the whole to defendant, reserving the 800 acres sold to plaintiff. *Held*, that defendant became a trustee for plaintiff to the extent of 800 acres, which he would be required to convey to plaintiff on repayment by her of her proportion of the taxes paid by defendant prior to a demand by plaintiff for a conveyance of such 800 acres.—Goodwin v. Rice, 1 N. W. 257, 26 Minn. 20.

29. The United States granted land to the state of Minnesota to aid the construction of a railroad between certain points. The state granted its interest to plaintiff company, deeds to be given by the state to plaintiff when its road should be completed. After plaintiff had complied with the terms of the grant to it, defendant company procured from the state a deed of the lands in question. *Held*, that defendant would be decreed a trustee for plaintiff as to the lands in question, and would be required to convey the same to plaintiff.—Winona & St. P. R. Co. v. St. Paul & S. C. R. Co., 2 N. W. 489, 26 Minn. 179.

30. An absolute conveyance of land was made on a parol agreement by the grantee to hold the land in trust for the wife of the grantor until it could be sold advantageously, and to collect the rents, pay taxes and incumbrances, and sell the land, and pay over the proceeds to the wife of the grantor. *Held* that, as such trust or power was not created or declared by deed or conveyance in writing, as required by statute, the promise to pay over the proceeds could not be enforced in an action on the agreement; that, as no fraud or artifice was shown in the inception of the agreement, mere failure or refusal to perform it did not convert the grantee into a trustee, so as to enable the court to enforce the trust on that ground; but that any recovery must be on the ground that an interest of value to the parties passed to the grantee on the faith of the contract which he refused to perform; the relief being a decree for restitution, or its equivalent, to the party entitled.—Randall v. Constans, 23 N. W. 530, 33 Minn. 329.

31. A son, with intent to put his property beyond the reach of any judgment in an anticipated litigation, conveyed it to his mother, who accepted the conveyance with knowledge of its purpose, and orally promised to reconvey the property to the son when the litigation should be terminated or settled. After the anticipated danger had passed, the mother, with the intention of performing her agreement, executed to the son an instrument in the form of a deed of the premises, but, by reason of her husband not joining therein, the deed was void, and the son thereafter demanded a deed from both, which was refused. *Held*, that a reconveyance to the son could not be compelled, there being neither an express nor a constructive trust in his favor; that the deed from the mother did not create a valid express trust, as it did not disclose facts creating a fiduciary relation, or the terms of the trust, and because, under Gen. St. Minn. 1878, c. 69, § 2, a married woman cannot create or declare such a trust unless her husband shall join with her in the deed; and the mere refusal to perform the oral promise of the mother, void under the statute of frauds, was not a fraud for which the court could declare and enforce a constructive trust.—Tatge v. Tatge, 25 N. W. 596, 26 N. W. 121, 34 Minn. 272.

32. An agreement between several to purchase real estate to sell for their joint benefit establishes a fiduciary relation, and where one of them induces his associates to sell the property for a price which is in fact all it is worth, he having a secret agreement with the purchaser, pursuant to which he realizes a still larger sum from the property than his associates, they are entitled to an accounting, and to recover from him their share of that excess.—Newell v. Cochran, (Minn.) 43 N. W. 84.

41 Minn. 374.

33. The purchaser who pays the larger price to one of the associates, pursuant to the secret agreement, cannot be required to pay equal sums to the others.—Newell v. Cochran, (Minn.) 43 N. W. 84. 41 Minn. 374.

III. Trustees.

Removal.

34. Any one interested in the execution of an express trust to sell property and pay debts may bring an action, on behalf of himself and others, to enforce its execution, or for the removal of the trustee. Such a proceeding is not in the nature of a creditors' bill, and may be instituted by one who is a simple contract creditor.—Goncelier v. Foret, 4 Minn. 13, (Gil. 1.)

35. Under Pub. St. c. 32, § 26, providing that any person interested in the execution of an express trust may bring an action for the removal of the trustee, etc., all the persons interested in the trust need not be joined in the action.—Goncelier v. Foret, 4 Minn. 13, (Gil. 1.)

Dealings with trust property—Accounting for profits.

36. A mortgagee under an absolute deed with an unrecorded defeasance, who exchanges the mortgaged premises for other land, which he afterwards sells, is chargeable, on accounting with the mortgagor, for the full value of the land received in exchange, though he did not realize that value on selling it.—Darling v. Harmon, (Minn.) 49 N. W. 686.

47 Minn. 166.

Purchase of trust property.

37. A purchase by a trustee in his own name of the trust property is not void, but voidable at the option of the *cestui que trust* only.—Baldwin v. Allison, 4 Minn. 25, (Gil. 11.)

38. Only a *cestui que trust* can question a purchase of trust property by a trustee.—Kern v. Chalfant, 7 Minn. 487, (Gil. 393.)

39. The rule which disables a trustee from purchasing for his own benefit at a sale made by him in the discharge of a fiduciary duty is not applicable to the guardian of minor heirs, who purchases land belonging to the ancestor's estate at a sale conducted by the administrator under

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the order of the probate court, since the guardian has no power or control over such sale.—Barber v. Bowen, (Minn.) 49 N. W. 684. 47 Minn. 118.

40. When a partner who is a trustee of the firm to settle its affairs, and also an executor of his father's estate, to which the firm is indebted, mortgages the firm's land to his co-executors to secure the debt, in pursuance of a valid power from his copartner, such mortgage is, in effect, the mortgage of the copartner, and on a foreclosure thereof the trustee may rightfully purchase the land in his own name, as executor. The rule that a trustee cannot purchase the property of his *cestui que trust* does not apply.—Wilson v. Bell, 17 Minn. 61, (Gil. 40.)

40*a*. K. was indebted beyond his ability to pay at once without sacrificing his real estate. His wife also owned a large amount of real estate. They both conveyed the greater part of their real estate to R. by deeds absolute in terms. At the same time K. and R. executed an agreement in writing, acknowledging the conveyances as made for security on advances to K., and containing provisions in respect to future advances of money and credit, which R. covenanted to make, to enable K. to pay his debts, and save so much of his property as might remain after disposing of enough to reimburse R. for all advances. The contract gave to R. peculiar powers with respect to the holding and disposition of the lands conveyed. *Held*, that such a relation of trust and confidence was created between the parties as disabled R. to purchase under judgments or mortgages or bankruptcy proceedings, and hold against K., for his own benefit, property of K., whether included in the deeds executed as security or not.—King v. Remington, 29 N. W. 352, 36 Minn. 15.

IV. Remedies.

Action to set aside trust-deed.

41. In an action against a trustee to vacate and set aside a trust-deed, a *cestui que trust* need not be made a party defendant, although he may, on proper cause shown, (as in the case of collusion between the plaintiff and trustee,) and in the discretion of the court, be permitted to appear and defend.—Winslow v. Minnesota & P. R. Co., 4 Minn. 313, (Gil. 230.)

Action to determine title to trust property.

42. The complaint in an action alleged that a certain conveyance by plaintiff to R. was merely in trust, and that the trust had ended, and asked that the title of the property be adjudged in him. The answer alleged title in defendants, not merely under the deed from plaintiff to R., but also under various other deeds from other sources, and asked, as affirmative relief, that the title be adjudged in them. *Held* that, the action being therefore one to determine the title, defendants were not limited to asserting a claim under the deed from plaintiff to R., on the theory that the action was to foreclose the equities of that deed.—Cheever v. Converse, 28 N. W. 217, 35 Minn. 179.

Distinguishing Banning v. Bradford, 21 Minn. 308.

Action for accounting.

43. After the decease of a trustee, no successor in the trust having been appointed, and the trust property and all right thereto having passed to the *cestui que trust*, the latter may maintain an action for an accounting and partition of the trust property, as the real party in interest.—Judd v. Dike, 15 N. W. 672, 30 Minn. 380.

44. In an action for an accounting for property alleged to be held in trust by defendant the court found that certain bonds were so held by him, as to a one-fourth interest therein, for plaintiff. *Held*, that plaintiff was entitled to her proportionate share of the price received for them, with interest on the same from the time it was received, not merely from the time when the money was demanded.—Judd v. Dike, 15 N. W. 672, 30 Minn. 380.

Tracing trust funds.

45. Equity will follow money or other property through any number of transmutations, and preserve it for the owner, either in its original or substituted form, and, so long as it can be traced and identified in either form, it belongs to the original owner, if he elects to claim it.—Third Nat. Bank v. Stillwater Gas Co., 30 N. W. 440, 36 Minn. 75.

Participation in purchases by co-beneficiaries to protect trust.

46. *Co-cestuis que trustent*, desiring to share in the benefit of assignments of purchases of the trust, subject, under a prior lien, to other *cestuis que trustent*, must elect to do so by proper contribution within a reasonable time, and a delay of nine years, unexcused by want of notice, or fraud on the part of the other *cestuis que trustent* will be deemed a waiver of such right of participation.—Knox v. Randall, 24 Minn. 479.

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U.

Ultra Vires.

Corporate powers, see *Corporations*, 16-18; *Municipal Corporations*, 104.

Undertaking.

On appeal, see *Appeal and Error*, 684, 685.

Undue Influence.

In procuring deed, see *Equity*, 58-64.
—— will, see *Wills*, 11, 19.

UNION DEPOT COMPANIES.

Right to use depot.

The St. Paul Union Depot Company, organized under Gen. St. Minn. c. 34, tit. 1, was authorized to provide and maintain a union depot and tracks in the city of St. Paul, "open alike to all railroads now constructed, or which may hereafter be constructed, to or into St. Paul." The companies desiring to use the depot were to become stockholders. Laws 1879, c. 318, accepted by the depot company, provided that any railroad company desiring to use its depot might subscribe to the capital stock of the depot company, and further declared that there should be no unjust discrimination against or in favor of any railroad company using or desiring to use the tracks and depot, but that the terms and conditions adopted for the same should be, as far as practicable, uniform, and apply alike to all railroads. Provision was made for apportioning the number of shares any railroad company desiring to use the depot should take, but no price to be paid therefor was named. The stock was only to be owned by the companies using the depot, and the only profit to be realized was from such tolls and rentals as they might pay in. Five railroad companies became stockholders, buying the stock at par, and afterwards defendant railroad company, desiring to use the depot, sought to become a stockholder. *Held*, that defendant was entitled to its proportion of the stock at par, whatever might be its alleged value, and that, if all the stock was taken by the other companies, they might be compelled to surrender so much of their stock as might be necessary.—St. Paul Union Depot Co. v. Minnesota & N. W. R. Co., (Minn.) 49 N. W. 646.

47 Minn. 154.

UNITED STATES.

Action on contract made by agent, see *Action*, 3.
Claims for goods sold to Indians, see *Indians*, 4, 5.
Courts, see *Courts*, 31-35; *Removal of Causes*.
Indebtedness subject to garnishment, see *Garnishment*, 1.
Land office, see *Public Lands*, 115-119.

Lien upon goods belonging to.

A common carrier has no lien upon goods transported by him belonging to the United States.—Dufolt v. Gorman, 1 Minn. 301, (Gil. 234.)

UNIVERSITY OF MINNESOTA.

Exemption of property from taxation, see *Taxation*, 35-37.
Lands subject to be taken for public use, see *Eminent Domain*, 21.

Title to property.

1. The title to the lands reserved for the use and support of the state university remains in the state, and not in the corporation; and all property acquired by the regents, or funds placed at their disposal, remain the property of the state, of which they are the mere trustees or agents.—Regents of State University v. Hart, 7 Minn. 61, (Gil. 45.)

2. In Minnesota an injunction will not be granted to restrain the condemnation by a railroad of a right of way through university lots, on the ground that they had been appropriated by the state for the use of the university, where it appears that, pursuant to the recommendation of the professor of agriculture, the executive committee purchased the lots without the direct authority of the board of regents, taking title in the name of one of their number, and that this action had not been ratified by the regents, and that both the state and the holder of the legal title had been parties to the condemnation proceedings though the university had not.—University of Minnesota v. St. Paul & N. P. Ry. Co. (Minn.) 31 N. W. 936.

36 Minn. 447.

Board of regents—Power to contract.

3. The board of regents of the University of Minnesota are made a corporation by Comp. St. Minn. c. 23, p. 350, and have power to contract only within the limits fixed by statute, of which all persons are presumed to have notice.—Regents of State University v. Hart, 7 Minn. 61, (Gil. 45.)

4. The board of regents of the state university, not having power to contract or incur indebtedness beyond the fund provided by the legislature, cannot make a negotiable promissory note; and in an action on such a note, given for a valid indebtedness, judgment will be restricted in its enforcement to such fund.—Regents of State University v. Hart, 7 Minn. 61, (Gil. 45.)

Unlawful Detainer.

See *Forcible Entry and Detainer*.

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Usage.

See *Custom and Usage.*

USE AND OCCUPATION.

Liability of tenant in common, see *Tenancy in Common and Joint Tenancy*, 12–16.

When action lies.

1. An action for use and occupation will not lie against a party in possession of real estate by the license of the owner.—Reed v. Lammel, (Minn.) 42 N. W. 202.
40 Minn. 397.

Pleading.

2. A complaint in an action for use and occupation, which contains no allegations of facts showing the relation of landlord and tenant between plaintiff and defendant, fails to state a cause of action, and it cannot be sustained on the theory of waiving a tortious entry and occupation of the premises, and suing upon an implied contract.—Hurley v. Lameraux, 12 N. W. 447, 29 Minn. 138.

3. Where, in an action for use and occupation of land, plaintiff alleges title in himself, which defendant denies in his answer, but, on the trial, the title of plaintiff is undisputed, it is error to submit the issue to the jury.—Reed v. Lammel, (Minn.) 42 N. W. 202.
40 Minn. 397.

Evidence.

4. In an action for use and occupation, it is competent for defendant to show that he did not occupy the whole of the premises; and in such case, an admission that the value of the use and occupation of the whole premises is as stated in the complaint, goes for nothing.—Steele v. Thayer, (Minn.) 30 N. W. 758.
36 Minn. 174.

5. In an action for use and occupation of premises which defendant went into possession of without authority from plaintiff, and tried unsuccessfully to obtain a lease of, a notice sent by plaintiff's agent to defendant to vacate the premises, and to pay a certain sum for occupation, offered in evidence by defendant, *held* properly excluded. But evidence offered by defendant, to show an arrangement made by him with plaintiff's agent, whereby defendant was to remain in possession until plaintiff could be communicated with, *held* admissible.—Steele v. Thayer, 30 N. W. 758, 36 Minn. 174.

Amount of recovery.

6. Where plaintiff sues for the use and occupation of land, and not for rent reserved by express contract between the parties, he can recover only the value of such use and occupation of the premises as defendant is shown to have actually enjoyed.—Sanford v. Johnson, 4 N. W. 43, 26 Minn. 314.

Uses.

See *Trusts.*

USURY.

I. What Constitutes, 1–21.
II. Effect on Contract, 22–31.
III. Remedies of Debtor, 32–40.
IV. Usury as a Defense, 41–49.

Authority of agent to take, see *Principal and Agent*, 34, 35.
Included in amount for which mortgaged premises are sold on foreclosure, see *Mortgages*, 247.
Repeal of statute relating to, see *Statutes*, 65.

I. What Constitutes.

Retention by lender of part of money loaned.

1. On a loan of money, for the amount of which the borrower gives his promissory notes, the retention of a part of the money by the lender, without any satisfactory reason or explanation thereof, is sufficient to justify the jury in finding that such money was retained as usurious interest.—Egbert v. Peters, 29 N. W. 134, 35 Minn. 312.

2. Defendants, having applied to plaintiffs for a loan of $100, were informed that they could have it for a bonus of $20 and interest, and thereupon they made their note for $120, with interest, and delivered it to plaintiffs, who gave them a check for $120, saying that defendants might take $100 of the amount, and that a third party would get $20 of the amount and bring it back; and this was done. *Held*, that making the check for $120 was a mere device to conceal the usurious character of the transaction. — Elston v. Kelley, 26 N. W. 229, 34 Minn. 409.

Taking note for a sum in excess of loan.

3. When money is borrowed and a note for a larger amount is given, it being understood that interest is added to make up the face of the note, and the amount thus added is in excess of the lawful rate, the agreement is usurious.—W. B. Clark Investment Co. v. McNaughton, (Minn.) 48 N. W. 412.
46 Minn. 8.

4. Evidence that the payee of a note intentionally included therein a sum greater than the amount loaned, with 10 per cent. interest on the face amount of the note, whereby he secured to himself a greater compensation for the forbearance of the sum actually loaned than the statute allows, is sufficient to support the charge of usury.—Holmen v. Rugland, (Minn.) 49 N. W. 189.
46 Minn. 400.

Mistake in rate of interest.

5. A chattel mortgage was conditioned for the payment of a sum named, "according to a certain note of even date, with interest at 12 per cent." *Held*, upon evidence showing that, as respects the rate of interest, there was a mistake in the mortgage, the rate of interest in fact secured by the note being 10 per cent. only, that the mortgage was not usurious, within Laws Minn. 1879, c. 66, § 3, making void all contracts "whereupon or whereby there shall be reserved, secured, or taken any greater sum or value for the loan or forbearance of any money" than at

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the rate of 10 per cent. per annum. The statute avoids a contract for actual usury, not for a false appearance of usury.—Ward v. Anderberg, 17 N. W. 630, 31 Minn 304.

Lapse of time before delivery of sum loaned.

6. Where the negotiation of a loan is transacted through the mails, and a reasonable time transpires between the date of the execution of the securities, which bear interest from their date and their final acceptance, and the delivery to the mortgagor of the sum loaned, and there is no intention to pay or exact an unlawful rate of interest, the securities are not void for usury because of such intervening lapse of time.—Daley v. Minnesota Loan & Investment Co., (Minn.) 45 N. W. 1100.

43 Minn. 517.

Guaranty of sum due on usurious note.

7. A guaranty, made upon the sale of a past-due promissory note, that a certain sum is due, and that it bears interest at a certain rate, which the guarantor believes to be valid, it not being unusual, exorbitant, or at that time judicially declared invalid, is binding upon him for the full amount and specified interest, though the rate of interest is not valid, and a portion of the sum specified as due is made up from a calculation of interest at such rate.—Hendricks v. Banning, 7 Minn. 32, (Gil. 17.)

Transactions through agents — In general.

8. H., the payee of an overdue usurious note, pretending to L., the maker, to refuse to renew it, referred him to K., from whom he said he could borrow the money to pay it. L. thereupon applied to K. for the loan, which K. pretended to make to him, taking from him a note running to himself and giving him a check on H.'s bank, which L. indorsed over to H., receiving in exchange therefor merely his old note. In fact the pretended loan by K. was merely colorable, the transaction being a mere device by H. to evade the usury law, K. being his agent, and the new note in fact belonging to H. and being taken in substitution for the first one. *Held*, that L. could recover the value of property taken on a chattel mortgage executed to secure the new note on the ground that it was usurious, although at the time of its execution he was ignorant of the fact, and supposed that it was made to secure an actual loan made to him by K.—Lukens v. Hazlett, (Minn.) 35 N. W. 265.

37 Minn. 441.

9. Where one, as agent, sold notes and a mortgage securing them, executed by his principal to himself, to defendants, at a discount greater than the rate of interest allowed by law, but defendants made the purchase in good faith, not knowing the relation of the seller to the maker of the notes, there was no usury.—Jackson v. Travis, (Minn.) 44 N. W. 316.

42 Minn. 438.

10. Where a general agent loaning the money of his principal makes an illegal exaction from the borrower solely for his own benefit, and without the knowledge or sanction of his principal, who in no manner ratifies it, the latter is not affected by such illegal exaction.—Stein v. Swensen, (Minn.) 46 N. W. 360.

44 Minn. 218.

Compensation of agents—Bonus.

11. The taking out of money loaned, by agents, for their own benefit, of a sum as a bonus for procuring the loan, but without any collusion with the lender, if he neither authorizes nor ratifies the act, nor derives any benefit from it, is not presumptively a cover for usury on his part, and does not make the loan usurious.—Acheson v. Chase, 9 N. W. 734, 28 Minn. 211; Jordan v. Humphrey, 18 N. W. 450, 31 Minn. 495; Strait v. Frary, 22 N. W. 295, 33 Minn. 194.

12. Receiving a mortgage given to secure such loan, and attempting to enforce it for the amount actually loaned, with lawful interest, does not amount to a ratification.—Jordan v. Humphrey, 18 N. W. 450, 31 Minn. 495.

13. Defendant authorized one A. to lend money for him at the lawful rate of interest, and to take securities therefor in defendant's name. Under the contract of agency, A. was to receive no compensation from defendant for making loans, but was authorized to collect from the borrowers a reasonable compensation for such services. A. loaned $500 to plaintiff, taking plaintiff's note and mortgage for that sum in defendant's name, charging plaintiff a bonus of $50 for making the loan. Defendant never authorized the taking of any bonus, nor did he ever receive the benefit of any bonus. *Held*, that the taking of the $50, so far as it was a mere bonus, and not intended as a reasonable compensation for making the loan, was an unauthorized act on the part of A., and was not usury on the part of defendant.—Acheson v. Chase, 9 N. W. 734, 28 Minn. 211.

Distinguished in Avery v. Creigh, 29 N. W. 154, 35 Minn. 457.

14. A broker loaning money for a principal without compensation from him, under an express agreement with the borrower, charged him, in addition to interest, a commission for procuring the loan, examining certain personal property on which security was to be given, and drawing the necessary papers, and received such commission for his own exclusive use, the principal receiving only the interest. *Held*, it not appearing that the commission charged was excessive or unreasonable for the services performed for the borrower, that the transaction was not usurious.—Mackey v. Winkler, 29 N. W. 337, 35 Minn. 513.

15. A note given for a sum agreed to be paid to the payee, in consideration for his services in securing a loan for the maker from a third person, and not shown to be unreasonable in amount, or a cover for usury, is presumptively valid.—Thomas v. Miller, (Minn.) 40 N. W 358.

39 Minn. 339.

16. An agent, authorized to loan money of his principal without compensation from the latter for his services, but "to make what he could out of it," made a loan of $125 for a month, and deducted from the amount a month's interest and $6.46 as commission, paying the remainder in cash. *Held*, it not appearing that he had rendered any services in regard to the loan for which

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such commission would not be unreasonably large, that the deduction was a mere cover for usury. —Avery v. Creigh, 29 N. W. 154, 35 Minn. 456.

Distinguishing Acheson v. Chase, 9 N. W. 734, 28 Minn. 211.

17. An agent having general authority to make loans, a note taken by him for $17, with interest at the highest legal rate, but in fact given for a loan of $15 only, the extra $2 being charged as additional interest, is usurious and void.—Kemmitt v. Adamson, (Minn.) 46 N. W. 327.

44 Minn. 121.

Expenses incident to loan.

18. A charge made in good faith, which is reasonable in amount, to cover expenses for examining title and the preparation of the writings necessary to secure a sum loaned to a mortgagor, is not usurious.—Daley v. Minnesota Loan & Investment Co., (Minn.) 45 N. W. 1100.

43 Minn. 517.

Renewal—Compound interest.

19. Defendant, being indebted to plaintiff on certain notes, took them up, and gave instead new notes, whose amount was determined by taking the amount, principal and interest, actually due on the old notes, and adding thereto a sum reached by computing compound interest on the old notes at a given per cent. *Held* that, as to this latter amount, the new notes were usurious where the interest on the old notes was at the highest rate allowed by law.—Simpson v. Evans, (Minn.) 46 N. W. 908.

44 Minn. 419.

Explaining and distinguishing Martin v. Lennon, 19 Minn. 67, (Gil. 45.)

—— Expenses of procuring.

20. Where a borrower authorized an agent in writing to negotiate a loan for him, and thereby agreed "to pay him —— dollars" for securing extensions of the loan, it was competent for the borrower, in an action to recover the loan, to show by parol testimony that the amount thereafter verbally agreed to be paid the agent, nominally for procuring an extension, was really a part of the consideration of the loan, and a shift to cover a usurious transaction.—Stein v. Swensen, (Minn.) 49 N. W. 55.

46 Minn. 360.

Question for jury.

21. Whether the purchase of securities or other property, or the execution of a collateral contract by the borrower in connection with a loan, and as a part of the consideration and inducement therefor, will make the transaction usurious, is ordinarily to be determined as a question of fact in the trial court.—Chase v. New York Mortg. Loan Co., (Minn.) 51 N. W. 816.

II. Effect on Contract.

In general.

22. Under Gen. St. 1866, c. 23, § 1, which provides that "no contract for a greater rate of interest than $12 upon $100, for a year, shall be valid for the excess of interest over 12 per cent.," an executory promise to pay a rate of interest greater than 12 per cent. per annum is void, and cannot be enforced.—Brown v. Nagel, 21 Minn. 415.

23. Under Laws Minn. 1879, c. 66, § 3, which declares that "all bonds, bills, notes, assurances, conveyances, chattel mortgages, and all other contracts and securities whatsoever" which are usurious shall be void, where a contract for a usurious loan of money is evidenced by a note secured by bill of sale, the *contract*, as well as the note and bill of sale, are *void*, and there is no valid indebtedness for the money loaned.—Ormund v. Hobart, (Minn.) 31 N. W. 213.

36 Minn. 306.

Giving new note.

24. On an accounting and settlement for notes past due, drawing more than the legal rate of 7 per cent. after due, the maker consented to the allowance of interest at the rate stipulated in the contract over 7 per cent., and voluntarily gave new notes for the aggregate amount found due by including such interest. *Held* that, in an action brought on such new notes, he was not entitled to deduction for the excess of interest included therein, but was liable for the full face; for by giving such new notes he waived his right to be relieved in equity from such excess of interest. Whitacre v. Fuller, 5 Minn. 508, (Gil. 401,) overruled.—Martin v. Lennon, 19 Minn. 67, (Gil. 45.)

Explained and distinguished in Simpson v. Evans, 46 N. W. 909, 44 Minn. 421.

Substitution of new security.

25. Under Gen. St. Minn. 1878, c. 23, prohibiting usury, and making the usurious contract and all securities given therefor absolutely void, the effect of the statute is not avoided by the substitution of a new security for one infected with usury.—Jordan v. Humphrey, 18 N. W. 450, 31 Minn. 495.

26. The giving up by a creditor of security for a usurious debt, and taking new mortgages on the same property, will not remove the taint of usury. —Exlev v. Berrvhill, (Minn.) 33 N. W. 567.

37 Minn. 182.

27. Where plaintiff in replevin claims the property only under a mortgage given to secure a note which defendant alleges and proves to be usurious, plaintiff cannot recover under a former mortgage on the same property, in renewal of which the evidence shows that the mortgage under which he claims was executed, and which was not tainted with usury.—Barrows v. Thomas, (Minn.) 45 N. W. 443.

43 Minn. 270.

Extension of time of payment.

28. A note not originally usurious is not made so by a subsequent extension, granted in consideration of payment of usurious interest.—Avery v. Creigh, 29 N. W. 154, 35 Minn. 456.

29. A contract for the loan of money for a stated time, at a rate of interest not usurious, is not avoided, and the original debt forfeited, by a contemporaneous agreement, not intended as a means of evading the usury law, that at the option of the borrower the time of payment may be extended by the payment of more than the legal

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rate of interest for the period of the extension.—Stein v. Swensen, (Minn.) 46 N. W. 360.
44 Minn. 218.

Bona fide purchasers of negotiable paper.

30. An indorsee of a negotiable note transferred to him before maturity, and without notice of any usury affecting the same, is, if he surrenders other securities in consideration of the transfer of the note to him, a purchaser for value, within Gen. St. Minn. 1878, c. 23, § 4, declaring a usurious note void except as to *bona fide* purchasers in good faith, for value, before maturity.—First Nat. Bank of Rochester v. Bentley, 6 N. W. 422, 27 Minn. 87.

31. Laws Minn. 1879, c. 66, § 3, by the terms of which "*bona fide* purchasers of negotiable paper" are protected from the avoiding effects of usury, does not apply to mortgages securing negotiable paper.—Scott v. Austin, (Minn.) 32 N. W. 89.*
36 Minn. 460.

III. Remedies of Debtor.

Right to recover back interest paid.

32. One who, without any written contract stipulating the rate of interest, voluntarily pays a rate in excess of the legal one, cannot recover back such excess.—Nutting v. McCutcheon, 5 Minn. 382, (Gil. 310.)

33. Under Gen. St. c. 10, § 1, which provides that "no contract for a greater rate of interest than twelve dollars upon one hundred dollars for a year shall be valid for the excess of interest over twelve per cent.," one who voluntarily pays such excess cannot recover the same.—Woolfolk v. Bird, 22 Minn. 341.

34. Illegal interest voluntarily paid or allowed to be collected by foreclosure of a mortgage cannot be recovered back by the debtor.—Taylor v. Burgess, 6 N. W. 350, 26 Minn. 547.

35. Under Gen. St. Minn. 1866, c. 23, § 1, which provides that no contract for a greater rate of interest than 12 per cent. per annum shall be valid for the excess over that, but which provides no prohibition or penalties against paying, receiving, or contracting for any rate of interest, a debtor who voluntarily pays such excessive interest cannot recover the excess or have it credited on the unpaid residue of the debt. Following Woolfolk v. Bird, 22 Minn. 341; Taylor v. Burgess, 6 N. W. 350, 26 Minn. 547.—Cornell v. Smith, 6 N. W. 460, 27 Minn. 132.

36. Except in favor of a *bona fide* purchaser, a foreclosure sale, made under a power contained in a mortgage void for usury, works no estoppel against the mortgagor. Distinguishing Taylor v. Burgess, 26 Minn. 547.—Jordan v. Humphrey, 18 N. W. 450, 31 Minn. 495.

Right to recover penalty.

37. Gen. St. Minn. 1878, c. 81, § 24, provides that "the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure" three times the amount of any illegal interest for which the property was sold. *Held*, that it is not necessary to wait until the foreclosure has become complete by expiration of the time allowed for redemption before such action can be maintained.—Beal v. White, 8 N. W. 829, 28 Minn. 6.

Equitable relief—Cancellation of securities.

38. In a suit to cancel a mortgage as void for usury, and as having been paid, the burden of proof is on the plaintiff, and the finding of the court in favor of defendant on conflicting evidence will not be disturbed.—Bishop v. Corbitt, (Minn.) 41 N. W. 1030.
40 Minn. 200.

39. Under Laws Minn. 1879, c. 66, § 6, which provides that whenever it appears that any bond, etc., has been taken for usury, "the court shall declare the same to be void, and enjoin any proceeding thereon, and shall order the same to be canceled and given up," one who, as a plaintiff, seeks the avoidance and cancellation of securities for usury, need not, as a condition of obtaining such relief, offer to pay what he has received, with legal interest. Scott v. Austin, 32 N. W. 89, overruled.—Scott v. Austin, 32 N. W. 864, 36 Minn. 460; Exley v. Berryhill, 33 N. W. 567, 37 Minn. 182.

And compare Coolbaugh v. Roemer, 21 N. W. 472, 32 Minn. 445.

40. The fact that a mortgage, void for usury, has been foreclosed by sale under a power, the purchaser having notice of the usury, does not prevent the mortgagor from avoiding the sale and the mortgage by an action for that purpose.—Scott v. Austin, 32 N. W. 864, 36 Minn. 460; Exley v. Berryhill, 33 N. W. 567, 37 Minn. 182.

IV. Usury as a Defense.

Who may assert the defense.

41. A sheriff holding property under a writ of attachment against the property of a mortgagor may assert the invalidity of the mortgage for usury.—Stein v. Swensen, (Minn.) 46 N. W. 360.
44 Minn. 218.

42. An insolvent debtor having made a general assignment of all his property for the benefit of creditors, the assignee may assert the invalidity, by reason of usury, of mortgages upon the assigned property given by the assignor prior to the assignment.—Stein v. Swensen, (Minn.) 46 N. W. 360.
44 Minn. 218.

Pleading and proof.

43. Where a note provides that interest shall be paid thereon after maturity at the rate of 5 per cent. per month, an objection that the provision as to interest is void as being in the nature of a penalty is a defense, which, if not asserted at the proper time, will be deemed waived.—Bidwell v. Whitney, 4 Minn. 76, (Gil. 45.)

44. Where the defense of usury has not been interposed, the court will not declare a contract made in another state usurious, although, upon its face, it bears interest at a rate in excess of that

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allowed by the law of Minnesota.—Reiff v. Bakken, (Minn.) 31 N. W. 348.

36 Minn. 333.

45. In an action on a promissory note, executed by defendant B. to defendant C., and by the latter indorsed to plaintiff's son before maturity, and by the latter indorsed to plaintiff, likewise before maturity, defendants alleged that plaintiff corruptly, through his son and agent, contracted with them for usurious interest. *Held*, that the question of the good faith of a transfer of the note by the son to the father did not arise in the case.—Hass v. Camp, 42 N. W. 20, 40 Minn. 329.

46. Where a mortgagee of chattels brings an action to recover the possession thereof, alleging title and ownership generally, and upon the trial relies upon the mortgage to establish his title, the defendant may, under a general denial of plaintiff's title in his answer, show that the mortgage is void for usury.—Adamson v. Wiggins, (Minn.) 48 N. W. 185.

45 Minn. 448.

47. In a suit on a note, the answer being a general denial, and alleging that the note was a renewal of a prior usurious note, and also that interest in excess of the lawful rate was paid on the note in suit when it was given, defendant may show the payment of interest in excess of the lawful rate on the note in suit. — W. B. Clark Investment Co. v. McNaughton, (Minn.) 48 N. W. 412.

46 Minn. 8.

Evidence—Admissibility.

48. In an action to recover a loan alleged by defendant to have been usurious, it was proper for him to prove the general manner in which the agent transacted the business of his principal in loaning money, as that he ordinarily used a certain kind of blanks, made loans for only one month at a time, and extensions for only one month at a time, and charged commissions of a percentage on the amount upon each loan and extension.—Stein v. Swensen, (Minn.) 49 N. W. 55. 46 Minn. 360.

49. The unreasonableness of a sum charged by an agent as compensation for negotiating a loan for a borrower may be shown, in an action to recover the loan, as tending to prove that the sum charged was really in the interest of the principal, as a cover for a usurious loan.—Stein v. Swensen, (Minn.) 49 N. W. 55.

46 Minn. 360.

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V.

Vacation.

Of highway, see *Highways*, 53-57.
judgment, see *Judgment*, 29-57, 240-272.

Variance.

Between indictment and proof, see *Bigamy*, 7; *Criminal Law*, 84-87; *Homicide*, 38-42; *Indictment*, 14-16; *Larceny*, 24; *Nuisance*, 32.
—— pleading and proof, see *Adverse Claim*, 24; *Appeal and Error*, 325, 326; *Conversion of Personal Property*, 27; *Insurance*, 129-137; *Libel and Slander*, 74; *Malicious Prosecution*, 19, 20; *Mechanics' Liens*, 158-160; *Negotiable Instruments*, 209, 210; *New Trial*, 7, 9; *Pleading*, 235-277, 295, 296; *Sale*, 161-164.

VENDOR AND PURCHASER.

I. The Contract, 1-50.
II. Rights and Remedies, 51-118.
III. Vendor's Lien, 119-129.
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Interest subject to levy, see *Execution*, 18-22.
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Oral agreements, see *Frauds, Statute of*, 51-62.
Purchase-money mortgages, see *Mortgages*, 46-49.
Rights of purchasers as against attaching creditors, see *Attachment*, 46-49.
Sale by agent, see *Factors and Brokers; Principal and Agent*, 25-32.

I. The Contract.

What constitutes, generally.

1. A bond for a deed of lands, upon the performance of certain conditions, will ordinarily be construed by a court of equity as an agreement to convey.—Dahl v. Pross, 6 Minn. 89, (Gil. 38.)

2. A conveyance of land executed by an attorney in fact, which is inoperative as a transfer of the legal title because the power was not under seal, is a valid contract of sale, and will vest an equitable title in the grantee superior to the legal title of a subsequent grantee thereof, who takes with notice of the letter of attorney and conveyance by agent.—Groff v. Ramsey, 19 Minn. 44, (Gil. 24.)

3. In ejectment defendant claimed that he was in possession, and had been before L., plaintiffs' grantor, conveyed to them, under an agreement with L. to take care of her for life in consideration that she should convey the land to him. Defendant testified as to the agreement, and that it was contained in letters which passed between him and his wife and L., but the letters were not produced on the trial. It did not appear whether, if an agreement was made, it was to convey the land to defendant by deed or by will, or whether it was to be given to him or his wife. It appeared that, while L. and her husband lived on the land, defendant and his wife came there and lived until the husband died, and after that until L. died. After the husband's death, defendant filed and proved against his estate a claim for the board and maintenance of deceased and L. *Held*, that the court was warranted in finding that there was no agreement to convey the land to defendant.—Leyde v. Silvis, (Minn.) 50 N. W. 361.
47 Minn. 412.

Consideration.

4. Covenants by the grantees to deliver to the grantors one-third of all the crops grown on a certain tract of land, and to keep a specified number of cows and sheep, and to furnish grantors a team and wagon to attend church on Sundays, are a sufficient consideration for the conveyance of the land.—Somerdorf v. Schliep, (Minn.) 44 N. W. 1084.
43 Minn. 150.

Execution.

5. An executory contract to convey lands need not be under seal, and if so executed by one whose authority rests in parol only, the seal may be rejected as surplusage, and the instrument will be valid as a simple contract.— Minor v. Willoughby, 3 Minn. 225, (Gil. 154.)

6. Where a written agreement shows that it was contemplated that each of the seven vendees should execute the contract before it could be complete, and contains mutual covenants to be subsequently performed by the vendees in consideration of the conveyance, and only four of the vendees execute it, it is not binding on the vendor, and no recovery can be had against him in an action for damages for its breach, though the vendees entered on and improved the land with his knowledge and consent.—Stub v. Grimes, (Minn.) 37 N. W. 444.
38 Minn. 317.

Parol modification.

7. A contract for the sale of lands cannot rest partly in writing and partly in parol, and any modification of a written contract imposing new conditions on one of the parties must be in writing. —Heisley v. Swanstrom, (Minn.) 41 N. W. 1029.
40 Minn. 196.

Misrepresentations or fraud.

8. Where it is immaterial to the purchaser who the owner is, it is not a fraud upon him for the seller to represent himself as an agent, when in fact he is himself the owner.—Huffman v. Long, (Minn.) 42 N. W. 355.
40 Minn. 473.

9. Representations made without fraud, in the course of negotiations for the sale of real estate, that the property is free from incumbrance, are merged in the subsequent deed of conveyance executed on the consummation of the sale.—Fritz v. McGill, 18 N W. 753, 31 Minn. 536.

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10. Plaintiff negotiated with M. for the purchase of land for $10,000, knowing at the time that M. was acting as agent for the owner. Afterwards, M. proposed to unite with plaintiff in purchasing the land in common at the price before named, which proposal was accepted by plaintiff, and carried into effect by a warranty deed to them from the owner. In fact M. was entitled, by agreement with the owner, to receive all that he might sell the property for in excess of $8,000. *Held*, that plaintiff, knowing of the agency, was chargeable with knowledge that M. might be entitled to some compensation therefor, and that, there being no misrepresentation or deception, the conduct of M. did not constitute a fraud on plaintiff.—Miller v. Miller, (Minn.) 50 N. W. 612.

47 Minn. 546.

Certainty—Description of land.

11. A bond to convey "one-half" of a certain piece of land, without specifying which half, is to be construed to mean an undivided half of the whole.—Baldwin v. Winslow, 2 Minn. 213, (Gil. 174.)

12. The reservation in a bond for a deed of "two acres on the east side of the creek," although it is too uncertain to be available, will not render the bond to convey void.—Baldwin v. Winslow, 2 Minn. 213, (Gil. 174.)

13. An agreement "to execute and deliver to each and every lot-owner who may have title thereto from J. B. and wife, or either of them, in any portions of lot known as lot four, section twenty-nine, town one hundred and eleven north, of range ten west, state of Minnesota, a good and sufficient deed in fee-simple," is void for uncertainty, there being nothing to show what land is to be conveyed by such deed.—Sharpe v. Rogers, 10 Minn. 207, (Gil. 168.)

14. A description of land in a contract to convey, as "lot 6, lying within the city limits of St. Paul, amounting to six and seventy hundredths acres, according to the government survey thereof, upon the Mississippi river," is sufficiently definite.—St. Paul Land Co. v. Dayton, (Minn.) 43 N. W. 782.

42 Minn. 73.

15. Reference to the ownership in such a contract makes the following description sufficiently definite: "Whatever lots or lands which may be owned by the parties of the first part in the plat of Montville, aforesaid," etc.—St. Paul Land Co. v. Dayton, (Minn.) 43 N. W. 782.

42 Minn. 73.

16. Plaintiff sold to defendant a leasehold estate in land, together with the improvements thereon, in consideration of a certain sum of money, part of which was to be paid in cash, the balance in 5,000 acres of pine lands in Georgia, also 320 acres of land in Dakota; "said 320 acres of Dakota lands to be situate within nine miles at least of a railroad station, and to be good, tillable land." *Held*, that the contract was not void for lack of mutuality because of indefiniteness and uncertainty in that part of the contract relating to the Dakota lands.—Brown v. Munger, (Minn.) 44 N. W. 519.

42 Minn. 482.

17. Defendant contracted to convey, and plaintiff to receive, in part payment of a certain leasehold interest, 320 acres of good, tillable land in Dakota, to be situated within nine miles of a railway station. *Held*, that this conferred upon the defendant the right to select and appropriate to the contract the tract or tracts of land, subject to the requirements as to quality, quantity, and location, mentioned.—Brown v. Munger, (Minn.) 44 N. W. 519.

42 Minn. 482.

18. A contract provided that out of 40 acres of land, which was to be selected from a certain quarter section, the vendee was to have 10 acres in a body, averaging, in value and quality, with the whole. *Held*, that the land was sufficiently described, and the contract was valid, and the vendor had the right to select the particular tract of land to be conveyed, subject to the conditions of the contract in respect to quality and value.—Burgon v. Cabanne, (Minn.) 44 N. W 118.

42 Minn. 267.

19. Defendants executed to plaintiff a writing agreeing to convey a piece of land out of a certain 80-acre tract, to be not less in area than 40x120 feet, and to front on a public street or road; the particular location and description to be thereafter mutually agreed on. The particular location and description never were agreed on. *Held* not a contract.—Scanlon v. Oliver, (Minn.) 44 N. W. 1031.

42 Minn. 538.

—— Payments.

20. A contract for the conveyance of land provided that half the price should be paid when "deed with good title was ready, and the balance in equal payments in one or two years, with interest annually; interest to commence when possession is given, and that to be by" September 1st. *Held*, that the time in regard to deferred payments commenced to run from the time of payment of cash price and delivery of deed; and, if possession was not given at the time stipulated, interest on deferred payments did not commence until possession was given.—Drake v. Barton, 18 Minn. 462, (Gil. 414.)

21. A memorandum provided for the delivery of the deed on receipt of the cash payments, and "the securities for the deferred payments," without specifying the kind or character of the securities. *Held* bad for uncertainty.—George v. Conhaim, 37 N. W. 791, 38 Minn. 338.

Title of vendor.

22. It is not necessary to the validity of a bond to convey land that the obligor should have owned the land at the execution of the bond. Want of ownership is a matter of defense in an action on the bond.—Montgomery v. McEwen, 7 Minn. 351, (Gil. 276.)

23. In every contract for the sale of lands the vendor, unless acting in a mere ministerial or fiduciary capacity, or there is something to the contrary in the instrument, engages not merely to give a good title, but a deed with the usual covenants.—Drake v. Barton, 18 Minn. 462, (Gil. 414.)

24. Under a contract to sell and convey real estate by a warranty deed the vendee is entitled to a

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clear title, free of defects and incumbrances.—Murphin v. Scovell, (Minn.) 43 N. W. 1.
41 Minn. 262.

25. A vendee has a right to insist on a perfect title of record in the vendor at the time of the delivery of the deed.—George v. Conhaim, (Minn.) 37 N. W. 791.
38 Minn. 388.

26. A vendor of land who has contracted that he will thereafter, on demand, convey the property by good and sufficient deed in fee-simple, is in default if he fails to have a perfect title when such demand is made.—Gregory v. Christian, (Minn.) 44 N. W. 202.
42 Minn. 304.

27. Defendant sold a certain tract of land to plaintiff by an agreement in which he did not in terms expressly agree to convey the land to plaintiff, but did stipulate that the form of conveyance should be a warranty deed. *Held*, that plaintiff was not obliged to accept the deed of a third party, but was entitled to a conveyance from defendant, and had a right to insist that the title to the land be perfect in the defendant at the time of the delivery of the deed.—Steiner v. Zwickey, (Minn.) 43 N. W. 376.
41 Minn. 448.

28. A contract providing for "a reasonable time to be allowed said owner to perfect the title, should defects be found by said purchaser," does not give the vendor a reasonable time to obtain a title if he has none.—Benedict v. Williams, (Minn.) 38 N. W. 707.
39 Minn. 77.

29. A contract for the sale and conveyance of land for a certain sum was expressed to be "on terms as follows, viz.: One-fourth cash on delivery of warranty deed with perfect title," etc.; and by a subsequent clause it was agreed "that, if the title of said premises is not good, and cannot be made good within 60 days from date hereof, this agreement shall be void, and the above two hundred dollars refunded; but if the title to said premises is good, and not taken, the said two hundred dollars to be forfeited." The vendor never had title to a part of the land either in himself or in his control, but was merely guardian of the ward whose land it was. *Held* that, as his title was not good at the date of the agreement, and could not be made good within 60 days from that date, the agreement was at an end, and neither party any longer bound to perform it, except that the vendees were entitled to have the $200 refunded. The provision quoted was not to be construed as giving the vendees an option or election to abandon or dissolve the agreement.—Mackey v. Ames, 16 N. W. 541, 31 Minn. 103.

30. Upon payment by plaintiff to defendant of part of the purchase money on a contract for the sale of real estate, he received from defendant a memorandum dated May 1st, acknowledging receipt of such payment, and an agreement for a further payment within 30 days, and agreeing "that, if the title to said premises is not good, this agreement shall be void," and the amount received should be refunded; "but if the title to said premises is good, and the property is not taken on the above terms," the money received should be forfeited. Defendant had no title to the premises at the time of executing the contract, but he procured title thereto on May 31st. In the mean time, on May 15th, plaintiff had tendered payment and called on defendant to convey. *Held*, that plaintiff was entitled to a conveyance at any time after the contract was executed on making the further payment required, allowing defendant the time reasonably necessary for the execution of the papers, and that it was the duty of defendant to have repaid the money received on May 15th, and plaintiff could recover the same from him.—Goetz v. Walters, 25 N. W. 404, 34 Minn. 241.

31. The pendency of proceedings (not completed) to condemn real property for public use, is, as between vendor and purchaser, such a defect in the title that the latter, under a contract to convey to him good title, is not obliged to take the title so affected.—Cavenaugh v. McLaughlin, (Minn.) 35 N. W. 576.
38 Minn. 83.

32. Plaintiff, who sought specific performance of a contract by defendant to purchase certain land, derived title from a railroad company by a deed which contained the clause: "Reserving, however, a strip of land one hundred and fifty feet wide, to be used by the said railroad company for a right of way, or other railroad purposes, where the main line of this road, or any of its branches, as now located and constructed, or hereafter to be constructed, is laid, or may pass over said land." *Held*, that the easement depended on the fact of the then location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make plaintiff's title unmarketable.—Hedderly v. Johnson, (Minn.) 44 N. W. 527.
42 Minn. 443.

Distinguishing Carlson v. Duluth S. L. Ry. Co., 37 N. W. 341, 38 Minn. 305.

33. A contract for the sale of land provided that if the title should not be good, and should be refused on that ground, the contract should be void, and the earnest money returned. If the title should be good, but should not be accepted in the time limited, the earnest money should be forfeited. If there were defects which could be cured, 10 days should be allowed for that purpose. Part of the land was subject to a mortgage. After the time limited for acceptance, the vendor gave notice that the contract would be terminated if the purchaser did not by the next day accept a conveyance and pay the agreed price. The latter declined doing this, and demanded a return of earnest money, which the vendor refused. *Held*, that the vendor was not bound to cure the defect; that a tender of a conveyance was not necessary to an avoidance of the contract by him; and that the purchaser could not have specific performance, though he is now willing to take the land subject to the mortgage.—Long v. Miller, (Minn.) 48 N. W. 409.
46 Minn. 13.

34. A contract for the sale of land bound the vendees to make a cash payment within 10 days, and the vendor stipulated to furnish the vendees with an abstract of title immediately, and "in case of sale to deed by quitclaim." At the expi-

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ration of the 10 days, the vendees made a part of the cash payment, and the time for the payment of the balance was extended for two days, by a writing wherein the vendor agreed "to deed by special warranty." *Held* that the two agreements, construed together, clearly showed that the vendees had bargained for the transfer of only such title as was held by the vendor, and that they could not recover the cash payment made by them on the ground that the vendor's title had proven defective.—McManus v. Blackmarr, (Minn.) 50 N. W. 230.

47 Minn. 331.

Performance by vendor.

35. A contract for a "good and sufficient warranty deed in fee-simple, free from all incumbrances," requires a deed not only sufficient in form, but one conveying a good title, free from incumbrances; and a tender of a deed containing covenants of good title, the land being incumbered, does not comply with the contract.—Cogan v. Cook, 22 Minn. 137.

36. The vendee in a contract for the purchase of real estate, before the last day specified for the payment, tendered such payment, and demanded a deed. *Held*, that the vendor was entitled to a reasonable time, within the specified time of payment, in which to prepare a deed, and that 11 days, in the absence of evidence to the contrary, was not an unreasonable time.—Cogan v. Cook, 22 Minn. 137.

37. Plaintiff did certain work for defendant under a contract by which he was to be paid $200 in cash, and to receive from defendant a deed of a town-lot. Ten days after the work was performed and accepted, plaintiff demanded the deed, but defendant refused to convey until after a settlement with plaintiff. Two days later defendant tendered plaintiff a deed of the lot. *Held*, that defendant tendered the deed within the reasonable time after plaintiff's demand to which he was entitled, and he did not lose his right to such reasonable time by his refusal to convey until he had a settlement.—Porter v. Montgomery, 1 N. W. 844, 26 Minn. 118.

38. The vendor is entitled to a reasonable time after demand in which to prepare and deliver the conveyance, but not reasonable time within which to complete and make good a defective title.—Gregory v. Christian, (Minn.) 44 N. W. 202.

42 Minn. 304.

39. Under a contract for the sale of land, providing for a part payment within 20 days after an abstract showing a clear title should be presented to the purchaser, upon which payment the conveyance was to be made, if the vendee notifies the vendor that he is unable, for want of funds, to perform the contract, the vendor need not present an abstract of title or tender a deed; and it is not important that there was a cloud upon the title which the vendor was able and willing at once to remove.—Johnston v. Johnson, (Minn.) 44 N. W. 668.

43 Minn. 5.

40. By the contract for the sale of a lot it was agreed that it should be exclusive of a street to be opened through the tract of which it formed a part, and that it should be so selected that no part of it should lie within that street. The parties, without knowing what would be the location of the street, selected a lot which they supposed was exclusive of this street, and a conveyance was made and accepted. The street was afterwards opened, and a part of the lot taken therefor. *Held*, that the grantee was not entitled to a decree for specific performance of the agreement, as it has already been performed.—Gavin v. Murphy, 25 Minn. 142.

Performance by purchaser—Time of the essence.

41. A contract for the sale of land contained no stipulation declaring the intention of the parties that the time fixed for performance should be of the essence of the contract, although it was agreed that plaintiffs were "to pay as herein provided, or forfeit the $100 this day paid." It did not appear that the vendor needed or had engaged to use the money or security to be received from the vendees at any particular time or for any special purpose. No change of residence nor any business changes or undertakings were dependent on the prompt fulfillment of the contract, or were the inducement for making it. *Held*, that the time was not to be deemed essential.—Austin v. Wacks, 15 N. W. 409, 30 Minn. 335.

42. In a contract for sale of real property time was not made essential, either expressly or by implication. The vendees were absent on business until after the day fixed for performance, leaving the matter in charge of their agent; but they did not give him any written authority. Because of their absence, although he made exertions to communicate with them, he was unable to procure the execution of the mortgage required by the agreement. Thereupon he offered to the vendor to make the cash payment required, and to consent to any arrangement then possible, including the deposit of the deed in escrow, to secure the deferred payment. This the vendor refused, and tendered his deed, and demanded of the agent a strict compliance with the contract, and, on the day after that fixed for performance, notified the agent of his rescission. Three days afterwards the vendees tendered the money and mortgage required, which were refused, on the ground that the contract was rescinded. *Held*, that the court might relieve the vendees from the consequences of their delay; the situation of the vendor not having changed in the interval, although the land had risen in value.—Austin v. Wacks, 15 N. W. 409, 30 Minn. 335.

43. On a contract for the sale of land, in which time is not made of the essence by its terms, it cannot be shown by parol that it was understood by the parties when the agreement was executed that time was to be essential, and that a failure by the vendees to complete the agreement within the time named should release the vendor; although parol evidence of facts tending to show that time was impliedly essential, which were orally disclosed to the vendees, is admissible.—Austin v. Wacks, 15 N. W. 409, 30 Minn. 335; Judd v. Skidmore, 22 N. W. 183, 33 Minn. 140.

44. A contract under seal for the sale and conveyance of land, the purchase price to be paid in installments at stated times, provided that, "upon

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the just and full payment of said sum at the times above stated, time being made the essence of this contract, the party of the first part will, at her own expense, execute and deliver to the party of the second part a good and sufficient warranty deed, * * * and the said party of the second part agrees to make payment * * * promptly at the times above stated, * * * and, in case of a failure to make payment as aforesaid, at the option of first party this agreement may be declared null and void, and all payments thereon be declared null and void, and forfeited." *Held*, that the party of the first part could treat time as essential by declaring the contract null and void, and not otherwise; that, until such declaration was made, the contract was not annulled, but in force; and that, it appearing that a strict performance by the purchaser of the terms as to payments had been waived, and a substituted performance agreed upon, tender of which had been duly made by the purchaser, he was entitled to specific performance by the vendor.—Coles v. Suepard, 16 N. W. 153, 30 Minn. 446.

45. A lease contained a stipulation granting to the lessees "the right and privilege to purchase the leased premises of and from the party of the first part at any time before the expiration of this lease," for a sum named, "to be paid down in cash to the party of the first part, upon the demand of a deed prior to the expiration of this lease." *Held*, that payment of the sum stipulated, or a tender thereof, within the time limited, was an essential condition to the making of a contract of sale.—Steele v. Bond, 18 N. W. 830, 32 Minn. 14.

46. Upon a stipulation in a lease giving to the lessees an option to purchase at any time before the expiration of the lease, in which time is essential on the face of the stipulation, equity cannot extend the time of such option to purchase, nor require an accounting of moneys paid to secure such option, in the absence of any default or fraud on the part of the lessor.—Steele v. Bond, 18 N. W. 830, 32 Minn. 14.

47. As the result of negotiations for the renewal of a lease, the lessor made a proposition in writing to the lessee to sell the premises to him on certain terms, offering to him also that he might occupy the same on rental for a year, and that, in case of opportunity to sell, the lessor would give him the refusal on the terms stated. The lessee occupied the premises under this offer until nearly a year after it was made, when he notified the lessor that he had decided to purchase under the terms proposed, to which the lessor refused to accede. *Held* that, as no time was expressed for the acceptance of the lessor's proposition, the acceptance must be within a reasonable time; the lessor was not bound to hold open the original offer, nor to keep the property in market, and that the court might determine, as matter of law, that the acceptance was not tendered within a reasonable time.—Stone v. Harmon, 19 N. W. 88, 31 Minn. 512.

48. A contract for the sale of land on specified terms provided, among other things, that the vendor should furnish to the vendee an abstract of title, and ended with the clause: "This contract to be void if the settlement of this purchase is not had within 20 days from the delivery of the abstract." *Held*, that this clause made time of the essence of the contract; that it required the vendee, within 20 days after delivery of a proper abstract of title, to signify to the vendor his acceptance of the title; and that the vendee, while making unsubstantial objections to the title shown by the abstract, having failed to signify his acceptance within the 20 days, his right to demand specific performance was at an end, in the absence of a waiver on the part of the vendor.—Judd v. Skidmore, 22 N. W. 183, 33 Minn. 140.

49. After default in payments on a contract for the purchase of land, the vendors, on payment of the accrued interest, consented to extend the time for making the payments, but not for any specified period. *Held*, that a strict performance of the contract in respect to the time of such payments was thereby waived, and a reasonable time and opportunity should have been allowed the purchaser to make payment; and his rights were not terminated by a notice by the vendor of a purpose to sell the land to another at the first opportunity, although also offering to accept payment if made before such sale should be effected.—Quinn v. Olson, 26 N. W. 230, 34 Minn. 422.

Default—Penalty or damages.

50. In a contract to sell real estate, a clause by which the vendor promises to pay, in case he refuse to sell, a specified sum, is by way of penalty or stipulated damages, and does not give the vendor an option to refuse to sell.—Wilson v. Fairchild, (Minn.) 47 N. W. 642.

45 Minn. 203.

II. Rights and Remedies.

Rights of parties in respect of the property.

51. On a contract to convey land, the land becomes in equity the property of the purchaser, descendible to his heirs, and the vendor a trustee of the legal title for the purchaser, subject to the vendor's lien for the unpaid purchase money, which trust continues notwithstanding default in the payment of the purchase money according to the contract.—Chemedlin v. Prince, 15 Minn. 331, (Gil. 263.)

52. The vendor of lands, giving a contract for the sale of the same, is the legal owner so long as any portion of the purchase price conditioned to be paid is unpaid, and his estate therein is bound, subject to the rights of the vendee, by the lien of a judgment against him docketed in the county, and is subject to sale upon execution issued on such judgment.—Minneapolis & St. L. Ry. Co. v. Wilson, 25 Minn. 382.

53. An executory agreement, for the sale of land, provided that the vendee in possession should, during certain years, plant the entire cultivated portion of the land, not less than 50 acres of which should be in wheat, and not less than 5 acres in sugar cane, and granted to the vendor, during said years, control over any 50 acres of wheat and 5 acres of sugar cane he might select, as security for certain payments to be made. *Held*, that the vendor acquired no right in any specific portion of the crop until he

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made his selection under the contract.—Prentice v. Nutter, 25 Minn. 485.

54. One who has made a contract to purchase land is to be regarded as the equitable owner, and his equitable interest may be the subject of a trust or power in trust.—Randall v. Constans, 23 N. W. 530, 33 Minn. 329.

55. The sale under execution of the fee in land in which the execution debtor has only an equitable interest under a contract of purchase, where the execution directs only the interest of the execution debtor in such land to be sold, is void as against the vendor who holds the legal title as security for the unpaid purchase money.—Smith v. Lytle, 6 N. W. 625, 27 Minn. 184.

Distinguished in Reynolds v. Fleming, 45 N. W. 1100, 43 Minn. 516.

56. Where a contract contemplates that the vendors were to remain trustees of the legal title of the lands described therein until payment of the balance of the purchase price remaining unpaid, which was to be derived from sales, and that by necessary implication they were authorized to make conveyances to purchasers in order to convert such lands into money and securities, as provided by the contract, and that until such payment of the purchase price no conveyance was to be made to the vendee under the contract, the vendee is not entitled to a conveyance against a subsequent purchaser from the vendor, without alleging payment of the purchase money, or that the subsequent sale was unauthorized.—Thorsen v. Perkins, (Minn.) 40 N. W. 557.

39 Minn. 420.

57. Where one sells land to another who covenants to reconvey on payment of a certain sum within a given time, the vendor has an equitable title to the land, which he may convey to a third person, who will then be entitled to a conveyance of the legal title from the vendee, on performance of the specified condition.—Wilson v. Fairchild, (Minn.) 47 N. W. 642.

45 Minn. 203.

58. Where there are two vendees named in such a contract to sell, they are tenants in common of the equitable title, and one of them may pass his interest in it by his deed purporting to convey the land, so that his grantee may perform the conditions of the contract and be entitled to a conveyance of the undivided interest in the land of such vendee.—Wilson v. Fairchild, (Minn.) 47 N. W. 642.

45 Minn. 203.

Transfer of contract.

59. An unrecorded assignment by a vendor of a contract for the sale of land is void as against a subsequent judgment creditor of the vendor, who had no notice of the assignment: Gen. St. Minn. 1878, c. 40, § 21, providing that "every conveyance by deed, mortgage, or otherwise of real estate," shall, until recorded, be void as against any judgment against the grantor.—Wells v. Baldwin, 10 N. W. 427, 28 Minn. 408.

60. A. sold certain lands to B., retaining title until notes for the purchase money should be paid. B. went into possession, and died before making payment, devising the land to his wife for life, remainder to plaintiff. Subsequently A. died, bequeathing the notes and his interest in the lands to his residuary legatees, who, with intent to relieve the land from further payment by B.'s estate, wrote "Canceled" on the notes; and with the intent and to carry out such object, and for no additional consideration, made and delivered a deed thereof to B.'s widow, who afterwards died intestate. *Held*, that the claim for the unpaid purchase money was not thereby transferred to B.'s widow, and that her heirs held the land as naked trustees for the devisees of B.—Chemedlin v. Prince, 15 Minn. 331, (Gil. 263.)

Rescission by vendor.

61. A contract for the sale of land by plaintiff to defendants provided that in case defendants failed to perform all the stipulations of the contract strictly, then plaintiff "shall have the right to declare this contract null and void; and all rights and interest hereby created or then existing in favor of the said second parties, (defendants,) or under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party, (plaintiff,) without any declaration of forfeiture or act, or without any other act by said first party to be performed, and without any right of said second parties of reclamation or compensation for money paid or improvements made, as absolutely, fully, and perfectly as if this contract had never been made." *Held*, that on default by defendants the contract became void only at the election of plaintiff.—Higbie v. Farr, 10 N. W. 592, 28 Minn. 439.

62. A contract to sell and convey land expressly stipulated that certain conditions precedent should be strictly performed on time, and that, on failure to perform, the vendor should be released from the obligation to convey. *Held* that, on a failure of the purchaser to perform, not excused, a court of equity would regard the contract as at an end, and might, in its discretion, cancel it.—Schumann v. Mark, 28 N. W. 927, 35 Minn. 379.

63. A contract for the sale of land prescribed definite times for the payment of the purchase price, and provided for punctual payment and strict and literal performance at the times specified, the time of payment being stated to be of the essence of the contract; but it further provided that, in case of any default in such strict performance, the vendor should have the right to declare the contract null and void; and provided also for an increased rate of interest on overdue payments. *Held*, that the vendor had an election to determine whether strict performance should be required; that, in the absence of a determination to require strict performance, and of reasonable notice of such election, the mere default of the purchaser to make the payment specified did not extinguish his equitable rights; and that a subsequent declaration of forfeiture by the vendor, without notice and reasonable opportunity to make payment, was also ineffectual.—O'Connor v. Hughes, 29 N. W. 152, 35 Minn. 446.

64. In an action for the cancellation of a contract for the sale of land, in which time was made essential, where it appeared that though the strict

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requirements of the contract as to time were waived by plaintiff, so as to entitle defendants to reasonable notice of her intention to terminate the contract upon non-performance on their part, yet that by subsequently refusing to accept a proffered conveyance from plaintiff on the sole ground that her title was not good, (when it was in fact unexceptionable,) they waived and surrendered their rights to further time or notice, and thereupon the plaintiff was justified in putting an end to the contract.—Cummings v. Rogers, (Minn.) 30 N. W. 892. 36 Minn. 317.

65. The owner of a piece of land authorized an agent to sell it, so that it would bring a specified net sum to her, the agent to have for making the sale all above that sum for which he might sell. The agent discovered a fact in the condition of the land increasing its value, of which the owner was ignorant, and made a sale without disclosing it to her. The purchaser was aware of the fraud. *Held*, that the owner, in order to rescind the sale, need tender a return of only what she received.—Hegenmyer v. Marks, (Minn.) 32 N. W. 785.
37 Minn. 6.

66. And need not tender a return of what the agent received and retained.—Hegenmyer v. Marks, 32 N. W. 785, 37 Minn. 6.

Distinguished in Barringer v. Stoltz, 38 N. W. 809, 39 Minn. 64.

67. In a contract for the sale of real estate, the vendee agreed to erect a certain building on the land, and to lay the foundation in the summer of 1886; and the vendor reserved the right, in case of failure to lay the foundation during that summer, to rescind the contract on repaying all payments, and interest. The last payment was to be made in February, 1887. *Held*, that the election was to be promptly exercised, within a reasonable time after it accrued, and the parties, after the vendor knew it had accrued, having dealt so as to recognize the continued existence of the contract, the right was gone.—Paine v. Harrison, (Minn.) 37 N. W. 588.
38 Minn. 346.

68. In a contract for the sale of real estate was this clause: "It is further understood and agreed that the property shall be sold subject to the approval of the title by K." K. having disapproved the title, the purchaser gave the vendor notice that she would not accept his deed, and on a tender of a deed refused to accept it and perform the contract. *Held*, that the vendor might treat the contract as at an end.—Dean v. Hitchings, (Minn.) 41 N. W. 240.
40 Minn. 31.

Rescission by vendor—Action to cancel bond to convey.

69. A bond conditioned for the conveyance of real estate may be canceled by the court for a default of the obligee to perform its conditions.—Drew v. Smith, 7 Minn. 301, (Gil. 231.)

70. One who has executed a bond for a conveyance of land upon the performance of certain conditions, such bond being recorded, may, upon failure of the obligee to perform such condition on offering to surrender notes received, bring an action to cancel such bond, without making tender of a deed.—Dahl v. Pross, 6 Minn. 89, (Gil. 38;) Yoss v. De Freudenrich, 6 Minn. 95, (Gil. 45.)

Distinguished in Belote v. Morrison, 8 Minn. 91, (Gil. 66.)

71. Where there has been a partial payment of the purchase price, and default as to the remainder, the court will, in an action brought for that purpose, unless the obligee can excuse or justify his default, cancel a bond to convey real estate. Mere financial stringency, or depreciation of the value of property, will afford no such excuse.—Yoss v. De Freudenrich, 6 Minn. 95, (Gil. 45.)

72. To a complaint in an action to cancel a bond to convey title to defendant the answer set up that plaintiff took title to the land on its sale on mortgage foreclosure, to secure a loan to defendant of the amount necessary to pay the mortgage debt, etc., but did not allege that the sum advanced was less than the full value of the land, or that defendant would be injured by the granting of the relief prayed, nor was there any tender of payment of the loan. *Held*, that the answer was demurrable.—Belote v. Morrison, 8 Minn. 87, (Gil. 62.)

Distinguishing Dahl v. Pross, 6 Minn. 89, (Gil. 38;) Yoss v. De Freudenrich, 6 Minn. 95, (Gil. 45.)

73. In an action for the cancellation of a bond for the conveyance of real estate, the time limited by the court within which the obligee may perform and avoid a cancellation is discretionary, and not reviewable except for abuse of discretion.—Drew v. Smith, 7 Minn. 301, (Gil. 231.)

74. In an action for the cancellation of a bond for the conveyance of real estate on default of the obligee, the court may, in granting the obligee an opportunity to relieve himself from default, impose such terms as may be proper and equitable, as that he pay the obligor the amount the latter has paid for taxes on the land.—Drew v. Smith, 7 Minn. 301, (Gil. 231.)

75. A bond for the conveyance of land is not a mortgage, nor can the rights of the obligee be regarded as the same as those of a mortgagor.—Drew v. Smith, 7 Minn. 301, (Gil. 231.)

Rescission by purchaser.

76. A vendor of land made an innocent mistake as to quantity and description in selling and conveying the land. The vendee was familiar with the land, and had ample facilities for detecting the mistake before conveyance; the initial point of the description in the deed being a governmental subdivision. *Held*, that the rule *caveat emptor* applied, and that plaintiff was not entitled to a rescission of the contract.—Brooks v. Hamilton, 15 Minn. 26, (Gil. 10.)

77. Where the obligor in a contract for the sale of land justifies a refusal to perform under a provision in the contract authorizing him to declare it void "in case the title cannot be made good," the burden is upon him to prove that fact. Where the alleged defect is a sale of the land for taxes, he must prove that the period for redemption has expired.—Deakin v. Underwood, (Minn.) 33 N. W. 318.
37 Minn. 98.

78. Defendants agreed with plaintiff in writing to convey a piece of land in a certain 80-acre tract,

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to be not less than 40x120 feet, the particular location and description to be thereafter agreed on. *Held* that, while the matter thus rested in mere negotiation, either party had a right to withdraw, and demand back money paid in expectation of the making of the contemplated contract, distinguishing it from a case of money paid on an oral contract actually made, but not enforceable, because not in writing, as required by the statute of frauds.—Scanlon v. Oliver, (Minn.) 44 N. W. 1031. 42 Minn. 538.

79. A contract for the purchase of real estate provided that time was an essential condition of the agreement, in that if the vendee should fail to pay any installment of the purchase price at the time specified, or should fail to perform any of the covenants to be performed by him, all moneys paid should be forfeited, and the vendor should be forever discharged from any liability under the contract, which should become void. *Held*, that such provision was intended for the benefit of the vendor, who might waive it, and that the vendee was not entitled to avoid the contract for his own default. —Dana v. St. Paul Investment Co., (Minn.) 44 N. W. 55.

42 Minn. 194.

80. A vendee of land who has completed his purchase by the acceptance of a conveyance has no other remedy for a defect in title, in the absence of fraud, than an action on his covenants. —Miller v. Miller, (Minn.) 50 N. W. 612.

47 Minn. 546.

81. In the complaint in an action to rescind a purchase of land it is not necessary to allege a disaffirmance, or a previous offer to reconvey, nor to make an offer in the pleading to do what the court may require as a condition of granting relief.—Knappen v. Freeman, (Minn.) 50 N. W. 533.

47 Minn. 491.

—— For fraud and misrepresentations.

82. The mere giving of a warranty deed of real estate, while there was a "warranty deed of record," conveying the same property to another person outstanding, is not *per se* fraud; but where the grantor represents to the grantee facts about the possession and ownership which he knows to be false, and thereby induces him to enter into a contract, such contract is fraudulent and void.—**Brown v. Manning, 3 Minn. 35, (Gil. 13.)**

Distinguished in Lowry v. Hurd, 7 Minn. 366, (Gil. 288.)

83. One who has been induced by fraud to enter into a contract to perform work and furnish materials to be paid for by a conveyance of land, may, on discovery of the fraud, rescind the contract and bring an action for the value of the work done or materials furnished, whether the contract is by parol or in writing.—Brown v. Manning, 3 Minn. 35, (Gil. 13.)

84. A complaint which alleges that, at the time of making a contract for work to be paid for by the conveyance of certain land, defendant well knew that he was not the owner of the land nor in possession, but falsely represented himself to be, with intent to deceive plaintiff, and that plaintiff, relying upon these representations, was induced to enter into the contract, etc., sufficiently avers the fraud, notwithstanding it does not allege the nature of the estate or interest in the land that had been previously conveyed by defendant.—Brown v. Manning, 3 Minn. 35, (Gil. 13.)

85. An action to rescind a conveyance of real estate, and recover the consideration paid on fraudulent representations by the vendor as to the title, may be maintained without a previous tender of reconveyance.—Kiefer v. Rogers, 19 Minn. 32, (Gil. 14.)

86. In a suit to set aside a conveyance on account of false representations of the vendor as to incumbrances, tender of a quitclaim deed of the land executed by plaintiff, reciting a nominal consideration, and containing covenants against the acts of plaintiff, is a sufficient tender of reconveyance. — Kiefer v. Rogers, 19 Minn. 32, (Gil. 14.)

87. Where a grantor has falsely represented that the property conveyed was free from incumbrances other than those of which he informed the grantee, the latter's right to rescind on the ground of the existence of such other incumbrances is not affected by the grantor's offer to indemnify him against them, and to procure a release of them.—Kiefer v. Rogers, 19 Minn. 32, (Gil. 14.)

88. In an action for the rescission of a conveyance, on the ground of fraudulent representations as to incumbrances, where defendant produces and tenders a release of the additional incumbrance, it is within the discretion of the court to refuse an amendment pleading such tender in bar of the action.—Kiefer v. Rogers, 19 Minn. 32, (Gil. 14.)

89. Where one purchases land on the faith of the vendor's positive representations that it is free from incumbrances, the vendor cannot resist a rescission of the sale on the ground of the falsehood of such representations, by saying that the incumbrances were of record, and that since the vendee neglected to examine the records the rule of *caveat emptor* applies.—Kiefer v. Rogers, 19 Minn. 32, (Gil. 14.)

90. In negotiations for the sale of a platted lot of land the vendor represented that the lot contained five acres. A street ran across the lot, as the purchaser knew, and the area, exclusive of the street, was less than five acres. The price (at a specified sum per acre) was fixed on the basis of the area being five acres. *Held*, that the representation should not be deemed fraudulent, and the contract rescinded, merely because there were not five acres in the lot exclusive of the street.—Michaud v. Eisenmenger, (Minn.) 49 N. W. 202.

46 Minn. 405.

91. A vendee of land situated in another state, who examines it shortly after the sale, and who for six months thereafter deals with it as his own, and endeavors to dispose of it, thereby waives his right to rescind on the ground of the vendor's misrepresentations, made before the sale.—Marshall v. Gilman, (Minn.) 49 N. W. 688.

47 Minn. 131.

92. In an action on a note, an answer alleging that the note was given upon a purchase of land by defendant from plaintiff; that defendant was

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induced to make the purchase by the fraud of plaintiff, (setting it forth;) that, as soon as defendant discovered the fraud, he commenced suit to rescind, and tendered a reconveyance on condition that plaintiff surrender the note,—is good. —Knappen v. Freeman, (Minn.) 50 N. W. 533.
47 Minn. 491.

Release or waiver of right of action.

93. In a quitclaim deed was this clause: "This quitclaim deed is given to clear a certain contract of record dated January 22nd, 1887, filed," etc., "on page 303," etc., "in the office of the register of deeds," etc. *Held* a release of the contract referred to, it being a contract to convey real estate; and of existing causes of action upon it, both for specific performance and for damages for its breach.—Wood v. Rusher, (Minn.) 44 N. W. 127.
42 Minn. 389.

94. Where the breaches of covenants by the grantee in a deed to deliver a portion of the crops grown on the land to the grantors, to repair, etc., are not substantial and material, failure to complain to the grantee will be presumed to be a waiver of such breach.—Somerdorf v. Schliep, (Minn.) 44 N. W. 1084.
43 Minn. 150.

Action by vendor—Purchase money.

95. Where a party has settled upon land, and made lawful improvements thereon, as required in order to be entitled to enter and purchase the same under the laws of the United States, and, without fraud on his part, subsequent to the entry thereof, sells and conveys the same to a purchaser who knows the nature of the title, and that the same is subject to be contested by another claimant, he may recover of the purchaser the sum agreed to be paid as the consideration of such deed.—Bemis v. Bridgman, (Minn.) 44 N. W. 793.
42 Minn. 496.

96. A vendor delivered to a vendee the contract for the sale of land, and, at the same time, what purported to be receipts by him to the vendee for the money, but which were in the handwriting of a third party. *Held*, that the receipts, in connection with the fact of their delivery with the contract, were admissible against the administrator of the vendor, to prove that the vendor intended them to stand as his receipts for money paid on the contract.—In re Mosseau's Estate, (Minn.) 44 N. W. 193.
42 Minn. 212.

—— Restitution of land.

97. A vendee in a contract for the sale of lands was in possession, had made improvements, and paid part of the purchase money, but was in default as to the remainder, and, notwithstanding the tender of a deed and demand for payment, continued in default. *Held*, that the vendee, not excusing his default, nor offering to make it good, nor demanding a specific performance, was not entitled to retain possession as against the legal title of the vendor.—Williams v. Murphy, 21 Minn. 534.

98. The rights of a vendee in a contract for the sale of lands, who is in default for non-payment according to the terms of such contract, are not enlarged by the fact that the vendor, at the time of commencing an action of ejectment to recover the premises, still has the vendee's note for the remainder of the purchase money, especially where the vendor surrenders the note at the trial. —Williams v. Murphy, 21 Minn. 534.

99. A complaint alleged that plaintiff, being the owner and in possession of certain land, gave defendants a bond for the conveyance of the same to them on payment of $5,807, according to the terms of defendants' seven promissory notes; that defendants entered into possession of the land and have ever since been in possession thereof; that the first and second notes have been paid; that plaintiff recovered judgment on the second and third notes, and issued execution thereon; that defendants brought an action to vacate the levy of such execution on the ground that the property levied on was exempt, which action was still pending; that apart from the land so levied on, and the land bonded to defendants by plaintiff, defendants have no property not exempt from execution; that no part of the fifth note, which fell due before the commencement of this action, or of the sixth and seventh notes, which were not then due, has been paid; that defendants allowed the bonded lands to be sold for taxes; and that the rents and profits of the lands were of the yearly value of $300, and that the lands were worth $5,000. The prayer of the complaint was that the court ascertain the amount due to plaintiff; that an early day be fixed for the payment of the same; and that in default thereof the bond be declared forfeited, and that plaintiff have restitution of the bonded premises, or such other and further relief as may be just and equitable. *Held*, that the complaint stated a cause of action.—Denton v. Scully, 4 N. W. 41, 26 Minn. 325.

—— Damages.

100. A vendor of land, who has necessarily been put to expense to enable him to fulfill his contract of sale, may recover damages on account thereof from the vendee who wrongfully refuses to perform the contract of purchase on his part.—Kelley v. West, (Minn.) 32 N. W. 620.
36 Minn. 520.

Action by purchaser—Deficiency in quantity of land.

101. Upon an executory contract for the sale of a tract of land, which the vendors expressly covenanted and represented contained a certain number of acres, at a certain price per acre, after the delivery of the deed and payment of the price it was discovered that the number of acres in the tract was less than that covenanted in the contract. *Held*, that relief might be given, notwithstanding the performance of the contract, as in other cases of fraud or mutual mistake of fact.—Thwing v. Davison, 22 N. W. 293, 33 Minn. 186.

—— Reformation of deed.

102. The delivery, in pursuance of an agreement to sell and convey a certain parcel of land, described by the name by which it was known, and the boundary of which had been pointed out by the vendors to the purchaser, of a deed conveying less than the whole parcel, is a false and fraudulent representation; words are unnecessary.—Place v. Johnson, 20 Minn. 219, (Gil. 198.)

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103. In an action to reform a deed in respect of the quantity of land conveyed, alleged to be less than that agreed upon between the parties, representations made by the vendors to the vendee negotiating such agreement, as to the boundaries and quantity of the land, and an abstract of title thereto, furnished by the vendors to the vendee, describing the land, are admissible.--Place v. Johnson, 20 Minn. 219, (Gil. 198.)

104. A lease containing an agreement to sell the demised premises is admissible in evidence in an action to reform the deed given in pursuance of such agreement, although the agreement is void, where the objection is made, not to the contract of sale, but to the lease as a whole.—Place v. Johnson, 20 Minn. 219, (Gil. 198.)

—— Recovery of price paid.

105. Where a grantee, with covenants, etc., acquires any estate in the land, he cannot, in the absence of fraud, set up defects in, or want of, title in his grantor, as a defense in an action for the purchase money, nor can he rescind the contract and recover back what he has paid, but must rely upon his covenants.—Brown v. Manning, 3 Minn. 35, (Gil. 13.)

106. In an action to recover back money paid on a contract for the purchase of land, where the owner, having conveyed to a third person, is unable to perform, a tender of the balance of the purchase money and demand for the conveyance is not necessary.—Bennett v. Phelps, 12 Minn. 326, (Gil. 216.)

107. Where part payment on an agreement to convey realty is made in specific articles at an agreed price, such price is prima facie the amount the vendee is entitled to recover on breach of the agreement.—Bennett v. Phelps, 12 Minn. 326, (Gil. 216.)

Distinguishing Dayton v. Warren, 10 Minn. 233, (Gil. 185.)

108. Plaintiff paid defendant $50, "as and for a part of the purchase price" of land, which defendant orally agreed to convey to plaintiff whenever thereto requested. No time was specified for the payment of the balance of the purchase money. *Held*, that the balance was to be paid on the conveyance of the land to plaintiff, and plaintiff could not recover the $50 so paid without alleging and proving an offer by him to pay the balance of the purchase money, and a refusal by defendant to convey.—Sennett v. Shehan, 7 N. W. 266, 27 Minn. 328.

109. Under an oral agreement for sale of land, plaintiff paid a portion of the purchase money, and went into possession, with the understanding that a deed would be made upon payment of the balance. Defendant demanded the balance, and, upon refusal, sold the land to a third person. *Held*, in an action for the purchase money already paid, a tender of a deed at the time of the demand was essential to put plaintiff in default, and that without it he was entitled to recover the amount already paid.—Wyvell v. Jones, (Minn.) 33 N. W. 43.
37 Minn. 68.

110. Under a contract by a vendor to furnish an abstract of title, and if the vendee should ascertain the title to be so unmarketable as to warrant a refusal to complete the trade, and on that account should refuse, the vendor would return the money paid, a complaint by the vendee to recover said money, alleging that the abstract so furnished failed to show any title in defendant, marketable or otherwise, and that plaintiff thereupon returned the abstract, and refused to proceed, is not met by averments that defendant has a good title to, and good right to convey, the premises; and that he is anxious, willing, and able to give a good and marketable title, and complete it to plaintiff's satisfaction; and that he so informed plaintiff, (after the latter's refusal to proceed,)—since plaintiff had a right to regard solely the abstract of title.—Horn v. Butler, (Minn.) 40 N. W 833.
39 Minn. 515.

111. Plaintiff bought land of defendant, the contract reciting that $3,500 of the purchase money was paid. Defendant being unable to fulfil his agreement, plaintiff sued for the $3,500 paid. It appeared that but $2,000 was actually paid on the contract, and there was evidence that $1,500 was paid by plaintiff to one M., who had paid that sum to defendant on a contract for the purchase of the same land, which contract M. had failed to perform. Defendant allowed plaintiff to withhold this sum without objection. *Held*, that it was error to charge that defendant must have expressly directed plaintiff to pay M. the $1,500 before plaintiff could recover it of defendant, as such a direction might be implied from the evidence.—Murphin v. Scovell, (Minn.) 43 N. W. 1.
41 Minn. 262.

112. The want of a proper demand will not defeat an action to recover the purchase price of land paid by plaintiffs to certain parties as agents of defendants, where the latter deny the agency, and that they were interested in the land sold.—Jensen v. Weide, (Minn.) 43 N. W. 688.
42 Minn. 59.

113. Where the intended vendee in a contract of sale accepts the benefit of payments made by another person under a subsisting contract for the same land, which are applied on the vendee's purchase money, he thereby assumes the vendor's liability to reimburse the party to the first contract, a request of the vendor for such assumption being implied from his consent to apply the payments under the first contract on the second; and, where the vendor fails to make title, the vendee is entitled to recover of him the payments made by the other party under the first contract, which the vendee has refunded to him.—Murphin v. Scovell, (Minn.) 47 N. W. 256.
44 Minn. 530.

114. In an action by the purchaser to recover the price paid, on the ground of failure to deliver a deed, evidence showing incumbrances and servitudes upon the land is inadmissible.—Miller v. Irish Catholic Colonization Ass'n, (Minn.) 31 N. W. 215.
36 Minn. 357.

—— Damages.

115. Plaintiff sold and conveyed to defendant a tract of land, and, as part payment, defendant caused to be conveyed to plaintiff a large quantity of land in another state, by the warranty deed of another party, in whom defendant asserted the legal title to be. In fact, plaintiff took nothing by

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said deed, because neither his grantor nor defendant had any title whatsoever to the land. *Held*, that plaintiff could recover from defendant the value of the land at the time it was conveyed, with legal interest.—Donlon v. Evans, (Minn.) 42 N. W. 472.

40 Minn. 501.

116. In such case, statements as to value made by defendant during the negotiations, and the consideration expressed in the deed to plaintiff, (to which defendant was a subscribing witness, and which he delivered in accordance with his agreement to cause the land to be conveyed to plaintiff,) were competent evidence of value.—Donlon v. Evans, (Minn.) 42 N. W. 472.

40 Minn. 501.

117. Where defendants contract for the sale of land to plaintiff, falsely representing that they have title, and plaintiff takes possession, and erects a building, but is evicted by the real owner, he may recover of defendants the cost of the building, in addition to the sum paid for the land.—Erickson v. Bennet, (Minn.) 40 N. W. 157.

39 Minn. 326.

118. In an action to recover damages for failure to convey land, proof that a person refused to purchase the land offered for sale to him at a specified price does not go to show that it was not of a greater value than the price named, and is inadmissible for that purpose.—Reynolds v. Franklin, (Minn.) 49 N. W. 648.

47 Minn. 145.

III. Vendor's Lien.

When lien attaches.

119. A vendor of lands took in part payment from the vendee certain land-warrants, to which the vendee though acting in good faith, had in fact no title, the assignments thereof having been forged. *Held* that, as to the portion of the purchase money represented by such warrants, it remained unpaid, and the vendor retained an equitable lien on the land.—Duke v. Balme, 16 Minn. 306, (Gil. 270.)

120. Where, on an exchange of land, $200 was due plaintiff, and $200 was to be deposited in a bank to be paid plaintiff when he should build a cellar on defendant's lot, and the $200 due plaintiff was to be deposited to secure plaintiff's performance of the contract, and defendant did not deposit the money, plaintiff is entitled to recover the $200, and to a lien on the property given in exchange.—Brown v. O'Brien, (Minn.) 38 N. W 637.

39 Minn. 13.

121. A vendor's lien does not arise in the case of a sale of both real and personal property, for one entire sum or consideration, without any distinct price being set upon the real property.—Peters v. Tunell, (Minn.) 45 N. W. 867.

43 Minn. 473.

122. A vendor is not entitled to a lien where the consideration is an agreement to support the grantor during life, as it is of such a nature that the court cannot accurately ascertain and define the amount of the charge to be thus imposed upon the land.—Peters v. Tunell, (Minn.) 45 N. W. 867.

43 Minn. 473.

Who entitled to.

123. On a conveyance of lands to his wife, defendant paid part of the consideration in cash, and gave his note for the balance, which was subsequently transferred to plaintiff. *Held*, in an action to set aside the conveyance as in fraud of creditors, that plaintiff had no vendor's lien on the land.—Massey v. Gorton, 12 Minn. 145, (Gil. 83.)

124. The wife of B. loaned him a certain amount of her separate property, upon an agreement that the same was to be invested in lands or other purchases in his own name, but when requested he was to account for the said loan, and transfer to her the funds or any lands purchased with them. B. purchased certain land-warrants, which he exchanged for lands for himself, and subsequently, at the request of his wife, transferred the lands to her at an agreed valuation, to apply on the loan. *Held*, the title to the warrants having proved defective, that B.'s wife was not a *bona fide* purchaser for value, and the lien of the original vendor would attach to such lands in her hands.—Duke v. Balme, 16 Minn. 306, (Gil. 270.)

Assignment.

125. As a general rule, the equitable lien of a grantor of real estate for the price thereof is not assignable.—Hammond v. Peyton, 27 N. W. 72, 34 Minn. 529; Law v. Butler, 47 N. W. 53, 44 Minn. 482.

Waiver or release of lien.

126. A vendor of land, by taking security for the purchase price other than the personal obligation of the vendee, waives his equitable lien, unless it be retained by express agreement. Selby v. Stanley, 4 Minn. 65, (Gil. 34,) followed.—Daughaday v. Paine, 6 Minn. 443, (Gil. 304.)

127. Wherever, in the sale of real estate, the vendor takes any security whatever for the purchase price thereof other than the personal obligation or promise of the vendee, such fact will be deemed conclusive as to his intention to abandon his equitable lien, unless it is by express agreement retained.—Selby v. Stanley, 4 Minn. 65, (Gil. 34.)

128. A large tract of land was conveyed, and a mortgage for part of the purchase money was taken back on the whole. The purchaser platted the land, and sold two lots to a married woman, who, without her husband's consent, as required by Pub. St. c. 61, § 106, upon a release of the lots by the original mortgagee, executed to him a mortgage for $400, which was recorded, and subsequently conveyed the property free from all incumbrances, informing the purchaser of the existence of the mortgage. *Held*, that the mortgagee had no lien against the lands in the hands of the last purchaser, who had no notice of the real consideration of the mortgage.—Selby v. Stanley, 4 Minn. 65, (Gil. 34.)

Action to enforce.

129. The complaint in an action to enforce a vendor's lien for the purchase money of real estate alleged a sale of the land for an agreed price, payable on the delivery of the deed, and that when the deed was delivered the purchaser paid

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a part of the price only, "and agreed to pay to the plaintiff the balance of said purchase money within a few days thereafter." *Held*, that this averment did not show an agreement postponing the payment to an indefinite time subsequent to the giving of the deed.—Walter v. Hanson, 24 N. W. 186, 33 Minn. 474.

IV. BONA FIDE PURCHASERS.

Who are bona fide purchasers—Consideration.

130. A grantee of lands simply relinquishing a precedent debt is not a *bona fide* purchaser, but takes subject to all equities against the grantor.—Minor v. Willoughby, 3 Minn. 225, (Gil. 154;) Baze v. Arper, 6 Minn. 220, (Gil. 142.)

131. To constitute one a *bona fide* purchaser for a valuable consideration, and without notice, he must be without notice not only at the time of his purchase, but also at the time of actually paying the money. — Minor v. Willoughby, 3 Minn. 225, (Gil. 154.)

—— Actual notice.

132. A purchaser of land is chargeable with notice of any incumbrance thereon, recited in any deed occurring in his chain of title, whether such incumbrance be recorded or not.—Daughaday v. Paine, 6 Minn. 443, (Gil. 304.)

133. Notice of a vendor's equitable lien, disclosed in the chain of title, is sufficient as against a subsequent purchaser.—Daughaday v. Paine, 6 Minn. 443, (Gil. 304.)

134. Notice to defendant that plaintiffs were claiming title to the land in controversy as exclusive owners, and that they asserted and claimed that they had purchased the entire remaining interest of their grantor in the government subdivision which included the lots in controversy, was sufficient to put the defendant upon inquiry in respect to plaintiffs' title, and to support a finding of actual notice to him.—Cummings v. Finnegan, (Minn.) 44 N. W. 796.
42 Minn. 524.

135. Plaintiff, claiming title under a quitclaim deed from L., brought ejectment against defendant, who held under a prior unrecorded assignment of a sheriff's certificate of sale of the land under execution to L. It was shown that plaintiff before obtaining his deed had brought an action against L. for the same land, which was dismissed after a partial trial. *Held*, that plaintiff had notice of defendant's possession and title, and was not a *bona fide* purchaser.—Wolf v. Zabel, (Minn.) 46 N.W. 81. 44 Minn. 90.

136. Plaintiff in ejectment claimed title under an alleged lost warranty deed executed in 1861, and never recorded. Defendant claimed under a quitclaim deed executed in 1878 by the same grantor. Plaintiff introduced evidence that defendant was engaged in the abstract business in the county in which the land lay, and as such was in the habit of examining the county auditor's books for the purpose of making abstracts. He then offered in evidence books from the auditor's office containing tax-receipt stubs for three years preceding the execution of defendant's deed. There was no evidence that defendant had ever seen the stubs in question, but the evidence tended to show that an abstract maker does not examine stubs showing payment of taxes, but looks for delinquent taxes only. *Held*, that the stubs offered in evidence did not tend to show that defendant had notice of plaintiff's title, and it was error to admit them.—Morton v. Leland, 6 N. W. 378, 27 Minn. 35.

—— Notice to agent or attorney.

137. A., desiring to obtain a sum of money from his brother B., offered, in consideration thereof, to procure for him a conveyance of certain real estate from a third party, which offer was accepted. There was a defectively recorded mortgage on the premises, of which A. was aware. *Held*, that he was not an agent of B. in procuring the conveyance, so as to affect B. with notice of such mortgage.—Peppard v. House. (Minn.) 33 N. W. 790.
37 Minn. 280.

—— Constructive notice, generally.

138. A purchaser who has knowledge of facts sufficient to put him on inquiry, which would lead to a knowledge of an adverse title, cannot be regarded, with reference to such adverse title, as a *bona fide* purchaser.—Martin v. Brown, 4 Minn. 282, (Gil. 201.)

139. Whether the purchaser of land, with sufficient notice to put him on inquiry as to the equitable title of a person other than his vendor, has actual knowledge of such title, is immaterial. —Groff v. Ramsey, 19 Minn. 44, (Gil. 24.)

—— Acts of ownership and possession.

140. Possession of land is, as a general rule, notice to a purchaser of the title claimed by the occupant. —Minor v. Willoughby, 3 Minn. 225, (Gil. 154;) Morrison v. March, 4 Minn. 422, (Gil. 325;) Seager v. Burns, 4 Minn. 141, (Gil. 93;) Groff v. Ramsey, 19 Minn. 44, (Gil. 24;) Siebert v. Rosser, 24 Minn. 155.

141. Actual possession by one other than the vendor is notice sufficient to put the purchaser on inquiry as to the title of the occupant; and, if such occupant is the tenant of another, his occupancy is notice of the claims of the landlord. —Morrison v. March, 4 Minn. 422, (Gil. 325;) Groff v. Ramsey, 19 Minn. 44, (Gil. 24;) New v. Wheaton, 24 Minn. 406.

142. Repairing fences on cultivated but unoccupied ground is not sufficient, as an act of ownership and possession, to give constructive notice to third persons of the rights of the person making such repairs.—Smith v. Gibson, 15 Minn. 89, (Gil. 66.)

143. Acts of ownership done by a party prior to his purchase of land are not constructive notice of his rights therein after such purchase.—Roberts v. Grace, 16 Minn. 126, (Gil. 115.)

144. Where there is no visible change of possession, the mere fact that a tenant of the grantor of land, after its conveyance, attorns to the grantee, is not constructive notice of the grantee's rights therein, so as to supply the want of registry of the conveyance.—Roberts v. Grace, 16 Minn. 126, (Gil. 115.)

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145. Where a conveyance of land to three persons as tenants in common is placed upon record, the possession of such land by one of the tenants will be referred to such title, and is not notice of a conveyance to him by his co-tenants, which he fails to have recorded.—Dutton v. McReynolds, 16 N. W. 468, 31 Minn. 66.

146. A tenant in common of real estate in possession is presumed to be in under his own title, and not in right of his co-tenant; and the possession is therefore, of itself, no notice of the co-tenant's title.—Wilcox v. Loominster Nat. Bank, (Minn.) 45 N. W. 1136.

43 Minn. 541.

147. A judgment creditor asserting a lien upon land of his debtor, which is occupied by a tenant, is not chargeable with constructive notice that the debtor, in whom is the record title to the land, has sold it to a third person, where the deed is not recorded, and the tenant has not recognized the grantee therein as his landlord, though he has been informed of his purchase.—Wilkins v. Bevier, 45 N. W. 157, 43 Minn. 213; Same v. Bell, 45 N. W. 160, 43 Minn. 219.

148. A deed of land was delivered, but never recorded, and a mortgage taken back. Two days thereafter the purchaser conveyed, delivering the unrecorded deed to his grantee, who went into and retained possession for two years. During his occupancy he procured a quitclaim from the original grantor, and subsequently conveyed to defendant, who was, and had been for some time, a member of his family. In an action to foreclose the mortgage, defendant denies the mortgagor's title. *Held*, that his knowledge of his grantor's possession before the quitclaim, and the fact that he had made a partial examination of the record, which if properly made would have disclosed the true title, were sufficient to put him upon inquiry as to the unrecorded deed, and that he was not a *bona fide* purchaser.—Martin v. Brown, 4 Minn. 282, (Gil. 201.)

149. A person who takes a quitclaim deed of land then in the actual possession of the tenants of one who has a prior, though unrecorded, conveyance from the other's grantor, is chargeable with notice of such adverse claim, and is not a *bona fide* purchaser.—Wolf v. Zabel, (Minn.) 46 N. W. 81.

44 Minn. 90.

Who are bona fide purchasers—Record.

150. Where the owner of a tract of land whose deed is not recorded sells the land and takes a mortgage thereon to secure the purchase money, such mortgage will not operate as notice of the owner's title to a subsequent purchaser from the grantor of such owner.—Burke v. Beveridge, 15 Minn. 205, (Gil. 160.)

151. Notice, to put one on inquiry, must be sufficient information to enable him to conduct an inquiry to a successful termination, otherwise the rule applies that a title shall not be impeached for uncertainties; hence a purchaser is not bound by the record of a deed which incorrectly describes the property granted.—Roberts v. Grace, 16 Minn. 126, (Gil. 115.)

152. The record of a deed which gives, as a necessary boundary to the land intended to be conveyed, a boundary so untrue that the lands as claimed could not agree with it, and the deed would have to be reformed in equity before it would pass the estate, as between the parties, cannot operate as constructive notice to a subsequent purchaser.—Roberts v. Grace, 16 Minn. 126, (Gil. 115.)

153. Purchasers are not charged with constructive notice of entries in the index or reception book in the register's office, not required by law to be made.—Ahern v. Freeman, (Minn.) 48 N. W. 677.

46 Minn. 156.

154. Under Gen. Laws 1862, c. 19, requiring a sheriff's certificate of sale, on foreclosure of a mortgage by advertisement, to be recorded within 20 days after the sale or be void, a sheriff issued his certificate, sufficiently describing the mortgage, and had it recorded in time, but by mistake of the register of deeds in copying it the property was erroneously described. After about 25 years it was again recorded, and correctly. The names of the parties to the mortgage appeared correctly on the first record, and there was no other mortgage between them. The mistake, too, was a most noticeable one. *Held*, that there was sufficient in the first record to put a subsequent purchaser from the mortgagor on inquiry, which would have shown the mistake.—Cable v. Minneapolis Stock-Yards & Packing Co., (Minn.) 50 N. W. 528.

47 Minn. 417.

155. H. executed on the same day two conveyances of real estate, one to W. and one to G., each conveying what is now lot 6, block 129. The deed to W. gained priority by priority of record. It described the lot as lot 6, block 66, in a plat never filed, and stated other facts as elements of description which would put one on inquiry such as, if followed with diligence, would show the identity of said lot 6, block 66, with lot 6, block 129, in the plat subsequently filed. *Held*, that defendant, who claimed through G., had no right to rely on a description in a conveyance between the grantees of W., either to estop plaintiff from claiming that the deed to W. passed the title to lot 6, block 129, or to excuse himself from pursuing the inquiries suggested by the facts stated in that deed.—Briggs v. Ripley, (Minn.) 33 N. W. 120.

37 Minn. 78.

156. Where the description of land in a deed is insufficient to pass the title because of omissions therein, made through the mistake of the parties, and, after it is recorded, the same land is conveyed to another, who has no actual notice of the prior deed, the record is not constructive notice to the latter of the equitable rights of the former purchaser.—Bailey v. Galpin, (Minn.) 41 N. W. 1054. 40 Minn. 319.

157. Where the title to certain lands appears of record to be in the assignees under a deed of assignment, a *bona fide* purchaser from them, whose deed is first recorded, will be preferred to a previous grantee of the assignor in an unrecorded outstanding conveyance of the same land, executed before the assignment.—Strong v. Lynn, (Minn.) 37 N. W. 448.

38 Minn. 315.

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158. Where the title to land appears of record to be in testator at the time of his death, and his will, made in another state, is afterwards proved in Minnesota, and the lands are conveyed by the devisee to a *bona fide* purchaser for value, whose deed is duly recorded, the title of the latter will be preferred to that of the grantee in a deed of the same lands, executed by testator before his death, but recorded after the first deed.—Lyon v. Gleason, (Minn.) 42 N. W. 286.

40 Minn. 434.

159. Under Gen. St. Minn. 1878, c. 40, § 28, the record of an executory contract for the sale of lands is constructive notice to a subsequent purchaser of the same lands, but the prior record of such contract does not entitle the holder thereof to a preference over the grantee in a deed given before the execution of such contract.—Thorsen v. Perkins, (Minn.) 40 N. W. 557.

39 Minn. 420.

160. The record of a contract to convey real es tate, there being nothing to show that it had been enforced, or the right to enforce it extended, ceases to be notice of the vendee's rights under it, or of anything done pursuant to it, when, according to the record, the statute of limitations has barred the right to enforce it.—Byers v. Orenstein, (Minn.) 44 N. W. 129.

42 Minn. 386.

161. Where a conveyance of land in fee is duly recorded, subsequent purchasers take with notice of and subject to an express condition in the deed that intoxicating liquors shall not be sold on the land.—Sioux City & St. P. R. Co. v. Singer, (Minn.) 51 N. W. 905; Same v. Davis, Id. 907.

Against what claims purchaser protected.

162. An equitable lien for the purchase money, even when clear, will not follow the lands into the hands of a *bona fide* purchaser of the vendee who takes them without notice of such lien.—Selby v. Stanley, 4 Minn. 65, (Gil. 34.)

163. The fact that a conveyance of land was procured from a grantor through fraud will not affect the title of a subsequent innocent *bona fide* purchaser, for value and without notice, from the fraudulent grantee.—Cogel v. Raph, 24 Minn. 194.

164. On an exchange of lands by warranty deeds between V. and P., the equitable lien of V. as vendor, on the land conveyed by him to P., by reason of the failure of the title to the land conveyed to him by P. in exchange, cannot prevail against a subsequent creditor of P., who had no notice of the claim of V. against P. for such breach of warranty.—Dawson v. Girard Life Ins., A. & T. Co., 8 N. W. 142, 27 Minn. 411.

165. When the title to land appears of record to have been in an intestate at the time of his decease, and thereafter the property has been conveyed by the heir at law to a *bona fide* purchaser for value, the latter acquires title, as against a grantee named in an unrecorded deed executed by the intestate in his life-time.—Welch v. Ketcham, (Minn.) 51 N. W. 113.

166. Defendant took a conveyance and went into possession of a piece of land, subject to a prior outstanding contract to convey, under which the contractee was entitled to possession, circumstances indicating that such contractee had abandoned his contract. *Held*, that defendant, having acted in good faith, could not be held chargeable for more than actual profits of the land prior to the time of his having actual notice of the claims of contractee or his assigns.—Smith v. Gibson, 15 Minn. 89, (Gil. 66.)

Pleading.

167. A party claiming as a *bona fide* purchaser without notice, and for a valuable consideration, must deny notice of prior equities, even though it be not charged, and this denial must be full, positive, and precise, negativing the possibility of his having knowledge.—Minor v. Willoughby, 3 Minn. 225, (Gil. 154.)

Vendor's Lien.

See *Vendor and Purchaser*, 119-129.

Venire.

See *Jury*, 7-9.
De novo, see *New Trial*.

Venue.

Of affidavit, see *Affidavit*, 5, 6.
criminal complaint, see *Criminal Law*, 16.

VENUE IN CIVIL CASES.

Review of order for change of venue, see *Appeal and Error*, 449.

Actions against public officers.

1. Under Rev. St. c. 70, § 43, providing that an action against a public officer for an act done by him by virtue of his office must be tried in the county where the cause of action arose, simply gives the officer a personal privilege, which he may waive, and does not affect the jurisdiction.—Tullis v. Brawley, 3 Minn. 277, (Gil. 191.)

2. Under Rev. St. c. 70, § 43, providing that an action against a public officer for an act done by him officially must be tried in the county where the cause of action arose, an objection by a sheriff, in an action against him, that the action was brought in the wrong county, cannot be taken for the first time on a motion for a new trial.—Tullis v. Brawley, 3 Minn. 277, (Gil. 191.)

3. An action against a sheriff for the recovery of personal property, wrongfully taken by him, may be brought in the county where plaintiff resides, under the proviso of Gen. St. Minn. 1878, c. 66, § 49, that such an action "may be brought and maintained in the county where the wrongful taking occurred, or where the plaintiff resides;" notwithstanding the provisions, previously enacted, of section 47, covering all actions for the recovery of personal property detained for any cause, that such actions shall be tried in

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the county in which the subject of the action or some part of it is situated, and of section 48, that actions against a public officer for an act done by him in virtue of his office shall be tried in the county where the cause of action or some part of it arose.—Leonard v. Maginnis, 26 N. W. 733, 34 Minn. 506; Hinds v. Backus, 47 N. W. 655, 45 Minn. 170.

Actions against foreign corporations.

4. Gen. St. Minn. 1866, c. 66, § 40, corresponding to Gen. St. 1878, c. 66, § 49, as amended by Laws 1877, c. 68, provided that actions should be tried in the county in which the defendants, or any of them, should reside; "or, if none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the same may be tried in any county which the plaintiff shall designate in his complaint." An amendment of this section by Laws 1878, c. 38, struck out a proviso at the end of it defining the place of residence, within the meaning of the act, of corporations existing under the laws of the state, and added the following: "A corporation shall be deemed to reside in any county where it has an office, agent, or place of business, within the meaning of this section." *Held*, that the amendment did not affect the privilege of plaintiff, in an action against a foreign corporation, to designate the place of trial.—Olson v. Osborne, 15 N. W. 876, 30 Minn. 444.

Actions concerning land.

5. The district court of the county designated in the complaint has jurisdiction to try an action brought to determine a right or interest in real property situated in another county, unless, before the time for answering expires, a demand be made for a change of place of trial to the proper county, and the venue be actually changed, even though the summons was served by publication only.—Kipp v. Cook, (Minn.) 49 N. W. 257; Id. 258.

46 Minn. 535.

Death of party.

6. An action of tort brought in the district court for the county in which but one of three defendants resides, is properly triable in said county, notwithstanding the death of said resident defendant before either of the three appears or answers in the action, where no steps are taken to change the place of trial, as provided in Gen. Laws Minn. 1881, c. 132, § 1, or Ex. Sess. 1881, c. 25, § 1.—Collins v. Bowen, (Minn.) 47 N. W. 719.

45 Minn. 186.

Waiver of objections.

7. Rev. St. Minn. 1851, c. 70, § 41, providing that an action must be tried in the county in which the parties, or one of them, reside at the commencement of the action, etc., is not mandatory, and an objection that the proper county is not named in the complaint must be taken by motion on the part of the defendants who have answered.—Merrill v. Shaw, 1 Minn. 287, (Gil. 223;) Same v. Same, 5 Minn. 148, (Gil. 113.)

8. Where, in an action in the district court, the county designated in the complaint is not the proper county for the trial of the cause, the court does not lose jurisdiction; but the case may nevertheless be tried in the designated county, unless, before the time for answering expires, a written demand for a trial in the proper county is granted, and the place of trial thereupon changed, as provided in Gen. St. 1866, c. 66, § 42.—Gill v. Bradley, 21 Minn. 15.

9. A party waives his right to a change of venue allowed by Laws Minn. 1876, c. 51, in an action brought in one county to recover personal property detained in another, by consenting to a reference to take the testimony to be reported to the district court of the county where the action is brought, the case to be then heard on notice.—Sherman v. Clark, 24 Minn. 37.

Change of venue — In condemnation proceedings.

10. Upon appeal from the award of commissioners in condemnation proceedings, appointed under the provisions of Gen. St. Minn. 1866, c. 34, tit. 1, the district court, to which such appeal is taken, may, upon proper application and showing, by either party, change the place of trial to another county, the same as in other cases.—Lehmicke v. St. Paul, S. & T. F. R. Co., 19 Minn. 464, (Gil. 406;) Curtis v. Same, 20 Minn. 28, (Gil. 19.)

—— Prejudice of judge.

11. Repeated erroneous rulings in a cause, on the part of a district judge, are not sufficient evidence of prejudice or ill will to entitle the party to a change of venue on that ground.—Burke v. Mayall, 10 Minn. 287, (Gil. 226.)

—— To what court.

12. Gen. St. Minn. 1878, c. 66, tit. 4, relating to a change of the place of trial, having been intended only to provide for such change from the district court for one county to the district court for another county, does not authorize the transfer of an action from the municipal court of Minneapolis to a district court.—Janney v. Sleeper, 16 N. W. 365, 30 Minn. 473.

—— Time for application.

13. After a defendant's time to move for a change of venue, as a matter of right, has expired, under Gen. St. Minn. 1878, c. 66, § 49, with the expiration of his time to answer, the right to make such a motion is not restored to him by an order granting him leave to answer.—Allen v. Coates, 11 N. W. 132, 29 Minn. 46.

14. An action having been brought in a county other than that in which defendant resided, a demand for a change of venue to that county was duly made, as provided by statute, on plaintiff's attorney, whereupon he stated that he would sign a stipulation for such change at any time, and that a motion therefor need not be made. *Held*, that a delay of seven months thereafter, and after issue was joined, before applying for an order for change of venue, was sufficient ground for a denial of the motion, even regarding the agreement of plaintiff's attorney as an excuse for delay, in view of rule 21 of the district court, requiring due diligence in such cases; and that a motion for a change of the place of trial for the convenience of witnesses was also properly denied.—Waldron v. City of St. Paul, 22 N. W. 4, 33 Minn. 87.

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Change of venue—Notice of application.

15. Where a change of venue for convenience of witnesses is granted on the application of part only of the defendants, without notice to the others, and a trial is had in the county to which the cause is removed, without objection from the defendants who were not notified of the application for the change of venue, plaintiff cannot object that such notice was not given.—Wilson v. Richards, 9 N. W. 872, 28 Minn. 337.

—— Petition.

16. A verified petition for a change of venue on the ground of prejudice or ill will on the part of the judge, which makes a general charge or conclusion of ill will or prejudice, but fails to show facts on which it is founded, is insufficient, under Comp. St. Minn. c. 60, § 44, which requires that such petition shall set forth the cause of application, and be accompanied by an affidavit verifying the "facts stated in the petition."—Burke v. Mayall, 10 Minn. 287, (Gil. 226.)

—— Hearing and determination.

17. The charter of the St. Paul & Chicago Railway Company (Laws Minn. Ex. Sess. 1857, c. 1, § 13) provided that, on an appeal to the district court from an award of commissioners appointed in condemnation proceedings, either party should be entitled to a change of venue upon affidavit filed stating the belief of the affiant that a fair trial could not otherwise be had; the change to be to the nearest county where a fair trial could be had. *Held*, that it did not impose on the court the burden of determining which was the nearest impartial county, without proof from the moving party as to which was such county, and in the absence of proof it was not error to deny the motion.—Simmons v. St. Paul & C. Ry. Co., 18 Minn. 184, (Gil. 168.)

18. On a motion by one of two defendants for a change of venue, which was resisted by the plaintiff on the ground of convenience of witnesses, such defendant put in counter-affidavits upon that question. *Held*, that he thereby waived any strict right to insist upon the granting of his application, without reference to any consideration other than that his co-defendant had been joined with him for the purpose of evading the statute as to such a change, and was a consent that the question of convenience of witnesses might be heard together with his application.—Keith v. Briggs, 20 N. W. 91, 32 Minn. 185.

19. In an action brought against four defendants in the county wherein one resides, it is not error for the court to deny a motion for change of place of trial to a county agreed upon by three of the defendants, and in which two reside, when the plaintiff will lose the benefit of a term of the court held in the county to which the change is demanded, and where said defendants have neglected to move for a change until the case is called for trial.—McNamara v. Eustis, (Minn.) 48 N. W. 1123.

46 Minn. 311.

Venue in Criminal Cases.

See *Criminal Law*, 37-41.
Proof of venue, see *Criminal Law*, 95, 96.

Verdict.

Against joint defendants, see *Assault and Battery*, 8; *Trespass*, 21.
Aider by, see *Pleading*, 297-304.
Directing, see *Trial*, 66-72.
In civil actions, see *Ejectment*, 30; *Malicious Prosecution*, 44; *Nuisance*, 13-15; *Replevin*, 68-74; *Trial*, 120-161.
condemnation proceedings, see *Eminent Domain*, 218-220.
criminal prosecutions, see *Criminal Law*, 120-123; *Homicide*, 92-96; *Indecent Assault*, 5, 6; *Larceny*, 37-41; *Rape*, 15-19.
Objections to, see *Appeal and Error*, 385-387; *New Trial*, 29-33.
Review on appeal, see *Appeal and Error*, 437-439, 488-495.

Verification.

See *Affidavit*.
Of pleading, see *Justices of the Peace*, 69, 70; *Pleading*, 159-165.
statement for mechanic's lien, see *Mechanics' Liens*, 92-95.

Vessels.

See *Admiralty; Maritime Liens; Shipping*.

Vested Rights.

See *Constitutional Law*, 119-129; *Dower*, 1, 2.

Vice-Principal.

Negligence, see *Master and Servant*, 72-75.

View by Jury.

See *Criminal Law*, 47; *Eminent Domain*, 181; *New Trial*, 22-24; *Nuisance*, 35, 36; *Trial*, 3, 4.

Villages.

Incorporation and government, see *Constitutional Law*, 54-56; *Municipal Corporations*, 7, 8.

Voluntary Payment.

See *Payment*, 20-34; *Subrogation*, 1; *Usury*, 32-36.

Voters.

See *Elections and Voters*.

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W.

Wager.

See *Gaming.*

Wages.

See *Master and Servant*, 11-17.
Exemption, see *Exemptions*, 15, 16.
Liens, see *Liens*, 8, 9.

Waiver.

See *Estoppel.*
Of breach of covenant, see *Vendor and Purchaser*, 94.
—— of warranty, see *Sale*, 83-90.
conditions in insurance policy, see *Insurance*, 79, 80.
—— upon sale of goods, see *Sale*, 201.
defects in pleading, see *Pleading*, 278-304.
—— in summons, see *Justices of the Peace*, 6-10.
demand and notice, see *Negotiable Instruments*, 141-145.
exemption from execution, see *Sheriffs and Constables*, 28.
homestead right, see *Homestead*, 60-62.
irregularity in service of order, see *Practice in Civil Cases*, 60.
mechanic's lien, see *Mechanics' Liens*, 118-123.
objections, see *Appeal and Error*, 624-627, 748; *Appearance; Contempt*, 5; *Eminent Domain*, 236-239; *Insurance*, 84-87; *Reference*, 4; *Venue in Civil Cases*, 7-9.
obligation to fence railroad, see *Railroad Companies*, 232.
performance of contract, see *Contracts*, 107, 108.
privilege by witness, see *Witness*, 66.
right to appeal, see *Appeal and Error*, 21-23; *Criminal Law*, 152.
—— to compensation for property taken for public use, see *Eminent Domain*, 62-64.
—— to jury trial, see *Jury*, 43-47.
—— to peremptory challenge of juror, see *Jury*, 24, 25.
—— to prove claim in insolvency proceedings, see *Insolvency*, 83, 84.
—— to redeem from execution, see *Execution*, 118.
—— to redeem from mortgage, see *Mortgages*, 381.
riparian rights, see *Riparian Rights*, 3.
statutory provisions, see *Statutes*, 62.
—— right to new trial, see *New Trial*, 105, 106.
tender, see *Tender*, 7.
vendor's lien, see *Vendor and Purchaser*, 126-128.

War.

Effect on running of interest, see *Interest of Money*, 27.

Ward.

See *Guardian and Ward.*

WAREHOUSEMEN.

Liability of carrier as, see *Carriers*, 27, 29.

Warehouse receipts.

1. The title to warehouse receipts may be passed by a sale, transfer, and delivery for a valuable consideration, not in the form of an indorsement, though Gen. St. Minn. 1878, c. 124, § 17, makes such receipts negotiable and transferable by indorsement and delivery.—State v. Loomis, 8 N. W. 758, 27 Minn. 521.

2. A warehouseman issued receipts for wheat received by him, describing it as a certain number of bushels of "No. 2 wheat." The wheat was inferior to No. 2, and was kept in a bin by itself. The owner sold the wheat to parties who sold it to plaintiff, in each case the receipt being delivered, together with a written order for the wheat. *Held*, that plaintiff only acquired the right to the wheat that the owner had, and that an offer on the part of the warehouseman to deliver the identical wheat stored was a sufficient offer to perform the contract.—Robson v. Swart, 14 Minn. 371, (Gil. 287.)

3. In a warehouse receipt there was a clause whereby the warehouseman stipulated to deliver a specified number of gallons of whisky on return of the receipts and "payment of the whisky, the U. S. government and state tax, interest, and charges." *Held* that, though the words "payment of the whisky" were indefinite and ambiguous, it was obvious that a prepayment of some character was required in addition to the government and state tax, interest, and charges, and the clause was sufficient to put a purchaser of the receipt on inquiry as to its meaning.—Stein v. Rheinstrom, (Minn.) 50 N. W. 827.
47 Minn. 476.

Demand for goods stored.

4. An agent lawfully in charge of the business of a warehouse in which goods, the title to which is in dispute, are deposited is the proper party upon whom to make demand for the delivery thereof. -Lundburg v. Northwestern Elevator Co., (Minn.) 43 N. W. 685.
42 Minn. 37.

Lien for carrier's charges.

5. In the absence of an agreement or custom to that effect, a warehouseman acquires no lien upon property stored with him for carrier's charges paid by him.—Bass v. Upton, 1 Minn, 408, (Gil. 292.)

Sale for charges—Liability for excessive sale.

6. Laws Minn. 1889, c. 199, §§ 1, 2, give a lien for storage charges, and provide that, if they are not paid within three months, the bailee may sell the property, and apply the proceeds to discharge the lien and costs, the remainder, if any, to be paid over to the owner. A number of articles were de-

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posited at one time. The bailee advertised and sold the property article by article, and continued the sale after enough had been realized to pay the charges more than three months past due and the costs. *Held*, that the authority to sell terminated when that amount was realized, and, it not appearing which of the articles were sold before that, the bailee was liable in trover for the value of all of them.—Jesurun v. Kent, (Minn.) 47 N. W. 784.

45 Minn. 222.

7. A bailee having unlawfully sold a chiffonier and a lounge deposited for storage, he is liable in trover for the value of articles locked in the chiffonier, and others wrapped and inclosed in the lounge, though he had no notice that the articles were there.—Jesurun v. Kent, (Minn.) 47 N. W. 784.

45 Minn. 222.

Liability of warehouseman for removal vitiating insurance.

8. Defendants, warehousemen, received from plaintiff, for storage, certain goods, she to bear the risk from fire, and she had the goods insured in the warehouse where they were. In contemplation of their removing the goods, at some indefinite time, to another warehouse, they agreed with her to give her notice when the goods were removed, so that she might have the insurance continued upon them in such other warehouse. They removed the goods, and failed to give her notice. By the removal the insurance became void. The goods were destroyed by fire. They had no authority from her to make any arrangement for the insurance. Defendants testified, but it was denied by the agent for the insurance company, that they informed such agent of the removal, and he promised to make the necessary change in the policy. *Held* that, conceding plaintiff might, when informed of this, after the fire, have adopted or ratified what defendants so testified to, as an agreement by the insurer to continue the policy, she was not bound to do so, and that, though found by the jury to be as defendants testified, it is no defense to an action for neglecting to give notice of the removal.—Conover v. Wood, (Minn.) 51 N. W. 227.

Storage of grain—Rights of parties.

9. A deposit of grain for storage is a bailment, the title remaining in the depositor so that he is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain he deposited has been removed, and other grain, of like kind and quality, substituted in its stead.—Hall v. Pillsbury, (Minn.) 44 N. W. 673.

43 Minn. 33.

10. The holders of receipts for grain of the same kind and quality, deposited in a warehouse for storage, are tenants in common in the mass of grain of that kind and quality in the warehouse; the interest of each being limited to the amount called for by his receipt.—Hall v. Pillsbury, (Minn.) 44 N. W. 673.

43 Minn. 33.

11. The warehouseman may be tenant in common with depositors of grain in his warehouse, as where he puts his own grain in the warehouse or purchases from a depositor. His interest in the mass is limited to the excess above what is necessary to meet his outstanding receipts, which excess he may dispose of as his own.—Hall v. Pillsbury, (Minn.) 44 N. W. 673.

43 Minn. 33.

12. In an action for the conversion of wheat by a warehouseman, where the plaintiff had surrendered to the defendant's agent, though without any intention to transfer the property, certain "inspector's tickets," calling for the wheat, and had taken in place thereof certain "exchange tickets," it is immaterial that such "exchange tickets" were issued without the authority of the defendant, and that the wheat had been delivered under the "inspector's tickets" to some person other than the plaintiff.—Lewis v. St. Paul & S. C. R. Co., 20 Minn. 260, (Gil. 234.)

—— Pledge by warehouseman.

13. A miller engaged in purchasing wheat and manufacturing it into flour, and who was not a general warehouseman, and had no warehouse except an elevator which was part of his mill, was accustomed to receive wheat for storage in his mill from farmers until such time as they desired to sell it, issuing to them therefor the usual storage or warehouse tickets. He never sold, delivered, or shipped wheat out of his mill, or redelivered any wheat left with him for storage, but ground all wheat he received, using it as part of his stock in his business of milling. Having borrowed money from two banks, he issued to them, as collateral security for repayment of the loans, warehouse receipts for specified quantities of wheat. He had never sold wheat to these banks, and they never delivered any wheat to him, or had any in his possession, and it did not appear that there was any wheat in his mill at the time. *Held*, that the banks had no claim on wheat purchased by him from others more than a year after the issue of their warehouse receipts, and after the mill had been entirely cleared of wheat in the usual course of operating it, as no specific property had been appropriated to the contract, the identity of which was preserved.—Fishback v. Van Dusen, 22 N. W. 244, 33 Minn. 111.

14. The Minnesota warehouse act, (Laws 1876, c. 86; Gen. St. 1878, c. 124, §§ 13-20,) "to regulate the storage of grain," does not apply to a case where a borrower of money issues to the lender an instrument in the form of a warehouse receipt for the purpose of pledging or mortgaging his own property in his own possession to secure repayment of the loan.—Fishback v. Van Dusen, 22 N. W. 244, 33 Minn. 111.

Modified in National Exchange Bank v. Wilder, 24 N. W. 699, 34 Minn. 157.

15. An elevator company, owning and operating several warehouses for the storage of grain, and having wheat owned by itself in its warehouses mingled with wheat of others stored therein, issued warehouse receipts for its own wheat as security for loans of money made to it. *Held*, that this was equivalent to an actual transfer of the possession, and constituted a valid pledge, and rendered the warehouseman bailee of the pledgee, and that the pledgee was a depositor of the wheat within the Minnesota warehouse act, (Gen. St. 1878, c. 124, §§ 13-18,) declaring such deposit for

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storage a bailment and not a sale, by virtue of which grain subsequently purchased and stored by the warehouseman takes the place of that originally deposited, and is appropriated to the contract so as to become the property of the depositor. Modifying Fishback v. Van Dusen, 22 N. W. 244, 33 Minn. 111.—National Exch. Bank v. Wilder, 24 N. W. 699, 34 Minn. 149.

16. A warehouseman, owning goods in his warehouse, may pledge them by issuing and delivering his own warehouse receipt to the pledgee. And where the property is part of a larger uniform mass, as wheat in an elevator, separation from such mass is not necessary to constitute an appropriation of the property to the contract. The pledgee becomes tenant in common with the other owners.—National Exch. Bank v. Wilder, 24 N. W. 699, 34 Minn. 149.

17. Under the grain warehouse law of 1876, (Gen. St. Minn. 1878, c. 124,) where a warehouseman pledges his own property in his own warehouse by issuing to the pledgee a warehouse receipt therefor, this is equivalent to an actual transfer of the possession, and renders the warehouseman bailee of the pledgee. In such case the pledgee is a "depositor" within the meaning of the statute, and there is no distinction between him and one who makes a delivery of his grain. Following Bank v. Wilder, 34 Minn. 149, 24 N. W. 699. —Eggers v. Hayes, (Minn.) 41 N. W. 971.

40 Minn. 182.

Storage of grain — Demand of grain — Tender of charges.

18. A demand by the holder of a warehouse or elevator receipt for grain deposited for storage for the amount called for by the receipt is good, notwithstanding that, by reason of removal of grain by the warehouseman, there is not enough left in store to answer all the receipts. He is not required to ascertain and demand the proportionate share belonging to his receipts.—Leuthold v. Fairchild, 27 N. W. 503, 28 N. W. 218, 35 Minn. 99.

19. It is competent for a bailee of grain held in store to waive the formal requisites of a tender of charges and grain receipts provided for by section 15, c. 124, Gen. St. Minn. 1878. And where such bailee places his refusal to deliver the grain solely on the ground that it is claimed by a third party, he will not be permitted subsequently to change his position, and justify such refusal on the ground that the charges are not paid.—Wallace v. Minneapolis & Northern Elevator Co., (Minn.) 35 N. W. 268.

37 Minn. 464.

—— Remedies for failure to deliver.

20. The refusal of an elevator company to deliver grain held by it, placed exclusively upon a ground other than the non-payment of charges on it, amounts to a waiver of a tender of such charges. —Tarbell v. Farmers' Mut. El. Co., (Minn.) 47 N. W. 152.

44 Minn. 471.

21. Gen. St. Minn. 1878, p. 1012, provides that whenever any grain is delivered for storage such delivery shall be treated as a bailment; that the grain so stored shall not be subject to the process of any court against the bailee; that upon demand by the bailor it shall be the duty of the bailee to deliver the amount of grain called for by the receipt; and that upon the refusal of the bailee to so comply with the demand of the bailor the former shall be deemed guilty of larceny, and the bailor may institute proceedings to recover possession of a quantity of grain equal to that deposited, or, if the grain cannot be had, for a money judgment for its value. *Held*, that the remedies so provided are not exclusive, but are in addition to such as previously existed at common law or by statute in case of the conversion of personal property by a bailee.—Daniels v. Palmer, (Minn.) 42 N. W. 855. 41 Minn. 116.

—— Liability of purchaser from warehouseman.

22. If a warehouseman sell as his own any grain beyond the excess of that in his warehouse, above the amount called for by his outstanding receipts, without express consent of the depositors, his sale passes no title, and the owners, the depositors, may follow the grain into the hands of the purchaser, and recover of him for a conversion.—Hall v. Pillsbury, (Minn.) 44 N. W. 673.

43 Minn. 33.

Warrant.

See *Arrest; Search-Warrant.*
For execution of capital sentence, see *Criminal Law*, 133.

Warranty.

See *Guaranty.*
Covenants, see *Covenants*, 2, 24-26.
Damages for breach, see *Damages*, 93, 94.
In application for insurance, see *Insurance*, 38-42.
On sale of goods, see *Sale*, 51-125, 154, 155.

WASTE.

By tenant in common, see *Tenancy in Common and Joint Tenancy*, 8.
Remedies of mortgagee, see *Mortgages*, 88.

Action—Against assignee of life-estate.

1. Under Gen. St. Minn. 1878, c. 75, §§ 45, 46, which give the right of action for waste against a tenant for life, the action may be maintained against the assignee of a life-estate.—Curtiss v. Livingston, (Minn.) 31 N. W. 357.

36 Minn. 380.

Injunction—Against mortgagor.

2. Waste by a mortgagor in possession will not be enjoined unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt. But the value of the property should remain largely in excess of the debt secured by it. —Moriarty v. Ashworth, (Minn.) 44 N. W. 531.

43 Minn. 1.

—— Against cotenants of mortgagor.

3. A mortgagee of an undivided interest in land is not entitled to an injunction restraining the tenants in common in possession of the land

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from removing the clay deposits thereon, where works for the manufacture of brick had been constructed, and clay deposits worked and opened, before the execution of the mortgage.—Russell v. Merchants' Bank, (Minn.) 50 N. W. 228.

47 Minn. 286.

WATER COMPANIES.

Rights and privileges.

1. Laws Minn. 1883, c. 80, § 3, authorized the village of Duluth to grant to a corporation the right to erect water-works, and to supply the village and its inhabitants with water, and to control the erection of the works and the laying of its pipes on such terms as might be agreed on with the corporation. The Duluth Gas & Water Company was authorized by its charter to contract to furnish and supply Duluth and the inhabitants of said village and vicinity with gas and water. The council of Duluth granted to this company the exclusive privilege of operating water-works and furnishing water to the village and its inhabitants for the term of 30 years. The village was to have the right to purchase the works at the end of 10 years, and agreed to purchase them at the end of 30 years if it then refused to extend the franchise for a further term of 20 years. *Held*, that neither the special act nor the ordinance prevented the company from using the mains laid under the streets of Duluth for supplying water to the inhabitants of another city in the vicinity.—City of Duluth v. Duluth Gas & Water Co., 47 N. W. 781, 45 Minn. 210.

Water rates.

2. In the schedule of rates or charges fixed by an ordinance for water furnished by a corporation, a certain maximum tariff was fixed for a "residence occupied by one family for domestic purposes, one to five rooms," and also the tariff for each additional room. The tariff for a "bath, with heating apparatus, private," for "water-closets," and for "water-basins," was also specified. Hot-water heaters, used for warming the house, were not mentioned, but it was provided that special rates should be made for supplies not enumerated. *Held*, that the tariff fixed for private residences did not include or warrant the use of water for a bath-tub, for closets, for basins, or for a heater in plaintiff's private residence.—Allen v. Duluth Gas & Water Co., (Minn.) 48 N. W. 1128.

46 Minn. 290.

WATERS AND WATER-COURSES.

Limitation of action for damages from erection of dam, see *Limitation of Actions*, 33, 34.

Nuisance by overflowing lands, see *Nuisance*, 1, 2, 5, 9-15.

Obstruction of stream in driving logs, see *Logs and Logging*, 27, 28.

Streams and waters as boundaries, see *Boundaries*, 1-4.

Grant or reservation of right to use water.

1. Plaintiff granted to one S. "the right to have and draw from the pond or canal of said [plaintiff] seven mill-powers of water, as defined in the said proposals, to be used upon the following described lots or pieces of land, * * * or upon one or more of said lots only, or upon such other lots or parcels of land as said grantee, his heirs or assigns, shall designate, with such quantity of water to be used upon such or any of said lots as S., his heirs or assigns, shall hereafter elect and determine; such designations and elections to be made and established in writing in some permanent form, executed and acknowledged as deeds for land are executed and acknowledged, and recorded in the office of the register of deeds of said H. county, before commencing to use said water on such lots or pieces of land." *Held*, that S. and his assigns were vested with the right to use such water-power only on the lots described in the deed, or on premises designated as therein provided, and, having used it on other premises, were liable to plaintiff for the value of such use.—Minneapolis Mill Co. v. Hobart, 1 N. W. 45, 26 Minn. 37.

2. The term "race-way" in a deed, reserving the right to conduct water through the land conveyed, as used by persons engaged in the construction and operation of mills run by water, means "an artificial canal dug in the earth," and does not give the right to carry the water over the land by means of an elevated flume.—Wilder v. De Cou, 1 N. W. 48, 26 Minn. 10.

3. A deed by a riparian owner granted to defendant the use of the water of the river, below a mill owned by the grantor, for the purpose of operating another mill, free from "interference or detention." *Held*, that the grant must be construed as subject to the reasonable use of the stream above by the grantor, and that the question, "What constitutes such reasonable use" was to be determined by general principles of law, independent of the grant.—Red River Roller-Mills v. Wright, 15 N. W. 167, 30 Minn. 249.

4. A riparian owner may grant a part of his estate, not abutting on the stream, and as appurtenant thereto a right to draw water from the stream through his remaining land; and for any diversion of the natural flow of the stream disturbing such right the grantee may maintain an action.—St. Anthony Falls Water-Power Co. v. City of Minneapolis, (Minn.) 43 N. W. 56.

41 Minn. 270.

What is a water-course.

5. The water which in times of ordinary high water overflows the bank of a stream, and is accustomed to flow down over the adjacent low-lands in a defined stream, is subject to the law relating to water-courses.—Byrne v. Minneapolis & St. L. Rv. Co., (Minn.) 36 N. W. 339.

38 Minn. 212.

Flowage.

6. A riparian owner may, in the erection of a dam upon his own land, keep it at such height as to swell the water in the channel up to his neighbor's line in the ordinary stage of water, without making himself liable for injuries not the necessary or proximate result therefrom, such as floods or extraordinary freshets; but he will be liable for any damages resulting from his dam at stages of water natural, ordinary, or to be reasonably anticipated at any particular period of the year,

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such as spring freshets.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

7. A stipulation by parties that a dam across a running stream may be maintained at a certain specified height includes as an incident the right of flowage necessarily caused by such maintenance.—Albee v. Hayden. 25 Minn. 267.

8. A riparian owner cannot maintain on his premises a dam of such height that it will set back the water of the stream on land above his at ordinary high water, such as may be reasonably anticipated, and the fact that the dam does not set back water in ordinary medium or ordinary low stages of water is immaterial.—Ames v. Cannon River Manuf'g Co., 6 N. W. 787, 27 Minn. 245.

Flowage—Action for damages.

9. In an action for damages resulting from the overflow of plaintiff's land, caused by the defendant's dam, the court refused to charge that "the attempt to measure the actual height or fall of the stream by a process of instrumental levelings is less satisfactory than, and must yield to, actual visible facts, because instrumental measurements are liable to accidents and mistakes." *Held* not error.—Finch v. Green, 16 Minn. 355, (Gil. 315.)

10. In an action for damages from the overflowing of lands, caused by the erection of a dam, plaintiff is entitled to damages, though nominal, for any flowage shown, though there is no proof of actual damages.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

11. Where wood and grass were injured by the unlawful maintenance of a dam, before the commencement of the action for damages thereby, it is not material that the wood and grass did not die until after the suit had been commenced. —Hayden v. Albee, 20 Minn. 159, (Gil. 143.)

12. In an action to recover damages caused to plaintiff's lands by the erection of a dam across a river, it is not necessary that the complaint should allege that the stream was not navigable. —Rhoades v. Siman, 24 Minn. 192.

13. In an action for damages, caused by the unauthorized maintenance of a dam, it is unnecessary to allege that the dam was raised in height at any particular time, and such allegation will not preclude proof that the dam was raised at other times than those specified in the complaint. —Hayden v. Albee, 20 Minn. 159, (Gil. 143.)

14. In an action for injuries from overflowing lands, caused by a dam, evidence of the condition of the land since the commencement of the action, tending to show that the dam had no effect in flowing such land, is competent.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

Statutory proceedings to obtain right to maintain dam.

15. A water-power which a riparian owner has, with a *bona fide* intent, turned to use, and improved to any extent, is a water-power "previously improved," within Gen. St. Minn. 1866, c. 31, § 16; and a lower proprietor cannot afterwards acquire a right to improve the same by proceedings under that statute.—Miller v. Troost, 14 Minn. 365, (Gil. 282.)

16. The right to a water-power that may be acquired under Gen. St. Minn. 1866, c. 31, dates from the time of commencing the proceedings, and is governed by the condition of the upper proprietor's power at that date.—Miller v. Troost, 14 Minn. 365, (Gil. 282.)

17. In proceedings to acquire a right to overflow lands, under Comp. St. Minn. c. 129, the petition will give the court jurisdiction if it state facts bringing the case within section 1 of that chapter, which provides that a person desirous of erecting a mill-dam so as to damage real estate not owned by him, nor damaged by consent, may obtain the right by proceeding as in the act provided. The restriction or limitation contained in the subsequent sections need not be negatived, nor need the petition state a want of consent on the part of the owners of the land desired to be overflowed.—Faribault v. Hulett, 10 Minn. 30, (Gil. 15.)

18. In proceedings to obtain the right to erect a dam, under Comp. St. Minn. § 129, a petition stating the names of the owners of the land damaged, sufficiently shows that the land so damaged was not owned by the petitioner, as required by such statute, and also that such land was not damaged by consent, for where an injury to the property of another is alleged the law presumes *prima facie* want of consent.—Faribault v. Hulett, 10 Minn. 30, (Gil. 15.)

19. A party seeking to procure the right to maintain a dam cannot, after appeal and judgment, object to judgment in such proceedings in favor of an owner on the ground of a mortgage on the owner's interest existing prior to such proceedings, under which the owner's title has, by subsequent foreclosure, been divested. It will be presumed, in such case, that damages were assessed on the basis of the mortgagor's interest only, and, if the party instituting the proceedings omitted on the trial to show such mortgage, he must excuse his omission before he can be relieved of the effects thereof.—Siman v. Rhoades, 24 Minn. 25.

20. In proceedings under Gen. St. Minn. 1866, c. 31, to obtain the right to erect a dam across a non-navigable stream, after the entry of judgment on appeal in the district court, that court has the power to correct such judgment, and make it conform to what the parties were entitled to, as the result of the trial.—Siman v. Rhoades, 24 Minn. 25.

21. Where proper notice has been served upon the owners of land affected by proceedings under Gen. St. Minn. 1866, c. 31, to procure the right to maintain a dam across a stream, jurisdiction is acquired, and an indefinite description of the lands in the petition may be amended even on appeal.—Siman v. Rhoades, 24 Minn. 25.

22. In proceedings under Gen. St. Minn. 1866, c. 31, to acquire the right to erect a dam across a stream, although the statute does not require that the petition shall contain a description of the lands with respect to which damages are sought to be assessed, the lands should be described in the report of the commissioner, or, on appeal, in the judgment.—Siman v. Rhoades, 24 Minn. 25.

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23. In proceedings under Gen. St. Minn. 1866, c. 31, to obtain the right to maintain a dam across a stream, after appeal to, and trial and judgment in, the district court, it will be presumed, in the absence of anything to the contrary, that it was made to appear to the court below that such stream was not navigable.—Siman v. Rhoades, 24 Minn. 25.

24. Under Gen. St. Minn. 1878, c. 31, § 17, providing for an "assessment of damages which will result to any person by the erection of said dam and its maintenance forever," the assessment cannot include damages resulting from a prior unlawful maintenance of the dam, and it is no defense to an action for such damages.—Hempstead v. Cargill, (Minn.) 48 N. W. 558.

46 Minn. 118.

Rights of water-power company.

25. Laws Minn. Ty. 1856, c. 137, incorporating defendant water-power company, authorized it, by section 9, "to maintain the present dams and sluices, and construct and maintain dams, canals, and water-sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water-power owned or possessed by said company, * * * and may construct dams on the rapids above and below the falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river, upon the property owned or to be owned by said corporation, which may be necessary to the full enjoyment of the powers herein granted: * * * provided that nothing herein shall be so construed as to authorize said corporation to interfere with the rights or property of any person or persons whatever." *Held*, that defendant was not authorized to appropriate the water power opposite the land of any other riparian owner.—Morrill v. St. Anthony Falls Water-Power Co., 2 N. W. 842, 26 Minn. 222.

Pollution.

26. In an action by the owner of a flouring-mill to restrain the owner of a saw-mill on the same stream, above the flouring-mill, from depositing in the stream sawdust and other refuse, it appeared that the injury thereby caused to plaintiff's mill was very serious. On the other hand, defendant showed that his mill was so constructed that the sawdust and refuse could not be disposed of otherwise than by permitting them to fall into the stream without practically destroying the value of defendant's mill as a water-power mill, and that, owing to the construction of buildings adjacent to his mill and the formation of the land, there was no other available method of disposing of the refuse without rendering the mill, as it was constructed, useless as such; and that others operating similar mills on other streams also permitted sawdust and refuse to be cast into those streams. *Held* that, although the question, "What was a reasonable use of the stream?" was a question of fact, the evidence did not justify a finding that defendant's use was reasonable; as the only occasion or necessity for such use might have resulted from mistake or carelessness in locating and constructing his mill.—Red River Roller-Mills v. Wright, 15 N. W. 167, 30 Minn. 249.

Diversion.

27. An injunction will lie to restrain the extension of a ditch, the effect of which would be, at certain seasons, to divert the water of a lake, and thereby decrease the water-power of the plaintiff and increase that of the defendant.—Bennett v. Murtaugh, 20 Minn. 151, (Gil. 135.)

Distinguished in Schaefer v. Marthaler, 26 N. W. 727, 34 Minn. 488.

28. In such case it need not affirmatively appear that such lake was meandered, though Laws Minn. 1867, c. 40, forbids the draining of meandered lakes only, or that plaintiff claimed any interest in the land covered by the lake, where it was shown that plaintiff used the water-power derived from the lake.—Bennett v. Murtaugh, 20 Minn. 151, (Gil. 135.)

29. Plaintiff and defendant owned land upon opposite sides of a water-course, plaintiff's tract extending above and below that of defendant. Opposite defendant's premises was a fall of about 5 feet. At the head of these rapids he built a wing-dam, and, about 50 feet above the dam, excavated a canal, 900 feet in length, over his own land, the lower end being near the foot of the rapids. The water flowing through this canal operated a grist-mill erected by defendant 800 feet below the dam. There was no testimony that withdrawing the water from the pond 50 feet above the dam had any different effect upon the head of water than would have resulted had it been taken out exactly at the dam. Plaintiff had made no attempt to utilize the water upon his side of the stream, nor did he have a mill privilege of any value. The court found that the dam was wholly upon defendant's side of the middle of the stream; that he had made but a reasonable use of the water, and this without materially lessening the quantity which otherwise would flow over the bed and along the bank on plaintiff's side. *Held*, that plaintiff was not entitled to an injunction restraining defendant from maintaining his dam and canal, nor to have any part of the canal or of the dam abated as a nuisance.—Pinney v. Luce, (Minn.) 46 N. W. 561.

44 Minn. 367.

Water-Works.

See *Municipal Corporations*, 102, 103.

Ways.

Public ways, see *Highways*.
Right of way, see *Easements*.
Streets, see *Municipal Corporations*, 125–135.

Weapons.

Assault while armed with dangerous weapon, see *Assault and Battery*, 12–18.

WEIGHTS AND MEASURES.

Measurement of logs, see *Logs and Logging*, 41–45.

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Use of improved scales and measures.

Gen. St. Minn. 1878, c. 21, § 11, imposing a penalty for selling or disposing of goods, wares, or merchandise by unsealed and unproved scales or measures, implies a prohibition, and no recovery can be had for the price against the purchaser.- Bisbee v. McAllen, 39 N. W. 299, 39 Minn. 143.

Wharves.

Right to construct, see *Riparian Rights*, 4-15.

Widow.

Allowance, see *Executors and Administrators.*
Devise to, see *Wills*, 63, 64.
Dower, see *Dower.*
Rights in homestead, see *Homestead*, 42-50.
—— of inheritance, see *Descent and Distribution.*

Wife.

See *Husband and Wife; Marriage.*

WILLS.

I. Testamentary Capacity, 1-10.
II. Fraud and Undue Influence, 11-19.
III. Requisites and Validity, 20-25.
IV. Revocation, 26-32.
V. Probate and Contest, 33-42.
VI. Construction, 43-66.
VII. Contracts to Make Wills, 67.

See, also, *Descent and Distribution; Executors and Administrators.*
Testamentary powers, see *Powers*, 4, 5.
Trial of issue of validity, see *Constitutional Law*, 136-138.

I. Testamentary Capacity.

Burden of proof.

1. Under Gen. St. Minn. 1878, c. 47, §§ 15-17, specifying the proof required when a will is offered for probate, the burden of establishing the sanity of a testator is upon him who offers the will for probate.—In re Layman's Will, 42 N. W. 286, 40 Minn. 371.

Evidence—Admissibility, in general.

2. Where it is claimed that testator was incompetent at the time the will was made, it may be shown that after such time he had capacity.—In re Pinney's Will, 6 N. W. 791, 7 N. W. 144, 27 Minn. 280.

3. On an issue as to the capacity of testator to make a will, the record of the probate court on an application to appoint a guardian for him is inadmissible.—In re Pinney's Will, 6 N. W. 791, 7 N. W. 144, 27 Minn. 280.

4. The contents of a bond executed by a testator are not admissible in evidence, as bearing on the question of testator's capacity, where testator did not read the bond or hear it read.—In re Pinney's Will, 6 N. W. 791, 7 N. W. 144, 27 Minn. 280.

5. On an issue of testamentary capacity, the declarations of testator concerning his business, contracts made by him, and entries in his diary at or about the time in question, are admissible.—In re Pinney's Will, 6 N. W. 791, 7 N. W. 144, 27 Minn. 280.

6. Where the testator, who had previously been of sound disposing mind and memory, was suddenly prostrated with severe and fatal illness, during which he executed a codicil to his will, it is competent, upon the issue of testamentary capacity, for the proponent to prove that a short time before he was taken sick the testator had expressed his intention to make such changes in his will as he did make by his codicil.—Hammond v. Dike, (Minn.) 44 N. W. 61.
42 Minn. 273.

7. It is proper to show the consistency of the will with the natural inclinations and previously declared intentions of the testator.—Hammond v. Dike, (Minn.) 44 N. W. 61.
42 Minn. 273.

8. A contestant of a will may testify, upon the issue of the testator's mental capacity, as to his verbal acts prior to the date of the will, and to state what he said when angry and violent.—In re Brown, (Minn.) 35 N. W. 726.
38 Minn. 112.

—— Opinion and expert testimony.

9. A question whether testator, in the opinion of the witness, had the capacity to make an intelligent disposition of his property by will, is not objectionable as calling on the witness for his opinion as to whether testator had capacity to make a valid will.—In re Pinney's Will, 6 N. W. 791, 7 N. W. 144, 27 Minn. 280.

10. The question whether a change in a testator's life-long purpose to provide for a sister, occurring on his death-bed, and without apparent motive or reason, and unexplained, indicates any change in his intellect, is not one for the opinions of experts.—Stockton v. Thorn, (In re Nelson's Will,) 39 N. W. 143, 39 Minn. 204.

II. Fraud and Undue Influence.

What constitutes undue influence.

11. A testator may be affected by his prejudices and predilections arising from his associations and external influences, but, if he is of sufficient testamentary capacity, he may nevertheless dispose of his property as he pleases by will, if it be his own voluntary act.—In re Mitchell's Estate, (Minn.) 44 N. W. 885.
43 Minn. 73.

12. Undue influence, to be sufficient to invalidate a will, must be something to destroy the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator.—Schmidt v. Schmidt, (Minn.) 50 N. W. 598.
47 Minn. 451.

Evidence.

13. On an issue of undue influence, evidence that testator's wife, who was preferred by the will, had great influence over testator in the ordinary affairs of life, is not admissible unless it is shown that she used such influence to procure

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the execution of the will.—Storer v. Zimmerman, 8 N. W. 827, 28 Minn. 9.

14. Declarations of a testator as to how he intended to dispose of his property, made before the execution of the will, and not connected with the act of making the will, are not admissible to prove undue influence.—Storer v. Zimmerman, 8 N. W. 827, 28 Minn. 9.

15. Proof that a will is unequal in its distribution of testator's property is not admissible to show undue influence, unless there is some direct evidence of that fact.—Storer v. Zimmerman, 8 N. W. 827, 28 Minn. 9.

16. In determining the question of undue influence upon the mind of a testator in disposing of his property by will, the frame of the will and the nature of the testamentary dispositions are in themselves important evidence.—In re Mitchell's Estate, (Minn.) 44 N. W. 885.

43 Minn. 73.

17. The fact that a person who had made two wills, dividing his property between his wife and his sister, within a few days after making the second, and after several days of very severe illness, of which he died, made another will, revoking those made before, and leaving all his property to his wife, (no reason being apparent for the change in the disposition of his property,) is not, in the absence of any other evidence, sufficient to require the issue of undue influence on the part of the wife to be submitted to the jury. —Stockton v. Thorn, (In re Nelson's Will,) 39 N. W. 143, 39 Minn. 204.

18. The provisions of a will, and the fact that the beneficiaries therein who are specially favored had opportunities to influence the testator, may be considered, in connection with other testimony, in trying the question of undue influence, but such facts, standing alone, are not evidence of such influence.—In re Hess' Will, (Minn.) 51 N. W. 614; Foster v. Dearborn, Id.

19. The exercise of undue influence over a testator must be proved by affirmative evidence, apart from his declarations or admissions made after the will was executed, they being only pertinent to show the effect of such influence upon his mind.—In re Hess' Will, (Minn.) 51 N. W. 614; Foster v. Dearborn, Id.

III. Requisites and Validity.

What constitutes a will.

20. A deed of property, executed in expectation of death, for purposes of distribution, will not be construed as a will, so as to postpone the vesting of title thereunder until the grantor's death, where there is nothing to show that he did not intend the deed to take effect upon its execution.—Brown v. Atwater, 25 Minn. 520.

Execution—Signature.

21. Under Gen. St. Minn. 1878, c. 47, § 5, providing that a will shall be "signed at the end thereof by the testator, or by some person in his presence and by his express direction," mere knowledge on the part of the testator that another is signing or has signed, and assent to or acquiescence in it, there being no previous direction, to be inferred from looks or gestures or other ambiguous token, is not enough. If the previous express direction is given by gestures, they must be unambiguous as words.—Waite v. Frisbie, (Minn.) 47 N. W. 1069.

45 Minn. 361.

—— Knowledge of contents.

22. Where a will is not read by nor to a testator, but is signed upon an assurance that it has been prepared according to the instructions of the testator, a finding in favor of the will cannot be sustained, if the language of the will is not the language of the instructions, and if it does not make, in legal effect, the provisions which the testator apparently desired.—Waite v. Frisbie, 47 N. W. 1069, 45 Minn. 361; Id., 51 N. W. 217.

Attestation.

23. Where witnesses to a will subscribed the same in the immediate and conscious presence of the testator, and under such circumstances that he could see them so subscribe, the fact that he did not actually see them is immaterial.—In re Allen, 25 Minn. 39

24. No formal request to witnesses to subscribe a will need be shown on an application for its probate, as no request is required by Gen. St. Minn. 1866, c. 47, § 5.—In re Allen, 25 Minn. 39.

Alterations and interlineations.

25. Under Gen. St. Minn. 1866, c. 47, § 5, which provides that no will shall be effectual unless, in addition to other requisites, it be "attested and subscribed in the testator's presence by two competent witnesses," when erasures and interlineations are made, in an existing will, an attestation of them alone is insufficient, and the will as altered by them must be duly attested to make them of any effect.—In re Penniman, 20 Minn. 245, (Gil. 220.)

IV. Revocation.

By alterations, interlineations, etc.

26. Where interlineations and alterations in an existing will are not duly attested so as to take effect as a disposition of the property, they cannot operate as a revocation of provisions for which they were substituted; for Gen. St. Minn. 1866, c. 47, § 9, requires that a writing, in order to operate as the revocation of a will, must be "signed, attested, and subscribed in the manner provided for the execution of a will."—In re Penniman, 20 Minn. 245, (Gil. 220.)

By canceling, burning, etc.

27. Cancellation or obliteration of a portion of a will is only *prima facie* evidence of intention to revoke.—In re Penniman, 20 Minn. 245, (Gil. 220.)

28. Where a portion of a will is canceled with a view to a new disposition, and the proposed disposition fails to be carried into effect, the presumption in favor of cancellation will be repelled, and the will allowed as originally written.—In re Penniman, 20 Minn. 245, (Gil. 220.)

29. Under Gen. St. Minn. 1878, c. 47, § 9, which provides that no will shall be revoked

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"unless by burning, tearing, canceling, or obliterating the same," a will which is placed by testator in a stove, with the intention of destroying it when the fire should be ignited, is not revoked, where a devisee, with the purpose of thwarting testator's intention, and without his knowledge or consent, takes the will out of the stove before it is scorched or mutilated in any degree, and secretes it, leaving the envelope inclosing the will to be subsequently destroyed by the fire.—Graham v. Birch, (Minn.) 49 N. W. 697. 47 Minn. 171.

By subsequent will.

30. A later will, properly executed, revoking former wills, is effectual as a revocation, though, having been lost or destroyed, its contents (other than the revocatory clause) cannot be proved so that it can be allowed and executed as a will.—In re Cunningham, (Minn.) 36 N. W. 269.
38 Minn. 169.

31. On issue arising upon proceedings to probate an earlier will, proof of a revocatory instrument is competent as evidence of a revocation, though it might be, but never has been, admitted to probate.—In re Cunningham, 36 N. W. 269, 38 Minn. 169.

By subsequent deed.

32. Under Gen. St. Minn. 1878, c. 47, § 9, relating to the revocation of wills, which provides that nothing in the section contained shall prevent the revocation "implied by law from the subsequent changes in the condition or circumstances of the testator," a deed procured by the fraud and undue influence of the grantee does not work a revocation of a will, previously executed, devising the same land.—Graham v. Birch, (Minn.) 49 N. W. 697.
47 Minn. 171.

V. Probate and Contest.

Jurisdiction—Will of non-resident.

33. Under Gen. Laws 1889, c. 46, (Prob. Code, §§ 32, 34,) allowing the filing in this state of a will of a non-resident which has been judicially proved and established in another state, and authorizing administration thereon in this state, it is error to admit the will and proceed to administration without any showing that there is property of the estate in the county where it is sought to admit the will subject to administration, or upon which the will may operate, since section 4 requires that wills must be proved, and letters testamentary or of administration granted, in some county where there is property belonging to the estate, and contains no exceptions. — Southard v. Southard, (Minn.) 50 N. W. 932.

Effect of prior proceedings as in case of intestacy.

34. It is not requisite, in order to probate the will of a deceased person in one of the probate courts of this state, or in order to have an authenticated copy of a foreign will, and of the probate thereof elsewhere, duly allowed, filed, and recorded, as provided by Probate Code Minn. §§ 32, 33, that proceedings in administration already had of the estate of such person as if he had died intestate, and which have terminated in a final decree in the same court, be first revoked, set aside, or vacated. — Stackhouse v. Berryhill, (Minn.) 49 N. W. 392.
47 Minn. 20.

Right to oppose probate—Creditor or heir.

35. A judgment creditor of an heir, to whom the real estate of his deceased ancestor would descend in the absence of a will has an interest that entitles him to contest the probate of a supposed will of deceased, which devises all the real estate to others than the said heir.—In re Langevin's Will, (Minn.) 47 N. W. 1133.
45 Minn. 429.

Guardian ad litem for minor.

36. Where an appointment of a guardian *ad litem* in proceedings to admit a will to probate is not required by statute, no such appointment for a minor interested is necessary; and, after a will has been regularly admitted to probate by the judgment of the proper probate court, that court has no jurisdiction to set aside the probate as void on the ground that it was adjudged without the appointment of a guardian *ad litem* for a minor interested in the testator's estate, or to adjudge a re-probate of the will upon that ground; and such re-probate, if allowed, is void.—In re Mousseau's Will, 14 N. W. 887, 30 Minn. 202.

Distinguished in Culver v. Hardenbergh, 33 N. W. 795, 37 Minn. 231.

Appeal from admission of will.

37. Under Gen. St. Minn. 1878, c. 49, § 14, providing for an appeal from a judgment or order of a probate court by a party who, "being entitled to be heard thereon, had not due notice or opportunity to be heard,—the latter fact to be shown by affidavit,"—an affidavit on appeal from the admission of a will to probate, which states that the appellant had no knowledge, information, or notice that a will was to be offered for probate, and "had no notice or opportunity whatever to be heard" as to such probate, is sufficient. —In re Brown's Will, 21 N. W. 474, 32 Minn. 443.

38. Notice of an appeal from the admission of a will to probate may properly be served upon the attorney of the proponent.—In re Brown's Will, 21 N. W. 474, 32 Minn. 443.

Effect of decree.

39. A decree admitting a will to probate is not an adjudication of the effect or construction of any provision of the will, but only that the will was executed by the person whose will it purports to be, and that such person was competent to make a will.—Greenwood v. Murray, 2 N. W. 945, 26 Minn. 259.

40. On the application for the allowance and probate of a will, the probate court can only adjudicate questions as to the validity of its execution, and whether it is the subsisting will of the testator; and, on appeal to the district court, the latter court can make only such determination as the probate court ought to have made, and it cannot assume to declare a trust or determine the disposition of the estate under the will.—Graham v. Birch, (Minn.) 49 N. W. 697.
47 Minn. 171.

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Effect of foreign probate.

41. Under Gen. St. Minn. 1878, c. 47, § 18, providing that wills duly proved and allowed in any other state, or in a foreign country, may be allowed, filed, and recorded in the probate court of any county in this state in which the testator left property, the allowance and probate of a will in pursuance of said section is sufficient evidence of the death of testator and the devise of lands. The records of the probate court import verity, and cannot be attacked collaterally.—Lyon v. Gleason. (Minn.) 42 N. W. 286.

40 Minn. 434.

42. Though a testator domiciled in another state leaves in this state personal property only, the power of the courts of this state to admit to probate a will already proved at the testator's domicile is not affected by Laws Minn. 1889, c. 46, § 32, providing that a will devising land in this state, and executed according to the laws of the testator's domicile, may be admitted to probate here on a certified copy of the foreign probate.—In re Washburn's Estate, (Minn.) 47 N. W. 790; Putnam v. Pitney, Id.

45 Minn. 242.

VI. Construction.

Omission to provide for children — Intention to disinherit.

43. Under Rev. St. c. 53, § 27, which provides that when a testator omits to provide for his children, and it appears that the omission was unintentional, such child shall take the same share as if he had died intestate, a will which, after disposing of all property specifically, bequeaths $10 to testator's daughter to be paid three years from his death, and after all debts were paid, is not such a case of unintentional omission as is contemplated by the statute.—Case v. Young, 3 Minn. 209, (Gil. 140.)

44. Testator, after certain specific devises and legacies, by a general residuary clause bequeathed all the balance of his property to his wife, with the provision "that her rights under this residuary provision shall not be affected or changed by the birth of any child of mine, if any should be born to me before or after my decease." *Held*, that a child born subsequent to execution of such will could inherit no portion of testator's estate, it being clearly evident that it was his intention to make no provision for such child.—Prentiss v. Prentiss, 14 Minn. 18, (Gil. 5.)

Description of devisees and legatees.

45. Testatrix devised land to her executor in trust to sell the same five years after her death, "unless my heirs agree to postpone said sale for a longer period," and on such sale the proceeds were to be paid to the husband, nephew, and two daughters of testatrix. *Held*, that the word "heirs" meant the persons designated by the will to receive the proceeds of the land devised.—Greenwood v. Murray, 9 N. W. 629, 28 Minn. 120.

Substituted devisees.

46. Testator, by the ninth clause of his will, bequeathed and devised to a certain named hospital, about to be incorporated, $25,000, and certain land. By the tenth clause he gave $25,000, and certain other land, to trustees, in trust for the establishment of an orphans' home to be organized by his trustees, and provided that if, in certain anticipated emergencies, it should so happen that it should be impracticable to establish such a home, then the money and land should be appropriated to erecting an asylum for aged and infirm persons. By the residuary clause, all the residue of the estate, after payment of legacies, was given to the trustees, to be divided equally between the asylum specified in the ninth bequest and "the institution which shall take under the tenth bequest of this will." By a codicil, testator declared the ninth and tenth clauses of the will void, stating that, as to the asylum mentioned in the ninth clause, he had conveyed the land to it by deed, and giving the other land to his trustees to be sold, and the proceeds paid to a certain established orphans' asylum. *Held*, that the codicil substituted the orphans' asylum in place of the asylum contemplated by the tenth clause of the will, and entitled it to half of the residuary estate.—Atwater v. Russell, (Minn.) 51 N. W. 624.

Description of property.

47. A will devised to testator's wife "one-third of all real estate" during widowhood; to one son, the "north half of the real estate divided from east to west;" to another, the south half of the real estate. *Held*, that such will was not void for uncertainty, but that extrinsic evidence was admissible to identify the testator's lands as the subject or object to which the language used in the will applied.—Case v. Young, 3 Minn. 209, (Gil. 140.)

48. Testator devised to his widow "the house where we now live, with the grounds connected therewith, being lots 1, 2, and 3, and two-thirds of lot 4, in block 225, situate at the junction of Eighth and Helen streets." Lots 1, 2, and 3 were at the junction of Eighth and Minnetonka streets, and lot 1 and the adjacent third of lot 2 were not owned by testator. The house was on lots 4 and 5 at the junction of Eighth and Helen streets. *Held*, that that part of the description which gave the numbers of the lots would be rejected as a mistake.—Butler v. Trustees of First Presbyterian Church, 7 N. W. 363, 27 Minn. 355.

49. A will devising and bequeathing, in terms, all the testator's real and personal property, contained this clause: "This disposition of my property is subject to, and not intended to interfere with, the right of dower or other legal right of my wife, in and to my said property or any of the same." *Held*, that the clause excludes from the bequest that part of the personal property which, in the absence of a testamentary disposition, the Minnesota statute gives to the widow.—Redford v. Redford, (Minn.) 47 N. W. 308.

45 Minn. 48.

Nature and duration of estate.

50. Land was devised by testator to W., the possession and use to go to him immediately on testator's decease, and if he survived testator 10 years the land should be his absolutely, but if he died within the 10 years the land was to go to his issue. *Held*, that W. took a fee, with a conditional limitation to his issue in case of his death within

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10 years of testator's death.—Whiting v. Whiting, (Minn.) 44 N. W. 1030.

42 Minn. 548.

51. A decree of distribution of a probate court, assigning real estate to a person named, "to have and to hold the same unto her, her heirs and assigns forever," is an assignment of an estate in fee, though the will under which the decree of distribution is made gives the distributee the residue of testator's estate to be used "during her natural life" the same as testator might do, with power to dispose of the same absolutely.—Tidd v. Rines, 2 N. W. 497, 26 Minn. 201.

52. A testator by his will devised and bequeathed all his real and personal property to his wife for life, "for her own exclusive use and benefit," and provided that after her death any and all of such property and estate, "or any part of the same then left by her," should be divided among his children; and he added, "as a special provision, I make this a condition, that my said wife shall, out and from said property left her, provide for the maintenance and a good education of my children." He also gave to his executors a power of sale. *Held*, that on his decease a life-estate in his realty vested in the wife and a remainder in fee in the children, and similar interests were created in the personalty, and in case of sales they would take similar interests in the proceeds; and that an implied power was given to the widow to dispose of so much of the capital or *corpus* of the estate as should be reasonably necessary for her own support and the maintenance and education of the children, in case the income should prove insufficient; but that she was not to use the principal while the income should be sufficient.—In re Oertle, 24 N. W. 924, 34 Minn. 173.

53. By a will, testator devised certain lands to his executors in trust to permit his son-in-law "to use and occupy the same for and during the term of his natural life, and after his decease in trust" for testator's daughter. *Held*, that the legal estate in the land was vested in the son-in-law by the statute of uses, and that his interest was subject to be sold for his debts.—Farmers' Nat. Bank v. Moran, 14 N. W. 805, 30 Minn. 165.

54. Testator by the second clause of his will directed his executors to invest $21,000, and pay over the income quarterly to a sister and brother in certain proportions, for life, and, on their death, to divide the principal among their children in certain proportions. By a codicil he provided: "Instead of the bequest of $21,000 mentioned in the second clause of my will, I increase the same to the sum of $30,000, to be paid to my sister, A., and W., my brother, in the same proportions as in said will specified, and the bequests to their children * * * to be increased in the same proportion." *Held*, that the codicil merely increased the $21,000 to $30,000, and left said sum to be treated as provided in the will as to the $21,000, and did not give the principal of the $30,000 absolutely to testator's brother and sister, nor give another absolute bequest of $30,000 to their children.—Atwater v. Russell, (Minn.) 51 N. W. 624.

Suspension of power of alienation.

55. Gen. St. Minn. 1866, c. 45, § 15, which forbids the suspension of the absolute power of alienation of real estate "for a longer period than during the continuance of two lives in being at the creation of the estate," does not apply to such a suspension until a person named "shall become of lawful age," as the power of alienation is not suspended thereby for any fixed time, and the suspension will cease upon the death before reaching majority of the person named.—Simpson v. Cook, 24 Minn. 180.

56. A testator died, leaving five minor children. His will provided that his property should not be divided until the youngest child should become of age. *Held*, that by the term "youngest child" was to be understood the youngest child living at the death of the testator, not the youngest child which should live to attain majority.—Simpson v. Cook, 24 Minn. 180.

57. A devise of land to executors, in trust to sell as soon as in their judgment the same can be sold for a reasonable price, does not suspend the power of alienation.—Atwater v. Russell, (Minn.) 51 N. W. 624.

Designation of executors and trustees.

58. A will nominated one O. as executor, and, by subsequent provisions, provided for certain trusts to be executed by "said executor." By a codicil C. was nominated co-executor simply, nothing being said as to the trusts. *Held*, that C. was not thereby made co-trustee in the trusts created by such will, and might lawfully purchase lands embraced in such trust.—Simpson v. Cook, 24 Minn. 180.

Rights of devisees to proceeds of real estate.

59. Where testator devises all his real estate to named persons, and then provides that his executors may convey such real estate, but does not direct the disposition of the proceeds, the devisees are entitled to such proceeds in lieu of the real estate devised to them.—Ness v. Davidson, (Minn.) 48 N. W. 10; Jaggar v. Same, Id.

45 Minn. 424.

60. Devisees of real estate, which by subsequent provisions of the will the executors are authorized to convey, the proceeds to be distributed to such devisees, cannot so incumber the real estate as that the executors will be obliged to convey, if at all, subject to the incumbrances.—Ness v. Davidson, (Minn.) 48 N. W. 10; Jaggar v. Same, Id.

45 Minn. 424.

Election—Between deed and will.

61. A testatrix conveyed by deed a portion of a lot to one of her sons. Afterwards, by will, she devised the entire lot, including that portion thereof previously conveyed by her, to her three sons, including the grantee in the deed referred to, share and share alike. *Held*, upon the probate of the will, that such grantee was required to elect whether he would relinquish his own property and take under the will; and that, if he elected to retain his own property and against the will, he was not entitled to a partition of the remainder of the lot, but equity will appropriate the gift made by the will to him, to compensate the other beneficiaries under it.—Brown v. Brown, (Minn.) 44 N. W. 250.

42 Minn. 270.

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Election—By widow between marriage settlement and will.

62. A marriage settlement gave to the wife during her life the usufruct of certain land. A will of the husband made certain bequests, and then devised all his property "which should remain to him" at his death. *Held*, that it was not the intention of testator to dispose of his wife's interest under the marriage settlement, and she was not put to an election, but could hold both under the settlement and the will.—Sherman v. Lewis, (Minn.) 46 N. W. 318.

44 Minn. 107.

—— By widow between statutory estate and will.

63. The first clause of a will contained a bequest to the wife of the testator of a gold watch and chain, "in addition to the amount now allowed her by law out of my estate, and which it is my will she shall have on my decease." Subsequent clauses devised and bequeathed all the residue of testator's estate, in certain specific shares and portions, to his four children. At the death of the testator, he left surviving him his wife and three of the children named in the will, the fourth having died without issue. *Held*, that the widow took, under the will, in addition to the watch and chain, the same share of the estate as the law in force at the date of the will would have give her had testator then died intestate; and that in addition thereto she was entitled, under the statutes of descent and distribution, to one-third of the devise and legacy which lapsed by reason of the death of the devisee and legatee without issue during testator's life-time.—Johnson v. Johnson, 21 N. W. 725, 32 Minn. 513.

64. Although the statutory estate given by Laws Minn. 1875, c. 40, Laws 1876, c. 37, § 3, to a surviving wife, in lieu of dower, in an undivided one-third of the lands of the husband, in fee-simple, "free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing," cannot be divested by a devise not assented to in writing, a surviving wife may be compelled to elect between such statutory estate and the provision made for her by her husband's will, which disposes of all his lands in which she is by law entitled to such estate, by a devise valid except for her legal rights therein.—In re Washburn's Estate, (Washburn v. Van Steenwyk,) 20 N. W. 324, 32 Minn. 336.

—— By probate court on behalf of widow.

65. Under Const. Minn. art. 6, § 7, giving probate courts jurisdiction "over the estates of deceased persons and persons under guardianship," a probate court has power where the question is involved in the settlement or distribution of the estate of a testator pending before it, to construe his will, in order to determine whether, under its provisions, there is a case for an election on the part of his widow; and, if there be such a case, and she be incompetent to make such election in person, by reason of insanity, the court, having appointed a guardian over her estate, has the power to make such election for her, or instruct her guardian to make it under the directions of the court.—State v. Ueland, 15 N. W. 245, 30 Minn. 277.

66. A testator, domiciled with his wife in Wisconsin, and owning land in Wisconsin and Minnesota, died in Wisconsin, leaving his wife surviving, but insane. In a suit for construction of the will, to which the widow and all parties interested were made parties, it was finally decided by the supreme court of Wisconsin that the will made a case for election by the widow, and the court elected for her to take under the will. *Held*, that such determination was conclusive between the parties as to the construction of the will, and that the election so made, there having been no previous election elsewhere, was effectual everywhere as the election of the widow, and precluded a different choice in respect to lands in Minnesota; that although a probate court in Minnesota, in the course of administration with respect to the lands in that state, had made an election in behalf of the widow to take against the will, prior to the final election made in Wisconsin, as an appeal had been taken therefrom which had the effect to transfer the cause to the district court for trial *de novo*, pending which such election was made by the supreme court of Wisconsin, the election by the probate court in Minnesota did not conclude the parties, nor control the judgment of the district court.—In re Washburn's Estate, (Washburn v. Van Steenwyk,) 20 N. W. 324, 32 Minn. 336.

VII. Contracts to Make Wills.

Validity and effect.

67. A party to a contract may obligate himself for a valuable consideration to make his will in a particular way, or to give certain specific property to a particular person, so as to bind his estate.—Newton v. Newton, (Minn.) 48 N. W. 450.

46 Minn. 33.

Winona, City of.

Contracts by, see *Municipal Corporations*, 114-116.
School-districts, see *Schools and School-Districts*, 6, 7.

Winona & St. Peter Railroad Company.

Exemption from taxation, see *Railroad Companies*, 126, 127, 137.

WITNESS.

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Wife as witness against husband, see *Adultery*, 4.

I. Competency.

a. *In General.*

Mental capacity.

1. Gen. St. Minn. 1878, c. 73, § 7, provides that "all persons except as hereinafter provided, having the power and faculty to perceive and to make known their perceptions to others, may be witnesses." Section 9 provides that persons "who are of unsound mind or intoxicated at the time of their production for examination" shall not be competent as witnesses. *Held*, persons intoxicated and of unsound mind are not wholly disqualified, but are competent if they have such an understanding as enables them to retain in memory the events of which they have been witnesses, and understanding sufficient to appreciate the obligation of an oath.—Cannady v. Lynch, 8 N. W. 164, 27 Minn. 435.

2. An allegation in a complaint that plaintiff had theretofore been adjudged insane, and had been confined for two years in a lunatic asylum, whence she was afterwards discharged, is not such an admission of plaintiff's insanity at the time of the trial as will disqualify her as a witness.—Cannady v. Lynch, 8 N. W. 164, 27 Minn. 435.

Understanding of obligation of oath.

3. Where a witness understands that he is brought into court to tell the truth, that it is wrong to tell a lie, and that he will be punished if he does tell a lie, he has sufficient understanding of the obligation of an oath to be competent.—State v. Levy, 23 Minn. 104.

Husband and wife.

4. Under Gen. St. Minn. 1878, c. 73, § 10, providing that a wife cannot be examined "for or against her husband without his consent; nor can either during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other,"—a wife cannot testify against her husband in an action by him against a defendant for enticing her away.—Huot v. Wise, 6 N. W. 425, 27 Minn. 68.

5. In an action by a judgment creditor of a husband to subject land conveyed to his wife on a purchase and payment of the price thereof by the husband to the judgment, to the extent of the wife's interest therein, in which the husband is not made a party, the wife is a competent witness for plaintiff, without the consent of the husband, as her testimony is not "for or against her husband."—Leonard v. Green, 16 N. W. 399, 30 Minn. 496.

6. Neither Laws Minn. 1889, c. 72, nor Laws 1885, c. 193, affects, except in the statutory proceeding in aid of execution, the rule in Gen. St. Minn. c. 73, § 10, that a husband cannot be examined against his wife without her consent, nor the wife against her husband without his consent.—Wolford v. Farnham, (Minn.) 46 N. W. 295.
44 Minn. 159.

7. That a wife refuses to consent that the adverse party may examine her husband as a witness against her, does not preclude her from calling him in her own behalf.—Wolford v. Farnham, (Minn.) 46 N. W. 295.
44 Minn. 159.

Co-defendant in criminal case.

8. Under Rev. St. Minn. p. 20, § 93, allowing parties and others to be witnesses in derogation of the common law, and providing that "no defendant in a criminal action or proceeding shall be a witness therein for himself," one defendant is not competent as a witness on behalf of a co-defendant until after discharge or judgment against the defendant whose testimony is offered, whether such defendants be tried together or separately, and the rule is the same whether the offense charged be a simple assault or a graver crime.—Baker v. United States, 1 Minn. 207, (Gil. 181;) State v. Dumphey, 4 Minn. 438, (Gil. 340.)

9. Laws Minn. 1868, c. 70, p. 110, providing that, "in the trial of all indictments, complaints, and other proceedings against a person charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness," does not include a co-defendant not on trial, so as to except him from the general rule as to competency.—State v. Dee, 14 Minn. 35, (Gil. 27.)

b. *Privileged Communications.*

Husband and wife.

10. Gen. St. Minn. 1878, c. 73, § 10, providing that neither husband nor wife can, "during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage," includes all private conversations between husband and wife, though on subjects not confidential in their nature.—Leppla v. Minnesota Tribune Co., 29 N. W. 127, 35 Minn. 310.

Attorney and client.

11. A request to an attorney to appear in and defend an action is not a privileged communication, and the fact of the retainer or employment may be proved by the testimony of the attorney.—Eickman v. Troll, 12 N. W. 347, 29 Minn. 124.

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12. On trial of an appeal from an order admitting a will to probate, an attorney at law, who had been testator's attorney, was permitted to disclose communications made to him by deceased on business matters, and the advice and counsel given thereon. The object was to lay a foundation for the admission in evidence of the opinion of said attorney as to the sanity of the testator, and there was nothing in the testimony which in any manner reflected upon the character or reputation of the deceased. *Held*, that contestant, who was one of the heirs at law of the deceased, could not exclude such testimony on the ground of privileged communications. — In re Layman's Will, (Minn.) 42 N. W. 286.*

40 Minn. 371.

13. An attorney is not obliged to produce a writing intrusted to him by his client, or to disclose its contents, without his consent, but he may be required to state whether he has it in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents.—Stokoe v. St. Paul, M. & M. Ry. Co., (Minn.) 42 N. W. 482.

40 Minn. 545.

14. The rule relating to privileged communications does not apply to questions put to a client as to statements made by him to his attorney.—State v. Tall, (Minn.) 45 N. W. 449.

43 Minn. 273.

Physician and patient.

15. Information acquired by a physician otherwise than in a professional capacity, and not necessary to enable him to prescribe or act for the patient, is not privileged under Gen. St. Minn. 1866, c. 73, § 10, subd. 4, (Gen. St. 1878, c. 73, § 10.)—Jacobs v. Cross, 19 Minn. 523, (Gil. 454.)

c. *Transactions with Deceased and Insane Persons.*

Interest of witness.

16. Under Gen. St. 1866, c. 73, tit. 1, § 8, providing that, where one party to a contract is dead, the other party shall not be admitted to testify as to such contract in his own favor, etc., such surviving party cannot testify in his own favor as to such contract in an action where he is interested, although he is not a party to the record.—Allen v. Baldwin, 22 Minn. 397.

17. In a proceeding by an administrator *de bonis non* against an administratrix who had been removed for a final settlement of her accounts, the administratrix contended that, as to certain property, a partnership had existed between decedent and one G.; that G. had taken possession of such property as surviving partner; and that therefore she was not liable therefor as administratrix. *Held*, that G. was not disqualified from testifying as to conversations with decedent tending to show the existence of the partnership, by Gen. St. Minn. c. 73, § 8, which prohibits "a party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties;" it appearing that G. was not a party or in privity with either of the parties, that he had no interest in the estate, as next of kin, creditor, etc., nor was he interested in the event of the proceeding, since a judgment therein would not conclude him on the question of the partnership. — Marvin v. Dutcher, 4 N. W. 685, 26 Minn. 391.

18. S. executed a chattel mortgage to A. for consideration furnished by F. *Held*, in an action by A. against B., a creditor of S., after the death of F., to recover the property which had been levied upon under an execution against S. by B., he claiming such mortgage to be fraudulent, that S. was a competent witness for A. to prove the transaction.—Foster v. Berkey, 8 Minn. 351, (Gil. 310.)

19. Gen. St. Minn. 1878, c. 73, § 8, excluding the testimony of parties to an action, and persons interested therein, as to conversations or admissions of a deceased party in regard to matters at issue, does not operate to exclude testimony by one not a party, nor interested, to show that the conditions of a mortgage given by plaintiff to deceased were different from those expressed in the instrument, and had been discharged, when such testimony is independent of any conversation had with deceased.—Harrington v. Samples, (Minn.) 30 N. W. 671.

36 Minn. 200.

20. In an action to reform an insurance policy and to recover on the reformed policy, the issue was whether there had been an agreement between the insurance agent, since deceased, and plaintiff's agent, for insurance on the property omitted from the policy. Plaintiff's agent testified as to conversations with the deceased insurance agent as to the agreement between them prior to issuing the policy. It appeared, after the evidence was received, under objection, that the witness was a member of a partnership which was a stockholder in plaintiff corporation. *Held* error not to strike out the evidence, as it related to transactions with a decedent, under Gen. St. Minn. 1878, c. 73, § 8.—Farmers' Union El. Co. v. Syndicate Ins. Co., 41 N. W. 547, 40 Minn. 152; Same v. Liverpool & London & Globe Ins. Co., 41 N. W. 548, 40 Minn. 155.

21. Gen. St. Minn. 1878, c. 73, § 8, declaring parties to actions, and persons interested in the event thereof, to be incompetent to testify to conversations with, or admissions of, deceased persons relative to a matter in issue, does not apply to an agent of a party to the action, such agent not being a party, nor having any legal interest in the event of the action.—Darwin v. Keigher, (Minn.) 47 N. W. 314.

45 Minn. 64.

22. In an action against the grand lodge by the beneficiary on a certificate of membership in the Ancient Order of United Workmen, one who joined a subordinate lodge of the order after the death of deceased, where it does not clearly appear that he will be liable to assessment to pay the benefit sued on, or incur other liability thereon, is not incompetent to testify, in behalf of defendant, to conversations with or admissions by deceased, under Gen. St. 1878, c. 73, § 8, making it incompetent for any party interested in the event of an action to testify therein concerning any conversation with or admission of a deceased party; the burden being on the party objecting to a witness to show interest.—Perine v. Grand Lodge A. O. U. W., (Minn.) 50 N. W. 1022.

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What transactions excluded.

23. In the provision of Gen. St. 1866, c. 73, § 8, that, when all the original parties to one side of a contract are dead or insane, the other party or parties shall not be admitted to testify as to such contract in his or their own favor unless the transactions on behalf of the deceased or insane parties were had or performed by an agent, whose testimony is received, the words "as to such contract" are equivalent to the words "as to what took place between the parties to such contract at the time of making the same."—Johnson v. Coles, 21 Minn. 108.

24. Under Gen. St. Minn. c. 73, § 8, providing that "it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane person or party, relative to any matter at issue between the parties," a party to the action or person interested in the result may testify as to any acts of a decedent, though they may have the effect of admissions. The statute applies only to spoken words.—Chadwick v. Cornish, 1 N. W. 55, 26 Minn. 28.

25. In an action on a certificate of membership in a mutual benefit association, by the beneficiary named therein, it was claimed that deceased had changed the beneficiary, and it appeared that he wrote to the company indicating such a change as he desired to make, and that the company wrote to him inclosing a formal revocation and reappointment, to be signed by him and returned, which he failed to do. *Held*, that it was competent for plaintiff to testify that he got the company's letter from the post-office, read it to deceased, and gave it to him, since the statute prohibiting a surviving party from testifying as to any conversation with, or admission of, a deceased person applies to spoken words, and not to acts from which admissions may be implied. Chadwick v. Cornish, 1 N. W. 55, 26 Minn. 28, followed.—Hall v. Northwestern Endowment & Legacy Ass'n, (Minn.) 49 N. W. 524.

47 Minn. 85.

26. Gen. St. Minn. 1878, c. 73, § 8, providing "that it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with or admission of a deceased or insane party or person, relative to any matter at issue between the parties," makes a party to or interested in the event of an action incompetent to testify to a conversation with or admission of any deceased or insane person, whether a party to the action or not, relative to a matter at issue between the parties.—Griswold v. Edson, 21 N. W. 475, 32 Minn. 436.

27. Under Gen. St. Minn. 1878, c. 73, § 8, forbidding a party to the action or one interested in its event to testify as to any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue, testimony by one to whom a certificate of deposit had been paid that the payee, plaintiff's intestate, had given it to him *causa mortis*, is incompetent in favor of defendant bank. — Beard v. First Nat. Bank. (Minn.) 40 N. W. 842.

39 Minn. 546.

28. Where it appears from the testimony of a disinterested witness that the defendants made to plaintiff (deceased since the commencement of the action) the fraudulent representations for which a recovery is sought, defendants are not permitted (under the statute of Minnesota relating to evidence of transactions with decedent) to testify that, in the conversation with the deceased, referred to by such witness, they made no such representations.—Redding v. Godwin, (Minn.) 46 N. W. 563.

44 Minn. 355.

29. Plaintiff executed a note to one S., and gave a chattel mortgage to secure it. After the death of the surety on the note, S. presented this note as a claim against the estate, had it allowed, and paid and transferred it to the administrator, who then took possession of the property covered by the mortgage. Plaintiff, in an action to recover the property, alleged that the note was usurious, and that defendant's intestate knew it was so. *Held*, that plaintiff is competent to testify to the usury, the contract having been made with S., who is still in life; and the case is not within the exceptions mentioned in Gen. Laws Minn. 1879, c. 66, § 5, which provides that, whenever "in any action in any court the defendant shall plead or answer the defense of usury, either party to the action may be a witness in his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except also actions in which the opposite party claims as assignee, and the original assignee is deceased." — Parker v. Maxwell, (Minn.) 47 N. W. 161.

45 Minn. 1.

Receiving testimony of opposite party.

30. The words "is received," as used in Gen. St. Minn. 1866, c. 73, § 8, providing that, when all the parties on one side of a contract are dead or insane, the other party shall not be admitted to testify in his own favor, unless such transaction was had and performed on behalf of the party or parties dead or insane, by an agent whose testimony is received, extend to a case where such evidence is receivable under the rules of evidence, though it may not be offered. —Bigelow v. Ames, 18 Minn. 527, (Gil. 471.)

31. Where the claim was for care, board, clothing, etc., in the family of plaintiff's intestate, and the arrangement with respect to it was made by intestate's wife, she must be regarded as his agent; and if she testifies the testimony of the other party may also be received, under the statute.—McNab v. Stewart, 12 Minn. 407, (Gil. 291.)

32. Proof by plaintiff, an executor, of an admission by the defendant of a liability in favor of the estate, does not waive the protection of the statute, so as to enable the defendant to testify as to conversations with, or admissions of, the deceased party.—Rhodes v. Pray, (Minn.) 32 N. W. 86.*

36 Minn. 392.

II. Examination.

Preliminary examination.

33. Preliminary examination of a witness by the opposite party is proper to show the incompetency of his testimony, but not to show matters in avoidance of the fact to be proved.—Lautenschlager v. Hunter, 22 Minn. 267.

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Leading questions.

34. Allowing leading questions to a witness, evidently ignorant, and unable to speak English, and whose examination, even through an interpreter, was accompanied with some difficulty, being within the discretion of the trial court, cannot be assigned as error.—Blakeman v. Blakeman, 18 N. W. 103, 31 Minn. 396.

35. Where, on an indictment for forgery, the state attempts to prove the crime by the person whose name was forged, and he appears to be hostile and unwilling to tell the truth, he may be asked whether he had not before stated facts to the prosecuting attorney which were contrary to his testimony at the trial.—State v. Tall, (Minn.) 45 N. W. 449.

43 Minn. 273.

Cross-examination.

36. The extent to which the cross-examination of a witness is allowable largely rests in the discretion of the trial court.—Gardner v. Kellogg, 23 Minn. 463.

37. The extent of the cross-examination of a witness on collateral matters, to show his interest, being within the discretion of the trial court, cannot be assigned as error.—Blakeman v. Blakeman, 18 N. W. 103, 31 Minn. 396; Lukens v. Hazlett, 35 N. W. 265, 37 Minn. 441.

38. It is improper, on cross-examination, to assume as true facts which are not in proof.—St. Paul & S. C. R. Co. v. Murphy, 19 Minn. 500, (Gil. 433.)

39. In replevin for goods of which plaintiff claimed to be the general owner, the defense was that the sale to plaintiff was fraudulent. Plaintiff, on the trial, identified a bill of sale to him, proved the execution and delivery to himself, and testified as to the delivery of goods thereunder. *Held*, that defendant might, upon cross-examination, go into all the circumstances of the sale tending to characterize the delivery thereunder as fraudulent. —Dodge v. Chandler, 13 Minn. 114, (Gil. 105.)

40. The boundary line between plaintiff and defendant being in controversy, plaintiff testified that at the time specified he was over the line with defendant, who then showed him the line; and on cross-examination stated that one B. was with them. *Held*, that the further question, "Was B. surveying the line?" was not proper cross-examination.—Jaspers v. Lano, 17 Minn. 296, (Gil. 273.)

41. Where a witness testifies as to the sale and delivery of a reaper, for the price of which the action was brought, on cross-examination it may be shown that notes were given therefor, and such notes may be introduced in evidence.—McCormick v. Miller, 19 Minn. 443, (Gil. 384.)

42. Upon an issue as to the execution of a promissory note, a witness testifying as to its execution may be cross-examined as to all the circumstances connected therewith, including the alleged consideration, and defendant may, for impeachment, contradict him as to every point sworn to by him.—Lamprey v. Munch, 21 Minn. 379.

43. On trial of an indictment for murder of a woman, her husband, testifying for the prosecution, was asked on cross-examination, with a view of charging him, instead of defendant, with the death of the wife, if deceased did not give birth to twins the day after witness married her, and if witness had not stated, before the homicide, that deceased would be assaulted before the week was over. *Held*, in the absence of proof of unfriendly marital relations between witness and deceased, that these inquiries were properly disallowed.—State v. Lautenschlager, 22 Minn. 514.

44. At the trial of an action for personal injuries a medical witness for defendant testified that plaintiff would recover permanently from the injuries, except a slight lameness. *Held*, that on cross-examination it was proper to ask him whether the injury was likely to produce and be followed by specified diseases, in order to ascertain what the witness meant by permanent recovery.—Kelly v. Erie Tel. & Tel. Co., 25 N. W. 706, 34 Minn. 321.

45. Evidence in support of an affirmative defense is properly excluded, when offered as a part of the cross-examination of the plaintiff's witnesses.—Sterling v. Bock, (Minn.) 32 N. W. 865.

37 Minn. 29.

46. The rejection, upon cross-examination, of questions as to the existence of a contract, for indefiniteness, is not prejudicial to the party offering them, since they may be renewed in more definite form.—Fetsch v. Mandehr, (Minn.) 31 N. W. 49.

36 Minn. 295.

47. The exclusion of proper questions on cross-examination is harmless error, if it is manifest that no answer the witness might have made, could in any way affect the result.—Schmidt v. McCarthy, (Minn.) 46 N. W. 239.

43 Minn. 288.

Re-cross-examination.

48. Where a witness has been examined, cross-examined, and dismissed, he can be recalled for further cross-examination only by leave of court, and the court may, in its discretion, regulate the manner and extent of such further cross-examination.—Cummings v. Taylor, 24 Minn. 429.

49. Upon the re-cross-examination of a witness, who had testified to the payment of certain money, he was asked to whom and for what purpose the money was paid. He had not testified as to the purpose of such payment on his re-examination, and on the original cross examination he had been interrogated on the subject, and there had been ample opportunity to examine him thereon. *Held*, that the question was properly excluded, as not proper cross-examination.—Butler v. Bohn, 17 N. W. 862, 31 Minn. 325.

Examination of adverse party.

50. In proceedings to probate a will, a proponent was examined as a witness for the contestants. *Held*, that under Gen. Laws Minn. 1885, c. 193, § 1, providing that a party to the record, or one for whose benefit an action is being prosecuted or defended, is compelled to testify as if under cross-examination, he could be interrogated by contestants concerning statements said to have been made by him to others concerning the mental ca-

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pacity of the deceased.—In re Brown, (Minn.) 35 N. W. 726.
88 Minn. 112.

Use of memoranda — Refreshing memory.

51. A memorandum is admissible as auxiliary to the evidence of the witness, not as a substitute for such testimony, and its accuracy must first be duly certified to by the witness making the same, and he must then be unable to speak from memory without its aid. A memorandum made by a witness from statements made to him by a third person, the correctness of which statements he cannot testify to, is not sufficiently verified to be admitted in aid of his testimony.—Stickney v. Bronson, 5 Minn. 215, (Gil. 172.)

52. Where a witness verifies a plat as showing accurately the relative position of the property in question, he may use it on his examination, to point out the situation and location of the property in question.—Rippe v. Chicago, D. & M. R. Co., 23 Minn. 18.

53. The manner in which a witness shall be allowed to refresh his recollection by reference to memoranda must be left to the trial court, to be exercised with reference to the circumstances of the case and the bearing of the witness.—Johnson v. Coles, 21 Minn. 108.

54. Allowing a witness to refresh his recollection by reference to memoranda is a question of a preliminary nature, addressed to the court, and where a witness has been allowed so to do, unless it clearly appears that the court has erred, a new trial will not be granted.—Madigan v. De Graff, 17 Minn. 52, (Gil. 34.)

55. Permitting a witness to refresh his recollection by referring to a memorandum, without first showing by him his inability to testify independently, is not reversible error, when the occurrences in question occurred three or four years prior to the trial, and involved accounts and payments running over a year; especially so when the witness seems fair and honest in his conduct.—Madigan v. De Graff, 17 Minn. 52, (Gil. 34.)

56. Where a question put to a witness, after he has refreshed his recollection by referring to memoranda, calls for his personal knowledge, and the answer is responsive, the *prima facie* presumption is that it is given of his own knowledge, independent of the writing.—Madigan v. De Graff, 17 Minn. 52, (Gil. 34.)

57. A witness, without it appearing that he did not remember, or that his recollection needed refreshing, was allowed to inspect memoranda made by him. *Held* that, if he remembered without the memoranda, his inspection was merely unnecessary; and if he did not, he had the right of inspection, and error, if any there was, was immaterial.—Chute v. State, 19 Minn. 271, (Gil. 230.)

58. A witness cannot, for the purpose of refreshing his memory, refer to a writing which is not verified as correct.—Eder v. Reilly, (Minn.) 51 N. W. 226.

59. Where a witness is allowed to inspect a paper or writing, for the purpose of refreshing his recollection, the opposing party has a right, for the purpose of cross-examination, to inspect such paper.—Chute v. State, 19 Minn. 271, (Gil. 230.)

Privilege.

60. Under Const. Minn. art. 1, § 7, which provides that no person in a criminal case shall be compelled to be a witness against himself, a defendant in a criminal proceeding cannot be required to testify before the grand jury touching the offense with which he is charged, and if he does so testify the indictment found will be set aside.—State v. Froiseth, 16 Minn. 296, (Gil. 260.)

61. Where questions are put, the answer to which may tend to criminate, it is optional with the witness whether he shall answer. It is the duty of the court to inform him of his privilege, and, if he claim it, the court may exclude similar questions without the form of submitting each question to the witness.—State v. Bilansky, 3 Minn. 246, (Gil. 169.)

62. Allowing questions which do not tend to criminate, but merely to disgrace or degrade, the witness, is discretionary with the trial court.—State v. Bilansky, 3 Minn. 246, (Gil. 169.)

63. In an action for libel, it is error to require a witness to testify whether he wrote the libel in question, the effect of an affirmative answer being to subject the witness to a criminal prosecution.—Simmons v. Holster, 13 Minn. 249, (Gil. 232.)

64. On an indictment for forgery, where the person whose name was forged is called, for the state, to prove that what purports to be his signature is a forgery, he is not entitled to claim the privilege of silence on the ground that his answer might criminate himself.—State v. Thaden, 45 N. W. 447, 43 Minn. 253; Same v. Tall, 45 N. W. 449, 43 Minn. 273.

65. On an indictment for forgery, a motion to strike out all the testimony of a witness on the ground that he was privileged to be silent in order to avoid self-crimination, is properly refused, where a part of his testimony was not covered by the privilege.—State v. Tall, (Minn.) 45 N. W. 449. 43 Minn. 273.

66. At the trial of a bastardy proceeding, a witness, having testified that he knew that the complainant had sexual intercourse with another than the defendant at about the time the child was begotten, was required by the court, against his objection, to state to whom he referred, and testified that he was himself the person. *Held*, that the court did not err, as the witness had waived his privilege by his voluntary testimony.—State v. Nichols, 13 N. W. 153, 29 Minn. 357.

III. Credibility.

Interest.

67. On a prosecution for the unlawful sale of intoxicating liquors, the only testimony to the fact of the sale was that of a private detective. *Held*, that it was error to exclude the question on cross-examination whether the witness had received any money for acting as detective against the liquor sellers, and whether he expected to

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receive any.—State v. Lee, 3 N. W. 345, 26 Minn. 262.

Duress.

68. A witness for the state on a trial for murder stated that on the trial of one R. for the same homicide with which defendant was charged, the testimony given by her, which bore strongly against R. and in exculpation of defendant, was given under threats of personal violence made by defendant. *Held*, that an offer by defendant to prove by a justice of the peace that he and the county attorney before the trial of R. assured the witness officially that she would be protected in telling the truth, was properly excluded as not tending to disprove the duress.—State v. Lawlor, 9 N. W. 698, 28 Minn. 216.

Showing bias.

69. Upon cross-examination of a witness, actual bias or prejudice existing on his part against the party cross-examining, as threats, quarrels, etc., may be shown; but evidence showing that there might be grounds or reason for such prejudice is incompetent.—State v. Bilansky, 3 Minn. 246, (Gil. 169.)

70. A witness may be asked, upon cross-examination, if he has not expressed feelings of hostility towards the party against whom he was called, and the particulars of such hostility, for the purpose of ascertaining its extent and nature.—State v. Dee, 14 Minn. 35, (Gil. 27.)

71. Evidence that plaintiff had brought an action against one of defendant's witnesses is not admissible to show ill feeling by the witness against plaintiff, in the absence of proof as to the effect that such act of plaintiff had on the mind of the witness, to be shown by the latter's acts or declarations. — Wischstadt v. Wischstadt, (Minn.) 50 N. W. 225.

47 Minn. 358.

Charge of crime.

72. On a criminal trial the court has no right, for the purpose of discrediting a witness for defendant, to allow testimony immaterial to the issue, tending to prove an offense distinct from that charged in the indictment.—Hoberg v. State, 3 Minn. 262, (Gil. 181.)

73. In an action on a promissory note a witness was asked, on cross-examination for the purpose of affecting his credibility: "Have you more than one wife living at this time?" *Held*, on appeal, that the admission or exclusion of his answer, the witness not claiming any privilege, was matter of discretion with the court below, and would not be reviewed, unless abuse was shown.—McArdle v. McArdle, 12 Minn. 98, (Gil. 53.)

74. Allowing irrelevant questions to be put to a witness, upon cross examination, tending to criminate, or for the purpose of discrediting his testimony, is matter of discretion with the trial court.—State v. McCartey, 17 Minn. 76, (Gil. 54.)

Conviction of crime.

75. Where defendant in a criminal action became a witness in his own behalf, evidence of his conviction of assault several years previous was admissible as affecting his credibility under Pen. Code Minn. § 531, providing that the record of any crime may be so received.—State v. Sauer, (Minn.) 44 N. W. 115.

42 Minn. 258.

76. Under Pen. Code Minn. § 531, providing that for the purpose of discrediting a witness his conviction of a crime may be shown by the record or by cross-examination, a witness may be asked on cross-examination whether he has been convicted of a crime in a certain court at a given date.—State v. Adamson, (Minn.) 45 N. W. 152.

43 Minn. 196.

Reputation of witness.

77. In impeaching a witness, by attacking his general character, the inquiry should be confined to his general reputation for truth and veracity. —Rudsdill v. Slingerland, 18 Minn. 380, (Gil. 342;) Moreland v. Lawrence, 23 Minn. 84; Warner v. Lockerby, 18 N. W. 145, 821, 31 Minn. 421.

78. In an action for libel, a witness testified as to statements made by a third person, implicating plaintiff in the offense charged in the libel. *Held*, that evidence tending to impeach the general character for truth and veracity of such third person might be allowed.—Simmons v. Holster, 13 Minn. 249, (Gil. 232.)

79. Whether evidence tends directly to prove a fact, or merely raises a presumption that it is so, can never depend on the character of the witness.—State v. Beebe, 17 Minn. 241, (Gil. 218.)

80. The character of a witness for truth and veracity cannot be impeached by evidence of the individual opinions or declarations of the party calling him, or of others, to the effect that he is unworthy of belief.—Horton v. Chadbourn, 17 N. W. 865, 31 Minn. 322.

81. A witness may be discredited by evidence as to his reputation for truth and veracity, but specific and particular acts cannot be shown, except in certain cases.—State v. Barrett, (Minn.) 41 N. W. 459.

40 Minn. 65.

82. Impeaching evidence of the bad reputation of a witness for truth and veracity is not restricted to his reputation at or very near the time of the trial at which he testifies. The limit of time is within the discretion of the court. —Buse v. Page, 19 N. W. 736, 20 N. W. 95; 32 Minn. 111.

Impeaching by showing contradictory acts or statements—Collateral matters.

83. A witness cannot be impeached upon matters collateral to the issue involved.—Allen v. Coates, 11 N. W. 132, 29 Minn. 46; Paddock v. Kingsley, 43 N. W. 393, 41 Minn. 528.

84. A witness can be discredited by contradiction only as to matters material to the issue.—State v. Staley, 14 Minn. 105, (Gil. 75.)

85. A witness cannot be impeached by contradicting him as to immaterial testimony elicited

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by cross-examination.—Derby v. Gallup, 5 Minn. 119, (Gil. 85.)

86. A witness cannot be impeached by showing contrary statements made by him, unless such statements are relevant to the issue; and when allowed they are to be regarded strictly as impeaching and not as substantive testimony.—Hicks v. Stone, 13 Minn. 434, (Gil. 398.)

87. In a controversy involving the *bona fides* of a transfer of goods, the testimony of witnesses as to the amount and nature of the alleged consideration thereof is material to the issue, and may be impeached by contradictory statements made by the witnesses out of court on those points.—Hicks v. Stone, 13 Minn. 434, (Gil. 398.)

88. When a witness testifies that he made a payment at a certain time, and, on cross-examination, that he knows he so made it because he "sold" a piece of land about that time, the record of the deed is not admissible to show that the sale was at a later time, since the deed could only show the date of the conveyance and not the date of the sale.—Goodell v. Ward, 17 Minn. 17, (Gil. 1.)

89. In an action for injuries from a fire, alleged to have been set by a locomotive, a witness having testified that he saw the fire which caused the injury start from another source, it was proper, for the purpose of impeachment, to ask him if he had not stated at a certain time and place that it started from the locomotive.—Hoy v. Chicago, M. & St. P. Ry. Co., (Minn.) 48 N. W. 1117.

46 Minn. 269.

Impeaching by showing contradictory acts or statements—Laying foundation.

90. Testimony as to what a witness testified in another and former trial between different parties is inadmissible, without first calling his attention to such testimony, that he may have an opportunity to explain.—Castner v. Gunther, 6 Minn. 119, (Gil. 63.)

91. A witness cannot be discredited by showing acts and declarations inconsistent with his testimony on the stand, without first calling his attention to such acts and declarations.—Scott v. King, 7 Minn. 494, (Gil. 401.)

92. To lay the foundation for showing that a witness has made a contradictory statement out of court, his attention should be called to the time, place, and persons involved in the supposed contradiction, with such reasonable certainty as to recall it to his mind, so that he may have an opportunity to correct his statement on the stand, or explain what he has said elsewhere. The precise date need not be indicated.—State v. Hoyt, 13 Minn. 132, (Gil. 125.)

93. It is only as to matters to which the attention of the witness is particularly called that he can be impeached by showing that he has made statements inconsistent therewith; and, having testified as to this on a trial for homicide, the impeaching witness cannot testify as to the further conversation had at the time.—State v. Staley, 14 Minn. 105, (Gil. 75.)

94. At the trial of an action for the recovery of personal property taken on execution against plaintiff's husband, the husband gave testimony tending to show that the property was plaintiff's, and not his. *Held* that, on his cross-examination, it was competent to show conduct and statements by him inconsistent with his testimony, and, on his denying it, to contradict him.—Ladd v. Newell, 24 N. W. 366, 34 Minn. 107.

95. Contradictory extrajudicial statements cannot be introduced in evidence for the purpose of impeachment until the foundation is laid by the proper preliminary inquiries of the witness whose credibility is questioned.—Watson v. St. Paul City Ry. Co., (Minn.) 43 N. W. 904.

42 Minn. 46.

96. Where it is sought to impeach the statements of a witness by proof of his admissions contained in a deposition or other writing signed by him, the proper foundation should be laid therefor as in other cases, by first directing his attention to the particular matters in question, and giving him an opportunity to explain.—Hammond v. Dike, (Minn.) 44 N. W. 61.

42 Minn. 273.

—— Evidence admissible for purposes of contradiction.

97. The admissibility of former statements of a witness, inconsistent with his testimony, offered for the purpose of impeachment, does not depend on the degree of their variance from such testimony. They are competent if they differ in any material particular from the evidence given, and their effect on the credit of the witness is for the jury to determine.—Tinklepaugh v. Rounds, 24 Minn. 298.

98. When a proper foundation is laid, a witness may be impeached by showing that he has elsewhere made statements on some matter material to the issue, contradictory to those made on the witness stand. If such statements are confessions, the court should first pass on their admissibility, as if impeachment of the witness was not involved. If they are not confessions, the court should charge the jury that statements not voluntarily made, but induced by fear or by the hope of an advantage, should be rejected, and not considered.—State v. Barrett, (Minn.) 41 N. W. 459.

40 Minn. 65.

99. On an indictment for forgery, a letter written by one jointly indicted with defendant to a witness proposing that he shall testify in support of a certain line of defense, which proposal corresponds to the testimony actually given by such witness, and which appears on its face to be a mere fabrication, is admissible to impeach such witness.—State v. Tall, (Minn.) 45 N. W. 449.

43 Minn. 273.

100. The official stenographer's notes of the testimony of a witness at a former trial, recognized by such witness as correct, are admissible to show that he has changed or added to his testimony at the present trial.—Bennet v. Syndicate Ins. Co., (Minn.) 44 N. W. 794.

43 Minn. 45.

101. Where it is sought to impeach the credit of a witness by contradictory statements by him contained in a letter or other writing, the production of such writing cannot be dispensed with

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by allowing evidence of extrajudicial admissions of its contents, made by a party to the suit. If the paper is lost, that fact must be established before secondary evidence can be received.—Horton v. Chadbourn, 17 N. W. 865, 31 Minn. 322.

Rebutting impeaching testimony.

102. Affidavits made by a witness some years previous, in another proceeding, were offered for purpose of impeachment. *Held*, that he might be allowed to explain the circumstances under which they were made. — Yale v. Edgerton, 14 Minn. 194, (Gil. 144.)

103. Where a witness, on cross-examination, denies having made certain statements out of court, time and place being specified, and testimony contradicting him is introduced, he may be afterwards recalled by the opposite party, and further examined as to such matter.—Jaspers v. Lano, 17 Minn. 296, (Gil. 273.)

104. A witness who is called to contradict another witness by showing contradictory statements made out of court may himself be contradicted in the same manner. — State v. Lawlor, 9 N. W. 698, 28 Minn. 216.

105. Testimony that impeaching witnesses belonged to a village "faction" opposed to that to which the person impeached belonged, is too vague and remote.—Holston v. Boyle, (Minn.) 49 N. W. 203.

46 Minn. 432.

Impeaching one's own witnesses.

106. Upon a trial for polygamy the second wife, called by the state, stated that she was not married to the prisoner. *Held*, that she might properly be asked if she had not stated to others that she was so married; such question not being asked to impeach her, but to lead her to correct her testimony, or to show the purpose of the prosecution in calling her. — State v. Johnson, 12 Minn. 476, (Gil. 378.)

Question for jury.

107. The credibility of a witness, knowingly testifying falsely as to one or more material facts, is, as to other facts, entirely for the jury, and they may believe or disbelieve him, as they see proper.—Schuek v. Hagar, 24 Minn. 339.

IV. Attendance and Fees.

Attachment of witness.

108. To entitle a party to an attachment for an absent witness he must have duly subpœnaed such witness. It is no excuse that the witness had been subpœnaed by the other side, and examined.—Beaulieu v. Parsons, 2 Minn. 37, (Gil. 26.)

Commitment to await trial — Recognizance for appearance.

109. Under Laws Minn. 1868, c. 71, providing that on affidavit filed by the prosecuting attorney, stating that affiant has good reason to believe that certain persons, material witnesses, will leave the state before the trial, the court may order such persons brought before it, and, if in its judgment the circumstances of the case or the interests of the state warrant it, may require such person to enter into a recognizance, with or without surety, as it might direct, and for a refusal to comply commit him to jail to await the trial, a witness for the state, who is willing to enter into his own recognizance to appear and testify at the trial, cannot be committed to await the trial, unless he intends to leave the state, and not return or be present at the trial, or otherwise evade his obligation to appear and testify, and, as thus construed, the act is not unconstitutional.—State v. Grace, 18 Minn. 398, (Gil. 359.)

110. Where one accused of felony has been held to answer in the district court, the prosecution is deemed "pending" in such court, within the meaning of Laws Minn. 1868, c. 71, providing for the compulsory attendance of witnesses by committing them to jail, or holding them to bail, though the return of the magistrate may not have been filed.—State v. Grace, 18 Minn. 398, (Gil 359.)

Compensation—In general.

111. In the absence of a special agreement for a different sum, a person attending as a witness at the request of a party, and without a subpœna is only entitled to recover for his services and expenses in that behalf the statutory compensation allowed in such cases.—Holbrook v. Cooley, 25 Minn. 275.

—— In criminal cases.

112. Under Gen. St. 1866, c. 70, § 7, which fixes the fees of witnesses "for attending in any justice's court," and section 41, which authorizes the county attorney to summon witnesses "without paying or tendering fees in advance," witnesses for the state in a criminal case are entitled to their fees, and it is proper to tax them in the costs against defendant, where costs are allowable.—State v. Bliss, 21 Minn. 458.

—— Of parties.

113. A defendant is not entitled to fees for attendance as a witness in a cause except where he attends solely as a witness for his co-defendants.—Barry v. McGrade, 14 Minn. 286, (Gil. 214.)

—— Of expert witnesses.

114. Gen. St. Minn. 1878, c. 70, § 8, providing for the allowance of fees or compensation to a witness summoned or sworn and examined "as an expert in any profession or calling," does not apply to cases where a witness, skilled in some profession or calling, is called upon to testify as to facts within his personal knowledge, although he may have acquired his knowledge of the facts while in the ordinary practice of his profession, and although his professional skill may have enabled him to observe such facts more intelligently and to narrate them more correctly.—Le Mere v. McHale, 15 N. W. 682, 30 Minn. 410.

115. A physician and surgeon upon the stand as a witness cannot properly refuse to answer a question upon the ground that his answer will be expert evidence, and that he has not been summoned or paid as an expert witness.—State v. Teipner, (Minn.) 32 N. W. 678.

36 Minn. 535.

116. The provision of the statute (Gen. St. 1878, c. 70, § 8) which authorizes a judge to allow to an

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expert witness "such fees or compensation as may be just and reasonable," has reference to an allowance to be made *after* the witness has been summoned and dismissed without being sworn or examined, or *after* he has been sworn and examined, and not before.—State v. Teipner, 32 N. W. 678, 36 Minn. 535.

117. Under Gen. St. Minn. 1878, c. 70, § 8, providing that the judge of any court of record before whom a witness is summoned or sworn and examined as an expert "may, in his discretion, allow such fees or compensation as, in his judgment, may be just and reasonable," the order of a trial judge refusing such allowance will not be reversed on appeal, unless, perhaps, where there has been a most palpable and gross abuse of discretion.—Le Mere v. McHale, 15 N. W. 682, 30 Minn. 410.

Women.

Eligibility as officers of school-districts, see *Schools and School-Districts*, 16-20.

WORDS AND PHRASES.

Abide.

See § 715, *post*.

Abide and satisfy.

1. A bond to stay proceedings on appeal, conditioned, as required by Gen. St. Minn. 1878, c. 86, § 10, to "abide and satisfy the judgment or order which the appellate court may give therein," is, in substance, where the appeal is from an order directing payment of a sum of money, an undertaking to pay such sum if the order is affirmed.—Erickson v. Elder, 25 N. W. 804, 34 Minn. 370.

About.

2. In an answer alleging the making of an agreement "about two weeks prior" to the time when a note became due. Is as much indicative of a little less as of a little greater period; and, in connection with an allegation of payment "in about ten days thereafter," fails to show, with sufficient certainty, payment before maturity.—Colter v. Greenhagen, 3 Minn. 126, (Gil. 74.)

Abstract of title.

3. In conveyancing. An abstract or summary of the most important part of the deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order, and intended to show the origin, course, and incidents of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, liens, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised. Burrill, Law Dict.—Banker v. Caldwell, 3 Minn. 94, (Gil. 46.)

Accept.

4. In Act Cong. 1875, c. 137, as amended by Act 1888, c. 866, relating to the removal of causes to the United States courts, and providing that it shall be the duty of the state court to accept the petition for removal and bond. Implies that the court is to act upon the petition and bond.—Roberts v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 51 N. W. 478.

Acceptance.

5. There may be an acceptance of goods sold without any receipt of them; as, where the sale is of specific goods, and the bargain itself identifies the goods as those sold, and of the quality which the buyer agrees to take.—Simpson v. Krumdick, 10 N. W. 18, 28 Minn. 352.

Accessory before the fact.

6. One who aids and abets in the commission of an offense, though not present.—State v. Beebe, 17 Minn. 241, (Gil. 218.)

Accomplice.

7. One who is in some way concerned or associated in the commission of a crime; a partaker of the guilt; one who aids or assists, or who is an accessory.—State v. Quinlan, 41 N. W. 299, 40 Minn. 55.

Accountable receipt.

8. In Gen. St. Minn. 1878, c. 96, § 1, punishing forgery, etc., of "any accountable receipt for money, goods, or other property." A written acknowledgment of the receipt, by the maker of it, of money or other personal property, coupled with a promise or obligation to account for or pay to some person the whole or some part thereof.—State v. Riebe, 7 N. W. 262, 27 Minn. 315.

Acknowledgment.

9. In Gen. St. Minn. 1878, c. 39, § 3, providing that no chattel mortgage shall be notice of any fact, as against creditors, etc., unless "acknowledged before some officer authorized to take the acknowledgment of deeds." The acknowledgment includes the due certificate of the fact by the officer taking the same.—Thompson v. Scheid, 38 N. W. 801, 39 Minn. 102.

Action.

10. In Gen. St. Minn. 1878, c. 66, § 79, limiting the time within which an action for relief on the ground of fraud may be brought. Means a civil action, as defined in chapter 66, § 1, embracing both legal and equitable actions.—Humphrey v. Carpenter, 39 N. W. 67, 39 Minn. 115.

Action for the recovery of real property.

11. In Gen. St. Minn. 1878, c. 75, § 11, allowing a second trial "in an action for the recovery of real property." Refers to an action in the nature of the common-law ejectment, and includes also proceedings under the statute of forcible entries and unlawful detainers for recovery of possession of real property.—Ferguson v. Kumler, 25 Minn. 183.

12. The action must be one in which the recovery of possession is sought; the statute does not include all actions in which the title may come in question and be determined.—Knight v. Valentine, 29 N. W. 3, 35 Minn. 367.

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Act of God.

13. In legal phraseology means an accident against which ordinary skill and foresight is not expected to provide; as applied to water courses, includes only floods or extraordinary freshets, and not such rises or high water in a stream as is usual and ordinary and reasonably anticipated at particular periods of the year.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

Actual and continued change of possession.

See §§ 103, 104, *post.*

Actual damages.

14. Damages pecuniary in their nature.—Clementson v. Minnesota Tribune Co., 47 N. W. 781, 45 Minn. 303.

Actual residence.

See §§ 659-662, *post.*

Adjudged invalid.

15. In Laws Minn. 1862, March 11, § 8, providing that in case the title of a purchaser at tax sale "shall be adjudged invalid," the purchaser shall have and retain the lien of the state, etc. Means so adjudged by the judgment of a court of competent jurisdiction.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

Administer.

16. The words "shall well, truly, and faithfully administer," in the condition of an administrator's bond, mean to fulfill the functions and perform the duties of an administrator.—Lanier v. Irvine, 21 Minn. 447.

17. So, also, as to the words "administer according to law."—Balch v. Hooper, 20 N. W. 124, 32 Minn. 158.

Administrator.

18. In Gen. St. Minn. 1878, c. 53, § 16, allowing an administrator to defend an action against a decedent which survives. Includes foreign as well as domestic administrators.—Brown v. Brown, 28 N. W. 238, 35 Minn. 191.

Admission.

See § 143, *post.*

Adopted.

19. Used in the records of a municipal council with reference to a report made by one of its committee. Expresses the adoption by the council of what was recommended by the committee.—State v. Minneapolis & St. L. Ry. Co., 39 N. W. 153, 39 Minn. 219.

Adoption.

20. By a corporation of a contract made by promoters before its organization. Is in legal effect the making of a contract of the date of the adoption, and not as of some former date.—McArthur v. Times Printing Co., (Minn.) 51 N. W. 216.

Adultery.

21. In a statute making it a ground for divorce. Includes illicit connection by a married man with an unmarried woman, as well as with a married woman.—Pickett v. Pickett, 7 N. W. 144, 27 Minn. 299.

Adverse possession.

22. Such actual, visible, notorious, distinct, and hostile possession as would, if continued for the period required by the statute of limitations, ripen into a perfect title.—Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

23. Must be accompanied by an intention to claim adversely.—Sherin v. Brackett, 30 N. W. 551, 36 Minn. 152.

Aggrieved.

24. In Gen. St. Minn. 1878, c. 13, giving "any person who shall feel himself aggrieved" a right to appeal to the district court from the order of town supervisors, laying out, altering, or discontinuing a road. A person is aggrieved, within the meaning of the statute, who is in a position to be injuriously affected by the order or determination made; in position to sustain special injury, disadvantage, or inconvenience, not common to himself with the other inhabitants or property owners of the town.—Schuster v. Supervisors of Town of Lemond, 6 N. W. 802, 27 Minn. 253.

Alley.

25. A narrow passage or way in a city, as distinguished from a public street.—Winston v. Johnson, 45 N. W. 958, 42 Minn. 398.

All the officers of the county.

26. In Gen. St. Minn. 1866, c. 64, § 33, providing that for judicial purposes, to effect civil rights, all the officers of the county to which another is attached, necessary to effect the same, shall have power, etc. Means the officers whose duties related to the enforcement of civil rights, through the district courts, as the sheriff, and not those whose duties lie in another field, as the county treasurer, register of deeds, etc.—Beebe v. Fridley, 16 Minn. 518, (Gil. 467.)

Amendatory statute.

27. A law for the amendment, not of what might have been enacted under the title of the original statute, but of what was enacted; not of what the original law might have been, but of what it was.—State v. Smith, 28 N. W. 241, 35 Minn. 257.

Amount claimed in the complaint.

28. In Gen. St. Minn. 1878, c. 65, § 113, allowing an appeal from a justice where the amount claimed in the complaint exceeds $30. Cannot be construed as equivalent to the words "amount for which judgment was demanded by either party in his pleadings," and does not authorize an appeal merely because the answer contains a counterclaim for more than $30.—Ross v. Evans, 14 N. W. 897, 30 Minn. 206.

Amount in controversy.

29. In Const. Minn. art. 6, § 8, providing that no justice shall have jurisdiction in a civil action where the amount in controversy exceeds $100. Is identical in meaning with "the sum claimed," as used in Gen. St. Minn. 1866, c. 65,

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§ 5, limiting a justice's jurisdiction to like cases where the sum claimed does not exceed $100.—Barber v. Kennedy, 18 Minn. 216, (Gil. 196.)

30. The words have reference to the subject of the litigation of which the costs are a mere incident, and do not include such costs.—Watson v. Ward, 6 N. W. 407, 27 Minn. 29.

31. In Gen. St. Minn. 1878, c. 64, § 82, limiting the jurisdiction of the municipal court of the city of St. Paul to civil actions "where the amount in controversy does not exceed $200." Interest, subsequent to the finding, is not included.—Conger v. Nesbitt, 15 N. W. 875, 30 Minn. 436.

32. The jurisdiction is determined by the amount claimed.—Wagner v. Nagel, 23 N. W. 308, 33 Minn. 348.

Appeal.

33. Save so far as its meaning is controlled or influenced by statute, an appeal is a proceeding by which a case is taken from an inferior to a superior tribunal, the determination of the former thereby vacated or suspended, and the case brought before the latter to be tried and determined de novo.—Dutcher v. Culver, 23 Minn. 415.

Appear.

34. Designating the act of a person with reference to an action pending. To come into court as a party to the suit.—Schroeder v. Lahrman, 1 N. W. 801, 26 Minn. 87.

Appear by affidavit.

35. When a certain state of facts is required to appear by affidavit, the legal evidence tending to establish the required facts must be such as would be received in the ordinary course of judicial proceedings, and not conclusions, opinions, or hearsay.—Mackubin v. Smith, 5 Minn. 367, (Gil. 296.)

Appellate jurisdiction.

36. In Const. Minn. art. 6, § 2, conferring appellate jurisdictions upon the supreme court, has the same signification as article 6, § 5, prescribing the appellate jurisdiction of the district court.—Tierney v. Dodge, 9 Minn. 166, (Gil. 153.)

Application.

37. Referred to in a policy of insurance. A letter requesting the issue of a policy may be regarded as an application therefor.—Scheffer v. National Life Ins. Co., 25 Minn. 534.

38. In Gen. St. Minn. 1878, c. 53, requiring, for the purpose of effecting an appeal to the district court, that an application for such appeal shall be filed in the probate court. Service and filing of notice of appeal is a sufficient application.—Lake v. Albert, 35 N. W. 177, 37 Minn. 453.

Appurtenances.

39. In the provision of the mechanic's lien law giving a lien for constructing, altering, or repairing houses, buildings, or appurtenances. Includes buildings on the opposite side of the street from the main building, constructed and designed to be used in connection therewith.—Carpenter v. Leonard, 5 Minn. 155, (Gil. 119.)

40. Does not include property used in different branches of the same business, which may be carried on separately, and which derives the power necessary to carry them on from a common source.—McDonald v. Minneapolis Lumber Co., 9 N. W. 765, 28 Minn. 262.

Article of personal property.

41. In Gen. St. Minn. 1878, c. 39, § 14, punishing any person who, "having conveyed any article of personal property by mortgage," shall sell the same with intent to defraud, etc. Means any kind of personal property; any personal property.—State v. Williams, 21 N. W. 746, 32 Minn. 537.

Article of produce or traffic.

42. In Laws Minn. 1883, c. 138, § 2, incorporating the Lumbermen's Board of Exchange, and empowering it to appoint persons to examine various articles specified, and "any other article of produce or traffic, commonly dealt in by the members of such corporation." Applies to logs afloat.—State v. Lumbermen's Board of Exchange, 23 N. W. 838, 33 Minn. 471.

As.

43. Preceding a word indicating representative character; as agent, trustee, etc. Means in the character of.—Hayes v. Crane, (Minn.) 50 N. W. 925.

44. In Rev. St. U. S. § 5056, providing that an action shall not be maintained against an assignee in bankruptcy, for anything done by him as such assignee, without previously giving him notice of such action, etc. The words "anything done by him as such assignee," include all things which an assignee assumes to do as such, and which he is by law authorized to do in any circumstances.—Haven v. Place, 11 N. W. 117, 28 Minn. 551.

45. In Gen. St. Minn. 1878, c. 77, § 5, providing that a person who interferes with the property of a deceased person is liable to the executor "as" general or special administrator, etc. Should be read "or."—Noon v. Finnegan, 13 N. W. 197, 29 Minn. 418.

As to such contract.

46. In Gen. St. Minn. 1866, c. 73, § 8, providing that when the original parties to one side of a contract are dead, the other parties thereto shall not be allowed to testify "as to such contract." Equivalent to the words, "as to what took place between the parties to the contract, at the time of making the same," including, with perhaps other things, the making and contents of the contract.—Johnson v. Coles, 21 Minn. 108.

Assault.

47. Is a statement of an act, and has a well-defined legal meaning, without the necessity of further detail.—State v. Ward, 28 N. W. 192, 35 Minn. 182.

See, also, § 370, *post.*

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Assent.

48. In Gen. St. Minn. 1878, c. 34, § 142, (Laws 1873, c. 11, § 23,) providing that directors of a corporation assenting to a violation of the provisions of the act under which it is organized and established, whereby it becomes insolvent, shall be liable, etc. A director's assent will be presumed from knowledge by him that such a violation is being, or about to be, committed, without objection on his part, his duty requiring him to object, and he having the opportunity so to do.—Patterson v. Stewart, 42 N. W. 926, 41 Minn. 84.

Assess.

49. Taxes on real estate are assessed when the amount or proportion of tax to which each parcel is subject is fixed and determined.—Webb v. Bidwell, 15 Minn. 479, (Gil. 394.)

Assessment.

50. Is employed in two different senses: (1) The appraisement or valuation of property, and entering it on the lists for the purposes of taxation; (2) a charge or special tax imposed on land, as its portion of the expense of a benefit conferred by a local improvement.—First Div. St. P. & P. R. Co. v. City of St. Paul, 21 Minn. 526.

51. In Laws Minn. 1857, (Ex Sess.) c. 1, § 18, providing for payments by the Minnesota & Pacific Railroad Company to the state "in lieu of all taxes and assessments whatever." Includes any charge or special tax imposed upon the property for local improvements.—First Div. St. P. & P. R. Co. v. City of St. Paul, 21 Minn. 526.

52. In Gen. St. Minn. 1878, c. 34, § 259, exempting property of cemetery associations from "all public taxes and assessments." Includes an assessment for a local improvement.—State v. City of St. Paul, 32 N. W. 781, 36 Minn. 529.

Assets.

53. In Gen. St. Minn. 1878, c. 49, § 2, giving jurisdiction of the administration of the estate of a nonresident deceased "leaving assets" in the county. Includes a claim against a railway company for injuries occasioning decedent's death.—Hutchins v. St. Paul, M. & M. Ry. Co., 46 N. W. 79, 44 Minn. 5.

54. In an order of court for the sale of "all the assets, property, and business" of an insolvent corporation. Includes assets belonging to the corporation itself, or causes of action which it might have enforced in its own right, but not causes of action which the receiver might have maintained only in the right of creditors.—Minnesota Thresher Manuf'g Co. v. Langdon, 46 N. W. 310, 44 Minn. 37.

Assign.

55. Comprehends every one who takes, either immediately or remotely, from or under the assignor, whether by conveyance, devise, descent, or act of law.—Brown v. Crookston Agricultural Ass'n, 26 N. W. 907, 34 Minn. 545.

56. In Gen. St. Minn. 1878, c. 81, § 18, providing that, on foreclosure of a mortgage by advertisement, the surplus shall be paid to "the mortgagor, his legal representatives or assigns." Includes a junior mortgagee.—Brown v. Crookston Agricultural Ass'n, 26 N. W. 907, 34 Minn. 545; Fuller v. Langum, 33 N. W. 122, 37 Minn. 74.

57. In Gen. St. Minn. 1878, c. 81, § 13, giving a right of redemption from foreclosure to "the mortgagor, his heirs, executors, administrators, or assigns." Does not include a mortgagee in a junior mortgage not foreclosed. — Cuilerier v. Brunelle, 33 N. W. 123, 37 Minn. 71; Buchanan v. Reid, 45 N. W. 11, 43 Minn. 172.

58. But does include a creditor having a lien to whom the right of redemption is given by section 16.—Buchanan v. Reid, 45 N. W. 11, 43 Minn. 172.

59. In Gen. St. Minn. 1878, c. 81, § 36, relating to redemption from sales on mortgage foreclosure, and providing that, at the expiration of the redemption period, the court shall grant a final decree upon the application of the purchaser or his assigns. Includes a lien creditor, to whom, by section 15, a certificate of redemption operates as an assignment of the right acquired under the sale.—Bovey De Laittre Lumber Co. v. Tucker, (Minn.) 50 N. W. 1038.

Assigned.

60. In an averment in a complaint that plaintiff "duly assigned" a promissory note to defendant. Imports that all necessary to make over plaintiff's right in the note, and to transfer the property to defendant, was done, including delivery to defendant, actual or constructive.—Hoag v. Mendenhall, 19 Minn. 335, (Gil. 289.)

61. In Laws Minn. 1867, c. 76, providing that an attachment may issue, where the debtor has assigned, etc., his property. The transfer of the legal title to the property, and perhaps any conveyance of any interest therein.—Guile v. McNanny, 14 Minn. 520, (Gil. 391.)

Assigned, secreted, or disposed of.

62. In Laws 1867, c. 76, relating to attachment, are descriptive of the different modes of fraudulent disposition by a debtor.—Guile v. McNanny, 14 Minn. 520, (Gil. 391.)

63. In Gen. St. Minn. 1878, c. 66, tit. 9, § 147, allowing a writ of attachment where it appears that a debtor has assigned, secreted, or disposed of his property, etc. The words were not intended to have separate, distinct, or exclusive meanings.—Auerbach v. Hitchcock, 9 N. W. 79, 28 Minn. 73.

Assignment.

64. The transfer of one's whole interest in any estate; but is now generally appropriated to the transfer of chattels, either real or personal, or of equitable interests.—Banning v. Sibley, 3 Minn. 389, (Gil. 282.)

65. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. Bouv. Law Dict.—Brown v. Crooks-

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ton Agricultural Ass'n, 26 N. W. 907, 34 Minn. 545.

66. Equitable transfers of a beneficial interest in a mortgage, effected by the purchase and resale of the debt, are not assignments within the meaning of Gen. St. Minn. 1878, c. 81, § 14, requiring a redemptioner to produce to a sheriff "any assignments necessary to establish his claim."—Wilson v. Hayes, 42 N. W. 467, 40 Minn. 531.

67. As distinguished from a sublease assignment signifies a parting with the whole term.—Craig v. Summers, 49 N. W. 742, 47 Minn. 189.

Associates.

68. In Laws Minn. 1849, c. 44, incorporating certain persons named "and their associates," under the name of the "Minnesota Historical Society." Refers to such persons, other than those specifically named, as might thereafter become members of the association.—State v. Sibley, 25 Minn. 387.

Association or society.

69. In Laws Minn. 1885, c. 184, § 11, authorizing the reincorporation of "any existing corporation, association, or society." The words "association" and "society" are not employed as synonyms with or to characterize the word "corporation," but refer to bodies other than legally created corporations.—State v. Steele, 34 N. W. 903, 37 Minn. 428.

At large.

70. In Laws Minn. 1873, c. 20, § 1, (Gen. St. 1878, c. 19,) imposing a penalty on the owner of a ram allowing it "to run at large." Is used in the sense of "without restraint or confinement." Webst. Dict.—Goener v. Woll, 2 N. W. 163, 26 Minn. 154.

Attached.

71. In the reservation, from the grant of lands by Act Cong. March 3, 1857, to the state to aid railroads, of land to which "the right of pre-emption has attached." Does not mean a mere settlement, residence, or cultivation of the land, but a proceeding in the proper land office, by which the inchoate right to land is initiated. —Weeks v. Bridgman, 43 N. W. 81, 41 Minn. 352.

Awarded.

72. From an allegation in a complaint that a contract for certain work, for which plaintiff had made a written offer, was "awarded" to him by defendant, is to be understood merely that defendant decided to agree with plaintiff for the work, not that defendant accepted the offer as made.—Starkey v. City of Minneapolis, 19 Minn. 203, (Gil. 166.)

Ballot.

See § 798, *post.*

Bank.

73. An institution authorized to receive deposits of money, to lend money, and to issue promissory notes. Bouv. Law Dict.—Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198.

Banking corporation.

74. In Laws Minn. 1874, c. 1, providing for the taxation of banking corporations. Includes not only every corporate body, doing a general banking business, whether under state or national authority, but also all property employed in banking, whether owned by corporations or individuals.—Board of Com'rs of Rice County v. Citizens' Nat. Bank of Faribault, 23 Minn. 280.

Bawdyhouse.

See § 352, *post.*

Beast.

75. A dog is not a beast within the meaning of Rev. St. Minn. c. 101, § 39, punishing every person who shall kill, etc., any horses, etc., or other beasts, etc.—United States v. Gideon, 1 Minn. 292, (Gil. 226.)

Beer.

76. A fermented liquid, made from malted grain, having different names, such as "ale," "porter," "brown stout," "lager," and "small beer," according to its strength, but not a spirituous liquor.—State v. Quinlan, 41 N. W. 299, 40 Minn. 55.

77. Is intoxicating liquor within the meaning of Gen. St. Minn. 1878, c. 16, § 11, relating to the sale of intoxicating liquors.—State v. Dick, 50 N. W. 362, 47 Minn. 375.

78. Testimony that beer was sold in a drinking saloon by one who manufactured it will be taken to mean a sale of the fermented malt liquor, commonly sold in such saloons, and not ginger beer, root beer, or the like.—State v. Dick, 50 N. W. 362, 47 Minn. 375.

Before.

79. In Gen. St. Minn. 1878, c. 66, § 218, requiring notice of trial to be served "at least eight days before the term." The first day of the term may be included in the computation, under the general rule established by chapter 66, § 82, that the time within which an act is to be done shall be computed by excluding the first day and including the last.—State v. Weld, 40 N. W. 561, 39 Minn. 426.

80. In Gen. St. Minn. 1878, c. 66, § 262, subd. 1, allowing a dismissal of an action before trial. The words "before trial" mean before the commencement of the trial.—Bettis v. Schreiber, 17 N. W. 863, 31 Minn. 329.

Benefit.

81. In Gen. St. Minn. 1866, c. 34, § 14, providing that commissioners, in appraising damages to land taken for railroad purposes, shall make due allowance for "any benefit" that the owners thereof may derive from the railroad. Does not include all the benefit which the landowner may receive, but only such benefit as is in its nature proper to be deducted; any benefit special to the landowner, and not shared by the community in common with him.—Weir v. St.

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Paul, S. & T. F. R. Co., 18 Minn. 155, (Gil. 139.)

Benevolent.

82. An association of single men, the object of which is to endow the wife of a member marrying with as many dollars as there are members, is not such a "benevolent society" as can be incorporated under Gen. St. Minn. 1878, c. 34, § 166.—State v. Critchett, 32 N. W. 787, 37 Minn. 13.

Benevolent and charitable.

83. In Pub. St. Minn. c. 17, §§ 56, 57, which authorize the incorporation of "benevolent and charitable societies." Do not include a savings association, formed for the pecuniary profit of its stockholders.—Sheren v. Mendenhall, 23 Minn. 92.

Bequeath.

84. In Gen. St. Minn. 1866, c. 69, §§ 2, 3, relating to bequests to married women. Has reference to both real and personal property.—Leighton v. Sheldon, 16 Minn. 243, (Gil. 214.)

Bill of exchange.

85. A draft on a bank, payable on a day subsequent to its date, is a bill of exchange and not a check.—Harrison v. Nicollet Nat. Bank of Minneapolis, 43 N. W. 336, 41 Minn. 488.

See, also, §§ 109-111, *post.*

Bona fide.

86. In Laws Minn. 1889, c. 200, § 5, relating to liens, and defining the rights of bona fide mortgagees, etc. Is to be taken in the usual and established sense.—Hill v. Aldrich, (Minn.) 50 N. W. 1020.

See, also, §§ 331-336, *post.*

Bona fide and diligent.

87. What amounts to such a bona fide and diligent search for a lost instrument as to allow the introduction in evidence of its contents is to be determined by the particular circumstances of each case.—Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

Bond.

88. As distinguished from recognizance, is the creation of a fresh debt, or obligation de novo; a recognizance being an acknowledgment of a former debt upon record. Bl. Comm. — In re Brown, 29 N. W. 131, 35 Minn. 307.

89. In Gen. St. Minn. 1878, c. 124, § 3, authorizing the giving of undertakings in lieu of bonds on appeal. "Bonds" is used in its general sense, as including recognizances.—In re Brown, 29 N. W. 131, 35 Minn. 307.

Books.

90. In a sheriff's return, certifying to a levy upon certain books. Is not to be taken as including debts due upon accounts therein contained.—Tullis v. Brawley, 3 Minn. 277, (Gil. 191.)

Brake-staff.

91. Consists of an iron rod, with a hand wheel attached to the upper end, and used to apply the brake, while the lower end is dropped into a socket fixed to the car, that it may be lifted out at pleasure.—Moon v. Northern Pac. R. Co., 48 N. W. 679, 46 Minn. 106.

Brief.

92. Synonymous with "points and authorities;" both being a condensed statement of the propositions of law which counsel desire to establish, indicating the reasons and authorities which sustain them.—Duncan v. Kohler, 34 N. W. 594, 37 Minn. 379.

Buy.

93. Buying a note, as distinguished from discounting it, is a transaction where the seller does not indorse the note, and is not accountable for it.—Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198.

By-law.

94. "By-law," "ordinance," and "municipal regulation" have substantially the same meaning, and are the laws of a corporate district, made by the authorized body, in distinction from the general law of the state; local regulations for the government of the particular place. — State v. Lee, 13 N. W. 913, 29 Minn. 445.

By the court.

95. The use of such words on an order does not necessarily make a chamber's order an order of the court.—Marty v. Ahl, 5 Minn. 27, (Gil. 14.)

Cards.

96. In Gen. St. Minn. 1878, c. 99, § 15, punishing whoever obtains money from another "by use of cards or instruments of like character." Cards of about the same size as ordinary playing cards, all black, except one having a figure imprinted on it, are within the meaning of the statute.—State v. Gray, 12 N. W. 455, 29 Minn. 142.

Carriage.

97. In the provision of the charter of the city of Duluth, authorizing the city to adopt ordinances to prevent the incumbering of streets with carriages, etc. Includes railroad cars.—City of Duluth v. Mallett, 45 N. W. 154, 43 Minn. 204.

Case at law.

98. In Const. Minn. art. 1, § 4, providing that the right to trial by jury shall extend to "all cases at law." Does not include proceedings under section 2 of the insolvent act, upon the petition of creditors, for the appointment of a receiver of the estate of a nonresident insolvent.—In re Howes, 38 N. W. 104, 38 Minn. 403.

99. The words are limited to common-law actions, as distinguished from suits in equity or admiralty and special proceedings, and do not include or fall within the term "remedial cases," as used in Const. art. 6, § 2, giving the supreme court original jurisdiction in such cases.—State

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v. Minnesota Thresher Manuf'g Co., 41 N. W. 1020, 40 Minn. 213.

Cause.

100. In Rev. St. Minn. c. 69, § 4, allowing application for the transfer of a "cause" from a justice's court. Does not include an attachment of property, which is merely a proceeding in a cause.—Curtis v. Moore, 3 Minn. 29, (Gil. 7.)

Cause of action.

101. Identity of cause of action is to be distinguished from identity of the subject-matter. The subject-matter of litigation may be the same, and yet the causes of action entirely different.—State of Wisconsin v. Torinus, 9 N. W. 725, 28 Minn. 175.

See, also, § 484, *post.*

Cause shown.

See §§ 328-330, *post.*

Certain.

See § 207, *post.*

Change in title.

102. A change in title is a change in ownership, which carries the legal right of possession and property, and the mere creation of a lien or incumbrance upon property insured cannot be regarded as effecting a "change in title," within the meaning of a condition in the policy of insurance.—Loy v. Home Ins. Co., 24 Minn. 315.

Change of possession.

103. In Gen. St. Minn. 1878, c. 41, § 15, making a sale of chattels without "actual and continued change of possession" presumptively fraudulent as to creditors, etc. An actual, and not a mere constructive, change is necessary.—Murch v. Swensen, 42 N. W. 290, 40 Minn. 421.

104. Such a change as the circumstances of the sale and the nature of the property admit; such as the vendor is capable of making.—Chickering & Sons v. White, 44 N. W. 988, 42 Minn. 457.

Character.

105. In a question as to the character of a witness in the neighborhood in which she resides. Will be considered as used in the sense of reputation.—Rudsdill v. Slingerland, 18 Minn. 380, (Gil. 342.)

Chargeable.

106. A statement in a tax deed that land was sold for taxes chargeable, etc., is not sufficient to show that the tax was delinquent.—Sheehy v. Hinds, 6 N. W. 781, 27 Minn. 259; Gilfillan v. Chatterton, 37 N. W. 583, 38 Minn. 335.

Charged.

107. In a complaint for commissions, alleging that plaintiff "charged" a certain amount. Does not import that the amount "charged" was true or just.—Farrington v. Wright, 1 Minn. 241, (Gil. 191.)

Charitable.

See § 83, *supra.*

Chaste.

108. In Gen. St. Minn. 1878, c. 100, § 6, punishing seduction under promise of marriage of any unmarried female "of previous chaste character." Although a woman may have so low a standard of propriety as to allow unseemly familiarities with a lover, yet if she have enough sense of virtue not to surrender her chastity unless induced to do so under a promise of marriage, she cannot be said as matter of law to be unchaste.—State v. Brinkhaus, 25 N. W. 642, 34 Minn. 285.

See, also, §§ 582, 583, *post.*

Check.

109. An instrument for the payment of a specified sum of money, having a drawer and a payee, drawn upon some bank or banker.—State v. Curtis, 40 N. W. 263, 39 Minn. 357.

110. A draft on a bank or banker payable on demand.—Harrison v. Nicollet Nat. Bank, 43 N. W. 336, 41 Minn. 488.

111. A draft on a bank payable on a day subsequent to its date is not a check, but a bill of exchange.—Harrison v. Nicollet Nat. Bank, 43 N. W. 336, 41 Minn. 488.

Children.

112. Designating beneficiaries in a life insurance policy. Construed to mean children of two marriages of the insured.—Ricker v. Charter Oak Life Ins. Co., 6 N. W. 771, 27 Minn. 193.

Citizen.

113. In Const. U. S. art. 4, § 2, declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It seems that only citizens of the United States are meant.—Davis v. Pierse, 7 Minn. 13, (Gil. 1.)

Civil action.

114. A contest as to an election for removal of a county seat is not a civil action, within the meaning of the statute as to costs in civil actions.—Bayard v. Klinge, 16 Minn. 249, (Gil. 221.)

115. By the use of the words "in all civil actions," in Pub. St. Minn. c. 57, § 21, providing that the district court or a judge thereof may grant an injunction in all civil actions, on complaint, etc., the legislature did not intend to prescribe that the writs mentioned could only be issued after the commencement of an action by the service of the summons or the delivery of the summons for service, but to designate the nature or character of the class of remedies in the course of which a party could avail himself of the benefit of the writ.—Lash v. McCormick, 14 Minn. 182, (Gil. 359.)

Claim.

116. In mechanic's lien act of Minnesota of March 20, 1858, giving a lien upon every building for the erection, etc., of which any person "shall have a claim." The words comprehend claims of such nature existing when the act was passed.—Mason v. Heyward, 5 Minn. 74, (Gil. 55.)

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Code.

117. A system of law; a systematic and complete body of law.—Johnson v. Harrison, 50 N. W. 923, 47 Minn. 575.

Collector.

118. In Pub. St. Minn. art. 16, c. 8, § 117, requiring county treasurers to pay over the state tax in like manner as theretofore required of the sheriff or collector, and to receive the like compensation. Is used synonymously with "sheriff." —Bingham v. Board of Sup'rs, Winona County, 8 Minn. 441, (Gil. 390.)

Color of title.

119. That which in appearance is title, but which in reality is no title; that which is apparently good title, but which, by reason of some defect appearing on its fact, does not in fact amount to title.—McLellan v. Omodt, 33 N. W. 326, 37 Minn. 157.

Color of title in fee.

120. In Gen. St. Minn. 1878, c. 75, § 15, providing that where a person has taken possession of land under color of title in fee and in good faith, for which he has given a valuable consideration, he shall not be ejected, unless compensation is tendered him for improvements, etc. Includes such color of title either in the occupying claimant himself or in the person under whom he claims his right.—Hall v. Torrens, 27 N. W. 717, 32 Minn. 527.

Commerce.

121. In Const. U. S. art. 1, § 8, empowering congress to regulate commerce between the states, etc. Embraces the transportation of property by a common carrier, including the rates to be charged therefor.—State v. Chicago, St. P., M. & O. Ry. Co., 41 N. W. 1047, 40 Minn. 267.

Common carrier.

122. One who undertakes for hire to transport the goods of such as choose to employ him from place to place.—Christenson v. American Express Co., 15 Minn. 270, (Gil. 208.)

Common law.

123. In the provision of Const. U. S. Amend. 7, preserving the right of trial by jury, "in suits at common law." The term includes not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights were alone regarded, and equitable remedies administered, or where, as in the admiralty, a mixture of public law and of maritime law and equity were often found in the same suit: and may be well construed to embrace all suits not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume, to settle legal rights.—St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

Communications.

124. In Gen. St. Minn. 1878, c. 73, § 10, making evidence as to communications between husband and wife incompetent. Includes all conversations, though not on subjects of a confidential nature.—Leppla v. Minnesota Tribune Co., 29 N. W. 127, 35 Minn. 310.

Company.

125. The language, "company established and doing business under the laws of the state," used in a complaint, imports a body corporate, rather than a mere copartnership.—Broome v. Galena, D., D. & M. Packet Co., 9 Minn. 239, (Gil. 225.)

Compensation.

126. In Const. Minn. art. 10, § 4, requiring compensation for land taken for public use. Something given or obtained as an equivalent.—Winona & St. P. R. Co. v. Denman, 10 Minn. 267, (Gil. 208.)

Competent.

127. In Gen. St. Minn. 1866, tit. 11, c. 73, § 89, providing that certain evidence shall be competent on the question of marriage. Admissible for the purpose of establishing the fact.—State v. Johnson, 12 Minn. 476, (Gil. 378.)

Complaint.

128. In Sp. Laws Minn. 1875, c. 2, § 11, (Gen. St. 1878, c. 64, § 90,) providing that no summons shall issue in the municipal court of St. Paul, until a complaint is made and filed. Is to be taken in its ordinary legal sense, and not to signify a verified pleading.—McMath v. Parsons, 2 N. W. 703, 26 Minn. 246.

129. A complaint is not equivalent to the affidavit required by Rev. St. U. S. § 5278, relating to extradition.—State v. Richardson, 24 N. W. 354, 34 Minn. 115.

Completion.

130. Within the meaning of Sp. Laws Minn. 1873, c. 107, extending the time for the "grading and completion" of a railroad upon which the company would be entitled to a grant of public lands, the railroad is completed when it is made ready for the running of trains, though not equipped with rolling stock.—De Graff v. St. Paul & P. R. Co., 23 Minn. 144.

Composition agreement.

131. An assignment for the benefit of creditors who shall file releases of their debts and claims is not a composition agreement, after such creditors shall have accepted the provisions of the assignment.—In re Walker, 33 N. W. 852, 34 N. W. 591, 37 Minn. 243.

Concurrent covenants.

132. Covenants where mutual conditions are to be performed at the same time.—Snow v. Johnson, 1 Minn. 48, (Gil. 32;) Chouteau v. Rice, 1 Minn. 106, (Gil. 83.)

Confession and avoidance.

See §§ 484–486, *post.*

Connected.

133. Where the main subject of an action is the wrongful entry of defendant upon real estate, the after occupation by the defendant of the premises is "connected" therewith, within the meaning of Pub. St. Minn. c. 60, § 83, pro-

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viding that the same transaction or transactions connected with the same subject of action may be united in a complaint.—Armstrong v. Hinds, 8 Minn. 254, (Gil. 221.)

Consideration.

134. Something of value in the eye of the law, moving from one person to another. It may be of some benefit to the latter, or some detriment to the former.—New York & M. Gold Min. Co. v. Martin, 13 Minn. 417, (Gil. 386.)

Construction.

135. Of a building. Work done at the yard or shop of a contractor, in preparing material for a building, is a construction, within the meaning of the laws relating to mechanics' liens. —Howes v. Reliance Wire-Works Co., 48 N. W. 448, 46 Minn. 44.

Constructive eviction.

See §§ 261-263, *post.*

Contained.

136. In a policy of insurance of a number of mules stated to be "all contained" in a certain barn, those words are matter of description, not of warranty, and the insurance covers the mules, though out of the barn.—Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229.

Contiguous.

137. A building erected 25 feet from the one insured is not within the condition of an insurance policy that if the risk is increased by the erection of a contiguous building the policy should be void.—Olson v. St. Paul Fire & Marine Ins. Co., 29 N. W. 125, 35 Minn. 432.

Contract.

138. The "contract, or some note or memorandum thereof," required by the statute of frauds, (Gen. St. Minn. 1878, c. 41, § 12,) for the leasing or sale of lands, must be one signed by the vendor or his agent, containing a sufficient description of the subject-matter, a statement of the agreed price, and a designation of the vendor sufficient to identify him without parol proof. — Clampet v. Bells, 39 N. W. 495, 39 Minn. 272.

139. In a provision of an insurance policy that "this policy is made and accepted upon the above express terms, and that no part of this contract can be waived except in writing," etc., the words "contract" and "policy" are synonymous.—Wilkins v. State Ins. Co., 45 N. W. 1, 43 Minn. 177.

Contracting.

140. In Gen. St. Minn. 1878, c. 32, § 76, relating to liens for labor upon logs and timber, and providing that the act shall not inure to the benefit of any person interested in contracting, cutting, hauling, banking, or driving logs by the thousand. The word "contracting" should be read "contracting for."—King v. Kelly, 25 Minn. 522.

Contributing members.

141. The contributing members of a mutual benefit association are the members in good and regular standing who have not forfeited their membership.—Neskern v. Northwestern Endowment & Legacy Ass'n, 15 N. W. 683, 30 Minn. 406.

Convenient.

142. In an assignment for the benefit of creditors, authorizing the assignee to sell as soon as convenient, etc. Fit, suitable, or proper; as soon as he reasonably can do so.—McClung v. Bergfeld, 4 Minn. 148, (Gil. 99.)

Conversation.

143. In Gen. St. Minn. 1878, c. 73, § 8, prohibiting a party to an action or interested therein from giving evidence of "any conversation with or admission of" a deceased or insane party or person, relative to any matter at issue between the parties. Refers strictly only to spoken words.—Chadwick v. Cornish, 1 N. W. 55, 26 Minn. 28.

Convey.

144. In Laws Minn. 1869, c. 56, § 4, providing that a wife cannot give a power of attorney to her husband to convey land or any interest therein. Includes leasing of land.—Sanford v. Johnson, 24 Minn. 172.

Conveyance.

145. A bond for title by a married woman is not a "conveyance," required by Pub. St. Minn. c. 35, § 12, to be separately acknowledged by her; the word "conveyance" being expressly defined by section 30 as not embracing "executory contracts for the sale or purchase of land." —Kingsley v. Gilman, 15 Minn. 59, (Gil. 40.)

146. A contract for the sale of real estate is a conveyance within Gen. St. Minn. 1878, c. 69, § 2, requiring the husband of a married woman to join with her in a conveyance.—Gregg v. Owens, 33 N. W. 216, 37 Minn. 61.

147. An agreement for a conveyance is within the meaning of Rev. St. Minn. c. 46, § 30, authorizing the record of conveyances.—Cogan v. Cook, 22 Minn. 137.

148. A "release" of mortgaged premises is an instrument by which the title to real estate might be "affected in law or equity," within Gen. St. Minn. c. 40, § 26, defining conveyances, and section 21, requiring registry of the same as against purchasers without notice.—Palmer v. Bates, 22 Minn. 532.

149. Gen. St. Minn. 1878, c. 40, § 21, providing that unrecorded conveyances shall be void as against subsequent purchasers, includes a release by a mortgagee, whether done by entry in the margin of the record, by certificate of discharge, or decree of court.—Merchant v. Woods, 7 N. W. 826, 27 Minn. 396.

150. A party-wall agreement is within Gen. St. Minn. 1866, c. 40, § 26, providing that no covenant shall be implied in a conveyance, etc.— Warner v. Rogers, 23 Minn. 34.

151. An insolvent assignment or conveyance by an insolvent debtor is such a conveyance by an insolvent debtor, whereby a creditor shall ob-

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tain a preference, as may be avoided, as provided by Laws Minn. 1881, c. 148, § 2.—Weston v. Loyhed, 14 N. W. 892, 30 Minn. 221.

Conveyed.

152. In Gen. St. Minn. 1878, c. 39, § 14, providing that if any person, having conveyed by mortgage any article of personal property, shall dispose of said property with intent to defraud, etc. "Having conveyed" means, having executed a mortgage.—State v. Williams, 21 N. W. 746, 32 Minn. 537.

Copy.

153. In Laws Minn. 1887, c. 206, requiring, when real estate is included in a general assignment, that a copy of the deed of assignment, order, or decree certified by the clerk, etc., shall be filed for record in the office of the register of deeds, etc. Contemplates a copy of what is already matter of record in the office of the clerk. —Paulson v. Clough, 42 N. W. 398, 40 Minn. 494.

Corn.

154. As used in the United States, referring to grain. Is restricted in meaning to maize or Indian corn, unless the meaning is enlarged by the circumstances of its employment.—Kerrick v. Van Dusen, 20 N. W. 228, 32 Minn. 317.

Corporation.

155. A board of education, incorporated under Sp. Laws Minn. 1869, c. 92, is not a corporation within Const. Minn. art. 10, § 1, defining corporations within that article to be "all associations and joint stock companies, having any of the powers or privileges not possessed by individuals or partnerships, except such as embrace banking privileges."—Board of Education of Sauk Centre v. Moore, 17 Minn. 412, (Gil. 391.)

156. In Pub. St. Minn. c. 66, § 5, providing that actions may be commenced against corporations in the same manner as other civil actions. Includes foreign as well as domestic corporations.—Sullivan v. La Crosse & M. Steam-Packet Co., 10 Minn. 386, (Gil. 308.)

See, also, §§ 69, 125, *supra*; § 227, *post*.

Corruptly.

157. In an indictment. Doing an act for unlawful gain, viciously, wickedly.—State v. Stein, (Minn.) 51 N. W. 474.

Costs.

158. In Pub. St. Minn. c. 82, § 16, allowing an attorney a lien upon a judgment to the extent of the costs, etc. Refers to the sums allowed the party to indemnify him for employing an attorney, and does not include disbursements or charges.—Forbush v. Leonard, 8 Minn. 303, (Gil. 267.)

159. In Gen. St. Minn. c. 66, § 241, providing that if a plaintiff, after refusing an offer of judgment, shall fail to recover more than offered, defendant shall be allowed costs. Includes disbursements.—Woolsey v. O'Brien, 23 Minn. 71.

County.

See § 26, *supra*.

County block.

160. The words "county block," written upon a block in a plat, do not evidence a donation or grant to a county not designated, within the meaning of Rev. St. Minn. c. 31, § 5, providing that every donation or grant to a corporation or body politic marked as such on a plat, required by such chapter, shall be deemed a sufficient conveyance, etc.—County Com'rs of Hennepin County v. Dayton, 17 Minn. 260, (Gil. 237.)

County purposes.

161. In Laws Minn. 1861, c. 6, § 2, relating to taxes for county purposes, includes only the ordinary expenses of the county.—McCormick v. Fitch, 14 Minn. 252, (Gil. 185.)

Court.

See § 198, *post*.

Court of competent authority.

162. A court with the proper parties before it, and having jurisdiction of the subject-matter.—Charles v. Charles, 42 N. W. 935, 41 Minn. 201.

Court of record of this state.

163. A federal court sitting within the territorial limits of the state is "a court of record of this state," within the meaning of the insolvent law, (Gen. Laws Minn. 1881, c. 148.)—In re Kittson's Estate, 48 N. W. 419, 45 Minn. 197, following Simon v. Mann, 23 N. W. 856, 33 Minn. 412.

Covenant running with the land.

164. A covenant runs with the land, where either the liability to perform it, i. e., its burden, or the right to take advantage of it, i. e., its benefit, passes to the assignee of the land.—Shaber v. St. Paul Water Co., 14 N. W. 874, 30 Minn. 179.

Covenants.

See § 132, *supra*; § 212, *post*.

Created.

165. A foreign corporation which accepts the provisions of Laws Minn. 1877, c. 14, is created, within the meaning of Laws 1889, c. 225, requiring certain acts to be done by a corporation created or organized under the laws of the state. —State v. Sioux City & N. R. Co., 44 N. W. 1032, 43 Minn. 17.

Creditor.

166. One who has the right to require the fulfillment of an obligation or contract. Bouv. Law Dict.—Mohr v. Minnesota Elevator Co., 41 N. W. 1074, 40 Minn. 343.

167. In Gen. St. Minn. 1878, c. 41, §§ 15, 16, providing that a sale of goods and chattels, unless accompanied by delivery, etc., shall be presumed fraudulent and void as against creditors of the vendor, etc. "Creditors" includes all persons who are creditors of the vendor at any time while the property remains in his possession, or under his control.—Murch v. Swensen, 42 N. W 290, 40 Minn. 421.

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168. Those in whose favor a claim for indebtedness against an insolvent is filed and allowed are creditors under the insolvent law, (Laws Minn. 1881, c. 148.)—Adamson v. Cheney, 29 N. W. 71, 35 Minn. 474.

169. The payee of a promissory note given by a decedent for the benefit of another is a creditor within the meaning of Gen. St. Minn. 1878, c. 53, allowing an appeal from the probate court upon the application of a creditor.—Lake v. Albert, 35 N. W. 177, 37 Minn. 453.

170. Creditors, to whom a right of action upon an executor's bond is given by Gen. St. Minn. 1878, c. 55, § 5, are those who have been found or determined to be such, by an allowance of their claims by the person or tribunal provided by statute for the examination and allowance of claims against the estates of decedents.—First Nat. Bank of St. Paul v. How, 9 N. W. 626, 28 Minn. 150.

Creditor having a lien.

171. In Gen. St. Minn. 1878, c. 81, § 16, allowing redemption to a creditor having a lien, the phrase is not used as intending a personal creditor, but includes one having the right of recourse to the land for satisfaction of his claim or demand, though he may have no personal claim against the mortgagor.—Buchanan v. Reid, 45 N. W. 11, 43 Minn. 172.

172. The term includes an attaching creditor who has not yet obtained judgment.—Atwater v. Manchester Sav. Bank, 48 N. W. 187, 45 Minn. 341.

See, also, §§ 55-59, *supra*.

Credits.

173. In Const. Minn. art. 9, § 3, providing that laws shall be passed taxing credits, etc. The excess of the sum of all legal claims and demands, whether for money or other valuable thing, due or to become due to the person liable to pay taxes thereon, when added together, (estimating every such claim or demand at its true value in money,) over and above the sum of all legal bona fide debts owing by such person.—State v. Rand, 40 N. W. 835, 39 Minn. 502.

Crime.

174. The terms "crime," offense," and "criminal offense," are all synonymous, and ordinarily used interchangeably, and include any breach of law established for the protection of the public, as distinguished from an infringement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding.—State v. West, 43 N. W. 845, 42 Minn. 147.

175. The terms "crime," "public offense," as used in the general laws, do not refer to offenses against a municipal government.—State v. Lee, 13 N. W. 913, 29 Minn. 445.

176. All felonies and misdemeanors are crimes.—State v. Sauer, 44 N. W. 115, 42 Minn. 258.

Criminal.

177. Offenses against ordinances enacted by a municipal corporation are not criminal cases, in the proper sense of the term "criminal."—City of Mankato v. Arnold, 30 N. W. 305, 36 Minn. 62. But see State v. West, 43 N. W. 845, 42 Minn. 147.

Criminal offense.

178. In Const. Minn. art. 1, § 7, providing that no person shall be held to answer for a criminal offense, except on presentment of a grand jury, and except in cases cognizable by justices of the peace, which, by article 6, § 8, are limited to cases where the punishment does not exceed three months' imprisonment, or a fine not exceeding three months. The term "criminal offense," includes offenses consisting of violation of municipal ordinances, punishable by imprisonment or fine exceeding the prescribed term and amount.—State v. West, 43 N. W. 845, 42 Minn. 147.

See, also, §§ 174-176, *supra*.

Criminal prosecution.

179. A prosecution for the violation of a municipal ordinance is not within the meaning of Const. Minn. art. 1, § 6, guarantying the right of trial by jury in "criminal prosecutions."—City of Mankato v. Arnold, 30 N. W. 305, 36 Minn. 62.

Crossings.

See § 280, *post*.

Currency.

180. The established, lawful, standard medium of exchange: legal tender money, or gold or silver coin.—Butler v. Paine, 8 Minn. 324, (Gil. 284.)

Current.

See § 512, *post*.

Cut or device.

181. A sticker or paster on the face of the ballot is not a "cut or device" to distinguish one ballot from another, within the meaning of Gen. St. Minn. 1878, c. 1, § 82, prohibiting the use of such cut or device.—Quinn v. Markoe, 35 N. W. 263, 37 Minn. 439.

Daily newspaper.

182. A newspaper published consecutively six days each week, including Sunday, is a daily newspaper within the meaning of Laws Minn. 1889, requiring the designation of a daily newspaper published six successive days in each week as an official paper.—Tribune Pub. Co. v. City of Duluth, 47 N. W. 309, 45 Minn. 27.

Damages.

183. In Gen. St. Minn. 1878, c. 53, requiring an appeal bond to contain a condition to pay all damages and costs awarded against appellant on such appeal. Is synonymous with costs, as the only damages that could be awarded against appellant are the taxable costs.—Riley v. Mitchell, 35 N. W. 472, 38 Minn. 9.

See, also, §§ 325, 326, *post*.

Dangerous weapon.

184. In Laws Minn. 1864, c. 41, providing that if any person, being armed with a dangerous weapon, shall assault another with intent, etc.,

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he shall be punished, etc. A weapon likely to produce death or great bodily harm.—State v. Dineen, 10 Minn. 407, (Gil. 325.)

Day.

185. In construing the state constitution, the word "day" is, prima facie, to be taken in its ordinary and popular meaning of the space of 24 hours from midnight to midnight. — State v. Brown, 22 Minn. 482.

186. Sunday is not a "day," within the meaning of a statute requiring publication for a certain number of days.—Sewall v. City of St. Paul, 20 Minn. 511, (Gil. 459.)

Death in violation of a criminal law.

187. In an insurance policy providing that such death shall invalidate the policy. Does not include suicide by the insured, to prevent his return to the state to answer for a criminal charge. —Kerr v. Minnesota Mut. Ben. Ass'n, 39 N. W. 312, 39 Minn. 174.

Debt.

188. Strictly, a sum of money due upon contract arising from the agreement of the parties. —Cole v. Aune, 41 N. W. 934, 40 Minn. 80.

189. In an enlarged sense, any just claim or demand for the recovery of money; that which one person owes and is bound to pay to another. —Cole v. Aune, 41 N. W. 934, 40 Minn. 80.

190. In Gen. St. Minn. 1878, c. 66, § 147, allowing an attachment where the plaintiff's debt was fraudulently contracted. Includes debts or liabilities fraudulently created or incurred.—Cole v. Aune, 41 N. W. 934, 40 Minn. 80.

191. The word "debt" is of large import, and, properly speaking, includes all that is due to a man under any form of obligation or promise. Burrill, Law Dict.—Daniels v. Palmer, 42 N. W. 855, 41 Minn. 116.

Debtor.

192. In Minnesota insolvent law of 1881, as amended by Laws 1889, c. 30, § 1, providing that "any debtor" may make an assignment for the benefit of creditors, etc. Includes any one who is capable of contracting a debt, and has done so.—Kinney v. Sharvey, (Minn.) 50 N. W. 1025.

Decision.

193. In Gen. St. Minn. 1878, c. 66, § 253, providing that "a verdict, report, or decision may be vacated, and a new trial granted," for various causes, among them, "that the verdict, report, or decision is not justified by the evidence." The dismissal of an action for insufficiency of evidence is a "decision," within the meaning of the statute.—Volmer v. Stagerman, 25 Minn. 234.

194. The statute does not refer to a final decision only; whenever any issue or issues under the pleadings are tried or submitted, and decided by the court, this is a "decision," upon the making of which a motion may be made to vacate and for a new trial.—Ashton v. Thompson, 9 N. W. 876, 28 Minn. 330.

Decree.

195. In Gen. St. Minn. 1866, c. 56, § 4, providing that, after certain payments from a decedent's estate, the probate court shall assign the residue of the estate by a decree, etc. Is the final distribution to be made when the estate is fully settled.—Wood v. Myrick, 16 Minn. 494, (Gil. 447.)

Dedication.

196. Of land. The act of devoting or giving property for some proper object, and in such manner as to conclude the owner.—Village of Mankato v. Willard, 13 Minn. 13, (Gil. 1.)

Deed.

197. A mortgage is a deed, within the meaning of Gen. St. Minn. 1878, c. 40, § 2, (Laws 1887, c. 47,) providing that the validity of a deed executed by a married woman shall not be affected by her minority.—Daley v. Minnesota Loan & Investment Co., 45 N. W. 1100, 43 Minn. 517.

See, also, § 327, *post.*

De facto.

198. Where a court or office has been established by an act of the legislature, apparently valid, and the court has gone into operation, or the office is filled and exercised under such act, it is to be regarded as a de facto court or office. —Burt v. Winona & St. P. R. Co., 18 N. W. 285, 289, 31 Minn. 472.

De facto court.

199. A court existing under color of law.—Burt v. Winona & St. P. R. Co., 18 N. W. 285, 289, 31 Minn. 472.

De facto officer.

200. One who is exercising the duties of an office, under color of legal right.—Burt v. Winona & St. P. R. Co., 18 N. W. 285, 289, 31 Minn. 472.

201. A person having and claiming color of title to an office by election or appointment, and in the exercise of its functions and duties; in possession of it.—Carli v. Rhener, 7 N. W. 139, 27 Minn. 292.

De facto road.

202. A road actually used by the public.—Locke v. First Div. St. P. & P. R. Co., 15 Minn 350, (Gil. 283.)

Defamatory.

203. Does not, in its ordinary and proper signification, include the element of malice. A defamatory publication is one which is false and calculated to bring the person defamed into disrepute, but not necessarily malicious.—Marks v. Baker, 9 N. W. 678, 28 Minn. 162.

Default.

204. In a sheriff's accountable receipt, providing for the payment of the amount of a debt, in default of the delivery of goods for which the receipt is given. Means a breach of legal duty. —Mason v. Aldrich, 30 N. W. 884, 36 Minn. 283.

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Defeasance.

205. A bond for reconveyance is a "defeasance of a deed absolute," within the meaning of Gen. St. Minn. 1878, c. 40, § 23, requiring the record of such defeasance for the purpose of notice.—Butman v. James, 27 N. W. 66, 34 Minn. 547.

Defect.

206. In Sp. Laws Minn. 1881, c. 73, subc. 8, § 8, providing that no action shall be maintained against the city of Mankato on account of any injuries received by means of "any defect in the condition of any bridge, street, sidewalk, or thoroughfare," unless commenced within one year from the happening of the injury, etc. Refers to defects in such public ways or structures as such, and with regard to their usefulness and safety for the purposes of travel.—Pye v. City of Mankato, 38 N. W. 621, 38 Minn. 536.

Definite.

207. To sustain a motion to make a pleading more definite and certain, the indefiniteness or uncertainty must be such as appears on the face of the pleading, not arising from extrinsic facts.—Lee v. Minneapolis & St. L. Ry. Co., 25 N. W. 399, 34 Minn. 225.

Defraud.

208. In the provision of the insolvent law, (Laws Minn. 1881, c. 148,) refusing a debtor his release where he has disposed of his property with intent "to cheat and defraud creditors." Refers to actual fraud, as distinguished from fraud in law.—In re Shotwell, 45 N. W. 842, 43 Minn. 389.

Delinquent.

209. Delinquency of taxes necessarily includes present obligation to pay.—Chauncey v. Wass, 25 N. W. 457, 30 N. W. 826, 35 Minn. 1.

See, also, § 106, *supra.*

Demise.

210. The words "demise," or "let," or their equivalent, in a lease, imply a covenant for title and for quiet enjoyment, but no other covenants on the part of the lessor are implied thereby.—Wilkinson v. Clauson, 12 N. W. 147, 29 Minn. 91.

Departure.

211. In pleading. A statement of matter in a subsequent pleading, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it.—Rosby v. St. Paul, M. & M. Ry. Co., 33 N. W. 698, 37 Minn. 171.

Dependent covenants.

212. Covenants in which the performance of one depends on the prior performance of another.—Chouteau v. Rice, 1 Minn. 106, (Gil. 83.)

Desertion.

213. In Gen. St. Minn. 1878, c. 69, § 5, providing that desertion by husband or wife shall be a ground for an action to bar the right of curtesy or dower. Is used in the same sense as in chapter 62, § 6, subd. 5, relating to divorce, and imports such a willful abandonment, by one party of the other, as would constitute good ground for a divorce.—Weld v. Weld, 7 N. W. 267, 27 Minn. 330.

Detached.

214. In an insurance policy, describing buildings as "adjoining and communicating, occupied, * * * situated, detached," etc. Construed to mean detached as a whole or mass from other buildings, and not to refer to the buildings as detached from one another.—Broadwater v. Lion Fire Ins. Co., 26 N. W. 455, 34 Minn. 465.

Device.

See § 181, *supra;* § 324, *post.*

Diligence.

See § 235, *post.*

Directly.

215. In a request to charge that unless death was caused directly, etc. Construed to mean proximately.—McLean v. Burbank, 11 Minn. 277, (Gil. 189.)

Directly or indirectly.

216. These words, used in an agreement by one who had sold his business that he would not directly or indirectly re-engage in the same, preclude the seller from engaging his services to or in assisting a rival dealer in the same business to solicit and make sales, and to influence buyers in the market, including his old customers, but not from subordinate employment not affecting the management or control of the business, or directly influencing custom.—Nelson v. Johnson, 36 N. W. 868, 38 Minn. 255.

Discount.

217. A bank of discount is one that furnishes loans upon drafts, promissory notes, bonds, or other securities.—Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198.

218. Discounting negotiable paper, as understood in the business of banking, is a mode of loaning money, with the right to take the interest allowed by law in advance.—Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198.

219. The power to "discount" notes, etc., conferred upon banks by Gen. St. Minn. 1866, c. 33, § 13, does not authorize the purchase of notes by banks.—Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198.

Dispose.

220. In Gen. St. Minn. 1878, c. 66, tit. 9, § 147, allowing a writ of attachment against a debtor about to dispose of his property with intent to defraud, etc. Is used as a comprehensive term, including any disposition to put the debtor's property beyond the reach of creditors.—Auerbach v. Hitchcock, 9 N. W. 79, 28 Minn. 73.

221. In Sess. Laws Minn. 1867, c. 76, providing that an attachment may be allowed, where the debtor has assigned, secreted, or disposed of, etc., his property, etc. The words "disposed of" signify any actual removal or disposition in fact of his property, other than embraced within the

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meaning of the words "assigned" or "secreted," and used in connection therewith.—Guile v. McNanny, 14 Minn. 520, (Gil. 391.)

222. In an ordinance of the city of Minneapolis, providing that no person shall sell or dispose of spirituous liquors, etc. The words "dispose of" include other forms of disposal than indicated by other words in the ordinance, though consistent with them as respects the intent and purpose.—State v. Deusting, 22 N. W. 442, 33 Minn. 102.

Disposed.

See §§ 62, 63, *supra.*

Disseisin.

223. The intention to claim and possess the land in question is one of the qualities indispensable to constitute disseisin, as distinguished from trespass.—Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

Distinct.

224. In Pub. St. Minn. c. 75, § 8, providing that if mortgaged premises consist of distinct farms, tracts, etc., they shall be sold separately on foreclosure. Means a separation by some natural means or boundary, or by intervening space, and not simply a portion which may be described by arbitrary imaginary lines.—Worley v. Naylor, 6 Minn. 192, (Gil. 123.)

District.

225. In Const. Minn. art. 1, § 6, providing that one accused of crime shall be tried by a jury of the "county or district" wherein the crime was committed. The word "district" means trial district.—State v. Miller, 15 Minn. 344, (Gil. 277.) See State v. Gut, 13 Minn. 341, (Gil. 315.)

226. Such "district" may be an area larger or smaller than a county.—State v. Kemp, 24 N. W. 349, 34 Minn. 61.

Dog.

See § 75, *supra.*

Domestic corporation.

227. A corporation formed by the consolidation of a domestic and a foreign corporation pursuant to Laws Minn. 1881, c. 94, is a domestic corporation within Laws Minn. 1872, c. 53, § 2, (Gen. St. Minn. 1878, c. 34, § 15.) providing for service upon domestic corporations.—In re St. Paul & N. P. Ry. Co., 30 N. W. 432, 36 Minn. 85.

Domicile.

228. Nearly synonymous with "home."—Venable v. Paulding, 19 Minn. 488, (Gil. 422.)

See, also, §§ 659-662, *post.*

Dower.

229. Is not the result of the marriage contract, but is a provision which the law makes, founded on public policy, for the benefit of the wife, as an incident to the marriage relation, and contingent upon the seisin and death of the husband.—Morrison v. Rice, 29 N. W. 168, 35 Minn. 436.

See, also, § 360, *post.*

Driven.

230. In Sp. Laws Minn. 1875, c. 48, § 2, entitling the St. Louis Dalles Improvement Company to toll on all logs driven down the St. Louis river, at a certain section, etc. Construed to properly include logs driven only by the unaided action of the stream.—St. Louis Dalles Imp. Co. v. C. N. Nelson Lumber Co., 44 N. W. 1080, 43 Minn. 130.

Due.

231. Without any qualification, the word "due" means owing and immediately payable: but as used in Gen. Laws Minn. 1860, pp. 247, 248, § 15, relating to garnishment, allowing attachment of any money or other thing due or belonging to defendant, means any indebtedness to defendant absolute in its nature, and payable at some time beyond any contingency.—Gies v. Bechtner, 12 Minn. 279, (Gil. 183.)

232. In a clause of a mortgage, stating that after sale the mortgagee may retain the principal and interest which shall be due, etc., "due" is used in the sense of owing.—Fowler v. Johnson, 3 N. W. 986, 6 N. W. 486, 26 Minn. 338.

233. In Rev. St. Minn. 1878, c. 81, § 6, subd. 3, requiring the notice of sale in foreclosure to state the "amount claimed to be due." Is not used in the sense of "owing," but means the amount already payable, and for which the mortgagee has at the date of the notice a right to sell.—Bowers v. Hechtman, 47 N. W. 792, 45 Minn. 238.

234. In a tax deed stating a sale of the land for taxes due, "due" is not equivalent to "delinquent."—Sherburne v. Rippe, 29 N. W. 322, 35 Minn. 540; Gilfillan v. Chatterton, 37 N. W. 583, 38 Minn. 335.

Due diligence.

235. As between a guarantee and guarantor, the rule requiring due and reasonable diligence on the part of the former means a resort to the ordinary course of the law; i. e., obtaining judgment, issuing execution, etc.—Dewey v. W. B. Clark Investment Co., 50 N. W. 1032.

Due form.

236. A sheriff's certificate of mortgage sale, found to have been executed in due form, will be presumed to have contained a description of the property sold, the sum paid for it, and the time when the purchaser would be entitled to a deed.—Goenen v. Schroeder, 18 Minn. 66, (Gil. 51.)

Due process of law.

237. In Const. Minn. art. 1, § 7, declaring that no person shall be deprived of life, liberty, or property, "without due process of law." The intent of the language is to protect the citizen in the enjoyment of life, liberty, and property, and to prohibit interference therewith, except in accordance with such provisions of law as the legislature may enact to protect society, and secure the rights guarantied by the constitution.—Davidson v. Farrell, 8 Minn. 258, (Gil. 225.)

238. What is such "due process of law," depends upon the facts and circumstances of each

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particular case.—Davidson v. Farrell, 8 Minn. 258, (Gil. 225.)

239. "Due process of law" is law in its regular course of administration, through the courts of justice.—Baker v. Kelley, 11 Minn. 480, (Gil. 358;) Beaupre v. Hoerr, 13 Minn. 366, (Gil. 339;) State v. Becht, 23 Minn. 411.

240. "Due process of law," means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs.—State v. State Board of Medical Examiners, 26 N. W. 123, 34 Minn. 387.

241. "Due process of law" is incapable of any complete or exhaustive definition; all that can be done is to lay down certain general principles, and apply them to the facts of each case as they arise. "Due process of law" and the "law of the land" mean the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. In judicial proceedings, due process of law requires notice, hearing, and judgment; it does not mean the general body of the law, common and statute, nor anything the legislature may see fit to declare to be such.—Bardwell v. Collins, 46 N. W. 315, 44 Minn. 97.

242. Due process of law requires notice and hearing before judgment.—Irwin v. Pierro, 47 N. W. 154, 44 Minn. 490.

243. The constitutional requirement of "due process of law" is not limited strictly to judicial process or proceedings.—Lovell v. Seeback, 48 N. W. 23, 45 Minn. 465.

Duly assigned.

See §§ 60, 61, *supra.*

Duly contracted.

244. An allegation in a complaint that plaintiff duly contracted to do certain work provided for by statute means that the parties contracted in compliance with the statute.—Folsom v. Chisago County, 9 N. W. 881, 28 Minn. 324.

245. An allegation in a complaint that defendant, a county, duly contracted for certain printing and publishing in a newspaper, raises a presumption that such newspaper was of the size and quality required by the statute, and that plaintiff was the lowest bidder.—Folsom v. Chisago County, 9 N. W. 881, 28 Minn. 324.

Duplicate taxation.

246. A requirement that one person, or any one subject of taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once.—State v. Rand, 40 N. W. 835, 39 Minn. 502.

Duress.

247. In its extended sense, means that degree of severity either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness.—Tapley v. Tapley, 10 Minn. 448, (Gil. 360.)

248. Pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with property of serious import, so that the injury can only be prevented or escaped from by doing the thing or act required.—Kraemer v. Deustermann, 35 N. W. 276, 37 Minn. 469.

Easement.

249. Consists of a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.—Warner v. Rogers, 23 Minn. 34; Mackey v. Harmon, 24 N. W. 702, 34 Minn. 168.

250. In a highway. Embraces all public travel not prohibited by law, as the wants and habits of the public demand.—Carli v. Stillwater Street Railway & Transfer Co., 10 N. W. 205, 28 Minn. 373.

Effects.

See §§ 604–608, *post.*

Elements.

251. In a lease providing that the premises shall be surrendered in good condition, etc., damages by the elements excepted. Refers to some sudden, unusual, or unexpected action of the elements, such as floods, tornadoes, or the like, extraordinary disasters not anticipated; and does not include the percolation of water through side walls.—Harris v. Corlies, Chapman & Drake, 41 N. W. 940, 40 Minn. 106.

Eligible.

252. In Const. Minn. art. 7, § 7, providing that everybody entitled to vote at any election, etc., shall be eligible to any office which now is or hereafter may be elective, etc. Proper to be chosen; qualified to be elected.—Taylor v. Sullivan, 47 N. W. 802, 45 Minn. 309.

Eminent domain.

253. The right of the state as a sovereign to resume the possession of private property for public use; the right to take private property for public use; a superior right to apply private property to public use.—Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155, (Gil. 139.)

254. The term implies no restriction as to manner of exercise of the right.—Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155, (Gil. 139.)

Encumbrance.

255. In the provision of the charter of the city of Winona, (Sp. Laws Minn. 1867, p. 102,) authorizing its common council to prevent the encumbrance of streets, etc. Is used in the sense of obstruction.—Fox v. City of Winona, 23 Minn. 10.

Engineering purpose.

256. In Sp. Laws Minn. 1864, c. 1, authorizing the Southern Minnesota Railroad Company to change the location of its line for engineering

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purposes. A purpose of constructing the road on a certain route on which it can be built, operated, and kept in repair in the best, cheapest, and safest manner.—McRoberts v. Southern Minnesota R. Co., 18 Minn. 108, (Gil. 91.)

Enter upon, take, possess, occupy, or use.

257. In the provision of the charter of the First Division St. Paul & Pacific Railroad Company, (Laws Minn. 1857, Ex. Sess. p. 3, § 13,) authorizing such company to apply for the appointment of commissioners to appraise lands for any of the purposes for which it may "enter upon, take, possess, occupy, or use lands." These words are employed to designate acts which amount to an appropriation of the land in question.—Hursh v. First Div. St. P. & P. R. Co., 17 Minn. 439, (Gil. 417.)

Equally.

258. Equally interested, in a venture, imports equality in all respects.—Connolly v. Davidson, 15 Minn. 519, (Gil. 428.)

Equity.

259. In Gen. St. Minn. 1866, c. 66, § 79, permitting certain equities to be set up in an answer. Means an equity which, according to the rules governing courts of equity under the former system, would entitle the defendant to relief wholly or in part, against the liability set forth in the complaint as the basis of plaintiff's action.—Barker v. Walbridge, 14 Minn. 469, (Gil. 351;) Birdsall v. Fischer, 17 Minn. 100, (Gil. 76.)

Equitable.

See § 434, *post.*

Established.

See § 523, *post.*

Estate.

See §§ 405, 406, *post.*

Estate of homestead.

See §§ 347-350, *post.*

Every person.

260. In Const. Minn. art. 1, § 8, declaring every person to be entitled to a remedy for injuries or wrongs. Is not to be taken in its broadest sense, so as to include aliens,—enemies, as well as friends.—Davis v. Pierse, 7 Minn. 13, (Gil. 1.)

Eviction.

261. From land. An actual, physical putting out, or virtual exclusion, under the paramount title, of the covenantee from the peaceful enjoyment of his title.—Allis v. Nininger, 25 Minn. 525.

262. An involuntary loss of possession by reason of the hostile assertion of an irresistible title.—Fritz v. Pusey, 18 N. W. 94, 31 Minn. 368.

263. Inability of a purchaser of land to obtain possession by reason of the paramount title constitutes constructive eviction.—Fritz v. Pusey, 18 N. W. 94, 31 Minn. 368.

Evince no intention.

264. In Gen. St. Minn. 1878, c. 45, § 46, providing that "whenever any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a forfeiture," etc. Construed as meaning, "evince an absence of intention."—Sioux City & St. P. R. Co. v. Singer, (Minn.) 51 N. W. 905.

Examinations.

265. In Gen. St. Minn. 1878, c. 36, § 67, requiring a county superintendent of schools to keep records of all examinations of teachers. Includes re-examinations.—School Dist. No. 10 v. Thelander, 21 N. W. 554, 32 Minn. 476.

Exception.

266. An exception in a deed is of a part of the thing granted, and of something in esse at the time of the grant, while a reservation is something newly created or reserved out of the thing granted that was not in esse before; as, an easement.—Elliot v. Small, 29 N. W. 158, 35 Minn. 396; Winston v. Johnson, 45 N. W. 958, 42 Minn. 398.

Execution.

267. Of a note. Usually imports delivery.—Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

Existing.

268. In Pub. St. Minn. c. 60, § 24, providing that the limitation of an action upon an existing contract shall commence from the time the last payment is made thereon. A contract once made is an existing contract until it is paid or barred by the statute of limitations, or its obligation in some other way canceled.—Whitaker v. Rice, 9 Minn. 13, (Gil. 1.)

269. In the act establishing the municipal court of the city of St. Paul, (Sp. Laws Minn.) and providing for a transfer thereto of any action before a justice of the peace, now existing, etc. Refers to justice, and not to action.—Marsh v. Smith, 22 Minn. 46.

Expenses.

270. In the provision of a chattel mortgage for the payment, out of the proceeds of the sale of the mortgaged property, of "all expenses for the sale," those words include only expenses incurred in doing such things as form part of the proceedings of sale,—the expense of a copy of the mortgage, of taking the mortgaged property, of giving notice of sale, and of conducting and completing the sale; they do not include the mortgagee's expenses incurred in placing the copy in a sheriff's hands, or in attending the sale.—Ferguson v. Hogan, 25 Minn. 135.

Expert.

271. A person selected by the court or the parties in a cause, on account of his knowledge or skill, to examine, estimate, and ascertain things,

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and make a report of his opinion; one who is admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point in issue.—Le Mere v. McHale, 15 N. W. 682, 30 Minn. 410.

Expiration.

272. In Gen. St. Minn. 1878, c. 84, § 12, as amended by Laws 1881, (Ex. Sess. c. 9,) providing that if an action is brought upon a written lease against a tenant holding over "after the expiration of said lease," restitution shall be made, etc. The words "expiration of said lease" mean the expiration of the time expressed in the lease as the term thereof.—State v. Burr, 13 N. W. 676, 29 Minn. 432.

Ex post facto law.

273. A law which renders an act punishable in a manner in which it was not punishable when it was committed.—State v. Ryan, 13 Minn. 370, (Gil. 343.)

Express warranty.

274. In the law of insurance. A stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends.—Aetna Ins. Co. v. Grube, 6 Minn. 82, (Gil. 32.)

Face.

275. A stipulation of express warranty in a policy of insurance will be considered to be on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper referred to in the policy.—Aetna Ins. Co. v. Grube, 6 Minn. 82, (Gil. 32.)

False—Forged.

276. As applied to a writing. A writing that is counterfeit or not genuine; an instrument by which some one has attempted to imitate another's personal act, and, by means of such imitation, to cheat and defraud.—State v. Willson, 9 N. W. 28, 28 Minn. 52.

False, forged, or altered.

277. In Gen. St. Minn. 1878, c. 96, § 2, prescribing the penalty for uttering as true any false, forged, or altered record, deed, or instrument. The words have the same meaning as similar words in section 1, prescribing the punishment for falsely making, altering, or forging writings, etc.—State v. Willson, 9 N. W. 28, 28 Minn. 52.

Family physician.

278. A physician who usually attended and was consulted by a person's wife and children would be his family physician.—Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497, (Gil. 473.)

Farm.

279. In the popular sense, a portion or tract of land, consisting usually of grass land, meadow, pasture, tillage, and woodland, cultivated by one man, and usually owned by him in fee. Webst. Dict.—Worley v. Naylor, 6 Minn. 192, (Gil. 123.)

Farm crossings.

280. In the charter of the St. Paul & Sioux City Railroad Company, (Sp. Laws Minn. 1864, c. 1, subc. 2, § 2, providing for the construction and maintenance of "proper and necessary farm-crossings" over the line of its roads. Crossings from one side to the other of the railroad, whether by passing over or under the tracks.—St. Paul & S. C. R. Co. v. Murphy, 19 Minn. 500, (Gil. 433.)

Feloniously.

281. As defined in Pub. St. Minn. c. 98, § 18, to mean criminally. Is applicable to misdemeanors as well as felonies.—State v. Hogard, 12 Minn. 293, (Gil. 191.)

282. In an indictment. Includes forcibly.—O'Connell v. State, 6 Minn. 279, (Gil. 190.)

283. The words "feloniously," "criminally," are not necessary in an indictment which shows that the act charged as the offense is a crime.—State v. Garvey, 11 Minn. 154, (Gil. 95.)

File.

284. At common law. A thread string or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe-keeping and readily turning to the same.—Gorham v. Summers, 25 Minn. 81.

285. A plat referred to in a deed as on file will be taken to mean deposited, as distinguished from a technical filing of the plat.—Slosson v. Hall, 17 Minn. 95, (Gil. 71.)

Filed.

286. A paper is "filed," in the ordinary sense, when it is delivered to the proper officer, and received by him to be kept on file. Indorsing and indexing are not included.—Gorham v. Summers, 25 Minn. 81.

287. A chattel mortgage when delivered to, received by, and kept by the proper officer, is filed within the meaning of Gen. St. Minn. 1878, c. 39, §§ 1–3, requiring such filing for the purpose of notice.—Gorham v. Summers, 25 Minn. 81.

288. A notice of intention to redeem left in the office of a register, and by him recorded and indexed, is filed within the meaning of Gen. St. Minn. 1866, c. 81, § 16, requiring the filing of such notice.—Willis v. Jelineck, 6 N. W. 373, 27 Minn. 18.

Final decree.

289. A decree which disposes of the cause, either sending it out of court before a hearing is had upon the merits or decreeing either in favor of or against the prayer in the bill.—Chouteau v. Rice, 1 Minn. 24, (Gil. 8.)

Final judgment.

290. The definitions of a "final judgment" by Rev. St. Minn. p. 349, § 158, and page 360, § 73, as "a final determination of the rights of the parties in the action," involve the necessity of its being a full determination of all the rights of the parties presented by the record, and containing such a complete grant of relief that no act re-

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mains to be done to entitle the party to his rights in the action but the issuance of the writ of execution to enforce it. Per FLANDRAU, J.—Deuel v. Hawke, 2 Minn. 50, (Gil. 37.)

291. A final judgment is a judgment that determines all that an application seeks.—Entrop v. Williams, 11 Minn. 381, (Gil. 276.)

292. A judgment adjudging the amount due and directing a sale of mortgaged premises is a final judgment from which an appeal can be taken.—Dodge v. Allis, 7 N. W. 732, 27 Minn. 376.

293. A judgment dismissing an appeal from an award of commissioners in condemnation proceedings is final, within Gen. St. Minn. 1878, c. 34, § 29, as amended by Laws 1881, c. 57, requiring a railway corporation to pay an award within 60 days after final judgment.—Minneapolis & N. W. R. Co. v. Woodworth, 21 N. W. 476, 32 Minn. 452.

Final order.

294. In Pub. St. Minn. c. 71, § 11, subd. 6, allowing an appeal from a final order affecting a substantial right, etc. An order which terminates or ends a matter or proceeding.—Rondeau v. Beaumette, 4 Minn. 224, (Gil. 163.)

295. An order granting a new trial is not a final order affecting a substantial right, within the meaning of Gen. St. Minn. 1878, c. 86, § 8, subd. 6, allowing an appeal from such an order. —McNamara v. Minnesota Cent. Ry. Co., 12 Minn. 388, (Gil. 269.)

296. In Gen. St. Minn. 1878, c. 86, § 8, subd. 6, allowing an appeal from a final order in a special proceeding. Includes an order for the final distribution of an intestate's estate.—State v. Severance, 13 N. W. 48, 29 Minn. 269.

297. An order appointing commissioners in proceedings to condemn lands is a final order in a special proceeding.—In re St. Paul & N. P. Ry. Co., 25 N. W. 345, 34 Minn. 227.

First mortgage bonds.

298. Ordinarily bonds secured by first mortgage.—Minnesota & P. R. Co. v. Sibley, 2 Minn. 13, (Gil. 1.)

Fixtures.

299. In the primary meaning of the term, and distinguished from movable or tenants' fixtures, means chattels annexed to the realty so as to become a part of it.—Wolford v. Baxter, 21 N. W. 744, 33 Minn. 12.

Floating.

300. By the phrase "rivers of sufficient size for floating logs," etc., used in Gen. St. Minn. 1878, c. 32, §§ 1, 78, is meant such streams as with artificial contrivances, and the use of means ordinarily employed, are capable of floating logs.—Merriman v. Bowen, 23 N. W. 843, 33 Minn. 455.

Force.

301. The use of terms "with force," "with force and arms," is not necessary in a complaint for assault and battery.—Greenman v. Smith, 20 Minn. 418, (Gil. 370.)

Foreclosed.

302. In Laws Minn. 1871, c. 52, § 1, providing that a mortgage containing a power of sale may be foreclosed within 10 years after the maturity of such mortgage. Is to be taken in its popular sense, and the term is not applicable until a sale of the property has been effected.—Duncan v. Cobb, 21 N. W. 714, 32 Minn. 460.

Foreclosure.

303. In Gen. St. Minn. 1878, c. 81, § 24, allowing a mortgagor, within one year after foreclosure, to recover three times the amount of certain overcharges, and for which the property was sold, unless such overplus has been paid to the mortgagor or his assigns. The word "foreclosure" means the proceedings resulting in and including the mortgage sale.—Beal v. White, 8 N. W. 829, 28 Minn. 6.

Forfeit.

304. In Gen. Laws Minn. 1889, c. 200, § 4, relating to mechanics' liens, and providing that if the vendee of land sold upon an executory contract shall "forfeit or surrender such contract" the vendor shall be deemed the owner, within the meaning of the act, the word "forfeit," used as it is in connection with "surrender," which undoubtedly means "yielded," "rendered," or "delivered up," must be given its common and general definition, which is "lost by omission or negligence or misconduct," instead of the restricted meaning ordinarily expressed by "forfeitable."—Nolander v. Burns, (Minn.) 50 N. W. 1016.

Forfeiture.

305. In Act Minn. March 9, 1878, providing that lands granted to the Duluth & Iron Range Railroad Company by Act March 9, 1875, shall, in case of forfeiture by said company, be transferred to the Duluth & Winnipeg Railroad Company. Means such a forfeiture as must be asserted by judicial proceedings.—Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., 47 N. W. 464, 45 Minn. 104.

306. The word is not used in the act in the sense of a default or breach of condition.—Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., 47 N. W. 464, 45 Minn. 104.

Forged.

See § 276, *supra*.

Forgery.

307. The fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy.—State v. Mott, 16 Minn. 472, (Gil. 424.)

Franchise.

308. A right such as cannot be exercised without the express permission of the sovereign power; a privilege or immunity of a public nature which cannot be legally exercised without legislative grant.—Blake v. Winona & St. P. R. Co., 19 Minn. 418, (Gil. 362;) Green v. Knife Falls Boom Corp., 27 N. W. 924, 35 Minn. 155;

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Dike v. State, 38 N. W. 95, 38 Minn. 366; State v. Minnesota Thresher Manuf'g Co., 41 N. W. 1020, 40 Minn. 213.

See, also, § 572, *post.*

Fraud.

309. Fraud is every kind of artifice made use of by one person for the purpose of deceiving another.—Brown v. Manning, 3 Minn. 35, (Gil. 13.)

310. Deceit in grants and conveyances of land and bargains and sales of goods, etc., to the damage of another person, either by the suppression of the truth or the suggestion of a falsehood, constitutes fraud. Jac. Law Dict.—Brown v. Manning, 3 Minn. 35, (Gil. 13.)

311. In the sense of a court of equity, fraud properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and which are injurious to another.—Cock v. Van Etten, 12 Minn. 522, (Gil. 431.)

312. The fraud on which courts of equity go in cases of part performance is not fraud merely of that nature which may be said to exist in every case of refusal to fulfill an agreement, but that sort of fraud cognizable in equity only.—Townsend v. Fenton, 21 N. W. 726, 32 Minn. 482.

313. Fraud, in its broadest sense, includes all acts or omissions which involve a breach of legal duty, which are injurious to the rights of others, and, in contemplation of equity, many acts which do not involve any actual intention to defraud.—In re Shotwell, 45 N. W. 842, 43 Minn. 389.

See, also, § 208, *supra.*

Free.

314. In Const. Minn. art. 2, § 2, providing that the Mississippi river and rivers of the state shall be "forever free," etc. Is equivalent to "without any duty, tax, impost, or toll."—Osborne v. Knife Falls Boom Corp., 21 N. W. 704, 32 Minn. 412.

Free lands.

315. In a trust deed of railway lands. Construed to mean such lands as had not been bargained or sold, or contracted to be sold, through any particular agency, or in any particular manner, or set apart or used for a town-site, or for depot purposes; such land as was for sale at the company's office.—Sioux City & St. P. R. Co. v. Robinson, 43 N. W. 326, 41 Minn. 452.

Frivolous answer.

316. An answer which, if true, does not contain any defense to any part of the plaintiff's cause of action. Its insufficiency as a defense must be so glaring that the court can determine it upon a bare inspection, without argument.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

From.

317. "From its passage" and "from the day of its passage," used in reference to an act of the legislature, like the expressions, "from the date" and "from the day of the date," are synonymous.—Parkinson v. Brandenburg, 28 N. W. 919, 35 Minn. 294.

From and after.

318. In Laws Minn. 1885, c. 70, providing that the act shall take effect and be in force "from and after its passage," the words "from and after" are words of exclusion, and in computing time the day of passage is to be excluded.—Parkinson v. Brandenburg, 28 N. W. 919, 35 Minn. 294.

Fugitive from justice.

319. To be a fugitive from justice, in the sense of the act of congress regulating extradition, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within the state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense he has left its jurisdiction, and is found within the territory of another state.—State v. Richter, 35 N. W. 9, 37 Minn. 436.

Furnish.

320. Furnishing material, within the meaning of the laws relating to mechanics' liens, includes work done or prepared at the yard or shop of the contractor.—Howes v. Reliance Wire-Works Co., 48 N. W. 448, 46 Minn. 44.

321. The furnishing of the material is complete when it is sold and delivered for the purposes of the erection.—Burns v. Sewell, (Minn.) 51 N. W. 224.

Gambling.

322. Risking money or other property, between two or more persons on a contest or chance of any kind, where one must be the loser and the other the gainer.—State v. Shaw, 39 N. W. 305, 39 Minn. 153.

323. Betting on a horse race is gambling.—State v. Shaw, 39 N. W. 305, 39 Minn. 153.

Gambling device.

324. A horse race is not a gambling device, within the meaning of Pen. Code Minn. §§ 294, 295, prohibiting gambling devices; nor are lists descriptive of such race, or statements or announcements of the particulars thereof, from which those desiring to bet on the races may conveniently obtain information with respect to the same, gambling devices.—State v. Shaw, 39 N. W. 305, 39 Minn. 153.

General damages.

325. Damages, such as the law implies or presumes to have accrued from a wrong complained of; sometimes spoken of as necessarily resulting from the wrong.—Smith v. St. Paul, M. & M. Ry. Co., 14 N. W. 797, 30 Minn.169.

326. Damages not pecuniary in their nature.—Clementson v. Minnesota Tribune Co., 47 N. W. 781, 45 Minn. 303.

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Good and sufficient deed.

327. A contract for the sale of land calling for a "good and sufficient deed" means such a deed as will actually pass the title.—Cogan v. Cook, 22 Minn. 137.

Good cause shown.

328. In Gen. St. Minn. 1878, c. 66, § 125, authorizing the court, "upon good cause shown," to set aside or modify its judgments, etc. A good defense to the action is "good cause" for setting aside a judgment taken against defendant on his default.—Lord v. Hawkins, 38 N. W. 689, 39 Minn. 73.

329. Merely reading a certified statement of a court commissioner, without seeing the witnesses or the contending parties, and thereupon setting aside the determination of the commissioner, is not a setting aside for "good cause shown," within the meaning of the statute.—State v. Bechdel, 37 N. W. 338, 38 Minn. 278.

330. In the provision of the act relating to the municipal court of the city of St. Paul, (Sp. Laws Minn. 1889, c. 351, § 21, subd. 7,) providing that defaults may be opened for good cause shown, etc. The cause must be such as would justify the exercise of the power by a district court.—Granse v. Frings, 49 N. W. 60, 46 Minn. 352.

Good faith.

331. In Gen. St. Minn. 1878, c. 69, § 2, as amended by Laws 1889, c. 103, providing that a deed made by a married woman, in good faith, without joinder of her husband, shall, after a divorce procured by her, be valid as if she had been single at the time of the conveyance. The words "good faith" are used in their ordinary and popular sense, referring to the actual knowledge and intentions of the parties.—Wistar v. Foster, 49 N. W. 247, 46 Minn. 484.

332. Want of notice is an essential element of good faith as the term is used in Gen. St. Minn. 1878, c. 39, § 1, providing that chattel mortgages, not filed, and without change of possession of the mortgaged property, shall be void as to subsequent purchasers, etc., in good faith.—Tolbert v. Horton, 18 N. W. 647, 31 Minn. 518.

333. An attaching or judgment creditor is not a purchaser in good faith, within the meaning of Rev. St. Minn. c. 46, § 24, providing that an unrecorded conveyance shall be void against subsequent purchasers in good faith.—Greenleaf v. Edes, 2 Minn. 264, (Gil. 226;) Gaston v. Merriam, 22 N. W. 614, 33 Minn. 271.

334. One who purchases at a foreclosure sale, or who takes an assignment from such purchaser, is not entitled to protection from the effect of the statute prohibiting usury, (Gen St. Minn. 1878, c. 23,) as an innocent purchaser in good faith, unless the purchase or assignment was without notice, as well as for a valuable consideration.—Jordan v. Humphrey, 18 N. W. 450, 31 Minn. 495.

335. To constitute such good faith on the part of a trespasser on land as will restrict the measure of damages to the actual damage, no more is necessary than that he should have acted without culpable negligence or a willful disregard of the rights of others, in the honest and reasonable belief that his conduct was rightful; notice of an adverse claim would not, alone, place him in the position of a culpably willful trespasser.—Whitney v. Huntington, 33 N. W. 561, 37 Minn. 197.

336. "Good faith," as used in Laws Minn. 1887, c. 191, entitled "An act to regulate actions for libel," and providing that to protect the publisher the publication must have been made in good faith, etc., means made in the belief of its truth, upon reasonable grounds for the belief, after exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances.—Allen v. Pioneer-Press Co., 41 N. W. 936, 40 Minn. 117.

See, also, § 86, *supra*.

Grade.

337. In an order of the common council of a city to the board of public works to "grade" a street. Construed to include macadamizing the street, as well as putting down stone gutters and curbing.—State v. District Court of Ramsey County, 22 N. W. 295, 33 Minn. 164.

Grant.

338. In Pub. St. Minn. c. 61, § 106, securing to a married woman any property acquired by her by grant, etc. Applies to corporeal and incorporeal, personal and real, property.—Rich v. Rich, 12 Minn. 468, (Gil. 369.)

Gross earnings.

339. In Laws Minn. 1857, (Ex. Sess.) c. 1, subc. 1, providing for payment to the state by a railroad company of 3 per cent. upon its gross earnings. The term does not include the compensation paid to such company by another company for the use of its lines.—State v. St. Paul, M. & M. Ry. Co., 15 N. W. 307, 30 Minn. 311.

Guest.

340. One who stops at an inn as a traveler, and is received as such, immediately becomes a guest.—Ross v. Mellin, 32 N. W. 172, 36 Minn. 421.

Half.

341. A conveyance of "one half" of a certain piece of land is to be construed as meaning an undivided half.—Baldwin v. Winslow, 2 Minn. 213, (Gil. 174.)

342. In a deed, conveying the east half of a lot, the word "half" is to be taken in its general and popular sense, and not as divided in the usual and customary way of dividing government lots into halves.—Cogan v. Cook, 22 Minn. 137.

Headquarters of a railroad.

343. In Sp. Laws Minn. 1879, c. 182, providing for the issuance of bonds by the city of Minneapolis to the Minneapolis & Northwestern Railroad Company, provided the eastern terminus, general offices, and headquarters of

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said railroad shall be at Minneapolis. The statute means the operating headquarters and general offices of the road, and requires that they should be established and permanently maintained in said city.—State v. City of Minneapolis, 21 N. W. 722, 32 Minn. 501.

Heirs.

344. In a will. May be construed to mean devisees, legatees, or distributees, when such appears to be the intention of the testator.—Greenwood v. Murray, 9 N. W. 629, 28 Minn. 120.

Highway.

345. A passage, road, or street which every citizen has a right to use.—Carli v. Stillwater Street Railway & Transfer Co., 10 N. W. 205, 28 Minn. 373.

Hindered and obstructed.

346. In Gen. St. Minn. 1878, c. 32, § 78, authorizing a person who is hindered and obstructed in driving logs, by the logs of another, to recover compensation for driving the hindering logs to some point for separation. It is not necessary, to constitute a hindrance or obstruction, that the logs should come in actual contact.—Anderson v. Maloy, 19 N. W. 387, 32 Minn. 76.

Homestead.

347. In the acts exempting homesteads. The place of residence of the family; a dwelling-house in which the family of the owner resides, and connected therewith a greater or less quantity of land.—Tillotson v. Millard, 7 Minn. 513, (Gil. 419;) Kelly v. Baker, 10 Minn. 154, (Gil. 124;) Kresin v. Mau, 15 Minn. 116, (Gil. 87;) Byrne v. Hinds, 16 Minn. 521, (Gil. 469;) Ferguson v. Kumler, 6 N. W. 618, 27 Minn. 156.

348. The land and dwelling, not the interest or title of the claimant, constitute the homestead.—Kaser v. Haas, 7 N. W. 824, 27 Minn. 406.

349. The legal home and dwelling place remain the homestead, although the owner is temporarily absent therefrom.—Donaldson v. Lamprey, 11 N. W. 119, 29 Minn. 18.

350. The right to the use and occupation of certain premises as an exempt homestead is treated as a substantial interest in itself, and is frequently denominated in the books an "estate of homestead."—Holbrook v. Wightman, 17 N. W. 280, 31 Minn. 168.

Horse race

See §§ 322, 323, *supra*.

Household furniture.

351. A silver watch worn by a debtor is not household furniture, and as such exempt from execution under Gen. St. Minn. c. 66, § 279, although it is the only time piece used in the household.—Rothschild v. Boelter, 18 Minn. 361, (Gil. 331.)

House of ill fame.

352. A mere synonym for bawdy house, having no reference to the fame of the place, but denoting the fact.—State v. Smith, 12 N. W. 524, 29 Minn. 193.

If.

353. In the charter of the village of Blue Earth, (Sp. Laws Minn. 1872, c. 36,) providing that persons licensed by the village council to sell liquors shall not be required to obtain a license from the board of county commissioners, and shall not be prosecuted for selling, etc., liquors, "if having first obtained license therefor," agreeably to the provisions of Gen. St. 1866, c. 16, the word "if" is not intended to preserve the right of license in the county board, as it and the words following can be read, without violence, as referring to a license by the village council.—State v. Fleckenstein, 2 N. W. 475, 26 Minn. 177.

Immediately.

354. In Gen. St. Minn. 1878, c. 66, § 204, providing that application to enjoin a foreclosure sale shall be made immediately on receiving notice of the publication of notice of sale. Does not mean without any delay, but requires promptness in action.—O'Brien v. Oswald, 47 N. W. 316, 45 Minn. 59.

Immunity.

355. In Const. Amend. Minn. 1881, prohibiting the legislature from enacting any special or private law, granting any special or exclusive immunity, etc. An exemption from any charge, duty, office, tax, or imposition.—Dike v. State, 38 N. W. 95, 38 Minn. 366.

Implied contracts.

356. Such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform.—Deane v. Hodge, 27 N. W. 917, 35 Minn. 146.

Impotency.

357. In the law of divorce. Want of potentia copulandi, and not merely incapacity for procreation. It is an incapacity that admits neither copulation nor procreation. What the law refers to is capacity for copula vera, not for partial, imperfect, or unnatural copulation. The incapacity must also be incurable. — Payne v. Payne, 49 N. W. 230, 46 Minn. 467.

Improve.

358. In Gen. St. Minn. 1878, c. 18, § 3, providing that occupants of land shall maintain partition fences in equal shares so long as they continue to improve the same. Is not used in the sense of "cultivate." A fencing of land is an improvement, within the statute.—Boenig v. Hornberg, 24 Minn. 307.

Improvement.

359. That by which the value of anything is increased, its excellence enhanced, or the like; or an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally

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used, or more useful for the same purposes.—State v. Reis, 38 N. W. 97, 38 Minn. 371.

Inchoate right of dower.

360. The right of the wife to such interests in the lands of the husband as may be allowed by the law in force at the time of his death. It is a mere expectancy or possibility.—Guerin v. Moore, 25 Minn. 462.

Incidental printing.

361. In Sess. Laws Minn. 1856, p. 24, § 4, declaring it to be the duty of the state printer to do the incidental printing of each house of the legislature, etc. Does not include printing of the proceedings of a constitutional convention, or that of any body claiming to act as such.—Goodrich v. Moore, 2 Minn. 61, (Gil. 49.)

Including.

362. In Pub. St. Minn. c. 62, § 9, providing that the clerk must insert in the entry of judgment the necessary disbursements, including the fees of officers, etc. Does not necessarily confine the items of disbursements recoverable to those enumerated.—Cooper v. Stinson, 5 Minn. 522, (Gil. 416.)

Incorporated.

363. In Sp. Laws Minn. 1878, c. 19, § 1, enacting that certain territory shall be incorporated as the village of Pine Island. Is equivalent to "set apart by act of the legislature for incorporation," as found in Gen. Laws 1875, c. 139, § 1.—State v. Cornwall, 28 N. W. 144, 35 Minn. 176.

Incumbent.

364. Of an office. One in possession thereof.—State v. Benedict, 15 Minn. 198, (Gil. 153.)

365. In Gen. St. Minn. 1878, c. 9, § 2, subd. 1, providing that an office shall become vacant on the death of the incumbent. Does not apply to one elected to an office, but deceased without having qualified or entered upon its duties, and before the commencement of his term.—State v. Benedict, 15 Minn. 198, (Gil. 153.)

366. In Gen. St. Minn. 1878, c. 9, § 2, subd. 6, providing that an office shall become vacant upon the refusal or neglect of the incumbent to take oath of office, to file it, etc. Refers not merely to one already administering an office, but as well to one elected or appointed to an office, but not yet qualified.—Scott County v. Ring, 13 N. W. 181, 29 Minn. 398.

Incumbrance.

367. In a covenant against incumbrances. Includes any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.—Fritz v. Pusey, 18 N. W. 94, 31 Minn. 368; Mackey v. Harmon, 24 N. W. 702, 34 Minn. 168.

368. An easement may be an incumbrance, within such a covenant.—Mackey v. Harmon, 24 N. W. 702, 34 Minn. 168.

369. The word "incumbrance" used in a city charter, authorizing the council to prevent the incumbrance of streets, embraces any kind of obstruction of the streets.—Fox v. City of Winona, 23 Minn. 10.

Indecent assault—Indecent liberties.

370. In Pen. Code Minn. § 245, which is entitled "Indecent assault," and declares a person who takes "indecent liberties" with or on the person of a female, without her consent, etc., guilty of felony, the terms are, in effect, convertible expressions, and "indecent assault" is but the statutory definition of the crime epitomized.—State v. West, 40 N. W. 249, 39 Minn. 321.

Indemnify.

371. Is used in two general senses: (1) In the sense of giving security, as by the execution and delivery of a bond; (2) in the sense of compensating for actual damage.—Weller v. Eames, 15 Minn. 461, (Gil. 376.)

372. In a bond to indemnify one delivering goods to the obligor against legal liability, by reason of such delivery. Is to be taken in the sense of "to compensate for actual damage."—Weller v. Eames, 15 Minn. 461, (Gil. 376.)

Indirectly.

See § 216, *supra*.

Indorse.

373. As applied to commercial paper. Imports delivery.—Hoag v. Mendenhall, 19 Minn. 335, (Gil. 289.)

374. In its technical sense. Means to incur the liability of one who warrants payment of the paper, provided it is duly presented at maturity to the maker, not paid by him, and such fact is duly notified to the indorser.—Paine v. Smith, 24 N. W. 305, 33 Minn. 495.

Indorsement.

375. Of a bill or note. Is not merely a transfer of the title, but a fresh and substantive contract by which the indorser becomes a party to the bill or note, and liable for its payment on certain conditions.—Paine v. Smith, 24 N. W. 305, 33 Minn. 495.

376. Of a deposition. A final certificate annexed to the deposition is not an indorsement, within the meaning of a rule of court requiring a commissioner to take testimony to indorse upon the commission the time or times and place of taking it.—Beatty v. Ambs, 11 Minn. 331, (Gil. 234.)

Injunction.

See § 521, *post*.

Injuries.

377. In the provision of the charter of Minneapolis, (Sp. Laws Minn. 1881, c. 8, § 20,) requiring a notice to the mayor, etc., of that city before bringing an action "on account of any injuries received by means of any defect," etc. Includes as well injuries to property as to persons.—Nichols v. City of Minneapolis, 16 N. W. 410, 30 Minn. 545.

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Injuriously affected.

378. In Gen. St. Minn. 1878, c. 34, requiring corporations exercising the right of eminent domain to compensate for property injuriously affected. Means that the damage must be special, differing in kind from that sustained by the public generally, and which, by common law, would have given a private right of action. —Rochette v. Chicago, M. & St. P. Ry. Co., 20 N. W. 140, 32 Minn. 201.

Insanity.

379. Kleptomania is not insanity within the meaning of Gen. St. Minn. 1878, c. 62, § 5, allowing the annulment of a marriage for the insanity of one of the parties, etc.—Lewis v. Lewis, 46 N. W. 323, 44 Minn. 124.

Insolvency.

380. In its general and popular sense. Means the insufficiency of one's entire property and assets to pay all his debts.—Daniels v. Palmer, 29 N. W. 162, 35 Minn. 347.

381. In the insolvent law, (Laws Minn. 1881, c. 148,) when applied to a merchant or trader. Means his inability to pay his debts in the ordinary course of business, and not an inability to pay his debts at some future time.—Daniels v. Palmer, 29 N. W. 162, 35 Minn. 347; Daniels v. Bank of Zumbrota, 29 N. W. 165, 35 Minn. 351.

382. The "insolvency" of a debtor, which, as to a guarantor of his promissory note, will excuse the failure of the holder of the note to take legal proceedings against him, is such an utter insolvency as would make an action against him fruitless.—Brackett v. Rich, 23 Minn. 485.

383. A debtor, who has, in his own name, subject to be levied upon by execution, sufficient property to pay all his debts, is not insolvent, in such sense as to affect the validity of a transfer of property by him as against his creditors.—Camp v. Thompson, 25 Minn. 175.

Institution.

384. Although sometimes used as descriptive of the establishment or place where a business is carried on, "institution" properly means an association or society organized or established for promoting some specific purpose, in the act incorporating Hamline University, (Laws Minn. 1854, c. 43,) the terms "institution" and "university" are used synonymously.—State v. Hamline University, (Nobles County v. Hamline University,) 48 N. W. 1119, 46 Minn. 316.

Instrument under seal.

385. Words in the testimonium clause, indicating that a scroll or device was used as a seal, will render an instrument one under seal.—Brown v. Jordhal, 19 N. W. 650, 32 Minn. 135.

Insurance.

386. A non-enforceable contract for other insurance is not "other insurance," within the meaning of a clause in a fire insurance policy prohibiting the same without permission.—Funke v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 13 N. W. 164, 29 Minn. 347.

Intent.

387. In Pen. Code Minn. § 177, providing that, to constitute the offense of mayhem, the injury must be willfully inflicted, with the intent to injure, etc. Defined to be the purpose formed at the time.—State v. Hair, 34 N. W. 893, 37 Minn. 351.

388. The provision of the insolvent law (Laws Minn. 1881, c. 148) refusing a release to a debtor who has disposed of his property "with intent to cheat and defraud his creditors" means the commission of acts with the actual, corrupt, and dishonest design or purpose of cheating and defrauding.—In re Shotwell, 45 N. W. 842, 43 Minn. 389.

See, also, §§ 405, 406, *post.*

Intentionally.

See §§ 577, 578, *post.*

Interest.

389. In Laws Minn. 1869, c. 56, § 4, invalidating a power of attorney from a wife to her husband, authorizing the conveyance of any interest in the wife's estate. Embraces a leasehold interest.—Sanford v. Johnson, 24 Minn. 172.

390. In Gen. St. Minn. 1878, c. 75, § 2, providing that if a defendant in an action to determine adverse claims to real property disclaims in his answer any "interest or estate," etc., plaintiff cannot recover costs. Includes liens. —Donohue v. Ladd, 17 N. W. 381, 31 Minn. 244.

391. Of money. A rent paid by the debtor for the use of the creditor's money.—Brewster v. Wakefield, 1 Minn. 352, (Gil. 260.)

392. Interest, being the creature of contract, is recoverable strictly as interest only during the continuance of the contract, as provided by its terms before breach, and not after.—Mason v. Callender, 2 Minn. 350, (Gil. 302;) Bailly v. Weller, 2 Minn. 384, (Gil. 338.)

Interested in the estate.

393. Gen. St. Minn. 1878, c. 55, § 1, providing that bonds taken in or by order of the probate court may be prosecuted in the name, etc., of a person interested in the estate, includes an administrator de bonis non.—Balch v. Hooper, 20 N. W. 124, 32 Minn. 158.

Interested in the event of the action.

394. In Gen. St. Minn. 1878, c. 73, § 8, prohibiting testimony, by a person so interested, as to transactions, etc., with a deceased person, through whom the adverse party claims. The statute uses the expression in the sense in which it was understood at common law. To render a person incompetent on the ground of interest, he must have some legal, certain, and immediate interest, either in the event of the cause itself or in the record, as an instrument of evidence for or against him in some other action. The interest must be pecuniary, certain, direct, and immediate, and not an uncertain, contingent, remote, or a merely possible interest.—Perine v. Grand Lodge A. O. U. W., (Minn.) 50 N. W. 1022.

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Interlocutory.

395. An interlocutory order or decree is one made pending the cause, and before a final hearing on the merits.—Chouteau v. Rice, 1 Minn. 24, (Gil. 8.)

Involuntary servitude.

396. In Const. Minn. art. 1, § 2, forbidding involuntary servitude. Includes enforced labor.—State v. West, 43 N. W. 845, 42 Minn. 147.

Irrelevant.

397. A pleading is irrelevant which has no substantial relation to the controversy between the parties to the suit.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

Issue.

398. In a grant or devise of a remainder to issue. Is a word of purchase, and not of limitation.—Whiting v. Whiting, 44 N. W. 1030, 42 Minn. 548.

399. In a cause. The subject of difference between the parties, as settled by the pleadings, whether oral or written.—Davidson v. Farrell, 8 Minn. 258, (Gil. 225.)

Issued.

400. The provision of Gen. St. Minn. 1866, c. 64, § 13, requiring an execution to be dated "on the day on which it issued," means the day on which the execution is taken out of the clerk's office.—Mollison v. Eaton, 16 Minn. 426, (Gil. 383.)

Join.

401. In a conveyance. An assent to the sole conveyance of a married woman, indicated or implied by the husband assuming to execute it for his wife as her agent, is not a sufficient compliance with Gen. St. Minn. 1878, c. 69, § 2, requiring a husband to join with his wife in a conveyance of her property.—Gregg v. Owens, 33 N. W. 216, 37 Minn. 61.

Jointly.

402. As to ownership. Imports an equal interest in the thing held and owned.—Holmes v. Campbell, 10 Minn. 401, (Gil. 320.)

Judge of the district court.

403. Gen. Laws Minn. 1876, c. 44, conferring upon the "judge of the district court" jurisdiction over assignments for the benefit of creditors, vests the jurisdiction in the court itself, to be exercised by the judge or the authorized officer.—Clark v. Stanton, 24 Minn. 232.

Judgment.

404. The sentence of the law upon the record.—Jordan v. Humphrey, 21 N. W. 713, 32 Minn. 522.

Judgment lien.

405. A judgment lien is not an estate or interest in the land. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment.—Burwell v. Tullis, 12 Minn. 572, (Gil. 486;) Ashton v. Slater, 19 Minn. 347, (Gil. 300.)

406. In Laws Minn. 1862, c. 27, providing that when no execution shall have been issued and levied, or returned "No property found," within five years from the time of the entry of judgment, the lien of the judgment shall be determined, and the property of the judgment debtor discharged therefrom, the clause "the lien of the judgment shall be discharged," and the clause, "the property of the judgment debtor discharged therefrom," are substantially synonymous.—Entrop v. Williams, 11 Minn. 381, (Gil. 276.)

Judgment or other determination.

407. Rev. St. Minn. § 77, p. 339, providing that in pleading a judgment or other determination of the court, the facts conferring jurisdiction need not be stated, does not apply to judgments of courts in foreign states.—Karns v. Kunkle, 2 Minn. 313, (Gil. 268.)

Judicial.

408. Pertaining to courts of justice, as judicial powers; practiced in the distribution of justice, as judicial proceedings; proceeding from a court of justice, as a judicial determination. Belonging to and emanating from a judge as such.—Home Ins. Co. of St. Paul v. Flint, 13 Minn. 244, (Gil. 228.)

Judicial decree.

409. A foreclosure by advertisement is not a judicial decree.—Loy v. Home Ins. Co., 24 Minn. 315.

Judicial power.

410. The authority vested in judges. Bouv. Law Dict.—Home Ins. Co. of St. Paul v. Flint, 13 Minn. 244, (Gil. 228.)

Judicial purposes.

411. Gen. St. Minn. 1866, c. 64, § 33, attaching the county of Manomin to the county of Hennepin "for judicial purposes, to enforce civil rights," embraces the purpose of enforcing civil rights through a district court.—Beebe v. Fridley, 16 Minn. 518, (Gil. 467.)

Junior.

412. Is no part of a man's name.—Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

Jurisdiction.

413. Of the legal department of the government. The legal authority to administer justice.—Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

414. Of a court. The authority to hear and determine.—Montour v. Purdy, 11 Minn. 384, (Gil. 278.)

415. Pub St. c. 38, § 23, requiring that the license of a guardian to sell his ward's lands shall be given by a "probate court of competent jurisdiction," signifies the probate court, whose jurisdiction it is proper to invoke in each particular case.—Montour v. Purdy, 11 Minn. 384, (Gil. 278.)

416. Gen. St. Minn. 1866, c. 57. § 47, subd. 1, referring to an executor, etc., licensed to make a sale by the "probate court having jurisdiction," means the probate court whose jurisdiction

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it is proper to invoke in the case in hand.—Rumrill v. First Nat. Bank, 9 N. W. 731, 28 Minn. 202.

417. Gen. St. Minn. 1878, c. 57, § 51, subd. 1, providing that, in an action relating to any estate sold by an executor, it must appear that the executor, etc., was licensed to make the sale by the "probate court having jurisdiction," means the probate court whose jurisdiction has attached to the estate or property which it directs to be sold. —Davis v. Hudson, 11 N. W. 136, 29 Minn. 27.

See, also, § 36, *supra.*

Jury.

418. In Const. Minn. art. 1, § 6, declaring that a person accused of a crime shall be entitled to a speedy and public trial by an impartial jury. Imports a body of twelve men.—State v. Everett, 14 Minn. 439, (Gil. 330.)

Jury of the county.

419. A jury drawn from a city under a law authorizing such drawing is a jury of the county within which the city is located, within the meaning of Const. Minn. art. 1, § 6.—State v. Kemp, 24 N. W. 349, 34 Minn. 61.

Kicking.

420. A railway car. Consists in giving a car an impetus with an engine, and then uncoupling it and letting it run to its place with this impetus.—Mark v. St. Paul, M. & M. Ry. Co., 20 N. W. 131, 32 Minn. 208; Howard v. Same, 20 N. W. 93, 32 Minn. 214.

Kleptomania.

421. A morbid propensity to steal.—Lewis v. Lewis, 46 N. W. 323, 44 Minn. 124.

Knowingly.

422. A charge in an indictment that defendant willfully testified falsely includes an assertion that he knowingly so testified.—State v. Stein, (Minn.) 51 N. W. 474.

Labor.

423. One who prepares plans and specifications, and superintends a building, performs labor in its erection, within the meaning of Gen. St. Minn. 1866, c. 90, p. 589, giving a lien to one who performs labor, etc.—Knight v. Norris, 13 Minn. 473, (Gil. 438.)

Laborers.

424. In Gen. St. Minn. 1878, c. 32, relating to liens for labor upon logs or timber, and providing that the act is intended for the protection of laborers for hire. Those performing manual labor.—King v. Kelly, 25 Minn. 522.

425. In Laws Minn. 1889, c. 204, relating to the exemption of laborers' wages from attachment, etc. Contemplates employes, other than working men engaged in manual labor.—Boyle v. Vanderhoof, 47 N. W. 396, 45 Minn. 31.

Laboring man.

426. In Gen. St. Minn. 1878, c. 66, § 310, subd. 11, exempting from garnishment wages of a laboring man to a certain amount. A person whose work is manual; and does not include an agent who sells goods by sample.—Wildner v. Ferguson, 43 N. W. 794, 42 Minn. 112.

Larceny from the person.

427. Extends to every case of stealing, where the property stolen is on the person, or in the immediate charge and custody of the person, upon whom the theft is committed.—State v. Eno, 8 Minn. 220, (Gil. 190.)

Law of the land.

See §§ 237-243, *supra.*

Lawful.

428. In the provision of the statute concerning fraudulent conveyances, that every conveyance made with intent to hinder or defraud creditors or other persons of their lawful rights, etc., shall be void, etc. Excludes the idea that such conveyances could be declared void, as against any one holding a claim or demand that could not be enforced in a court of justice.—Bruggerman v. Hoerr, 7 Minn. 337, (Gil. 264.)

Lawfully administered oath.

429. Upon which an indictment for perjury may be sustained. An oath administered pursuant to, or as required or authorized by, some law.—State v. McCarthy, 42 N. W. 599, 41 Minn. 59.

Lawfully convey.

430. In Rev. St. Minn. c. 46, § 3, providing that a quitclaim deed shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale. Does not mean that land already conveyed to another can be lawfully conveyed, but that any real or fancied interest may be released.—Martin v. Brown, 4 Minn. 282, (Gil. 201.)

Laying stock.

431. In Laws Minn. 1855, pp. 58, 59, § 9, giving a lien from the time of "laying stock." The commencement of labor or placing materials on the premises.—Farmers' Bank v. Winslow, 3 Minn. 86, (Gil. 43;) Dunwell v. Bidwell, 8 Minn. 34, (Gil. 18.)

Lease.

432. A conveyance by way of demise, always for a less term than the party conveying has in the premises.—Craig v. Summers, 49 N. W. 742, 47 Minn. 189.

Left.

433. In a clause of a will giving a remainder to children on the death of the testator's widow, the tenant for life, the words, "and which, or any part of the estate and property then left by her, shall be divided among my children," imply a power to use some part of the principal or capital, if necessary, for the support of the widow and the maintenance and education of the children.—In re Oertle, 24 N. W. 924, 34 Minn. 173.

Legal or equitable.

434. In Pub. St. Minn. c. 60, § 87, providing that legal or equitable causes of action may be

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united in the same complaint. Includes everything arising out of the same transaction or transactions, connected with the same subject of action, where the relief sought may be partly legal and partly equitable, or wholly of the nature of one or the other.—Montgomery v. McEwen, 7 Minn. 351, (Gil. 276.)

Legal process.

435. A foreclosure by advertisement is not legal process.—Loy v. Home Ins. Co., 24 Minn. 315.

Legal residence.

See § 664, *post.*

Legal tender notes.

436. In an indictment charging larceny of "United States legal tender notes." Means genuine and current treasury notes.—State v. Beebe, 17 Minn. 241, (Gil. 218.)

Less.

See § 475, *post.*

Let.

See § 210, *supra.*

Liable.

437. In Const. Minn. art. 10, § 3, providing that each stockholder in any corporation (with certain exceptions) "shall be liable to the amount of stock held or owned by him." Means that the liability of the stockholders, in addition to the corporate liability for debts, shall be a sum equal to the amount of stock owned or held by them.—Willis v. St. Paul Sanitation Co., (Minn.) 50 N. W. 1110.

Liability.

438. In the mechanic's lien law, (Gen. St. Minn. 1878, c. 90, § 14,) providing that executors have the same rights and are subject to the same liabilities that their testator would be or might have if living. Means the liability to have the lien preserved and continued by the filing of an account, and by bringing an action upon such account according to the course of legal proceedings in like cases.—Cummings v. Halsted, 1 N. W. 1052, 26 Minn. 151.

License.

439. Relating to the use of land. Is a mere power or authority, founded on personal confidence, not assignable, and revocable at pleasure, unless subsidiary to a valid grant, to the beneficial enjoyment of which its exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity.—Johnson v. Skillman, 12 N. W. 149, 29 Minn. 95.

Lien.

See §§ 405, 406, *supra.*

Like service and proof.

440. In Gen. St. Minn. 1878, c. 66, § 210, allowing judgment upon default to be entered in certain actions upon "like service and proof" as in an action arising on contract for the payment of money only. Means the personal service of the summons, and proof of such service, and of the defendant's default.—Exley v. Berryhill, 33 N. W. 567, 37 Minn. 182.

Limitation.

441. In Pub. St. Minn. c. 60, § 24, providing that the limitation upon an existing contract shall commence from the time the last payment is made thereon. The limitation within which an action can be brought on the contract as made originally between the parties.—Whitaker v. Rice, 9 Minn. 13, (Gil. 1.)

List.

442. In statutes requiring a tax assessor to "list" property for taxation. To describe property so as to show, more or less definitely, according to its character, to what particular property the valuation relates.—Thompson v. Davidson, 15 Minn. 412, (Gil. 333.)

Local.

443. The words "local" and "vicinity," used in connection with assessments, are not to be taken as indicating any definite limits, but are usually understood to extend to the real property reported by the assessors to be actually benefited to a certain amount.—State v. District Court of Ramsey County, 23 N. W. 222, 33 Minn. 295.

Local improvements.

444. The term "local improvements" is commonly applied to the grading, curbing, and paving of streets.—Rogers v. City of St. Paul, 22 Minn. 494.

445. In Const. Minn. art. 9, § 1, as amended in 1869, allowing municipal corporations to levy assessments for local improvements. Means improvements made in a particular locality by which the real property adjoining or near such locality is specially benefited.—Rogers v. City of St. Paul, 22 Minn. 494.

446. Sprinkling a street is a local improvement, within the meaning of the constitutional provision.—State v. Reis, 38 N. W. 97, 38 Minn. 371.

Local taxation.

447. In Const. Minn. art. 11, § 5, giving county or township organizations power of local taxation. The taxation of property, properly subject thereto, in the place where such local organizations exist.—Davidson v. County Com'rs Ramsey County, 18 Minn. 482, (Gil. 432.)

Lot.

448. In the statute relating to homesteads. Is to be taken in the sense of a city, town, or village lot, according to the survey and plat of the city, town, or village where the property is situated.—Wilson v. Proctor, 8 N. W. 830, 28 Minn. 13; Lundberg v. Sharvey, 49 N. W. 60, 46 Minn. 350.

449. In Gen. St. Minn. 1878, c. 90, § 1, allowing a mechanic's lien upon a house and the lot upon which it is erected, etc. Is synony-

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mous with "tract" or "parcel."—North Star Iron Works Co. v. Strong, 21 N. W. 740, 33 Minn. 1.

450. The word denotes one single parcel of land lying in a body, known and treated by usage or otherwise as one tract, and as being the lot, tract, or parcel which the parties naturally understood as that which would appertain to or be connected with building or buildings after they should be erected.—Lax v. Peterson, 44 N. W. 3, 42 Minn. 214.

Lots as surveyed.

451. In a power of attorney, authorizing the sale of real estate in lots as surveyed. Construed as meaning small parcels as surveyed and designated on a plat.—Rice v. Tavernier, 8 Minn. 248, (Gil. 214.)

Lottery.

452. A scheme by a merchant tailor whereby clubs were formed for the distribution of suits of clothing, of a stipulated value, under nominal contracts of purchase, the payment of a weekly installment entitling the holders of tickets to participate in weekly drawings by lot, with the chance of securing goods of the value of $40 at any drawing, without further additional payments than the weekly installments then paid, is a lottery, within Pen. Code Minn. § 282, declaring and defining a lottery to be a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance, whether called a "lottery," "raffle," "gift enterprise," or any other name.—State v. Moren, (Minn.) 51 N. W. 618.

Maintain.

453. In Pub. St. Minn. c. 68, § 3, allowing personal representatives of one whose death is caused by the wrongful act of another to maintain an action, etc. To commence, institute, or begin.—Boutiller v. Steamboat Milwaukee, 8 Minn. 97, (Gil. 72.)

Majority.

454. In Const. Minn. art. 11, § 1, providing that laws removing county seats shall be submitted to the electors of the county at the next general election, and be adopted by a majority of such electors. The words "majority of such electors" mean a majority of the electors voting at such election.—Taylor v. Taylor, 10 Minn. 107, (Gil. 81;) Bayard v. Klinge, 16 Minn. 249, (Gil. 221;) Everett v. Smith, 22 Minn. 53.

455. The words cannot be construed as meaning a majority of those voting on the particular question.—Bayard v. Klinge, 16 Minn. 249, (Gil. 221.)

456. In Const. Minn. art. 14, § 1, relating to amendments to the constitution, the requirement that "a majority of the voters present and voting shall have ratified such alterations or amendments" means a majority of the voters who are present, and vote upon the proposition submitted to the electors, without respect to those who may be present and vote for other purposes at any election which may be held at the same time and place at which the proposition may, for reasons of convenience or other reasons, be submitted; and that those who may, at such time and place, come and vote for other purposes only, are not to be regarded as present and voting, so far as respects the proposed amendments.—Dayton v. City of St. Paul, 22 Minn. 400.

457. Majority of stockholders means a majority per capita, where the right to vote is per capita; and a majority of stock, where each share of stock is entitled to one vote.—Mower v. Staples, 20 N. W. 225, 32 Minn. 284.

See, also, § 799, *post*.

Make.

458. In Sp. Laws Minn. 1883, c. 281, authorizing the city of Minneapolis to acquire land for public parks, make assessments upon lands benefited thereby, the provision empowering the court to make or order a new assessment means to order to be made, or to revise, correct, or amend the original assessment.—State v. District Court, Hennepin County, 22 N. W. 625, 33 Minn. 235.

Malice.

459. Such as will authorize exemplary damages. Implies that the act complained of was in the spirit of mischief, or of criminal indifference to civil obligation.—Seeman v. Feeney, 19 Minn. 79, (Gil. 54.)

Manual labor.

460. In Gen. St. Minn. 1878, c. 32, § 63, giving a lien to persons performing manual labor, in cutting, etc., logs and timber. Includes the use and earnings of all implements, instrumentalities, or agencies, such as axe, cant-hook, team, or the like, which are actually used in and necessary to the performance of such labor by the lumberman or logger.—Martin v. Wakefield, 43 N. W. 966, 42 Minn. 176.

Marketable title.

461. A title clearly shown to be good; one free from reasonable doubt.—Richmond v. Koenig, 45 N. W. 1093, 43 Minn. 480.

462. A title, as to the validity of which there is a reasonable doubt, is unmarketable.—Hedderly v. Johnson, 44 N. W. 527, 42 Minn. 443.

Market hours.

463. There is no natural period known as "market hours," as the words are used in the provisions of the charter of the city of St. Paul, (Sp. Laws Minn. 1881, c. 93, § 15,) relating to markets.—State v. Municipal Court of St. Paul, 20 N. W. 243, 32 Minn. 329.

Matter or proceeding.

464. In Gen. St. Minn. 1878, c. 49, § 4, providing that "the jurisdiction acquired by any probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law." Includes the administration of an estate.—Culver v. Hardenbergh, 33 N. W. 792, 37 Minn. 225.

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May.

465. In its primary and common use, is not imperative, but enabling only. In statutes it means "must" and "shall" only in cases when the public interests or the rights of third parties require it to be so construed.—Lovell v. Wheaton, 11 Minn. 92, (Gil. 57.)

466. In Pub. St. Minn. c. 85, § 15, relating to arbitration, and providing that the award may be returned at any term or session of the court that may be held within the time limited by the submission. "May" does not mean "must" or "shall."—Lovell v. Wheaton, 11 Minn. 92, (Gil. 57.)

467. In Gen. St. Minn. c. 90, § 18, providing a form of oath to the account in a mechanic's lien suit that may be used, the obvious intent is that, though the form need not literally be followed, it must be conformed to in substance.—Clark v. Schatz, 24 Minn. 300.

468. In Laws Minn. 1874, c. 1, § 124, providing that a certificate of tax sale may be in a prescribed form. "May" is equivalent to "shall."—Gillillan v. Hobart, 28 N. W. 222, 35 Minn. 185.

Memorandum of sale.

See §§ 138, 139, *supra.*

Mental anguish.

469. The mental anguish, like physical pain, to be taken into consideration in actions for personal injuries, is such only as is endured by plaintiff in consequence of the injury, and does not extend to anxiety respecting the safety of others.—Keyes v. Minneapolis & St. L. Ry. Co., 30 N. W. 888, 36 Minn. 290.

Merits.

470. In Rev. St. Minn. c. 81, § 11, allowing an appeal from an order involving the merits of the action, the words "involving the merits" mean "the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon discretion or favor of the court."—Chouteau v. Parker, 2 Minn. 118, (Gil. 95.)

471. So, also, in the like provision of Gen. St. Minn. 1866, c. 86, § 8, subd. 3.—Holmes v. Campbell, 13 Minn. 66, (Gil. 58.)

Mesne profits.

472. The profits or other pecuniary benefits which one who dispossesses the true owner receives between disseisin and the restoration of possession.—Nash v. Sullivan, 20 N. W. 144, 32 Minn. 189.

Minor heirs.

473. In Rev. St. U. S. § 2292, concerning a land patent to minor heirs. Children under 21 years of age.—Anderson v. Peterson, 32 N. W 861, 36 Minn. 547

Money.

See §§ 604-608, *post.*

More.

474. From October 3d, the date of a vacancy in an office of judge, to November 3d, the date of an election to fill such vacancy, is not more than 30 days, within Const. Minn. art. 6, § 10, providing that such a vacancy shall be filled at the first annual election that occurs more than 30 days thereafter.—State v. Brown, 22 Minn. 482.

More or less.

475. In a description in a deed. The words are controlled by the definite calls, and are immaterial.—Austrian v. Dean, 23 Minn. 62.

Mortgage.

See § 197, *supra.*

Mortgagee in possession.

See §§ 569-571, *post.*

Municipal corporations.

476. Includes such quasi corporations as counties or towns, as well as cities.—Dowlan v. Sibley County, 31 N. W. 517, 36 Minn. 430; and see cases cited.

Municipal regulations.

See § 94, *supra.*

Murder.

477. At common law. "When a person of sound mind, memory, and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied." [Coke.]—Bonfanti v. State, 2 Minn. 123, (Gil. 99.)

Must.

478. In Rev. St. Minn. c. 70, § 41, providing that an action "must be tried in the county in which the parties, or one of them, reside at the commencement of the action." Is not mandatory.—Merrill v. Shaw, 5 Minn. 148, (Gil. 113.)

Natural.

479. The natural state of a stream is that state in which the stream is, under the ordinary operation of the physical laws which affect it.—Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

Navigability.

See § 566, *post.*

Necessaries.

480. As applied to a wife. Not confined to articles of food and clothing required to sustain life or preserve decency, but include such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.—Bergh v. Warner, 50 N. W. 77, 47 Minn. 250.

Negative pregnant.

481. A negative that implies an affirmative.—Stone v. Quaal, 29 N. W. 326, 36 Minn. 46.

Negotiable.

482. In Gen. St. Minn. 1878, c. 124, § 17, making bills of lading negotiable. Does not mean ne-

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gotiable in the sense that bills or notes are negotiable, but merely makes a transfer and delivery of them equivalent, for certain purposes, to a transfer and delivery of the property.—National Bank of Commerce v. Chicago, B. & N. R. Co., 46 N. W. 342, 560, 44 Minn. 224; Same v. Wisconsin Cent. Co., Id.; Chicago, B. & N. R. Co. v. L. T. Sowle Elevator Co., Id.; Wisconsin Cent. Co. v. Same, Id.

Negotiating.

483. In Rev. St. U. S. § 5136, authorizing national banks to carry on, among other things, the business of negotiating promissory notes. Is used, in its ordinary, appropriate, transitive sense, to indicate, not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the owner or holder and put into circulation.—First Nat. Bank of Rochester v. Pierson, 24 Minn. 140.

New matter constituting a defense.

484. In the provision of the Code that an answer may contain "a statement of any new matter constituting a defense." Has the same meaning as "matter in confession and avoidance."—Finley v. Quirk, 9 Minn. 194, (Gil. 179;) Craig v. Cook, 9 N. W. 712, 28 Minn. 232.

485. The defense of a former recovery is new matter within the meaning of the provision.—Bowe v. Minnesota Milk Co., 47 N. W. 151, 44 Minn. 460.

486. Within the meaning of Pub. St. Minn. c. 60, § 75, requiring a reply to new matter in an answer, matter affirmatively pleaded as a defense is new matter; but that which amounts merely to a traverse of the complaint is not.—Nash v. City of St. Paul, 11 Minn. 174, (Gil. 110.)

New road.

487. A road open to public travel is not, within the proviso to Laws Minn. 1887, c. 13, § 1, exempting a railway company from liability for damages sustained by an employe while engaged in the construction of a new road, etc.—Schneider v. Chicago, B. & N. R. Co., 43 N. W. 783, 42 Minn. 68.

488. The construction of a railway yard, and tracks therein, to be used in connection with and as a part of a railroad line, is not a construction of a new road, or any part thereof, within that proviso.—Moran v. Eastern Ry. Co. of Minnesota, (Minn.) 50 N. W. 930.

Newspaper.

489. In the ordinary understanding of the word, a newspaper is a publication which usually contains, among other things, the current general news of the day, and is intended for general circulation, and adapted to the general reader.—Beecher v. Stephens, 25 Minn. 146.

490. The "Northwestern Reporter," a weekly publication purporting to be, and, in fact, "devoted specially to the interests of the legal profession," the usual contents of which were the general laws of the state of Minnesota, published shortly after their passage, the decisions of the supreme court of the state and of the supreme court of Wisconsin, and occasional decisions of other courts, a court directory, cards of attorneys and counselors at law, a list of transfers of real estate in Ramsey county, Minn., advertisements and notices of law books, and about a page of miscellaneous business advertisements and legal anecdotes, was not a newspaper, within the meaning of Gen. St. Minn. 1878, c. 65, § 15, providing that the publication of a summons issued by a justice of the peace should be "made in a newspaper published in the county," etc.—Beecher v. Stephens, 25 Minn. 146.

491. In a general sense, a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events, and news of general interest.—Hull v. King, 37 N. W. 792, 38 Minn. 349.

492. A religious weekly, devoting a portion of its space to news of general interest, is a newspaper, within the meaning of Gen. St. Minn. 1878, c. 81, § 5, requiring the publication of a notice of sale in foreclosure by advertisement "in a newspaper," etc.—Hull v. King, 37 N. W. 792, 38 Minn. 349.

See, also, § 182, *supra*.

New trial.

493. In Gen. St. Minn. 1878, c. 66, § 253, specifying the causes for a new trial. A retrial of issues of fact.—Dodge v. Bell, 34 N. W. 739, 37 Minn. 382.

Next before.

494. Gen. St. Minn. 1866, c. 57, § 35, requiring notice of an administrator's sale for such period "three weeks successively next before such sale, does not mean that the three weeks must expire the day before such sale; it is not objectionable if four days elapse after the three weeks, and before the sale.—Wilson v. Thompson, 3 N. W. 699, 26 Minn. 299.

Noise.

495. In a city ordinance prohibiting noise, etc. Construed to mean unreasonable noise.—State v. Cantieny, 24 N. W. 458, 34 Minn. 1.

Nonresident.

496. "A nonresident debtor," within Gen. St. Minn. 1878, c. 66, relating to attachments, may be a debtor remaining out of the state so long and under such circumstances as to be a nonresident. But a mere casual or temporary absence of a debtor from the state on business or pleasure will not render him a nonresident, although he may not have a house or usual abode, within the state.—Keller v. Carr, 42 N. W. 292, 40 Minn. 428.

Note of sale.

See §§ 138, 139, *supra*.

Novation.

497. The essential elements are an extinguishment of an old debt by a mutual agreement between all parties, whereby it becomes the obligation of the new debtor.—Cornwell v. Megins, 40 N. W. 610, 39 Minn. 407.

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Obligation.

498. A tie which binds one to pay or do something agreeably to the laws and customs of the country in which the obligation is made; the instrument or writing by which a contract is witnessed; a deed whereby a man binds himself under a penalty to do a thing; and in its most technical signification imports a sealed instrument. (Bouv. Law Dict.)—Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.)

499. In Pub. St. Minn. c. 30, § 71, allowing a counterclaim in an action arising on obligation. Means contract.—Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.)

500. In its general sense, obligation is synonymous with duty.—Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.)

501. "Obligation" construed to have been used in an instruction to the jury with respect to carelessness as meaning "duty."—Sibilrud v. Minneapolis & St. L. Ry. Co., 11 N. W. 146, 29 Minn. 58.

Obstruct.

502. In Gen. St. Minn. 1878, c. 94, § 63, providing that whoever shall willfully obstruct any engine, etc., upon a railroad, shall be punished, etc. To put obstructions on a railway in such a manner as is likely to cause disaster to engines, etc., using it, and endanger the safety of those conveyed, although no disaster actually results.—State v. Kilty, 10 N. W. 475, 28 Minn. 421.

Obstructed.

See § 346, *supra*.

Occupancy and residence.

503. In the homestead exemption laws of Minnesota. Refers to an actual occupancy of the premises, and an actual residence thereon as a home or a dwelling place.—Quehl v. Peterson, 49 N. W. 390, 47 Minn. 13.

Occupant.

504. In the townsite act. Does not necessarily mean one personally occupying the land. The occupation may be by a representative.—Carson v. Smith, 12 Minn. 546, (Gil. 458,) following Leech v. Rauch, 3 Minn. 448, (Gil. 332.)

Occupied.

505. Gen. St. Minn. 1878, c. 11, § 5, subd. 6, exempting from taxation "buildings belonging to public institutions of purely public charity, * * * together with the land actually occupied by such institutions." Includes not only the building and the ground covered by it, but adjacent ground which is reasonably necessary or appropriate to the purposes and objects in view, and which is used directly for the promotion and accomplishment of the same.—Hennepin County v. Brotherhood of Gethsemane, 8 N. W. 595, 27 Minn. 460.

Offense.

506. In its legal sense, imports an infraction or transgression of a law; the willful doing of an act which is forbidden by law, or omitting to do what it commands.—State v. Oleson, 5 N. W. 959, 26 Minn. 507.

507. A breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a punishable violation of law.—State v. Cantieny, 24 N. W. 458, 34 Minn. 1.

508. In Const. Minn. art. 1, § 7, providing that no person shall be put twice in jeopardy for the same offense. Does not include the violation of city ordinances.—State v. Lee, 13 N. W. 913, 29 Minn. 445.

See, also, §§ 174–176, *supra*.

Office.

See § 198, *supra*.

Officers.

509. In Gen. St. Minn. 1878, c. 80, § 23, providing that if there is no officer to whom an application for a writ of habeas corpus can be made, etc., within the county in which the applicant is restrained, then it may be made to "some officer having such authority" residing in an adjoining county. Includes the court as well as a judge thereof.—In re Doll, 50 N. W. 607, 47 Minn. 518.

See, also, §§ 26, 200, 201, *supra*.

Officers of schools.

510. In Const. Minn. art. 7, § 8, as amended in 1875, allowing women to vote for officers of schools, means one whose office pertains solely to the management of schools.—State v. Gorton, 23 N. W. 529, 33 Minn. 345.

Omission.

511. Failure to appoint commissioners for more than seven years is an omission to appoint, within the meaning of Pub. St. Minn. c. 44, § 59, providing that the omission to appoint commissioners to allow claims against the estate of a deceased person will not prevent the prosecution of the claims against the executor, etc.—Wilkinson v. Winne's Estate, 15 Minn. 159, (Gil. 123.)

Open and current.

512. An open and current account is one not closed, settled, or stated, but running.—Taylor v. Parker, 17 Minn. 469, (Gil. 447.)

Operation of the dam.

513. In Gen. St. Minn. 1878, c. 32, tit. 8, relating to the operation of sluice dams. Consists in controlling the water by means of the dam, and in opening the sluiceway for the passage of logs when wanted.—Anderson v. Munch, 13 N. W. 192, 29 Minn. 414.

Opportunity.

514. A fit and convenient time; a time favorable for the purpose; a convenience or fitness of time and place. (Webst. Dict.) — In re Hause, 19 N. W. 973, 32 Minn. 155.

Opportunity to be heard.

515. In Gen. St. Minn. 1878, c. 49, § 14, providing that a party not appearing in the probate

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court can only appeal where he has not had due notice, or an opportunity to be heard. Means such opportunity as the party is entitled to by law.—In re Hause, 19 N. W. 973, 32 Minn. 155. See In re Brown's Will, 21 N. W. 474, 32 Minn. 443.

516. The phrase refers to some act or omission in the proceedings which has deprived the party of his full legal rights in the premises.—In re Hause, 19 N. W. 973, 32 Minn. 155.

Or.

517. In Laws Minn. 1881, c. 148, § 2, providing that a receiver may be appointed when it shall appear that a debtor is insolvent, "or" has been giving or is about to give a preference to any creditor, should be construed "and."—Weston v. Loyhed, 14 N. W. 892, 30 Minn. 221.

518. In Gen. St. Minn. 1878, c. 34, § 33, providing that the owner of land, across which a railroad has been constructed, may recover his land and damages, where no proceedings under the law have been instituted, "or" are pending, to ascertain and assess compensation. Is to be construed in a conjunctive sense.—Kanne v. Minneapolis & St. L. Ry. Co., 23 N. W. 854, 33 Minn. 419.

519. In Sp. Laws Minn. 1885, c. 7, § 19, amending the charter of the city of St. Paul, and providing that no action for injuries received by means of any defect in the condition of any bridge, etc., shall be maintained unless commenced within one year, etc., "or" unless certain notice is given to officers of the city. Should be read as "nor."—Maylone v. City of St. Paul, 42 N. W. 88, 40 Minn. 406.

Order.

See §§ 294-297, *supra*.

Ordinance.

See § 94, *supra*.

Ordinary care.

520. In the law of negligence. Such care as persons of ordinary care and prudence would exercise under similar circumstances. Care commensurate with the risks of the situation.—Hall v. Chicago, B. & N. R. Co., 49 N. W. 239, 46 Minn. 439.

Ordinary course of law.

521. In Gen. St. Minn. 1866, c. 80, § 3, providing that a mandamus shall not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. Refers to injunction.—Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, (Gil. 188.)

See, also, § 235, *supra*.

Ordinary stage of water.

522. As defining the height to which a riparian proprietor may raise or set back the water of the stream. Includes its stage or level in such rises or high water as are usual, ordinary, and reasonably to be anticipated, but not to include its stage or level in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year.—Ames v. Cannon River Manuf'g Co., 6 N. W. 787, 27 Minn. 245.

Organized—Established.

523. The distinction between "organized" counties and "established" counties, recognized under the constitution and statutes of Minnesota, is that the establishing of a county is the setting apart of territory to be in future organized as a political community or *quasi* corporation for political purposes, while the "organizing" is the vesting the people of such territory with such corporate rights and powers.—State v. Parker, 25 Minn. 215.

Original jurisdiction.

524. In Rev. St. Minn. art. 2, c. 69, § 3, as amended by section 5, Amend. 1851, p. 6, limiting the jurisdiction of the district court, and conferring upon it original jurisdiction in certain cases. Means jurisdiction to entertain in the first instance.—Castner v. Chandler, 2 Minn. 86, (Gil. 68.)

525. In Laws Minn. 1862, c. 18, providing that the several district courts of the state shall have original jurisdiction in all cases of mandamus. Does not mean exclusive jurisdiction.—Crowell v. Lambert, 10 Minn. 369, (Gil. 295.)

Other.

526. In Act Minn. Aug. 12, 1858, exempting from execution certain tools and instruments of mechanics, miners, or other persons. The words "or other persons" mean those to the exercise of whose trade or business tools or implements are necessary, used, or kept for the purpose of carrying on their trade or business.—Grimes v. Bryne, 2 Minn. 89, (Gil. 72.)

527. In Gen. St. Minn. 1878, c. 66, § 269, providing that whoever shall carry off wood, etc., or other personal property of another person, without lawful authority, shall be liable to the owner thereof in treble damages. The words "other personal property" mean things ejusdem generis with those enumerated.—Berg v. Baldwin, 18 N. W. 821, 31 Minn. 541.

528. Gen. St. Minn. 1866, c. 34, § 45, as amended by Laws 1873, c. 13, authorizing the formation of corporations to engage in certain specified kinds of business, "or other lawful business," includes any kind of business for pecuniary profit, not enumerated, or which may have been omitted from those specified.—Brown v. Corbin, 42 N. W. 481, 40 Minn. 508.

529. "Other," as used in the charter of the city of St. Paul, c. 4, § 3, subd. 18, (Sp. Laws Minn. 1874, c. 1, § 3,) conferring power to establish markets and other public buildings, shows that "markets" was used in a restricted sense, to designate public buildings erected and devoted to the use of receiving for sale and purchase such marketable articles for daily use and consumption as might be wanted to supply the inhabitants of the city.—City of St. Paul v. Traeger, 25 Minn. 248.

530. "Other," as used in Gen. St. Minn. 1878, c. 46, § 3, providing that the share of real

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estate taken by a surviving husband or wife shall be subject in proportion with the other real estate to the decedent's debts, implies that the real estate which is to share with it the burden of paying debts is also the property of the deceased, which would not include property conveyed by him or her during life.—Goodwin v. Kumm, 45 N. W. 853, 43 Minn. 403.

Out of the state.

531. Gen. St. Minn. 1878, c. 57, § 50, providing that "persons out of the state" may commence an action to recover real estate, sold by an executor or administrator, within five years after their return to the state, extends to persons who have always resided abroad.—Jordan v. Secombe, 22 N. W. 383, 33 Minn. 220.

Overdue.

532. As applied to a demand bill of exchange, and used in reference to a right of action against a drawer or indorser. Such a bill is not overdue until presentment for payment and payment refused. It may be due, however, though never in fact presented to the drawer for payment; as where retained for a long time without presentment.—La Due v. First Nat. Bank of Kasson, 16 N. W. 426, 31 Minn. 33.

Owner.

533. In a petition for the appointment of commissioners to condemn lands. Construed to mean the owner in fee.—St. Paul & S. C. R. Co. v. Matthews, 16 Minn. 341, (Gil. 303.)

534. In replevin. Does not necessarily import general or absolute ownership, but may be one having the possessory title.—Miller v. Adamson, 47 N. W. 452, 45 Minn. 99.

535. In the mechanic's lien law of August 12, 1858, giving a lien to one who furnishes materials, etc., for erecting, etc., a building, by contract with the owner thereof. Includes the equitable as well as the legal owner.—Atkins v. Little, 17 Minn. 342, (Gil. 320.)

536. The similar provision of Gen. St. Minn. 1878, c. 90, § 1, includes a qualified owner, and does not mean an absolute owner.—Benjamin v. Wilson, 26 N. W. 725, 34 Minn. 517.

537. As used in the homestead act. May include an equitable ownership.—Wilder v. Haughey, 21 Minn. 101.

538. In Laws Minn. March 10, 1860, providing that the removal of the owner of a homestead therefrom will not render such homestead liable or subject to forced sale on execution. Applies only to a person who has dwelt upon the homestead.—Kresin v. Mau, 15 Minn. 116, (Gil. 87.)

Paid.

539. In Laws Minn. 1881, c. 135, § 7, providing that a judgment and sale (for taxes) shall be void upon proof that such taxes shall have been paid. Embraces the meaning of the words "satisfied by payment, redemption, or sale," which, in section 1, define conditions authorizing proceedings under the act.—Forrest v. Henry, 23 N. W. 848, 33 Minn. 434.

Papers on appeal.

540. In Pub. St. Minn. c. 62, § 9, allowing disbursements for printing "papers on appeal." Long, duplicate arguments are not within the meaning of the words.—Hart v. Marshall, 4 Minn. 552, (Gil. 434.)

Partition.

541. A decree on final distribution in the probate court is a partition, within the meaning of Gen. St. Minn. 1878, c. 56, § 1, providing that, before partition of an estate, an allowance shall be made for the children under seven years of age.—Wood v. Myrick, 16 Minn. 494, (Gil. 447;) Greenwood v. Murray, 9 N. W. 629, 28 Minn. 120.

Part payment.

542. Equivalent to the words "payment of a part."—Young v. Perkins, 12 N. W. 515, 29 Minn. 173.

Part performance.

543. "Part performance." Proceeding in reliance on a contract, either in performance or pursuance of it, so as to so alter the party's position as to incur an unjust and unconscientious injury and loss, is a part performance of an oral agreement, within the statute of frauds. —Brown v. Hoag, 29 N. W. 135, 35 Minn. 373.

Party.

544. In Gen. St. Minn. 1878, c. 66, § 285, authorizing an action to set aside a fraudulent judgment, etc., to be brought by "the party aggrieved." Means a party to the action in which the judgment was recovered.—Stewart v. Duncan, 42 N. W. 89, 40 Minn. 410.

545. In Pub. St. Minn. 1849–1858, c. 50, § 3, providing that contracts for the sale of goods for the price of $50 or more shall be in writing, signed by the parties to be charged therewith. Does not mean all the parties to the writing, but only those to be charged.—Morin v. Martz, 13 Minn. 191, (Gil. 180.)

Patent.

546. A monopoly or exclusive right to an invention, not existing at the common law, but by special grant from the government.—Deane v. Hodge, 27 N. W. 917, 35 Minn. 146.

Patent ambiguity.

547. Exists where the mere perusal of an instrument shows plainly that something more must be added before the reader can determine which of several things is meant by it.—McNair v. Toler, 5 Minn. 435, (Gil. 356.)

Patent medicines.

548. Medicines, prepared for immediate use by the public, put up in packages or bottles, labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics. —State v. Donaldson, 42 N. W. 781, 41 Minn. 74.

Payable.

549. In a certificate of deposit "payable" in bonds. Equivalent to the expressions, "to be

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paid," or, "which I agree to pay."—Easton v. Hyde, 13 Minn. 90, (Gil. 83.)

Pecuniary liability.

550. An agreement by a county to issue county orders upon the completion of a jail is a pecuniary liability, within the meaning of Gen. St. Minn. 1866, c. 11, § 78, prohibiting a county from incurring pecuniary liability that will necessitate the levy of a tax exceeding ten mills on the dollar.—Johnston v. Board of Com'rs of Becker County, 6 N. W. 411, 27 Minn. 64.

Peddling.

551. In a city ordinance forbidding peddling within the city without a license. Selling meat from a wagon, and soliciting orders therefor from house to house, is peddling, although the purchasers had been accustomed to buy in such manner, and the seller had a meat-shop in the city.—City of Duluth v. Krupp, 49 N. W. 235, 46 Minn. 435.

Penalty.

552. In Gen. St. Minn. 1878, c. 66, tit. 2, limiting the time for bringing an action upon a statute for a penalty, given, in whole or in part, to a person who prosecutes for the same. Embraces penal statutes, which involve the feature of affording a private remedy to the party aggrieved, by giving to him in whole or in part the penalty which is imposed for the violation of the law.—Merchants' Nat. Bank of Chicago v. Northwestern Manuf'g & Car Co., (Minn.) 51 N. W. 117.

Perils of navigation.

553. As an excepted liability of a common carrier. Such perils as cannot be foreseen or avoided in the exercise of care and prudence.—Christenson v. American Express Co., 15 Minn. 270, (Gil. 208.)

554. A snag in a river may be a "peril of navigation," against liability for which a carrier can contract.—Christenson v. American Express Co., 15 Minn. 270, (Gil. 208.)

Permanent.

555. A hospital which is in a continuing and lasting condition is "permanent," in the ordinary sense of the word.—Atwater v. Russell, (Minn.) 51 N. W. 629.

Person.

556. In the statutes relating to tax sales (Laws Minn. 1874, c. 1, § 130; Laws 1875, c. 5, § 33,) providing that the payment of an insufficient amount for the purpose of redemption shall not invalidate the redemption, but that the auditor shall be liable for the deficiency to the person entitled thereto. May be construed to include the state; Gen. St. 1878, c. 4, § 1, subd. 11, providing that "person" may extend and be applied to bodies politic and corporate.—Forrest v. Henry, 23 N. W. 848, 33 Minn. 434.

See, also, § 260, *supra*.

Personal judgment.

557. In Gen. St. Minn. 1878, c. 81, tit. 2, § 28, allowing service of a summons in mortgage foreclosure upon all parties against whom no personal judgment is sought, etc. Means a money judgment for the mortgage debt.—Bardwell v. Collins, 46 N. W. 315, 44 Minn. 97.

Personal property.

558. An assignment of all personal property does not carry with it insurance policies thereon.—White v. Robbins, 21 Minn. 370.

Personal representative.

559. An agent of heirs is not their personal representative, within the meaning of Pub. St. Minn. c. 63, § 32, requiring service of notice of sale in foreclosure upon a personal representative of the mortgagor, residing within the county where the mortgaged premises are situated.—Jones v. Tainter, 15 Minn. 512, (Gil. 423;) Atkinson v. Duffy, 16 Minn. 45, (Gil. 30.)

560. The term "personal representatives," as used in a will, is synonymous with "executors or administrators," if nothing in the context controls otherwise.—Boutiller v. Steamboat Milwaukee, 8 Minn. 97, (Gil. 72.)

561. In Pub. St. Minn. c. 68, § 3, authorizing an action by personal representatives for personal injuries, after the death of the party injured. The term includes an administrator.—Boutiller v. Steamboat Milwaukee, 8 Minn. 97, (Gil. 72.)

Personal services.

See § 691, *post*.

Pint.

562. In an indictment for selling "one pint" of liquor. Means one pint, no more.—State v. Lavake, 6 N. W. 339, 26 Minn. 526; State v. Bach, 30 N. W. 764, 36 Minn. 234.

Place.

563. "Place," merely naming a town in which a sale is to be made, does not comply with Gen. St. Minn. 1866, c. 57, § 35, requiring notice of the time and place of an administrator's sale to be published, etc.—Hartley v. Croze, 37 N. W. 449, 38 Minn. 325.

Pleadings.

564. 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 matter in dispute between the parties.—Desnoyer v. L'Hereux, 1 Minn. 17, (Gil. 1.)

565. Gen. St. Minn. 1878, c. 66, § 131, providing that intervention shall be by complaint, and that all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings, refers to and allows a course of pleadings analogous to the ordinary pleadings in civil actions, including demurrer.—Shepard v. Murray County, 24 N. W. 291, 33 Minn. 519.

Point of navigability.

566. In reference to the rights of a riparian owner. Is not to be understood in the narrow

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sense of being limited to that point where the waters of the stream may be navigable for some purposes at certain stages of water, but must have reference not only to an ordinarily low stage of water, but also to the size and kind of vessels which navigate the stream, and the kind of business done upon it.—Union Depot, Street Ry. & Transfer Co. of Stillwater v. Brunswick, 17 N. W. 626, 31 Minn. 297.

Point or question.

567. In Laws Minn. 1861, c. 25, p. 136, requiring a judge to give his decision in writing upon each point or question submitted to him. Means, in case of demurrer, one of the grounds of demurrer specified in the statutes.—Commonwealth Ins. Co. v. Pierro, 6 Minn. 569, (Gil. 404.)

Points and authorities.

See § 92, *supra*.

Police regulation.

568. In its limited sense and common acceptation, relates to public order, health, etc.—State v. Lee, 13 N. W. 913, 29 Minn. 445.

Policy.

See §§ 138, 139, *supra*.

Possession.

569. The use of the words "so possessed," "in possession as aforesaid," after an allegation in a complaint of ownership and possession under such title, sufficiently conveys the meaning that plaintiff was owner and possessor at the time of the injury complained of.—Gould v. Sub-District No. 3 of Eagle Creek School-Dist., 7 Minn. 203, (Gil. 145.)

570. Act Minn. March 10, 1873, § 1, providing that when any person "has peaceably taken possession" of land under a deed, without notice of any defects invalidating the same, he shall not be ejected therefrom until he is compensated for improvements made by him prior to notice, shall have been tendered, refers to the time of the making the improvements, and means when any person at the time of making the improvements has peaceably taken possession, etc.—Wilson v. Red Wing School-Dist., 22 Minn. 488.

571. To constitute a mortgagee in possession the mortgagee must be in possession by agreement or assent of the mortgagor or his assigns, that he have possession under the mortgage and because of it.—Rogers v. Benton, 38 N. W. 765, 39 Minn. 39.

See, also, § 686, *post*.

Power.

572. As distinguished from a franchise, is a right possessed by all citizens who choose to engage in a business without legislative grant.—State v. Minnesota Thresher Manuf'g Co., 41 N. W. 1020, 40 Minn. 213.

Power coupled with an interest.

573. To constitute a power coupled with an interest, there must be an interest in the thing itself which is the subject of the power, and not merely in that which is produced by the exercise of the power. Such a power is one ingrafted on an estate, or in the thing itself, and the power and the thing must be united and coexist.—Alworth v. Seymour, 44 N. W. 1030, 42 Minn. 526.

Power to sell.

574. In a power of attorney. Construed to authorize the attorney to convey.—Farnham v. Thompson, 26 N. W. 9, 34 Minn. 330.

Power to sell and convey.

575. Power to sell and power to convey are distinguishable. A person may give another authority to sell land without giving him authority to execute conveyances, or he may give him power to execute conveyances without the power to make sales, or he may give him power to do both.—Dayton v. Nell, 45 N. W. 231, 43 Minn. 246.

Practicable.

576. In Gen. St. Minn. 1878, c. 118, § 5, providing that whenever practicable a term of imprisonment shall be so fixed as to expire between certain specified dates. Means whenever it may be done consistently with proper punishment for the offense.—Mims v. State, 5 N. W. 369, 26 Minn. 494.

Premeditated design.

577. In Rev. St. Minn. c. 100, § 2, as amended by Laws 1853, p. 24, prescribing the degree of murder where the killing was with a premeditated design to effect death. Means or involves an intention.—Bonfanti v. State, 2 Minn. 123, (Gil. 99.)

578. The expressions "intentionally," and "with premeditated design," in Gen. St. Minn. 1866, c. 94, relating to homicide, are not used as synonymous: the latter involving a greater degree of deliberation and forethought than the former.—State v. Hoyt, 13 Minn. 132, (Gil. 125.)

Prescribed by law.

579. In Const. Minn. art. 6, § 13, declaring that the duties of clerks of district courts shall be prescribed by law. Means prescribed by both statutory and common law.—Walter v. Greenwood, 12 N. W. 145, 29 Minn. 87.

Present.

580. To present an indictment means to lay before a court; to indict; to give notice officially of a crime or offense.—State v. Hinckley, 4 Minn. 345, (Gil. 261.)

Presumption.

581. The expressions "raise a presumption," "raise a strong presumption," in a charge referring to evidence, are equivalent to the expressions, "are strong evidence," or "are evidence of great weight."—McArthur v. Craigie, 22 Minn. 351.

Previous chaste character.

582. A woman who has been previously in the habit of illicit intercourse, but has reformed,

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and become chaste from principle, and who is so at the time of the act charged, is of "previous chaste character," within the meaning of Pub. St. c. 96, § 6, punishing the seduction of such a woman.—State v. Timmens, 4 Minn. 325, (Gil. 241.)

583. Gen. St. Minn. 1878, c. 100, § 6, providing that seduction of an unmarried female of previous chaste character shall be a felony, means of chaste character, immediately previous to the act.—State v. Gates, 6 N. W. 404, 27 Minn. 52.

Prior.

584. In Sp. Laws Minn. 1875, c. 132, providing that notice of a meeting to vote upon the question of issuing mutual aid bonds shall be given "at least ten days prior thereto." Notice posted on the 13th, for a meeting on the 23d day of the month, is sufficient.—Coe v. Caledonia & M. Ry. Co., 6 N. W. 621, 27 Minn. 197.

See, also, §§ 79, 80, *supra*.

Privilege.

585. In Const. Amend. Minn. 1881, prohibiting the legislature from enacting any special or private law, granting any special or exclusive privilege, etc. A right or immunity granted either against or beyond the course of the common or general law.—Dike v. State, 38 N. W. 95, 38 Minn. 366.

See, also, § 670, *post*.

Privileged communication.

586. Between husband and wife. Includes all conversations between husband and wife, though on subjects not confidential in their nature.—Leppla v. Minnesota Tribune Co., 29 N. W. 127, 35 Minn. 310.

587. In the law of slander and libel. A communication made in good faith upon any subject-matter in which the party communicating it has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty.—Marks v. Baker, 9 N. W. 678, 28 Minn. 162.

Privity.

588. Mutual or successive relationship to the same rights of property.—Newman v. Home Ins. Co., 20 Minn. 422, (Gil. 378.)

589. Privity exists between two successive holders, where the later takes under the earlier, as by descent, or by will, or grant, or by a voluntary transfer of possession.—Sherin v. Brackett, 30 N. W. 551, 36 Minn. 152.

Probable cause.

590. For instituting a criminal prosecution. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.—Cole v. Curtis, 16 Minn. 182, (Gil. 161;) Casey v. Sevatson, 16 N. W. 407, 30 Minn. 516; Burton v. St. Paul, M. & M. Ry. Co., 22 N. W. 300, 33 Minn. 189; Gilbertson v. Fuller, 42 N. W. 203, 40 Minn. 413.

591. For instituting a civil prosecution or action. Such reasons, supported by facts and circumstances, as will warrant a cautious man in the belief that his action, and the means taken in prosecuting it, are legally just and proper.—Burton v. St. Paul, M. & M. Ry Co., 22 N. W. 300, 33 Minn. 189.

Probate.

592. Originally meant relating to proof and afterwards relating to the proof of wills. In the American law now a general name or term used to include all matters of which probate courts have jurisdiction, which, in Minnesota, are the estates of deceased persons, and of persons under guardianship.—Johnson v. Harrison, 50 N. W. 923, 47 Minn. 575.

Probate Code.

593. The body or system of law relating to the estates of deceased persons, and of persons under guardianship.—Johnson v. Harrison, 50 N. W. 923, 47 Minn. 575.

Proceeding.

594. The examination of one charged with a crime is a proceeding, within Gen. St. Minn. 1878, c. 65, § 20, providing for the transfer of a proceeding by the justice before whom the same is pending to another justice.—State v. Bergman, 34 N. W. 737, 37 Minn. 407.

See, also, § 464, *supra*.

Process.

595. In a large acceptation is nearly synonymous with "proceedings," and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action.—Hanna v. Russell, 12 Minn. 80, (Gil. 43.)

596. Affidavits, recognizances, or justices' returns, are not process, within the meaning of Schedule B., U. S. Int. Rev. Law 1864, requiring a stamp duty on process on appeal from justices' courts.—Dorman v. Bayley, 10 Minn. 383, (Gil. 306.)

597. A summons is not process within the meaning of Const. Minn. art. 6, § 14, providing that the style of all process shall be "The State of Minnesota."—Hanna v. Russell, 12 Minn. 80, (Gil. 43;) Sherman v. Gundlach, 33 N. W. 549, 37 Minn. 118.

Profits.

598. Of a joint venture. An excess of receipts over expenditures; net earnings.—Connolly v. Davidson, 15 Minn. 519, (Gil. 428.)

Promoters.

599. Of a corporation. Those who bring about its organization.—Battelle v. Northwestern Cement & Concrete Pavement Co., 33 N. W. 327, 37 Minn. 89.

Proof of loss.

600. In the law of insurance. The statement of loss which an insured is required to give by

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the terms of the policy.—Cargill v. Millers' & Manuf'rs' Mut. Ins. Co., 22 N. W. 6, 33 Minn. 90.

Proper county.

601. In Rev. St. Minn. c. 70, § 41, providing that the court may change the place of trial, where the county designated in the complaint is not the proper county. The county where some of the parties resided at the time of the commencement of the action, or in which defendants have property liable to attachment.—Merrill v. Shaw, 5 Minn. 148, (Gil. 113.)

602. In Laws Minn. 1881, c. 40, requiring the supreme court to transmit the record, etc., in mandamus proceedings, to the district court of the proper county. The county where the defendants or one of them reside.—State v. Town of Lake, 10 N. W. 17, 28 Minn. 362.

Proper probate court.

603. In Pub. St. Minn. c. 38, § 25, relating to sales by guardians. Has the same meaning as "probate court of competent jurisdiction" in section 23.—Montour v. Purdy, 11 Minn. 384, (Gil. 278.)

See, also, §§ 413-417, *supra*.

Property.

604. The exclusive right of possessing, enjoining, and disposing of a thing; ownership; the thing owned; that to which a person has the legal title, whether in his possession or not.—Banning v. Sibley, 3 Minn. 389, (Gil. 282.)

605. State railway bonds are property.—Banning v. Sibley, 3 Minn. 389, (Gil. 282.)

606. The right of a riparian proprietor is property.—Hanford v. St. Paul & D. R. Co., 42 N. W. 596, 44 N. W. 1144, 43 Minn. 104.

607. The words "property," "money," or "effects," as used in the statute relating to garnishment, do not include negotiable paper.—Hubbard v. Williams, 1 Minn. 54, (Gil. 37.)

608. Those words include indebtedness from the garnishee.—Crone v. Braun, 23 Minn. 239.

Proprietor.

609. An owner. The person who has the legal right or exclusive title to anything, whether in possession or not.—Davis v. Murphy, 3 Minn. 119, (Gil. 69.)

Prosecute with effect.

610. In a replevin bond, conditioned that the action will be so prosecuted." Means with success, or to a successful termination.—Boom v. St. Paul Foundry & Manuf'g Co., 22 N. W. 538, 33 Minn. 253.

611. In an appeal bond, conditioned, as required by Gen. St. Minn. 1878, c. 53, that appellant shall prosecute his appeal with effect, etc. Does not mean a prosecution to a successful issue, but with due diligence to a final determination.—Riley v. Mitchell, 35 N. W. 472, 38 Minn. 9.

Protest.

612. Of a note. Includes in its popular sense all the steps taken to fix the liability of a drawer or indorser.—Wolford v. Andrews, 13 N. W. 167, 29 Minn. 250.

Proximate cause.

613. The primary cause may be the proximate cause of a disaster, though it operate through successive instruments; as, an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole? or was there some new and independent cause intervening between the wrong and the injury?—Purcell v. St. Paul City Ry. Co., (Minn.) 50 N. W. 1034.

Public.

614. A thing is public when owned by the public, and also when its use is public.—Hennepin County v. Brotherhood of Gethsemane, 8 N. W. 595, 27 Minn. 460.

Publication.

615. The requirement, in the charter of the city of St. Paul, of "thirty days' notice by five publications prior to the time when the right of redemption will expire, that deeds will be given in pursuance of sales for local assessments," means that all five publications must be made before the 30 days begin to run.—Gaston v. Merriam, 22 N. W. 614, 33 Minn. 271.

Public charity.

616. An institution established, maintained, and operated for the purpose of taking care of the sick, without any profit, or view to profit, but at a loss which has to be made up by benevolent contribution, and the benefits of which the public are entitled to enjoy, is an institution of public charity, within the meaning of Gen. St. Minn. 1878, c. 11, § 5, exempting all buildings belonging to such institutions from taxation.—Hennepin County v. Brotherhood of Gethsemane, 8 N. W. 595, 27 Minn. 460.

Public landing.

617. The words "public landing" designating a space on a plat of a townsite. May be considered upon the question of dedication.—Village of Mankato v. Meagher, 17 Minn. 265, (Gil. 243.)

Public nuisance.

618. A nuisance affecting the surrounding community generally, or the people of some local neighborhood.—Village of Pine City v. Munch, 44 N. W. 197, 42 Minn. 342.

Public offense.

619. As used in the general laws. Does not refer to offenses against a municipal government.—State v. Lee, 13 N. W. 913, 29 Minn. 445.

620. In Gen. St. Minn. 1878, c. 105, § 11, authorizing a peace officer to arrest without warrant for a public offense committed or attempted

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in his presence. Has the ordinary signification and includes all such violations of municipal ordinances as are punishable by fine or imprisonment.—State v. Cantieny, 24 N. W. 458, 34 Minn. 1.

Public use.

621. In Pub. St. Minn. c. 1, § 251, providing that a county may purchase and hold land for the public use. Means actual use, occupation, and possession, rendered necessary for the proper charge of the administrative or other functions of the county, through its appropriate officers.—Williams v. Lash, 8 Minn. 496, (Gil. 441;) James v. Wilder, 25 Minn. 305.

622. Public use of a railroad or railroad track is one to which all the people have a right, though the number who require the use may be small.—Kettle River R. Co. v. Eastern Ry. Co. of Minnesota, 43 N. W. 469, 41 Minn. 461; Chicago, B. & N. R. Co. v. Porter, 46 N. W. 75, 43 Minn. 527.

Purchaser in good faith.

See §§ 331-336, *supra*.

Purpose.

623. Sp. Laws Minn. 1865, c. 79, making it the duty of the common council of the city of St. Paul to elect an assessor who shall perform all the duties required by law of assessors of property for the purposes of taxation, does not limit his duties to such as relate to taxation only, but is intended to point out the kind of assessor referred to.—McClung v. City of St. Paul, 14 Minn. 420, (Gil. 315.)

Purprestur e.

624. The filling up of the bed of a navigable stream beyond the point of navigability by a riparian owner, for the sole purpose of extending his possessions, and so as to obstruct and interfere with the public right of navigation, constitutes a purprestur e.—Union Depot Street Ry. & Transfer Co. of Stillwater v. Brunswick, 17 N. W. 626, 31 Minn. 297.

Question.

625. In Pub. St. Minn. c. 51, § 4, relating to fraudulent contracts and conveyances, the provision that the question of fraudulent intent shall be deemed a question of fact and not of law means the question of the existence of fraudulent intent.—Gere v. Murray, 6 Minn. 305, (Gil. 213.)

See, also, § 567, *supra*.

Raceway.

626. An artificial canal, dug in the earth, leading from the dam of a stream to the machinery which it drives; a water course leading from the bottom of a water wheel.—Wilder v. De Cou, 1 N. W. 48, 26 Minn. 10.

Railroad.

627. Synonymous with "railway."—State v. Brin, 16 N. W. 406, 30 Minn. 522.

628. The ordinance of the city of Hastings providing that certain bonds should not be issued to a railroad company until the railroad should be completed to a point of junction with some other "railroad leading to Milwaukee and Chicago," embraces not only a railway whose line reaches Milwaukee and Chicago, or terminates at those places, but a railroad connecting either directly or by way of another railroad whose line reaches Milwaukee and Chicago, and terminates at those places.—State v. City of Hastings, 24 Minn. 78.

Ratification.

629. Of a contract. Implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence.—McArthur v. Times Printing Co., (Minn.) 51 N. W. 216.

630. Is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal.—Mitchell v. Minnesota Fire Ass'n, (Minn.) 51 N. W. 608.

Ravish.

631. In an indictment. To carnally know a female by force, and against her will.—O'Connell v. State, 6 Minn. 279, (Gil. 190.)

Real estate.

632. A will devising real estate, without a specification of the same as "my real estate," or words of like nature, will be taken to mean the real estate of the testator.—Case v. Young, 3 Minn. 209, (Gil. 140.)

Real property.

633. As defined, for purposes of taxation, in Gen. St. Minn. 1878, c. 11, § 2, to include the land itself, and all buildings, etc., thereon, and all rights and privileges thereto belonging or in anywise appertaining, and all mines, etc., under the same, embraces leased water powers.—State v. Minneapolis Mill Co., 2 N. W. 839, 26 Minn. 229.

634. The statutory definition, for the purpose of taxation, has no application to assessments for local improvements.—State v. District Court of Ramsey County, 17 N. W. 954, 31 Minn. 354.

635. The easement of a street railway company in a public street is not assessable as real estate for local improvements.—State v. District Court of Ramsey County, 17 N. W. 954, 31 Minn. 354.

Reasonable cause.

636. On the question of what constitutes reasonable cause to believe a debtor insolvent, actual knowledge, or even actual belief, is not the criterion; the true inquiry is whether a reasonable man, acting with ordinary prudence, sagacity, and discretion, and having in view all the facts known, would have cause to believe a debtor insolvent.—Daniels v. Palmer, 29 N. W. 162, 35 Minn. 347. See Same v. Bank of Zumbrota, 29 N. W. 165, 35 Minn. 351.

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Reasonable doubt.

637. As to the guilt of a person charged with a crime. Is not a mere possible doubt, but is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.—State v. Staley, 14 Minn. 105, (Gil. 75.) See State v. Sauer, 38 N. W. 355, 38 Minn. 438.

638. Proof beyond reasonable doubt is such proof as establishes the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.—State v. Staley, 14 Minn. 105, (Gil. 75.)

Receipt.

See § 5, *supra*.

Received.

639. In Gen. St. Minn. 1866, c. 73, § 8, providing that where all the original parties to a joint or joint and several contract, on the same side, are dead, the other parties cannot testify to the contract in their favor, unless such transaction was had and performed on behalf of such deceased parties, by an agent whose testimony is received, etc. The words "is received" do not mean received in fact, but received by law, or, in other words, receivable under the law of evidence.—Bigelow v. Ames, 18 Minn. 527, (Gil. 471.)

Receiver.

640. A receiver, provided for in a mortgage or trust deed, is in no sense a technical receiver, to be appointed by a court.—Rice v. St. Paul & P. R. Co., 24 Minn. 464.

Recognizance.

641. A form of security for the appearance of an accused in criminal proceedings, whether in the form of a common-law recognizance or of a common bond.—Martin v. Elwood, 29 N. W. 135, 35 Minn. 309.

See, also, §§ 88, 89, *supra*.

Redeeming.

642. In Gen. St. Minn. 1878, c. 81, § 15, relating to redemption from sales on foreclosure, and providing that, after the period for redemption has expired, "no one redeeming," the court may grant a final decree, etc. Refers to a redemption which annuls the sale.—Bovey De Laittre Lumber Co. v. Tucker, (Minn.) 50 N. W. 1038.

Refuses or neglects.

643. In Gen. St. Minn. 1866, c. 11, § 27, providing that when a person "refuses or neglects" to make a statement of his personal property, or to subscribe on oath to the statement, to a tax assessor, the latter may examine any other person whom he may suppose has knowledge, etc. The words embrace all cases of refusal, neglect, or omission, fraudulent, willful, intentional, or otherwise, by any person, to make a true statement of all the personal property exempt, as well as unexempt, which, by the provisions of the chapter, such person is required to list for taxation, either as owner or holder, guardian, parent, husband, trustee, executor, etc.—Thompson v. Tinkcom, 15 Minn. 295, (Gil. 226.)

Release.

644. Rev. St. Minn. c. 71, § 93, providing that no release or waiver of a homestead exemption shall be valid unless in writing, subscribed by the householder and his wife, refers to release or waiver as to an execution or other process of the court, and does not include a mortgage.—Olson v. Nelson, 3 Minn. 53, (Gil. 22.)

Released.

645. In a finding that property was released by an officer upon giving a bond. Construed to mean "delivered" or "surrendered."—Hicks v. Mendenhall, 17 Minn. 475, (Gil. 453.)

Relevant.

See § 397, *supra*.

Remedial cases.

646. In Const. Minn. art. 6, § 2, giving the supreme court original jurisdiction in remedial cases prescribed by law. Includes a proceeding to take land by eminent domain.—Warren v. First Div. St. Paul & P. R. Co., 18 Minn. 384, (Gil. 345.)

647. The remedial cases meant are those where the remedy is afforded summarily, through certain extraordinary writs, such as prohibition, mandamus, certiorari, and quo warranto.—State v. St. Paul & S. C. R. Co., 28 N. W. 245, 35 Minn. 222.

See, also, §§ 98, 99, *supra*.

Remedy.

648. The means employed to enforce a right or redress a wrong.—Warren v. First Div. St. Paul & P. R. Co., 18 Minn. 384, (Gil. 345.)

649. A mechanic's lien is not a remedy, but a statutory security.—Atkins v. Little, 17 Minn. 342, (Gil. 320.)

Remittitur.

650. The filing and transcript of a judgment of the supreme court in any county of the state, for the purpose of issuing an execution, is not a remittitur.—La Crosse & M. Steam Packet Co. v. Reynolds, 12 Minn. 213, (Gil. 135.)

Rental value.

651. Of land. The value of the use.—Nelson v. Minneapolis & St. L. Ry. Co., 42 N. W. 788, 41 Minn. 131.

Representation.

652. In the law of insurance. A verbal or written statement made by the assured to the underwriter, before the subscription to the policy, as to the existence of some fact, or state of facts, tending to induce the writer more readily to assume the risk, by diminishing the estimate

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he would otherwise have formed of it.—Aetna Ins. Co. v. Grube, 6 Minn. 82, (Gil. 32.)

653. A statement in regard to a material fact, made by the applicant for the insurance, to the insurer, with reference to a proposed contract of insurance.—Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497, (Gil. 473.)

Representative.

654. Generally, one who stands in the place of or represents another.—Walter v. Hensel, 44 N. W. 57, 42 Minn. 204.

655. In articles of association of a mutual life insurance company, providing for paying a certain sum to the representatives of a deceased member. Means and includes any person whom the member may designate, or, if he make no designation, the person whom the by-laws designate, as the one to whom the money shall be paid.—Walter v. Hensel, 44 N. W. 57, 42 Minn. 204.

656. Is not to be construed as limited to members of the family of the assured.—Walter v. Hensel, 44 N. W. 57, 42 Minn. 204.

Required.

657. In Pub. St. c. 39, § 52, providing that an administrator's sale shall not be avoided, if it appears, etc., that the administrator gave a bond, in case a bond was required, upon granting the license for the sale. Is not used in the sense of "ordered" or "demanded," but, in speaking of the bond, has reference to any bond required by law.—Babcock v. Cobb, 11 Minn. 347, (Gil. 247.)

Reservation.

658. In a deed. Something created or reserved out of the thing granted that was not in existence before.—Elliot v. Small, 29 N. W. 158, 35 Minn. 396; Winston v. Johnson, 45 N. W. 958, 42 Minn. 398.

Residence.

659. In its popular sense, a place of abiding or dwelling for some continuance of time, implies an established abode, fixed permanently, for a time, for business or other purposes, although there may be an intent in the future at some time or other to return to the original domicile.—Lawson v. Adlard, 48 N. W. 1019, 46 Minn. 243.

660. In construing statutes relating to attachment proceedings, a distinction has been recognized between an actual and a legal residence; the latter being generally deemed the domicile, and not the residence contemplated.—Lawson v. Adlard, 48 N. W. 1019, 46 Minn. 243.

661. Residence and domicile are not synonymous; the former is an act, the latter is an act coupled with an intent.—Keller v. Carr, 42 N. W. 292, 40 Minn. 428.

662. Gen. St. Minn. 1878, c. 80, § 23, providing that in certain cases the application for a writ of habeas corpus may be made to some officer having authority to grant the same, residing in an adjoining county, is not to be restricted to an officer having an actual, permanent residence in the county, but to be held as including the case of presence in the county for the purpose of transacting judicial business therein.—In re Doll, 50 N. W. 607, 47 Minn. 518.

See, also, §§ 496, 503, *supra*.

Resides out of the state.

663. In Gen. St. Minn. 1866, c. 66, § 15, providing that, where defendant departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of an action, the expressions "resides out of the state," and "time of his absence," are similar in meaning.—Venable v. Paulding, 19 Minn. 488, (Gil. 422.)

Residue.

664. In Gen. St. Minn. 1866, c. 56, § 4, providing that, after payment of certain charges against the decedent's estate, etc., the probate court shall assign the residue of the estate, etc., by a decree for that purpose. The words "residue of the estate" embrace all the estate, both real and personal, which is to be affected by the decree.—Wood v. Myrick, 16 Minn. 494, (Gil. 447.)

Revenue act.

665. A mere appropriation of public money, though it may lead to the necessity of taxation, is not a "revenue act," such as, under Const. Minn. art. 4, § 10, must originate in the house of representatives.—Curryer v. Merrill, 25 Minn. 1.

Revocation of a will.

666. Is an act of the mind, which must be demonstrated by some outward and visible sign.—Graham v. Burch, 49 N. W. 697, 47 Minn. 171.

Right.

667. In Act Cong. Sept. 4, 1841, relating to pre-emptions vitiating all assignments and transfers of "the right hereby secured." Means the right of pre-emption.—Camp v. Smith, 2 Minn. 155, (Gil. 131.)

668. In Laws Minn. March 7, 1861, § 60, saving certain causes of action against old school districts in favor of a party who holds a "right," etc. Embraces other rights than those arising under a contract, obligation, or lien, and includes the right to indemnity or damages for injuries to real and personal property.—Gould v. Sub-Dist. No. 3 of Eagle Creek School Dist., 7 Minn. 203, (Gil. 145.)

669. Gen. St. Minn. 1878, c. 81, § 15, relating to redemption from mortgage foreclosure sales, and providing that, if a lien creditor redeems, the certificate of redemption operates as an assignment to him of the "rights acquired under such sale," includes the right to a final decree.—Bovey De Laittre Lumber Co. v. Tucker, (Minn.) 50 N. W. 1038.

Right or privilege.

670. In Const. Minn. art. 1, § 2, providing that no member of the state shall be deprived of any rights or privileges unless by the law of the

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land. The words "rights or privileges" do not include the compensation of public officers.—County Com'rs Hennepin County v. Jones, 18 Minn. 199, (Gil. 182.)

River.

See § 300, *supra*.

River front.

671. Is applicable to the shores above low-water mark.—Eastman v. St. Anthony Falls Water-Power Co., 44 N. W. 882, 43 Minn. 60.

Road.

672. In a provision of a charter of a railway company, requiring the bell of each of its engines to be rung, and its whistle blown, at a distance of 80 rods from a crossing road. Does not include a private way, used occasionally.—Locke v. First Div. St. Paul & P. R. Co., 15 Minn. 350, (Gil. 283.)

See, also, § 202, *supra*.

Roadbed.

673. Of a railroad. Strictly speaking refers to the bed upon which the superstructure of the railroad rests.—Dunn v. Burlington, C. R. & N. Ry. Co., 27 N. W. 448, 35 Minn. 73.

Rob.

674. May mean the felonious taking of the property of another, and is applicable to a public body as well as to an individual; but when applied in a popular sense to an individual, in reference to a public or municipal body, denotes the acquisition of money or property of the public by fraud or indirection, or other means, wrong in foro conscientiae, but not legally criminal.—McCarty v. Barrett, 12 Minn. 494, (Gil. 398.)

675. An alleged slander in charging that plaintiff robbed a town, is to be construed as meaning that he robbed the public, not that he was a notorious robber.—McCarty v. Barrett, 12 Minn. 494, (Gil. 398.)

Salary.

676. In Laws Minn. 1871, c. 90, relating to the salary of the county auditor. Includes all the compensation which a county auditor is entitled to receive under the provisions of the act.—Bruce v. County Com'rs Dodge County, 20 Minn. 388, (Gil. 339.)

677. In Sp. Laws Minn. 1878, c. 216, fixing the salaries of certain officers in Ramsey county. Includes necessary clerk hire.—Beaumont v. Ramsey County, 19 N. W. 727, 32 Minn. 108.

Save all rights.

678. The provisions of Gen. St. Minn. 1878, c. 86, § 10, that an appeal from an order "shall stay all proceedings thereon and save all rights affected thereby," if the bond prescribed is executed, show more than the intent to merely arrest affirmative action; show the intent that an injunction order, when appealed from and stayed, shall not affect any rights,—shall be inoperative pending the bill.—State v. Duluth St. Ry. Co., 50 N. W. 332, 47 Minn. 369.

Scalped railway ticket.

679. A railway ticket purchased from a ticket broker.—Hoffman v. Northern Pac. R. Co., 47 N. W. 312, 45 Minn. 53.

Scalper.

680. A ticket broker.—Hoffman v. Northern Pac. R. Co., 47 N. W. 312, 45 Minn. 53.

Seal.

681. A scroll, with the word "seal" written within, is a seal.—Brown v. Jordhal, 19 N. W. 650, 32 Minn. 135.

682. Such scroll or other device does not necessarily, as does a common-law seal, establish its own character. There must be something in the instrument upon which it appears showing that it was intended to be used as a seal.—Brown v. Jordhal, 19 N. W. 650, 32 Minn. 135

Search.

683. In Gen. St. Minn. 1878, c. 70, § 2, allowing certain fees to a clerk for a search of the records or files in his office. Is limited to a search for some particular paper or record, or to ascertain some particular fact.—Church v. St. Paul & N. P. Ry. Co., 23 N. W. 860, 33 Minn. 410.

Secreted.

684. In Sess. Laws Minn. 1867, c. 76, providing that an attachment may be allowed where the debtor has secreted, etc., his property, etc. Hidden, in fact.—Guile v. McNanny, 14 Minn. 520, (Gil. 391.)

See, also, §§ 62, 63, *supra*.

Seduce.

685. To draw aside and entice from the path of rectitude and duty; to corrupt; to deprave; to entice to a surrender of chastity. [Webst. Dict.]—State v. Timmens, 4 Minn. 325, (Gil. 241.)

Seised or possessed.

686. In Gen. St. Minn. 1878, c. 66, § 4, providing that no action for recovery of possession of real property shall be brought unless the plaintiff, his ancestor, etc., was "seised or possessed" of the premises within 20 years. The term "seised" is not used in contradistinction to "possessed," so as to admit an interpretation that the legal title or ownership only would be sufficient to prevent the title running as against the true owner.—Seymour v. Carli, 16 N. W. 495, 31 Minn. 81.

Seisin.

687. The title of the owner of a freehold estate.—Seymour v. Carli, 16 N. W. 495, 31 Minn. 81.

688. Seisin means, ex vi termini, the whole legal title.—Allen v. Allen, (Minn.) 51 N. W. 473.

Sell.

See § 574, *supra*.

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Seminary.

689. Seminary, a place of training; institution of education; school, academy, college, or university in which young persons are instructed in the several branches of learning, which may qualify them for their future employments. [Webst. Dict.]—Hennepin County v. Grace, 8 N. W. 761, 27 Minn. 503.

Separate estate.

690. The wife's separate property is her separate estate, although the husband may have a contingent interest therein.—Spencer v. Sheehan, 19 Minn. 338, (Gil. 292.)

Services.

691. In Gen. St. Minn. 1878, c. 8, § 172, providing that the county treasurer shall receive certain percentages for his services, provided that he shall not receive more than $1,200 for his personal services in any one year. The terms "services," and "personal services," include all the labor of performing the duties of treasurer, in receiving, collecting, and disbursing, as above mentioned, whether such labor be performed by the treasurer himself, or by a deputy or clerk, and all the expenditures incidental to such performance save those of which the statute specifically directs the allowance.—Yost v. Board of Com'rs of Scott County, 25 Minn. 366.

Settlement.

692. The terms "in settlement of a debt," "for or on account of a debt," and "in payment of the same," have substantially the same meaning when applied to the receipt of a note for such purposes.—Combination Steel & Iron Co. v. St. Paul City Ry. Co., 49 N. W. 744, 47 Minn. 207.

693. In findings by the court, referring to interest on a note. Construed to have been used in the sense of payment, and not of computation or adjustment.—Goenen v. Schroeder, 18 Minn. 66, (Gil. 51.)

694. In 5 U. S. St. at Large, p. 453, § 10, providing that every person who shall thereafter make a settlement on public land, etc., shall be authorized to enter a quarter section thereof. Means a settlement with a view to pre-empt.—Peterson v. First Div. St. Paul & P. R. Co., 6 N. W. 615, 27 Minn. 218.

Sham pleading.

695. A pleading known by the pleader to be false.—Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

Sheriff.

696. The term "sheriff's certificate" includes a certificate by either the principal sheriff or his deputy.—Burke v. Lacock, 42 N. W. 1016, 41 Minn. 250.

Shyster.

697. A trickish knave; one who carries on any business, especially a legal business, in a dishonest way.—Gribble v. Pioneer Press Co., 25 N. W. 710, 34 Minn. 342.

Signature.

698. May be written, printed, or lithographed.—Herrick v. Morrill, 33 N. W. 849, 37 Minn. 250.

Six successive weeks.

699. Pub. St. Minn. c. 75, § 4, providing for publication of notice of sale in mortgage foreclosure "for six successive weeks at least, once in each week," means 42 days, or 6 weeks of 7 days each, including the day of sale.—Worley v. Naylor, 6 Minn. 192, (Gil. 123.)

700. A publication commencing February 1, 1873, for a sale on March 10, 1873, is not a compliance with Gen. St. Minn. 1866, c. 81, § 5, requiring publication of notice of sale for six successive weeks.—Pratt v. Tinkcom, 21 Minn. 142.

Sluice.

701. The words "sluice," "sluicing," in Gen. St. Minn. 1878, c. 32, tit. 8, authorizing the licensing of sluice dams, are used in the sense of opening the gates or sluiceway for logs, etc., and not in the sense of using manual labor in driving them through.—Anderson v. Munch, 13 N. W. 192, 29 Minn. 414.

Society.

See § 69, *supra*.

Sold.

702. Implies a price or consideration of some kind.—State v. Lavake, 6 N. W. 339, 26 Minn. 526.

Solicitor's lien on title deeds.

703. A right to hold title deeds to enforce payment by embarrassing the debtor, but unaccompanied by any charge upon the estate.—Gardner v. McClure, 6 Minn. 250, (Gil. 167.)

Solvent.

See §§ 380-383, *supra*.

So made.

704. In Gen. St. Minn. 1866, c. 11, § 139, providing that a tax deed "so made" by the auditor shall vest in the grantee, etc., a good and valid title, etc., and shall be received as prima facie evidence of such title, etc. Means made after compliance with all the previous requirements of the law, as spoken of the vesting of title.—Broughton v. Sherman, 21 Minn. 431.

Special execution.

705. A copy of a judgment, with a direction to the sheriff indorsed thereon to execute it.—Crombie v. Little, 50 N. W. 823, 47 Minn. 581.

Special proceeding.

See §§ 294-297, *supra*.

Specific question.

706. In Gen. St. Minn. 1866, c. 66, § 199, providing that specific questions in a case triable by the court may be tried by a jury or re-

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ferred. A question specified or distinctly stated.—Cummings v. Taylor, 21 Minn. 366.

Spirituous liquor.

707. Beer is not a spirituous liquor.—State v. Quinlan, 41 N. W. 299, 40 Minn. 55.

Stock in trade.

708. In the statute exempting from attachment or sale on execution, stock in trade not exceeding $400 in value. Embraces unfinished and incomplete articles, bought and held for the sole purpose of finishing and fitting them for sale and use.—McAbe v. Thompson, 6 N. W. 479, 27 Minn. 134.

709. Includes articles purchased from wholesale dealers, kept indiscriminately for sale or for manufacture, as the opportunity offers, in the condition in which they were bought.—Hillyer v. Remore, 44 N. W. 116, 42 Minn. 254.

Storing.

710. The word "storing," as used in an insurance policy, prohibiting the storing of hazardous or extrahazardous goods, means a keeping for safe custody as the principal object, and not a keeping for the purposes of consumption or sale.—Phœnix Ins. Co. v. Taylor, 5 Minn. 492, (Gil. 393.)

Stranger.

711. In the law of escrows. Is used in opposition to the party to whom the contract runs.—Minneapolis Threshing Mach. Co. v. Davis, 41 N. W. 1026, 40 Minn. 110.

Street.

712. A public thoroughfare or highway in a city or village.—Carli v. Stillwater St. Ry. & Transfer Co., 10 N. W. 205, 28 Minn. 373.

Structure.

713. In Pen. Code Minn. § 476, making it a felony to displace, remove, or injure a railway structure, or any part thereof, etc. Does not include a fence bounding and inclosing land used for railroad purposes.—State v. Walsh, 45 N. W. 721, 43 Minn. 444.

Subcontractor.

714. In Gen. St. Minn. 1878, c. 90, § 2, (repealed by Laws 1889, c. 200, § 19,) which provided that all persons performing work of a specified character, or furnishing any materials therefor, whether such work was performed as a subcontractor, etc., or otherwise, should have a lien upon improved property, etc. Did not include one who simply furnishes materials, but takes no part in the work of construction.—Merriman v. Jones, 44 N. W. 526, 43 Minn. 29.

Subject-matter.

See § 101, *supra*.

Sublease.

See §§ 64-67, *supra*.

Submit.

715. A condition in an arbitration bond that the principal "shall well and truly submit and stand to and abide by the decision and award of the arbitrators" extends to the performance by the principal of the award after it is made.—Washburne v. Lufkin, 4 Minn. 466, (Gil. 362.)

Subscription.

716. The subscription of a summons by an attorney, required by Gen. St. 1878, c. 66, § 53, may be written or printed or lithographed, and adopted by the attorney; the word does not necessarily mean a written signature.—Herrick v. Morrill, 33 N. W. 849, 37 Minn. 250.

Substantial performance.

717. A contract is substantially performed where the omission or departure from the contract is unintentional, slight, and easily remedied.—Leeds v. Little, 44 N. W. 309, 42 Minn. 414; Elliott v. Caldwell, 45 N. W. 845, 43 Minn. 357.

Successors in trust.

718. In an assignment. Refers to such persons as might lawfully succeed the assignee in case of resignation, removal, or death.—Langdon v. Thompson, 25 Minn. 509.

Sufficient.

719. Pub. St. Minn. c. 59, § 37, providing that a justice may adjourn a case for sufficient cause. Means some good and sufficient legal cause or excuse for the delay asked, and not any pretext, which, in the arbitrary discretion of the party or justice, might be deemed sufficient.—School Dist. No. 7 of Wright County v. Thompson, 5 Minn. 280, (Gil. 221.)

720. Gen. St. Minn. 1878, c. 13, § 60, providing for the execution of a bond upon an appeal from the action of county commissioners, with sufficient sureties, means two or more sureties.—State v. Fitch, 16 N. W. 411, 30 Minn. 532.

Suitable.

721. Likely to suit; capable of suiting; adapted. Not equivalent to "adequate."—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 249.)

722. "All suitable precautions," in an agreement that certain work in the construction of a tunnel shall be prosecuted with all suitable precautions for safety, etc., mean all such suitable precautions as a discreet, prudent, and cautious man of ordinary capacity would adopt in the construction of such a tunnel, were the risk all his own, under the facts and circumstances as then and there known and understood, and which, by the use of reasonable diligence, caution, and skill, might have been known or anticipated.—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 249.)

Surety.

723. Any person is a surety who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who himself ought to have paid it before the surety was compelled to do so.—Wendlandt v. Sohre, 33 N. W. 700, 37 Minn. 162; Cassan v. Maxwell, 40 N. W. 357, 39 Minn. 391.

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724. In Gen. St. Minn. 1878, c. 66, § 36, allowing parties severally liable upon the same obligation or instrument, and sureties on the same instrument, to be included in the same action. A surety, within the meaning of the statute, is any one who is bound on the same instrument for its payment with another, who, as between themselves, is the principal debtor, whatever may be the particular form of the undertaking.—Hammel v. Beardsley, 17 N. W. 858, 31 Minn. 314.

Surrender.

725. Of an interest in land. The yielding up of an estate for life or for years to him that has the immediate reversion or remainder; wherein the particular estate becomes extinct by a mutual agreement between the parties.—Dayton v. Craik, 1 N. W. 813, 26 Minn. 133.

726. Surrender by operation of law takes place where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist.—Smith v. Pendergast, 3 N. W. 978, 26 Minn. 318.

See, also, § 304, *supra*.

Syndic.

727. At common law in England. An agent appointed by a corporation for the purpose of obtaining letters of guardianship and the like.—Minnesota Loan & Trust Co. v. Beebe, 41 N. W. 232, 40 Minn. 7.

Take.

728. In Const. Minn. art. 1, § 13, declaring that private property shall not be taken for public use without just compensation. Overflowing land by backing water upon it is a taking of the land, within the constitutional provision.—Weaver v. Mississippi & R. R. Boom Co., 11 N. W. 114, 28 Minn. 534.

729. Maintaining a boom which occasions periodic overflows is a taking by the exercise of the right of eminent domain.—McKenzie v. Mississippi & R. R. Boom Co., 13 N. W. 123, 29 Minn. 288.

730. A direct physical obstruction or injury to private property may amount to a taking of it.—Rochette v. Chicago, M. & St. P. Ry. Co., 20 N. W. 140, 32 Minn. 201.

731. Property is taken, within the constitutional meaning, where it is destroyed or materially impaired by rendering it impossible for the owner of it to enjoy it to the full extent that he is entitled to.—Adams v. Chicago, B. & N. R. Co., 39 N. W. 629, 39 Minn. 286.

732. In Gen. St. Minn. 1878, c. 34, relating to the taking of land for railway purposes, "taking" is used in a comprehensive sense, and embraces not merely the appropriation of the right of way, considered by itself alone, but also the facts, circumstances, and direct effects accompanying or flowing from such appropriation.—Wilmes v. Minneapolis & N. W. Ry. Co., 13 N. W. 39, 29 Minn. 242.

733. Land is to be deemed taken for a public use as of the date of the filing of the award by commissioners in condemnation proceedings.—City of Minneapolis v. Wilkin, 15 N. W. 668, 30 Minn. 145.

734. In an indictment for larceny. A charge that defendant did feloniously take, implies a trespass.—State v. Friend, 50 N. W. 692, 47 Minn. 449.

735. In Pen. Code Minn. § 240, subd. 1, making it a criminal offense to take a female under the age of 16 years for the purpose of prostitution, etc. "Take" does not mean a taking by force or violence. Such taking may be accomplished by persuasion, enticement, or device.—State v. Jamison, 35 N. W. 712, 38 Minn. 21.

Tax.

736. A pecuniary charge, imposed by the legislative power of the state, upon property, to raise money for public purposes.—Davidson v. Board of Com'rs of Ramsey County, 18 Minn. 482, (Gil. 432.)

737. An assessment levied for a local improvement is a tax.—State v. City of St. Paul, 32 N. W. 781, 36 Minn. 529.

See, also, § 246, *supra*.

Tax certificate.

738. The term is equally applicable to the certificate of tax sale prescribed in Gen. St. Minn. 1878, c. 11, § 84, and the certificate of assignment provided for in section 89.—Nelson v. Central Land Co., 29 N. W. 121, 35 Minn. 408.

Tenancy from year to year.

739. Is substantially a tenancy at will, except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year.—Hunter v. Frost, 49 N. W. 327, 47 Minn. 1.

Tenancy in common.

740. Tenants in common are such as hold by several and distinct titles, but by unity of possession.—Gould v. Sub-District No. 3 of Eagle Creek School Dist., 8 Minn. 427, (Gil. 382.)

Term.

741. In Gen. St. Minn. 1866, c. 66, § 200, providing for notice of trial, etc., "for the term." Includes a special term at which the action noticed may properly be tried.—Colt v. Vedder, 19 Minn. 539, (Gil. 469.)

Terms.

742. In a power of attorney authorizing the attorney to sell upon such terms as he shall deem meet. Applies to the amount of and the time of paying the consideration.—Carson v. Smith, 5 Minn. 78, (Gil. 58.)

There.

743. The words "then and there," used in an indictment without reference to any place or county, do not indicate the county in which the alleged crime was committed, although a county is mentioned as descriptive of other facts.—State v. Brown, 12 Minn. 490, (Gil. 393.)

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Thoroughfare.

744. A passage through; a street or way open at both ends and free from any obstruction.—City of Mankato v. Warren, 20 Minn. 144, (Gil. 128.)

Time for which he is elected.

745. In Const. Minn. art. 4, § 9, providing that no senator or representative shall, during the time for which he is elected, hold any office. Construed to mean during his term of office, under the general or state government, etc.—Barnum v. Gilman, 8 N. W. 375, 27 Minn. 466.

Title.

746. To real property. The means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it.—Loy v. Home Ins. Co., 24 Minn. 315.

Tool or instrument.

747. A silver watch worn by debtor, a cigar maker, and used by him to keep the time of his workmen, is not a tool or instrument used and kept for the purpose of carrying on his trade, within Gen. St. Minn. c. 66, § 279, exempting certain tools and instruments from execution.—Rothschild v. Boelter, 18 Minn. 361, (Gil. 331.)

To wit.

748. Its office and effect is to particularize what is too general in a preceding sentence, and render clear, and of certain application, that which might seem otherwise doubtful or obscure.—Buck v. Lewis, 9 Minn. 314. (Gil. 298.)

749. In an indictment. Its office is to mark that the party does not undertake to prove the precise circumstances alleged.—State v. Heck, 23 Minn. 549.

Town.

750. As a generic term, embraces all such primary municipal corporations as incorporated cities and villages, and, independently of any statutory provision, it has become a well-settled rule of construction that the term "town," when used in a general statute, may include cities, unless the contrary appears from the whole statute to have been the intent of the legislature.—Odegaard v. City of Albert Lea, 23 N. W. 526, 33 Minn. 351.

751. In Const. Minn. art. 11, § 3, providing that laws may be passed providing for organization for municipal and other town purposes. A portion of the state bounded by geographical lines to which, to a greater or less extent, the power of self-government is committed.—State v. Sharp, 6 N. W. 408, 27 Minn. 38.

752. "Town" may mean "township."—Herrick v. Morrill, 33 N. W. 849, 37 Minn. 250.

753. In Laws Minn. 1885, c. 172, requiring the corporate authorities of a town to establish voting precincts, etc. Refers to an incorporated municipality.—Stemper v. Higgins, 37 N. W. 95, 38 Minn. 222.

Township.

754. Does not mean "town" in the sense of a platted village or townsite.—Herrick v. Morrill, 33 N. W. 849, 37 Minn. 250.

Trader.

755. One who buys grain, mills it, sells it for a profit, and also operates a warehouse, receiving in store and buying and selling grain, is a trader.—Daniels v. Palmer, 29 N. W. 162, 35 Minn. 347.

756. One engaged in the brewing business, buying malt and grain, and selling beer, is a trader, within the bankrupt and insolvent laws.—Hastings Malting Co. v. Heller, 49 N. W. 400, 47 Minn. 71.

Transaction.

757. Gen. St. Minn. 1866, c. 66, § 80, subd. 1, allowing defendant to counterclaim a cause of action arising out of the transaction set forth in the complaint, means a transaction which refers not merely to an occurrence or act, but to some commercial or business transaction or dealing; something in the nature of a contract, perhaps a series of contracts, with respect to the same business or subject.—Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

Transferable to or vested in.

758. Rev. St. U. S. § 5057, providing that no suit shall be maintainable between an assignee in bankruptcy and a person claiming an adverse interest touching any "property or rights of property transferable to or vested in such assignee," unless brought within two years from the time when the cause of action accrued, etc., means property or rights of property of such kind or description as, by the provisions of the bankrupt law, would, if they belonged to the bankrupt, be transferred or vested in the assignee.—Haven v. Place, 11 N. W. 117, 28 Minn. 551.

Traveler.

759. Dwellers and inhabitants of a city no larger than the city of St. Paul in 1872, who change their dwelling place from one part of it to another, are not travelers, within the meaning of the rule as to an innkeeper's liability to travelers.—Lusk v. Belote, 22 Minn. 468.

Trespass.

See § 223, *supra*.

Trial.

760. The judicial hearing upon the issues in a cause, for the purpose of determining it.—State v. Bergman, 34 N. W. 737, 37 Minn. 407.

761. A judgment by default is not a trial, within the meaning of Pub. St. Minn. c. 61, § 59, allowing a new trial in certain cases.—Myrick v. Pierce, 5 Minn. 65, (Gil. 47.)

True bill.

762. An indictment indorsed "a true bill," and signed by the foreman of the grand jury, and properly filed, is evidence that the indictment has been found, as provided by Gen. St. Minn.

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1866, c. 107, §§ 57, 60.—State v. McCartey, 17 Minn. 76, (Gil. 54;) State v. Beebe, 17 Minn. 241, (Gil. 218.)

Trust.

763. Implies two estates or interests,—one equitable and one legal; one person as trustee holding the legal title, while another as the cestui que trust has the beneficial interest.—Hospes v. Northwestern Manuf'g & Car Co., (Minn.) 50 N. W. 1117.

Trustee of an express trust.

764. An agent who takes a contract for the benefit of his principal in his own name is within Gen. St. Minn. 1878, c. 66, § 28, allowing such a trustee to sue in his own name.—Cremer v. Wimmer, 42 N. W. 467, 40 Minn. 511.

Two-thirds vote.

765. In the provisions of the constitution of Minnesota requiring a two-thirds vote of the legislature for certain purposes. A vote in each house of two thirds of all the members thereof. —State v. Gould, 17 N. W. 276, 31 Minn. 189.

Understanding.

766. May express a valid contract engagement, but one of a somewhat informal character.—Winslow v. Dakota Lumber Co., 20 N. W. 145, 32 Minn. 237.

Undue influence.

767. A coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear.—In re Nelson's Will, 39 N. W. 143, 39 Minn. 204.

768. As to the execution of a will. May be through threats or fraud, but, however exercised, must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made.—In re Nelson's Will, 39 N. W. 143, 39 Minn. 204.

769. To constitute undue influence in procuring execution of a will the mind of the testator must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influence of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but become subject to the will or purposes of another.—Mitchell v. Mitchell, 44 N. W. 885, 43 Minn. 73.

Uninterrupted course.

770. In Laws Minn. 1889, c. 19, regulating the practice of dentistry, and exempting students engaged in a "regular, uninterrupted course" of study from its provisions. Does not mean that the course of study shall be without vacations, such as all schools have.—State v. Vandersluis, 43 N. W. 789, 42 Minn. 129.

University.

See § 384, *supra*.

Unmarketable title.

See §§ 461, 462, *supra*.

Unoccupied.

See § 782, *post*.

Unprofessional.

771. In Laws Minn. 1883, c. 125, § 9, authorizing the state medical examining board to refuse certificates of practice to those guilty of unprofessional or dishonorable conduct, "unprofessional" is used convertibly with "dishonorable."—State v. State Medical Examining Board, 20 N. W. 238, 32 Minn. 324.

Unsatisfied.

772. Indorsed on a sheriff's return upon an execution is not a return that no property could be found.—Sherburne v. Rippe, 29 N. W. 322, 35 Minn. 540.

Unsold.

773. In Laws Minn. 1881, c. 135, § 9, providing that all lands remaining unsold at a tax sale shall be stricken from the tax lists, and subsequently sold, etc. Not sold to an actual purchaser.—Mulvey v. Tozer, 42 N. W. 387, 40 Minn. 384.

Until.

774. In a stipulation that a party may have until a certain date to answer. Construed as inclusive of the designated date.—Barker v. Keith, 11 Minn. 65, (Gil. 37.)

Use and occupy.

775. In a devise of land to trustees to permit a person named to use and occupy the same for life. The words "use and occupy" are not to be interpreted in the narrow sense of personal occupation, but as entitling the beneficiary to the whole estate for life.—Farmers' Nat. Bank of Owatonna v. Moran, 14 N. W. 805, 30 Minn. 165.

Use of the county.

776. In Laws Minn. 1860, c. 15, § 2, authorizing a county to purchase and hold real and personal estate for the use of the county. The expression "for the use of the county" has the same meaning as "for the public use of the county."—James v. Wilder, 25 Minn. 305; Shepard v. Murray County, 24 N. W. 291, 33 Minn. 519.

Usual business hours.

777. The business hours of the community generally, and not the particular hours that may be regarded in some cases.—Derosia v. Winona & St. P. R. Co., 18 Minn. 133, (Gil. 119.)

778. The "usual business hours" of a railway station agent are the time within which the community generally did business with him.—Derosia v. Winona & St. P. R. Co., 18 Minn. 133, (Gil. 119.)

Usual covenants for title.

779. A deed with the usual covenants for title includes a warranty deed with full covenants.—Drake v. Barton, 18 Minn. 462, (Gil. 414.)

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Usury.

780. The taking or contracting for a greater rate of interest than the law permits for the forbearance or use of money.—Stein v. Swensen, 49 N. W. 55, 46 Minn. 360.

Vacant.

781. In Gen. St. Minn. 1878, c. 9, § 2, providing that an office shall be vacant upon failure of the incumbent to qualify, etc. Applies to the particular term to which the event causing a vacancy relates.—Scott County v. Ring, 13 N. W. 181, 29 Minn. 398.

Vacant, unoccupied, or not in use.

782. In a policy of insurance against fire, exempting the insurer from liability if the building should be "vacant, unoccupied, or not in use" at the time of the fire. A building containing furniture and fixtures, and in which a person slept part of the time, is not within such provision.—Stensgaard v. National Fire Ins. Co., 30 N. W. 468, 36 Minn. 181.

Vagrant grant.

783. As of swamplands. Where an act purports by words of present grant to give a certain quantity of land not specifically designated, the grantee acquires, by force of the act, the right to receive that quantity; and when, in the manner required by the act, the land is located, the grantee becomes the owner thereof.—St. Paul & C. Ry. Co. v. Brown, 24 Minn. 517.

Valuation.

784. Is susceptible of the same meaning as "value."—Sergeant v. Dwyer, 46 N. W. 444, 44 Minn. 309.

Value.

785. In Laws Minn. 1857, Ex. Sess. c. 1, § 13, providing for appraising the value of land taken for public use. Embraces not only the value of the land as an isolated parcel, but includes such additional value as attaches to it by reason of its connection with adjacent land of the same owner.—Scott v. St. Paul & C. Ry. Co., 21 Minn. 322. See Simmons v. Same, 18 Minn. 184, (Gil. 168;) Colvill v. Same, 19 Minn. 283, (Gil. 240.)

Value or contract price.

786. In Gen. St. Minn. 1878, c. 90, §§ 2, 5, relating to liens for the value or contract price of labor or materials. As between the parties to a contract, the contract price fixed is the measure of liability, but it is not intended that the owner's contract should carry with it an implied consent that the contractor should bind him to pay whatever he might promise for labor or materials, or any more than the reasonable price or value.—Laird v. Moonan, 20 N. W. 354, 32 Minn. 358.

Value received.

787. In an ordinary written contract. Imports a consideration.—Frank v. Irgens, 6 N. W. 380, 27 Minn. 43.

788. Expresses the consideration required by the statute of frauds.—Osborne v. Baker, 25 N. W. 606, 34 Minn. 307.

Verdict contrary to law.

789. A verdict contrary to the law applicable to the facts of the case; not contrary to the law as given by the court.—Hurt v. St. Paul, M. & M. Ry. Co., 40 N. W. 613, 39 Minn. 485.

Vested.

See § 758, *supra*.

Vested rights.

790. In Gen. Laws Minn. 1857, c. 93, authorizing amendments, not impairing vested rights, to the charter (Sp. Laws 1861, c. 1) of the Lake Superior & Mississippi Railroad Company. Means valuable rights which the corporation might acquire under the charter, by other action and proceedings thereunder than the mere acceptance of the charter.—Ames v. Lake Superior & M. R. Co., 21 Minn. 241.

Vicinity.

See § 443, *supra*.

Videlicet.

See §§ 748, 749, *supra*.

Village.

791. In Gen. St. Minn. 1878, c. 39, § 2, requiring chattel mortgages to be filed with the clerks of villages. Does not include boroughs.—Bannon v. Bowler, 26 N. W. 237, 34 Minn. 416.

792. "Village of Lake City," in Sp. Laws Minn. 1865, c. 6, requiring a line of railway to be built through the village of Lake City, etc., is used inadvertently for "City of Lake City."—State v. City of Lake City, 25 Minn. 404.

Void.

793. In an agreement that if title to premises is not good, and cannot be made good within a certain period, the agreement should be void. Means at an end.—Mackey v. Ames, 16 N. W. 541, 31 Minn. 103.

794. In Gen. St. Minn. 1878, c. 57, providing that a purchase by an executor, etc., at his sale, shall render the same void. Is used in the sense of "voidable."—White v. Iselin, 5 N. W. 359, 26 Minn. 487.

795. In Gen. St. Minn. 1878, c. 34, § 15, providing that want of service of notice in proceedings to condemn land shall render subsequent proceedings void as to the person not served. Means void until they should be rendered valid by some other event or act having the effect of curing the want of jurisdiction.—Rheiner v. Union Depot, Street Ry. & Transfer Co., 17 N. W. 623, 31 Minn. 289.

796. In Gen. St. Minn. 1878, c. 39, § 1, declaring chattel mortgages without delivery of possession to be absolutely void unless filed. Bears the sense of "voidable" or "subject to be avoided."—Tolbert v. Horton, 18 N. W. 647, 31 Minn. 518.

797. In a statute providing that a preferential transfer by an insolvent, etc., shall be

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void. Means "voidable," in proceedings under and in aid of the law.—Smith v. Brainerd, 35 N. W. 271, 37 Minn. 479.

Vote by ballot.

798. Designating an elector's choice of a person for an office by the deposit of a ticket bearing the name of such person in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the persons voted for.—Brisbin v. Cleary, 1 N. W. 825, 26 Minn. 107.

Vote of the electors.

799. In Sp. Laws Minn. 1869, c. 92, providing for the issuance of bonds by the corporation therein created, in pursuance of a vote of the electors. The expressed will of a majority of such electors voting upon the question.—Board of Education of Sauk Centre v. Moore, 17 Minn. 412, (Gil. 391.)

Wagon.

800. In Gen. St. Minn. 1878, c. 66, § 310, subd. 6, exempting from sale on execution "one wagon," etc. A light open buggy with side springs is a "wagon," within the meaning of the statute.—Allen v. Coates, 11 N. W. 132, 29 Minn. 46. See Dingman v. Raymond, 8 N. W. 597, 27 Minn. 507.

801. So, also, is a two-seated, upholstered, one-horse carriage built and used for easy riding only.—Kimball v. Jones, 43 N. W. 74, 41 Minn. 318.

Wagon crossings.

802. In Gen. St. Minn. 1878, c. 34, § 54, requiring railroads to build and maintain cattle guards at "wagon crossings." Refers to wagon roads used for public travel crossing railroads, and not to private ways or farm crossings.—Sather v. Chicago, M. & St. P. Ry. Co., 41 N. W. 458, 40 Minn. 91.

Waiver.

803. A voluntary relinquishment of some right which, but for such waiver, the party would have enjoyed.—Fishback v. Van Dusen, 22 N. W. 244, 33 Minn. 111.

See, also, § 644, *supra*.

Wanton, willful, or malicious trespass.

804. Involves a conscious violation of the rights of the party trespassed upon.—Carli v. Union Depot, Street Ry. & Transfer Co., 20 N. W. 89, 32 Minn. 101.

Warranty.

805. In the law of insurance. Warranties are conditions precedent, the truth of which must be pleaded and proved by the assured.—Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497, (Gil. 473.)

See, also, § 274, *supra*.

Waste.

806. Any unlawful act or omission of duty on the part of a tenant, which results in permanent injury to the inheritance.—Whitney v. Huntington, 26 N. W. 631, 34 Minn. 458.

Wearing apparel.

807. A silver watch, worn by a person, is not exempt from execution as wearing apparel under Gen. St. Minn. c. 66, § 279.—Rothschild v. Boelter, 18 Minn. 361, (Gil. 331.)

When.

808. In Pub. St. Minn. 1849–1858, c. 44, § 59, providing that it shall be the duty of the court to appoint commissioners to audit claims against the estate, "when" letters testamentary or of administration shall be granted. Means no more than "in case" or "if."—Wilkinson v. Winne's Estate, 15 Minn. 159, (Gil. 123.)

Willfully.

809. In an indictment. Means intentionally, as distinguished from accidentally or involuntarily; designedly and perversely. — State v. Stein, (Minn.) 51 N. W. 474.

Willfully and corruptly.

810. In an indictment for perjury. Equivalent to the words "willfully" and "knowingly," used in the statute (Pen. Code Minn. § 87) defining the offense.—State v. Stein, (Minn.) 51 N. W. 474.

Written instrument.

811. Written instruments, as used in Laws Minn. 1867, c. 64, mean formal instruments or agreements, and do not include mere entries or memoranda made only for the use or convenience of the party making them.—Board of Com'rs of Mower County v. Smith, 22 Minn. 97.

Written instrument for the payment of money only.

812. Laws Minn. 1856, pp. 6, 7, allowing verification of a pleading by an attorney or other person, when the action or defense is founded upon a "written instrument for the payment of money only," refers to and comprehends bills of exchange, notes, bonds, contracts, or any instrument, the creature of contracting parties, containing stipulations for the payment of money only, but does not include judgments.—Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

Wrongful act.

813. In Pub. St. Minn. c. 68, § 3, giving a right of action to the personal representatives of one whose death is caused by the wrongful act of another. Does not mean willful or malicious act.—McLean v. Burbank, 12 Minn. 530, (Gil. 438.)

Wrongfully and feloniously.

814. The words "did wrongfully and feloniously take, steal, and carry away," in an indictment for larceny, involve the possession and the wrongful taking of the property from the actual or constructive possession of the owner, general or special, and without his consent.—State v. Friend, 50 N. W. 692, 47 Minn. 449.

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Year.

815. In an indictment, in stating the time of the alleged offense, such words as "one thousand eight hundred and seventy-one," immediately following the month and day of the month, sufficiently denote the year.—State v. Munch, 22 Minn. 67.

WORK AND LABOR.

Contract for work and material distinguished from sale, see *Sale*, 7.

When action lies—Oral agreement.

1. An oral agreement for services not to be performed within one year is not wholly void, though no action can be maintained on it. And where one by such an agreement contracts to render services for a specified time at a specified gross sum, to be paid when they are all rendered, and commences to render the services, but quits without cause, he cannot recover for what he has done. —Kriger v. Leppel, (Minn.) 43 N. W. 484.

42 Minn. 6.

2. In an action for services rendered by plaintiff in purchasing certain realty for defendant, the evidence showed that plaintiff purchased the land for defendant, and that plaintiff was to have an interest therein, thereafter, on payment of an agreed sum. There was a written contract by which defendant agreed to convey to plaintiff an interest in the land, and to allow him, as part payment, the sum claimed by plaintiff, "for services heretofore rendered in purchasing" the same. Plaintiff testified that, when the written contract was made, defendant orally promised to pay him the amount specified in case he should be unable to buy the interest as contemplated. There was nothing in the contract to show that, in case plaintiff failed to comply with its conditions, he was to have noth ing for the services. *Held*, that a verdict for plaintiff was sustained by the evidence.—Ashworth v. Frost, (Minn.) 45 N. W. 431.

43 Minn. 259.

—— Quantum meruit.

3. In an action upon *quantum meruit* for services rendered, it appeared that they were rendered under a special contract, by which plaintiff was to render the service, to be paid for by defendant by furnishing her a room and board, and that he had failed to comply with his part of the contract during a portion of the time while such services were being rendered. *Held*, that the plaintiff, not having rescinded upon failure of defendant to perform, had no remedy upon a *quantum meruit*, but should have sued upon the special contract.—Bond v. Corbett, 2 Minn. 248, (Gil. 209.)

4. Where services are rendered on an express contract, action therefor must be brought upon the contract, unless it is rescinded before completion, when the action may be upon a *quantum meruit*.—Marcotte v. Beaupre, 15 Minn. 152, (Gil. 117.)

5. Plaintiff, an architect, was to have a certain sum for drawing plans, and 2½ per cent. for superintendence, but defendant would not allow him to superintend the work. *Held*, that plaintiff might treat the contract as rescinded, and sue for the value of his services in preparing the plans.—Marcotte v. Beaupre, 15 Minn. 152, (Gil. 117.)

6. Where a party to a contract has so acted upon it that he cannot be placed *in statu quo*, and is prevented by the other party from completing the same, he may sue for work done and materials furnished on *quantum meruit* and *quantum valebant*, and refer to the contract as furnishing a basis from which the reasonable value of work and material may be ascertained. —Siebert v. Leonard, 17 Minn. 433, (Gil. 410.)

7. Defendant's agent made a contract in behalf of his principal, which defendant afterwards refused to sign; plaintiff, in ignorance thereof, going on and doing work thereunder. *Held*, that plaintiff might, on learning of defendant's refusal, rescind the contract, and recover on a *quantum meruit* for the value of the work done.—Hawkins v. Lange, 22 Minn. 557.

8. The plaintiffs having performed services for the defendant under a special agreement that they should receive therefor an annual pass over the defendant's road, and the defendant having then refused to give the pass, the plaintiffs may recover upon the *quantum meruit* for their services; the value of such a pass being deemed to be impossible of proof, or of estimation as a measure of damages. —Brown v. St. Paul, M. & M. Ry. Co., (Minn.) 31 N. W. 941.

36 Minn. 236.

9. In an action upon the *quantum meruit* for services, the defendant alleging in defense an *express* contract that the plaintiff's compensation, fixed by the contract, was to depend upon a specified contingent event, it is incumbent upon the defendant to prove that the specified event had *not* happened.—Evans v. Miller, (Minn.) 34 N. W. 596, 37 Minn. 371.

10. Plaintiff worked for one P., who was his uncle, for several years without any express agreement for compensation, but with the mutual understanding of both that he should be adequately provided for in P.'s will, but P. died without making such provision. *Held*, that plaintiff was entitled to recover of P.'s estate the value of his services as upon a *quantum meruit*.—Schwab v. Pierro, (Minn.) 46 N. W. 71.

43 Minn. 520.

Pleading.

11. A complaint alleging a written contract for the performance of work, labor thereunder within certain times, the value of the labor performed, and the amount paid and remaining unpaid, sufficiently states a cause of action.—Nash v. Murnan, 6 Minn. 577, (Gil. 411.)

12. A complaint set forth that plaintiff and defendant entered into a sealed agreement for the erection of a building for defendant at a specific price, according to plans and specifications; that no plans and specifications were furnished, and that performance according thereto was practically abandoned; that plaintiff did the work as directed, under the immediate direction and supervision of the defendant, frequently

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protesting that it was insecure, and, when nearly completed, the building, without plaintiff's fault, fell to the ground. Judgment was demanded for the unpaid balance of the contract price, less the value of the work yet to be done when the building fell. *Held*, that the action was upon a *quantum meruit*, the contract being referred to for the purpose of determining the reasonable value of the work, and fully stating the origin of the plaintiff's cause of action.—Siebert **v.** Leonard, 17 Minn. 433, (Gil. 410.)

Evidence—Sufficiency.

13. On a claim of $150 for certain extra work in filling at a curve, the evidence showed that about 100 days' labor was devoted to such filling and to the moving of certain wood, but no evidence as to how much was devoted to filling or how much to the wood. *Held* insufficient to support a finding that the value of such filling was $150.—Schwerin v. De Graff, 19 Minn. 414, (Gil. 359.)

14. A schedule to a complaint for work and labor done contained an item for 2,800 yards of excavation done in January, 1869. Plaintiff testified that "the work was to be measured by the engineer of the railroad company. His measure was to be taken as correct, and he was to be paid according to such estimate;" and further, "that he [plaintiff] thought he did about 2,800 yards on that section in January,—he guessed at it." Defendant testified that nearly all the work done on that section was performed before January, and what was done afterwards was included in the December estimate. *Held*, that plaintiff's evidence was too vague and indefinite to support referee's finding that he had done 2,800 yards of grading in January.—Schwerin v. De Graff, 19 Minn. 414, (Gil. 359.)

15. In an action for services rendered defendant in attending to and protecting his interests in the estate of his deceased son, it appeared that such services consisted almost entirely of correspondence with various persons, the nature and extent of which were given in evidence. The only testimony as to the value of the services was that of plaintiff, who claimed they were worth $50. *Held*, that a verdict for that amount in plaintiff's favor would not be set aside as unsupported by the evidence.—Svanoe **v.** Larson, (Minn.) 49 N. W. 388.

47 Minn. 7.

Question for jury.

16. Whether extra or different work than called for by a special contract, and not expressly agreed to be paid for, is of such character as to raise an implied *assumpsit* to pay for the same, is usually a question for the jury to be determined by the nature, amount, and value of such work.—Fravell v. Nett, (Minn.) 48 N. W. 446.

46 Minn. 31.

WRECKING TRAINS.

What constitutes the offense.

Under Gen. St. Minn. 1878, c. 94, § 63, which declares that "whoever shall willfully obstruct any engine or carriage passing upon any railroad, so as to endanger the safety of persons conveyed in or upon the same," shall be punished, etc., the offense is complete when an obstacle is placed on a railway in such manner that any train in passing may strike it, and is of such a character that the safety of persons conveyed will be endangered if a train should come in collision with it.—State v. Kilty, 10 N. W. 475, 28 Minn. 421.

Writs.

See *Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Mandamus; Prohibition, Writ of; Replevin; Search Warrant; Summons.*

Wrongful Attachment.

See *Attachment*, 99-109.

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CONSTITUTIONS AND STATUTES

CITED, CONSTRUED, ETC.,

IN THE

MINNESOTA REPORTS, VOLS. 1 TO 47, INCLUSIVE, AND THE MINNESOTA CASES IN THE NORTHWESTERN REPORTER, VOLS. 1 TO 52, INCLUSIVE.[1]

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25 Edw. III., ch. 2.
3 Minn. 255, (Gil. 174.)

50 Edw. III., ch. 6.
4 Minn. 396, (Gil. 298.)

3 Hen. VII., ch. 4.
4 Minn. 396, (Gil. 298.)

4 Hen. VII., ch. 13.
3 Minn. 253, (Gil. 172.)

28 Hen. VIII., ch. 1.
3 Minn. 253, (Gil. 172.)

32 Hen. VIII., ch. 3.
3 Minn. 253, (Gil. 172.)

37 Hen. VIII., ch. 9.
2 Minn. 362, (Gil. 314.)

1 Edw. VI., ch. 12.
3 Minn. 253, (Gil. 172.)

1 & 2 Ph. & M., ch. 13.
10 Minn. 358, (Gil. 283.)

2 & 3 Ph. & M., ch. 10.
10 Minn. 358, (Gil. 284.)

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4 Minn. 396, (Gil. 298;) 7 Minn. 345, (Gil. 271;) 12 Minn. 66, (Gil. 33;) 13 Minn. 330, (Gil. 303;) 18 Minn. 424, (Gil. 382;) 51 N. W. 476.

27 Eliz. ch. 4.
4 Minn. 396, (Gil. 298;) 7 Minn. 345, (Gil. 271.)

21 Jac. I., ch. 16.
9 Minn. 18, (Gil. 6.)

29 Chas. II., ch. 3, § 4.
6 Minn. 260, (Gil. 171;) 13 Minn. 193, (Gil. 181.)

29 Chas. II., ch. 3, §§ 7, 8.
14 Minn. 430, (Gil. 320.)

29 Chas. II., ch. 3, § 16.
25 Minn. 171.

2 Wm. & M. ch. 5.
24 Minn. 591, 617.

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3 Minn. 336, (Gil. 235.)

4 Anne, ch. 16, § 4.
5 Minn. 130, 143, 146, (Gil. 93, 108, 111.)

4 Anne, ch. 16, § 6.
1 Minn. 415, (Gil. 300;) 34 Minn. 63.

4 Anne, ch. 16, § 27.
25 Minn. 225.

5 Anne, ch. 6.
3 Minn. 254, (Gil. 173.)

6 Anne, ch. 31.
18 Minn. 342, (Gil. 314.)

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11 Minn. 44, (Gil. 22.)

7 Anne, ch. 20.
24 Minn. 283.

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8 Anne, ch. 19.
3 Minn. 104, (Gil. 56.)

2 Geo. II., ch. 22, § 13.
6 Minn. 425, (Gil. 288.)

4 Geo. II., ch. 28.
24 Minn. 617.

24 Geo. II., ch. 18.
34 Minn. 63.

10 Geo. III., ch. 18.
1 Minn. 297, (Gil. 230.)

[1] NOTE. The statutes cited in the Minnesota cases in vol. 52, N. W. Rep., are included to page 384.

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7 Geo. IV., ch. 64, § 12.
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5 Minn. 516, (Gil. 410.)

Ch. 35, § 39.
7 Minn. 354, (Gil. 279;) 13 Minn. 197, (Gil. 186.)

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5 Minn. 331, (Gil. 262.)

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6 Minn. 48, (Gil. 7.)

Ch. 35, § 52.
5 Minn. 331, (Gil. 262;) 6 Minn. 181, 296, (Gil. 115, 203;) 11 Minn. 443, 444, (Gil. 326, 328.)

Ch. 35, § 54.
5 Minn. 330, 331, (Gil. 261, 262;) 9 Minn. 231, (Gil. 216;) 10 Minn. 58, (Gil. 40;) 18 Minn. 241, 409, (Gil. 223, 367;) 20 Minn. 462, (Gil. 417;) 24 Minn. 282.

Ch. 35, § 56.
9 Minn. 271, (Gil. 216;) 18 Minn. 241, (Gil. 223.)

Ch. 35, § 57.
5 Minn. 330, (Gil. 261;) 9 Minn. 231, (Gil. 216;) 15 Minn. 173, (Gil. 132;) 18 Minn. 241, (Gil. 223.)

Ch. 35, § 60.
5 Minn. 330, (Gil. 261;) 18 Minn. 241, (Gil. 224.)

Ch. 35, § 62.
7 Minn. 181, (Gil. 125.)

Ch. 35, § 63.
7 Minn. 181, (Gil. 125;) 9 Minn. 231, (Gil. 216;) 10 Minn. 58, (Gil. 40;) 18 Minn. 241, (Gil. 223.)

Ch. 35, § 68.
6 Minn. 93, (Gil. 43;) 9 Minn. 231, (Gil. 216;) 15 Minn. 62, (Gil. 42.)

Ch. 35, § 74.
5 Minn. 331, (Gil. 262;) 6 Minn. 229, (Gil. 149;) 18 Minn. 241, (Gil. 223.)

Ch. 36, § 4.
15 Minn. 517, (Gil. 426.)

Ch. 37, § 1.
20 Minn. 318, (Gil. 273;) 42 Minn. 348.

Ch. 38, § 6.
11 Minn. 404, (Gil. 297.)

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11 Minn. 353, (Gil. 251.)

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11 Minn. 402, 403, (Gil. 295.)

Ch. 38, § 22.
37 Minn. 3.

Ch. 38, § 23.
11 Minn. 401, 406, (Gil. 294, 298, 299;) 28 Minn. 204; 38 Minn. 334.

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11 Minn. 406, (Gil. 298, 299.)

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19 Minn. 126, (Gil. 93;) 20 Minn. 318, (Gil. 273.)

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19 Minn. 120, 126, (Gil. 88, 93.)

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19 Minn. 121, 126, 343, (Gil. 89, 93, 296.)

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11 Minn. 352, (Gil. 251.)

Ch. 39, § 13.
19 Minn. 126, (Gil. 94.)

Ch. 39, § 16.
11 Minn. 402, (Gil. 295.)

Ch. 39, § 21.
19 Minn. 125, (Gil. 92;) 30 Minn. 111.

Ch. 39, § 22.
11 Minn. 403, (Gil. 295;) 52 N. W. 383.

Ch. 39, §§ 43, 44.
4 Minn. 420, (Gil. 324.)

Ch. 39, § 48.
11 Minn. 403, (Gil. 295.)

Ch. 39, § 50.
11 Minn. 354, (Gil. 252;) 19 Minn. 128, 340, (Gil. 95, 293;) 24 Minn. 290.

Ch. 39, § 51.
19 Minn. 128, (Gil. 95;) 24 Minn. 290.

Ch. 39, § 52.
11 Minn. 353, 354, 406, (Gil. 251, 252, 299;) 19 Minn. 128, (Gil. 95;) 38 Minn. 334.

Ch. 39, § 54.
11 Minn. 406, (Gil. 299.)

Ch. 40, §§ 18, 39.
19 Minn. 345, (Gil. 298.)

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25 Minn. 354.

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21 Minn. 448; 25 Minn. 353.

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25 Minn. 353.

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15 Minn. 167, (Gil. 127.)

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15 Minn. 165, (Gil. 126.)

Ch. 43, § 1.
15 Minn. 167, (Gil. 127;) 20 Minn. 320, (Gil. 275.)

Ch. 44.
15 Minn. 168, (Gil. 128;) 20 Minn. 329 et seq., (Gil. 284.)

Ch. 44, § 1.
15 Minn. 166, (Gil. 127.)

Ch. 44, §§ 5, 11.
20 Minn. 327, (Gil. 282.)

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15 Minn. 166, 167, (Gil. 126.)

Ch. 44, §§ 20, 21.
6 Minn. 568, (Gil. 403;) 9 Minn. 150, (Gil. 140.)

Ch. 44, §§ 25, 29.
6 Minn. 568, 569, (Gil. 403.)

Ch. 44, §§ 31, 32, 34.
15 Minn. 166, (Gil. 126.)

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30 Minn. 214.

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24 Minn. 124.

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20 Minn. 337, (Gil. 276.)

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15 Minn. 166, (Gil. 126.)

Ch. 44, §§ 53–58.
20 Minn. 321, (Gil. 276.)

Ch. 44, § 59.
15 Minn. 167, (Gil. 128.)

Ch. 45, § 4.
19 Minn. 227, 228, (Gil. 187, 188.)

Ch. 45, § 8.
20 Minn. 337, (Gil. 291.)

Ch. 46.
24 Minn. 124.

Ch. 49, § 6.
5 Minn. 434, (Gil. 354;) 6 Minn. 371, (Gil. 257.)

Ch. 49, § 7.
8 Minn. 526, (Gil. 469.)

Ch. 49, § 8.
3 Minn. 233, (Gil. 157;) 8 Minn. 526, (Gil. 467;) 10 Minn. 213, (Gil. 171.)

Ch. 49, § 10.
6 Minn. 372, (Gil. 257.)

Ch. 50, § 1.
3 Minn. 376, (Gil. 270;) 19 Minn. 370, (Gil. 315.)

Ch. 50, § 2.
8 Minn. 132, (Gil. 102.)

Ch. 50, § 3.
13 Minn. 192, (Gil. 181.)

Ch. 51.
4 Minn. 403, 539, (Gil. 306, 423;) 11 Minn. 110, (Gil. 67;) 19 Minn. 370, (Gil. 315.)

Ch. 51, § 1.
3 Minn. 375, (Gil. 269;) 4 Minn. 211, 403, (Gil. 150, 306;) 6 Minn. 317, (Gil. 223;) 12 Minn. 66, (Gil. 32;) 13 Minn. 440, (Gil. 403;) 19 Minn. 22, 370, (Gil. 5, 315.)

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Ch. 51, § 3.
19 Minn. 22, (Gil. 5.)

Ch. 51, § 4.
4 Minn. 403, (Gil. 306;) 6 Minn. 316, 317, (Gil. 221, 222.)

Ch. 51, § 5.
6 Minn. 317, (Gil. 223.)

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6 Minn. 464, (Gil. 321.)

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19 Minn. 225–227, 229, (Gil. 185–187, 189.)

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4 Minn. 365, 429, (Gil. 274, 331;) 10 Minn. 372, (Gil. 298.)

Ch. 56, § 5.
4 Minn. 429, (Gil. 331.)

Ch. 57, § 1.
18 Minn. 227, (Gil. 207.)

Ch. 57, §§ 12, 13.
22 Minn. 192.

Ch. 57, § 19.
3 Minn. 50, (Gil. 18;) 4 Minn. 80, (Gil. 49;) 6 Minn. 353, 506, (Gil. 235, 351;) 12 Minn. 66, (Gil. 32;) 14 Minn. 484, 485, (Gil. 361.)

Ch. 57, § 20.
6 Minn. 353, (Gil. 235;) 12 Minn. 66, (Gil. 32.)

Ch. 57, §§ 21, 22.
14 Minn. 484, 485, (Gil. 361.)

Ch. 57, § 23.
6 Minn. 352, 495, (Gil. 235, 342;) 9 Minn. 106, (Gil. 95.)

Ch. 57, § 24.
5 Minn. 377, (Gil. 305;) 6 Minn. 352, 495, (Gil. 235, 342.)

Ch. 57, § 27.
44 Minn. 147.

Ch. 58, § 43.
9 Minn. 150, (Gil. 140;) 19 Minn. 128, (Gil. 95;) 25 Minn. 354.

Ch. 58, § 46.
9 Minn. 150, (Gil. 140.)

Ch. 58, § 47.
6 Minn. 229, (Gil. 148.)

Ch. 58, § 53.
29 Minn. 36.

Ch. 59, § 5.
8 Minn. 453, (Gil. 402;) 18 Minn. 227, (Gil. 207.)

Ch. 59, § 6.
8 Minn. 453, (Gil. 402.)

Ch. 59, § 7.
11 Minn. 88, (Gil. 53;) 12 Minn. 220, (Gil. 140.)

Ch. 59, § 9.
34 Minn. 544.

Ch. 59, § 24.
5 Minn. 283, (Gil. 224;) 8 Minn. 246, (Gil. 211.)

Ch. 59, § 25.
5 Minn. 460, (Gil. 370.)

Ch. 59, § 26.
8 Minn. 261, (Gil. 228.)

Ch. 59, §§ 29, 33.
5 Minn. 460, (Gil. 370.)

Ch. 59, § 37.
5 Minn. 283, (Gil. 224.)

Ch. 59, § 38.
8 Minn. 390, (Gil. 347;) 9 Minn. 46, 48, (Gil. 35, 37;) 18 Minn. 69, (Gil. 54.)

Ch. 59, § 44.
6 Minn. 425, (Gil. 288.)

Ch. 59, § 63.
8 Minn. 246, (Gil. 212.)

Ch. 59, § 79.
3 Minn. 34, (Gil. 11.)

Ch. 59, §§ 89, 90.
15 Minn. 244, (Gil. 188.)

Ch. 59, § 106.
5 Minn. 72, (Gil. 54.)

Ch. 59, § 107.
3 Minn. 32, (Gil. 9;) 5 Minn. 72, (Gil. 54.)

Ch. 59, § 120.
3 Minn. 34, (Gil. 12.)

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3 Minn. 81, (Gil. 39, 40.)

Ch. 59, §§ 124, 126.
10 Minn. 301, 302, (Gil. 237.)

Ch. 59, § 127.
12 Minn. 218, (Gil. 138.)

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5 Minn. 447, (Gil. 363.)

Ch. 59, § 130.
5 Minn. 446, (Gil. 363;) 12 Minn. 218, (Gil. 138.)

Ch. 59, § 133.
3 Minn. 81, (Gil. 40;) 5 Minn. 460, (Gil. 371.)

Ch. 59, § 136.
8 Minn. 260, (Gil. 226;) 10 Minn. 222, (Gil. 177;) 11 Minn. 76, 165, (Gil. 43, 104;) 30 Minn. 208.

Ch. 59, § 139.
3 Minn. 108, (Gil. 60;) 11 Minn. 76, (Gil. 44;) 18 Minn. 221, (Gil. 202;) 19 Minn. 479, (Gil. 413.)

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Ch. 59, § 140.
3 Minn. 108, (Gil. 60;) 8 Minn. 261, (Gil. 228;) 18 Minn. 221, (Gil. 202;) 19 Minn. 479, (Gil. 413.)

Ch. 59, § 147.
8 Minn. 263, (Gil. 230.)

Ch. 59, § 150.
10 Minn. 222, (Gil. 177.)

Ch. 59, § 199.
9 Minn. 168, (Gil. 155.)

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4 Minn. 323, (Gil. 240.)

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9 Minn. 170, (Gil. 157.)

Ch. 60, § 1.
6 Minn. 425, (Gil. 288;) 11 Minn. 469, (Gil. 350.)

Ch. 60, § 3.
9 Minn. 67, (Gil. 56;) 11 Minn. 469, (Gil. 350;) 13 Minn. 155, (Gil. 141.)

Ch. 60, § 4.
13 Minn. 500, (Gil. 460.)

Ch. 60, § 5.
13 Minn. 155, 156, (Gil. 141, 142.)

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9 Minn. 69, (Gil. 56;) 11 Minn. 469, 470, (Gil. 350, 351;) 16 Minn. 219, 222, (Gil. 192, 195.)

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11 Minn. 469, 473, (Gil. 350, 354;) 12 Minn. 142--144, (Gil. 80--82;) 13 Minn. 325, 499, (Gil. 298, 460;) 36 Minn. 275.

Ch. 60, § 14.
3 Minn. 109, (Gil. 61.)

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15 Minn. 169, 170, (Gil. 129, 130.)

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11 Minn. 147, (Gil. 89;) 35 Minn. 65.

Ch. 60, § 24.
9 Minn. 20, (Gil. 8;) 16 Minn. 218, 219, 222, 223, (Gil. 191, 194, 195;) 35 Minn. 65.

Ch. 60, § 27.
3 Minn. 336, (Gil. 235.)

Ch. 60, § 29.
11 Minn. 223, (Gil. 144.)

Ch. 60, § 30.
10 Minn. 135, (Gil. 107.)

Ch. 60, § 36.
5 Minn. 336, (Gil. 267.)

Ch. 60, § 37.
9 Minn. 93, 302, (Gil. 82, 286;) 10 Minn. 161, (Gil. 130.)

Ch. 60, § 38.
8 Minn. 409, (Gil. 364;) 9 Minn. 62, (Gil. 51;) 11 Minn. 336, 342, (Gil. 237, 242.)

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10 Minn. 289, (Gil. 227.)

Ch. 60, § 48.
9 Minn. 244, (Gil. 229;) 10 Minn. 390, (Gil. 311;) 47 Minn. 587.

Ch. 60, § 49.
9 Minn. 221, (Gil. 207.)

Ch. 60, § 51.
6 Minn. 554, (Gil. 390.)

Ch. 60, § 52.
10 Minn. 390, (Gil. 311.)

Ch. 60, § 53.
9 Minn. 62, (Gil. 52;) 10 Minn. 390, (Gil. 311.)

Ch. 60, § 54.
9 Minn. 244, 245, (Gil. 229, 230;) 10 Minn. 390, 391, (Gil. 311--313.)

Ch. 60, § 57.
3 Minn. 109, (Gil. 61.)

Ch. 60, § 58.
4 Minn. 480, (Gil. 372.)

Ch. 60, § 59.
4 Minn. 480, (Gil. 372;) 10 Minn. 185, 390, (Gil. 148, 311;) 14 Minn. 485, (Gil. 361.)

Ch. 60, § 69.
10 Minn. 190, 456, (Gil. 152, 365.)

Ch. 60, § 70.
6 Minn. 104, 495, (Gil. 48, 342;) 7 Minn. 363, (Gil. 285;) 9 Minn. 201, (Gil. 186.)

Ch. 60, § 71.
6 Minn. 352, 425, 495, 555, (Gil. 235, 288, 342, 392;) 7 Minn. 364, (Gil. 286;) 9 Minn. 106, (Gil. 95;) 11 Minn. 242, 245, (Gil. 159, 162.)

Ch. 60, § 72.
6 Minn. 495, (Gil. 342;) 7 Minn. 364, (Gil. 286;) 9 Minn. 106, (Gil. 95;) 11 Minn. 245, (Gil. 162;) 17 Minn. 41, (Gil. 22.)

Ch. 60, § 73.
12 Minn. 36, (Gil. 11.)

Ch. 60, § 79.
5 Minn. 323, (Gil. 258.)

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8 Minn. 66, (Gil. 43;) 9 Minn. 193, (Gil. 179;) 10 Minn. 138, (Gil. 110.)

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7 Minn. 164, (Gil. 107.)

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7 Minn. 353, (Gil. 279;) 8 Minn. 256, (Gil. 222;) 10 Minn. 203, (Gil. 164.)

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Ch. 60, § 88.
5 Minn. 239, (Gil. 185;) 11 Minn. 437, (Gil. 322.)

Ch. 60, § 89.
10 Minn. 138, (Gil. 110.)

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10 Minn. 196–198, (Gil. 158, 160.)

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8 Minn. 293, (Gil. 257.)

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4 Minn. 82, (Gil. 52;) 5 Minn. 26, 66, (Gil. 12, 48;) 6 Minn. 61, 290, (Gil. 17, 197;) 7 Minn. 330, 492, (Gil. 259, 399;) 8 Minn. 293, (Gil. 257;) 9 Minn. 63, 182, (Gil. 53, 168;) 10 Minn. 197, (Gil. 159;) 11 Minn. 69, 71, 234, (Gil. 40, 42, 153;) 15 Minn. 66, (Gil. 47.)

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10 Minn. 426, (Gil. 340;) 14 Minn. 466, (Gil. 349.)

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8 Minn. 471, (Gil. 422.)

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12 Minn. 347, (Gil. 226.)

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4 Minn. 250, (Gil. 175.)

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14 Minn. 166, (Gil. 127.)

Ch. 60, § 142.
3 Minn. 411, (Gil. 303;) 5 Minn. 72, (Gil. 53;) 6 Minn. 185, (Gil. 118.)

Ch. 60, § 143.
6 Minn. 185, (Gil. 118.)

Ch. 60, § 144.
5 Minn. 72, (Gil. 53;) 6 Minn. 185, (Gil. 118;) 9 Minn. 60, (Gil. 49;) 11 Minn. 546, (Gil. 420;) 20 Minn. 441, (Gil. 393.)

Ch. 60, § 147.
13 Minn. 182, (Gil. 173.)

Ch. 60, § 148.
3 Minn. 412, (Gil. 303;) 10 Minn. 328, (Gil. 256;) 24 Minn. 496.

Ch. 60, § 149.
3 Minn. 412, (Gil. 303;) 25 Minn. 208.

Ch. 60, § 150.
3 Minn. 412, (Gil. 303.)

Ch. 60, § 151.
3 Minn. 405, 411, (Gil. 299, 303;) 4 Minn. 411, (Gil. 314.)

Ch. 60, § 156.
3 Minn. 405, 412, (Gil. 299, 303;) 6 Minn. 277, (Gil. 188;) 10 Minn. 327, (Gil. 256.)

Ch. 60, § 161.
11 Minn. 231, (Gil. 152.)

Ch. 60, § 168.
7 Minn. 223, (Gil. 165.)

Ch. 60, § 169.
9 Minn. 106, (Gil. 95.)

Ch. 60, § 170.
6 Minn. 555, 574, (Gil. 392, 409;) 10 Minn. 199, (Gil. 161;) 41 Minn. 479.

Ch. 60, § 172.
7 Minn. 224, (Gil. 165.)

Ch. 60, § 173.
3 Minn. 143, (Gil. 88;) 10 Minn. 186. (Gil. 150.)

Ch. 61.
19 Minn. 349, (Gil. 302.)

Ch. 61, §§ 6, 7.
6 Minn. 182, (Gil. 116.)

Ch. 61, § 8.
10 Minn. 319, (Gil. 250.)

Ch. 61, § 10.
6 Minn. 574, (Gil. 409.)

Ch. 61, § 22.
4 Minn. 50, (Gil. 25;) 27 Minn. 248.

Ch. 61, § 32.
4 Minn. 436, (Gil. 338.)

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6 Minn. 534, (Gil. 372;) 7 Minn. 202, 273, (Gil. 144, 210.)

Ch. 61, § 41.
4 Minn. 426, (Gil. 328;) 5 Minn. 295, (Gil. 233;) 7 Minn. 329, (Gil. 258;) 8 Minn. 469, (Gil. 419;) 12 Minn. 65, (Gil. 32.)

Ch. 61, § 43.
3 Minn. 357, (Gil. 250.)

Ch. 61, § 44.
5 Minn. 32, 34, 35, (Gil. 17, 19, 20;) 11 Minn. 275, (Gil. 188.)

Ch. 61, § 47.
5 Minn. 86, 87, (Gil. 61.)

Ch. 61, § 54.
4 Minn. 426, 509, (Gil. 328, 395;) 8 Minn. 469, (Gil. 419;) 11 Minn. 345, (Gil. 245;) 12 Minn. 65, (Gil. 32.)

Ch. 61, § 55.
3 Minn. 239, (Gil. 164;) 11 Minn. 343, (Gil. 243, 244.)

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3 Minn. 138, (Gil. 82;) 7 Minn. 329, (Gil. 258;) 12 Minn. 506, (Gil. 416.)

Ch. 61, § 59.
3 Minn. 139, (Gil. 82;) 5 Minn. 67, (Gil. 48;) 6 Minn. 561, (Gil. 397;) 7 Minn. 328, (Gil. 257, 258;) 8 Minn. 30, (Gil. 13;) 15 Minn. 264, (Gil. 202.)

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Ch. 61, § 60.
6 Minn. 561, (Gil. 397;) 8 Minn. 31, (Gil. 14.)

Ch. 61, § 61.
3 Minn. 141, (Gil. 85;) 16 Minn. 466, (Gil. 418.)

Ch. 61, § 62.
11 Minn. 345, (Gil. 245.)

Ch. 61, § 63.
4 Minn. 426, (Gil. 328;) 6 Minn. 561, (Gil. 397;) 7 Minn. 329, (Gil. 258;) 11 Minn. 345, (Gil. 245.)

Ch. 61, § 66.
11 Minn. 345, (Gil. 245.)

Ch. 61, § 67.
12 Minn. 65, (Gil. 32.)

Ch. 61, § 70.
7 Minn. 115, (Gil. 73.)

Ch. 61, § 71.
3 Minn. 71, (Gil. 33;) 12 Minn. 65, (Gil. 32.)

Ch. 61, § 72.
10 Minn. 307, (Gil. 241;) 12 Minn. 65, (Gil. 32;) 14 Minn. 465, 466, (Gil. 347, 348.)

Ch. 61, § 73.
10 Minn. 307, (Gil. 241;) 14 Minn. 465, (Gil. 347.)

Ch. 61, § 75.
4 Minn. 426, (Gil. 328;) 11 Minn. 295, (Gil. 203.)

Ch. 61, § 76.
5 Minn. 337, (Gil. 269;) 10 Minn. 307, (Gil. 241;) 12 Minn. 573, (Gil. 493;) 16 Minn. 235, (Gil. 208;) 19 Minn. 28, (Gil. 10.)

Ch. 61, § 77.
5 Minn. 337, 416, (Gil. 269, 335;) 7 Minn. 520, (Gil. 425;) 12 Minn. 574, (Gil. 494;) 16 Minn. 236, (Gil. 209.)

Ch. 61, § 78.
10 Minn. 307, (Gil. 241.)

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9 Minn. 59, (Gil. 48.)

Ch. 61, § 80.
12 Minn. 574, 575, (Gil. 494, 495;) 38 Minn. 362.

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22 Minn. 83.

Ch. 61, § 85.
11 Minn. 382, 383, (Gil. 277, 278;) 12 Minn. 574, (Gil. 494;) 35 Minn. 541.

Ch. 61, § 88.
11 Minn. 383, (Gil. 278;) 13 Minn. 182, (Gil. 173;) 24 Minn. 496; 25 Minn. 208.

Ch. 61, § 90.
8 Minn. 210, (Gil. 181.)

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7 Minn. 518, 519, (Gil. 423, 424;) 8 Minn. 321, (Gil. 281;) 10 Minn. 156, 157, (Gil. 126;) 11 Minn. 456, (Gil. 338;) 12 Minn. 574, (Gil. 494.)

Ch. 61, § 93.
11 Minn. 458, (Gil. 341;) 15 Minn. 517, (Gil. 426.)

Ch. 61, §§ 94–96.
10 Minn. 156, 157, (Gil. 126.)

Ch. 61, § 99.
2 Minn. 103, (Gil. 85;) 7 Minn. 191, (Gil. 132.)

Ch. 61, § 103.
5 Minn. 379, (Gil. 307;) 7 Minn. 191, (Gil. 133.)

Ch. 61, § 106.
4 Minn. 69, (Gil. 37;) 5 Minn. 164, (Gil. 128;) 9 Minn. 81, (Gil. 70;) 10 Minn. 55, (Gil. 37;) 12 Minn. 432, 473, (Gil. 318, 376;) 13 Minn. 52, 84, (Gil. 48, 79;) 15 Minn. 60, (Gil. 41;) 16 Minn. 246, (Gil. 218;) 19 Minn. 346, (Gil. 298.)

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5 Minn. 415, (Gil. 335;) 10 Minn. 327, (Gil. 256.)

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3 Minn. 225, (Gil. 153;) 21 Minn. 186.

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4 Minn. 267, (Gil. 187;) 18 Minn. 72, (Gil. 56.)

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5 Minn. 416, (Gil. 335.)

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5 Minn. 416, (Gil. 336;) 22 Minn. 85; 29 Minn. 435.

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8 Minn. 511, (Gil. 454.)

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9 Minn. 271, 272, (Gil. 255, 256.)

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8 Minn. 307, (Gil. 270.)

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8 Minn. 453, 454, (Gil. 402–404.)

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8 Minn. 344, (Gil. 304.)

Ch. 62, § 9.
4 Minn. 552, (Gil. 434;) 5 Minn. 522. (Gil. 416;) 8 Minn. 307, (Gil. 270.)

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9 Minn. 26, 27, (Gil. 14, 15.)

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7 Minn. 318, 320, (Gil. 246, 248;) 15 Minn. 517, (Gil. 427.)

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6 Minn. 238, (Gil. 157.)

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Ch. 64, § 1.
5 Minn. 238, (Gil. 184;) 6 Minn. 179, (Gil. 113;) 8 Minn. 404, (Gil. 360;) 10 Minn. 60, 62, (Gil. 41, 44.)

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10 Minn. 400, (Gil. 319.)

Ch. 64, § 5.
10 Minn. 400, (Gil. 318;) 11 Minn. 51, (Gil. 26.)

Ch. 64, § 7.
6 Minn. 233, (Gil. 153;) 10 Minn. 400, (Gil. 319.)

Ch. 64, § 11.
4 Minn. 502, (Gil. 392;) 7 Minn. 174, 463, (Gil. 117, 372;) 19 Minn. 224, (Gil. 184.)

Ch. 64, § 15.
12 Minn. 461, (Gil. 360.)

Ch. 66, § 2.
4 Minn. 510, (Gil. 396.)

Ch. 66, § 5.
9 Minn. 243, (Gil. 229.)

Ch. 66, § 7.
4 Minn. 510, (Gil. 396.)

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8 Minn. 101, 102, (Gil. 76, 77;) 15 Minn. 169, (Gil. 129;) 20 Minn. 321, 329, (Gil. 276, 284.)

Ch. 68, §§ 1, 2.
15 Minn. 167, (Gil. 128.)

Ch. 68, § 3.
12 Minn. 533, (Gil. 442;) 15 Minn. 167, (Gil. 128.)

Ch. 69, §§ 15, 16.
10 Minn. 347, (Gil. 273.)

Ch. 71, § 1.
4 Minn. 365, (Gil. 274.)

Ch. 71, § 2.
3 Minn. 145, (Gil. 89;) 5 Minn. 26, (Gil. 12;) 11 Minn. 345, (Gil. 245.)

Ch. 71, § 5.
9 Minn. 234, (Gil. 219.)

Ch. 71, § 6.
4 Minn. 429, (Gil. 331;) 9 Minn. 235, (Gil. 220.)

Ch. 71, § 7.
6 Minn. 542, (Gil. 377;) 8 Minn. 380, (Gil. 337.)

Ch. 71, § 8.
11 Minn. 345, (Gil. 245.)

Ch. 71, § 9.
7 Minn. 329, (Gil. 258;) 15 Minn. 65, (Gil. 46.)

Ch. 71, § 11.
4 Minn. 167, 227, 320, 365, (Gil. 113, 163, 237, 274;) 5 Minn. 26, 36, 67, 349, (Gil. 12, 21, 48, 280;) 11 Minn. 255, 366, (Gil. 169, 264.)

Ch. 71, § 17.
12 Minn. 123, (Gil. 70.)

Ch. 71, § 22.
3 Minn. 145, 209, (Gil. 89, 139;) 4 Minn. 365, (Gil. 274;) 5 Minn. 26, 444, (Gil. 12, 362;) 7 Minn. 329, (Gil. 258;) 15 Minn. 65, (Gil. 46.)

Ch. 71, § 25.
6 Minn. 566, (Gil. 401.)

Ch. 71, § 26.
2 Minn. 328, (Gil. 279.)

Ch. 72, § 8.
12 Minn. 191, (Gil. 115.)

Ch. 72, § 15.
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1 Minn. 164, (Gil. 139;) 2 Minn. 32, (Gil. 22;) 4 Minn. 302, (Gil. 220 et seq.;) 7 Minn. 354, 355, (Gil. 280.)

Ch. 1, § 1.
9 Minn. 82, (Gil. 73;) 19 Minn. 141, (Gil. 107.)

Ch. 1, § 2.
4 Minn. 303, 305, (Gil. 221.)

Ch. 1, § 12.
5 Minn. 418, 421, (Gil. 338, 341.)

Ch. 2, § 7.
2 Minn. 128, (Gil. 103.)

Chs. 7, 8.
24 Minn. 76.

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Ch. 9, § 9.
44 Minn. 147.

Ch. 9, § 12.
2 Minn. 53, (Gil. 40.)

Ch. 10.
23 Minn. 311 et seq.

Ch. 10, § 3.
20 Minn. 535, (Gil. 478.)

Ch. 10, § 8.
39 Minn. 225.

Ch. 61, § 1.
9 Minn. 82, (Gil. 73;) 19 Minn. 141, (Gil. 107.)

SESSION LAWS 1854.

Ch. 6, subch. 7, §§ 2, 5.
5 Minn. 101, 102, 104, (Gil. 76, 77, 79.)

Ch. 6, subch. 7, § 6.
2 Minn. 307, (Gil. 263;) 5 Minn. 118, (Gil. 85.)

Ch. 6, subch. 8, § 26.
5 Minn. 101, (Gil. 75.)

Ch. 6, subch. 10, § 15.
33 Minn. 182.

Ch. 16, § 16.
5 Minn. 468, (Gil. 378.)

Ch. 21, § 4.
24 Minn. 228.

Ch. 41.
3 Minn. 58, (Gil. 24;) 4 Minn. 305, (Gil. 223;) 22 Minn. 88.

Ch. 42, § 3.
3 Minn. 243, (Gil. 166.)

Ch. 43.
46 Minn. 316.

Ch. 47.
1 Minn. 129, (Gil. 105.)

SESSION LAWS 1855.

Ch. 7.
1 Minn. 439, (Gil. 312;) 28 Minn. 506; 45 Minn. 67.

Ch. 16, §§ 4, 6.
11 Minn. 128, (Gil. 78.)

Ch. 16, §§ 9–25.
3 Minn. 92, (Gil. 44;) 4 Minn. 24, 464, 550, (Gil. 9, 359, 433;) 5 Minn. 291, (Gil. 230;) 33 Minn. 5.

Ch. 16, § 10.
3 Minn. 154, (Gil. 97.)

Ch. 16, § 22.
1 Minn. 417, (Gil. 302.)

Ch. 24, § 2.
6 Minn. 157, (Gil. 96.)

Ch. 24, § 5.
19 Minn. 508, (Gil. 439.)

Ch. 24, § 6.
15 Minn. 235, (Gil. 181;) 17 Minn. 191. (Gil. 165.)

Ch. 24, § 50.
18 Minn. 440, (Gil. 396.)

Ch. 27.
19 Minn 424, (Gil. 368;) 21 Minn. 316.

Ch. 27, § 4.
11 Minn. 529, (Gil. 404;) 39 Minn. 263, 267.

Ch. 27, § 5.
10 Minn. 279, (Gil. 219;) 11 Minn. 529, (Gil. 404.)

Ch. 48, §§ 1–6.
4 Minn. 279–281, (Gil. 198–200.)

SESSION LAWS 1856.

Ch. 3.
2 Minn. 320, 321, (Gil. 274, 276.)

Ch. 5, § 4.
7 Minn. 431, (Gil. 346.)

Ch. 5, § 5.
3 Minn. 321, 331, (Gil. 225, 231.)

Ch. 5, § 11.
2 Minn. 53, (Gil. 40.)

Ch. 5, § 18.
2 Minn. 58, 121, 240, (Gil. 46, 97, 200.)

Ch. 15.
25 Minn. 402.

Ch. 18, § 4.
2 Minn. 65, (Gil. 52.)

Ch. 27, § 15,
5 Minn. 103, (Gil. 78.)

Ch. 27, § 17.
2 Minn. 307, (Gil. 263.)

Ch. 48.
10 Minn. 445, (Gil. 357.)

Ch. 71.
4 Minn. 331, (Gil. 246.)

Ch. 71, § 5.
40 Minn. 136.

Ch. 137.
7 Minn. 58, (Gil. 42;) 20 Minn. 301, (Gil. 260;) 26 Minn. 223.

Ch. 137, § 9.
43 Minn. 63.

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Ch. 141, § 20.
8 Minn. 279, (Gil. 245.)

Ch. 145.
26 Minn. 230.

Joint Resolution No. 1, Hennepin County.
4 Minn. 331, (Gil. 246.)

Memorial 33, p. 368.
7 Minn. 138, (Gil. 82.)

SESSION LAWS 1857.

Ch. 1. (Ex. Sess.)
14 Minn. 300, (Gil. 227;) 18 Minn. 113, (Gil. 98;) 23 Minn. 472 et seq.; 25 Minn. 452; 29 Minn. 209; 34 Minn. 204; 36 Minn. 208, 260, 468; 38 Minn. 263; 47 Minn. 41.

Ch. 1, subch. 1. (Ex. Sess.)
18 Minn. 386, (Gil. 348;) 21 Minn. 340; 35 Minn. 227.

Ch. 1, subch. 1, §§ 1, 2. (Ex. Sess.)
38 Minn. 164.

Ch. 1, subch. 1, § 3. (Ex Sess.)
13 Minn. 321, (Gil. 294;) 17 Minn. 442, (Gil. 421;) 38 Minn. 164, 420; 39 Minn. 263.

Ch. 1, subch. 1, § 7. (Ex. Sess.)
10 Minn. 103, (Gil. 77;) 13 Minn. 318–320, (Gil. 291–293;) 23 Minn. 160; 35 Minn. 133.

Ch. 1, subch. 1, § 13. (Ex. Sess.)
16 Minn. 277, 280, 281, (Gil. 245, 248;) 17 Minn. 443, 448, (Gil. 421, 426;) 18 Minn. 186, (Gil. 170;) 21 Minn. 124 et seq., 323, 324, 425; 30 Minn. 480.

Ch. 1, subch. 1, § 16. (Ex. Sess.)
14 Minn. 324, (Gil. 248;) 38 Minn. 164.

Ch. 1, subch. 1, § 18. (Ex. Sess.)
14 Minn. 324, (Gil. 248;) 21 Minn. 527, 528; 23 Minn. 220, 473; 30 Minn. 312; 32 Minn. 295; 33 Minn. 535; 34 Minn. 204; 38 Minn. 164.

Ch. 1, subch. 1, § 20. (Ex. Sess.)
38 Minn. 164.

Ch. 1, subch. 1, § 21. (Ex. Sess.)
24 Minn. 474.

Ch. 1, subch. 1, § 25. (Ex. Sess.)
19 Minn. 530, (Gil. 460;) 23 Minn. 158.

Ch. 1, subch. 2. (Ex. Sess.)
19 Minn. 424, (Gil. 368.)

Ch. 1, subch. 2, § 2. (Ex. Sess.)
11 Minn. 187, 189, (Gil. 118, 121.)

Ch. 1, subch. 2, § 4. (Ex. Sess.)
21 Minn. 316, 474, et seq.; 38 Minn. 400.

Ch. 1, subch. 3, § 1. (Ex. Sess.)
18 Minn. 45, (Gil. 26.)

Ch. 1, subch. 3, §§ 2, 3. (Ex. Sess.)
26 Minn. 295.

Ch. 1, subch. 3, § 9. (Ex. Sess.)
21 Minn. 340; 23 Minn. 471, 473; 26 Minn. 295; 38 Minn. 116.

Ch. 1, subch. 3, § 10. (Ex. Sess.)
18 Minn. 113, (Gil. 98.)

Ch. 1, subch. 3, § 19. (Ex. Sess.)
19 Minn. 520, (Gil. 451.)

Ch. 1, subch. 4, § 11. (Ex. Sess.)
24 Minn. 474.

Ch. 2.
9 Minn. 26, 27, (Gil. 14, 15;) 23 Minn. 171.

Ch. 15. (Ex. Sess.)
19 Minn. 424, (Gil. 368.)

Ch. 16.
18 Minn. 111, (Gil. 97.)

Ch. 17, § 1. (Ex. Sess.)
2 Minn. 307, (Gil. 263 et seq.)

Ch. 18, §§ 1–52. (Ex. Sess.)
52 N. W. 133–135.

Ch. 31, § 5. (Ex. Sess.)
24 Minn. 351.

Ch. 37, § 1.
6 Minn. 157, (Gil. 96.)

Ch. 38. (Ex. Sess.)
11 Minn. 380, (Gil. 275.)

Ch. 39. (Ex. Sess.)
35 Minn. 405.

Ch. 39, § 9.
18 Minn. 261, 263, (Gil. 237, 239;) 19 Minn. 261, (Gil. 220.)

Ch. 39, § 17. (Ex. Sess.)
12 Minn. 144, (Gil. 82.)

Ch. 60. (Ex. Sess.)
22 Minn. 372.

Ch. 62, §§ 10–15. (Ex. Sess.)
25 Minn. 126.

Ch. 65.
18 Minn. 45, (Gil. 26.)

Ch. 65, § 2. (Ex. Sess.)
6 Minn. 157, (Gil. 96;) 18 Minn. 113, (Gil. 98.)

Ch. 71.
10 Minn. 24, 26, (Gil. 9, 10.)

Ch. 71, §§ 1, 7.
18 Minn. 111, (Gil. 97.)

Ch. 80, § 3. (Ex. Sess.)
7 Minn. 397, (Gil. 315;) 11 Minn. 44, (Gil. 23.)

Ch. 93. (Ex. Sess.)
21 Minn. 249.

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SESSION LAWS 1858, (General.)

Ch. 1.
29 Minn. 557.

Ch. 5, §§ 18, 20.
9 Minn. 219, (Gil. 204, 205.)

Ch. 25, § 7.
2 Minn. 67, (Gil. 54.)

Ch. 35.
4 Minn. 301, (Gil. 219;) 7 Minn. 192, 467, (Gil. 134, 375;) 21 Minn. 302.

Ch. 35, § 1.
3 Minn. 59, 61, (Gil. 25, 27.)

Ch. 35, § 8.
2 Minn. 95, (Gil. 76 et seq.)

Ch. 49.
23 Minn. 426.

Ch. 52, § 1.
2 Minn. 271, (Gil. 232;) 5 Minn. 417, (Gil. 337;) 7 Minn. 509, (Gil. 416;) 20 Minn. 193, (Gil. 171;) 24 Minn. 282; 33 Minn. 278.

Ch. 53.
4 Minn. 550, (Gil. 432;) 38 Minn. 273.

Ch. 54.
13 Minn. 482, (Gil. 445;) 44 Minn. 69.

Ch. 54, §§ 17, 19.
38 Minn. 273.

Ch. 55.
13 Minn. 63, (Gil. 55.)

Ch. 60.
22 Minn. 90.

Ch. 61.
4 Minn. 301 et seq., 488, (Gil. 219 et seq., 378;) 8 Minn. 392, (Gil. 349;) 12 Minn. 346, (Gil. 224;) 45 Minn. 347.

Ch. 72.
11 Minn. 187, (Gil. 119;) 14 Minn. 301, (Gil. 227.)

Ch. 75.
2 Minn. 337, (Gil. 288 et seq.;) 20 Minn. 400, (Gil. 351.)

Ch. 75, art. 15, §§ 9, 10.
2 Minn. 331, 341, (Gil. 282, 293.)

Ch. 75, art. 16, § 5.
2 Minn. 341, (Gil. 293.)

Ch. 75, art. 20.
2 Minn. 340, (Gil. 292.)

Ch. 77.
14 Minn. 421, (Gil. 316.)

Ch. 84.
20 Minn. 400, (Gil. 351.)

Ch. 94.
2 Minn. 172, (Gil. 143.)

Ch. 96.
4 Minn. 42, (Gil. 20;) 41 Minn. 252

SESSION LAWS 1858, (Special.)

Ch. 1.
8 Minn. 185, (Gil. 157.)

Ch. 1, subch. 3, § 11.
9 Minn. 168, (Gil. 155.)

Ch. 1, subch. 5, §§ 11, 12.
9 Minn. 217, 219, (Gil. 202, 205.)

Ch. 1, subch. 10, § 25.
9 Minn. 168, (Gil. 155.)

Ch. 1, subch. 10, § 26.
15 Minn. 484, (Gil. 398.)

Ch. 2, subch. 5, § 10.
9 Minn. 216, 218, (Gil. 201, 202.)

Ch. 26.
7 Minn. 155, (Gil. 98;) 14 Minn. 234, (Gil. 171.)

Ch. 28.
22 Minn. 120.

Chs. 71, 78, 79.
20 Minn. 400, (Gil. 351.)

Ch. 100.
23 Minn. 426.

Ch. 104.
10 Minn. 25, 26, (Gil. 10, 11;) 18 Minn. 115, (Gil. 100.)

Ch. 111.
7 Minn. 397, (Gil. 315.)

Ch. 183.
7 Minn. 155, (Gil. 98;) 14 Minn. 234, (Gil. 171.)

SESSION LAWS 1860, (General.)

Ch. 1.
7 Minn. 263, (Gil. 203;) 11 Minn. 507, (Gil. 384 et seq.)

Ch. 1, § 1.
14 Minn. 255, (Gil. 187.)

Ch. 1, § 3.
12 Minn. 397, (Gil. 281;) 17 Minn. 278, (Gil. 254.)

Ch. 1, §§ 9, 11.
14 Minn. 255, 262, (Gil. 187, 193.)

Ch. 1, § 18.
14 Minn. 262, (Gil. 193;) 15 Minn. 415, (Gil. 335.)

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Ch. 1, §§ 19--21.
15 Minn. 415, (Gil. 335.)

Ch. 1, §§ 22, 28.
12 Minn. 400, 401, (Gil. 284, 285.)

Ch. 1, § 30.
14 Minn. 262, (Gil. 193.)

Ch. 1, §§ 31, 33, 37.
12 Minn. 400--402, (Gil. 284--286.)

Ch. 1, §§ 42, 43.
14 Minn. 261, (Gil. 193.)

Ch. 1, § 73.
14 Minn. 549, 550, (Gil. 419.)

Ch. 1, § 77.
14 Minn. 258, (Gil. 189.)

Ch. 1, § 99.
27 Minn. 453; 45 Minn. 176.

Ch. 1, § 105.
35 Minn. 420.

Ch. 2.
4 Minn. 107, (Gil. 67;) 19 Minn. 217, (Gil. 178.)

Ch. 2, §§ 7, 9.
10 Minn. 375, (Gil. 301.)

Ch. 2, §§ 12, 21, 22.
19 Minn. 217, 218, (Gil. 179.)

Ch. 2, § 25.
10 Minn. 375, (Gil. 301;) 24 Minn. 197.

Ch. 2, § 38.
15 Minn. 254, (Gil. 194;) 24 Minn. 197.

Ch. 2, § 39.
15 Minn. 254, (Gil. 194;) 19 Minn. 218, (Gil. 180.)

Ch. 2, § 40.
19 Minn. 218, (Gil. 180.)

Ch. 3.
4 Minn. 107, (Gil. 67;) 6 Minn. 147, (Gil. 90;) 19 Minn. 217, 220, (Gil. 179, 181.)

Ch. 3, §§ 7, 8.
19 Minn. 217, 218, (Gil. 179, 180.)

Ch. 3, § 9.
4 Minn. 107, (Gil. 68;) 14 Minn. 264, (Gil. 195;) 19 Minn. 218, (Gil. 180.)

Ch. 3, § 12.
19 Minn. 217, (Gil. 179.)

Ch. 3, §§ 21, 24.
4 Minn. 107, (Gil. 68.)

Ch. 3, § 30.
4 Minn. 107, (Gil. 68;) 19 Minn. 218, 220, (Gil. 180, 181.)

Ch. 3, §§ 33, 34.
19 Minn. 220, (Gil. 181.)

Ch. 3, § 37.
8 Minn. 448, (Gil. 397.)

Ch. 3, §§ 38, 39.
19 Minn. 219, 220, (Gil. 180, 181.)

Ch. 3, §§ 46, 47.
4 Minn. 108, (Gil. 68.)

Ch. 4, art. 1, § 8.
14 Minn. 257, (Gil. 189.)

Ch. 4, art. 3, § 4.
34 Minn. 494.

Ch. 14, art. 1, § 1.
12 Minn. 406, (Gil. 290.)

Ch. 14, art. 11, § 3.
31 Minn. 452, 453.

Ch. 15.
6 Minn. 147, 218, (Gil. 90, 140;) 8 Minn. 505, 510, (Gil. 447, 452.)

Ch. 15, art. 1, § 2.
25 Minn. 311; 33 Minn. 520.

Ch. 15, art. 1, § 8.
6 Minn. 148, (Gil. 91.)

Ch. 15, art. 2, § 7.
6 Minn. 148, (Gil. 91;) 19 Minn. 220, (Gil. 181.)

Ch. 15, art. 2, § 22.
6 Minn. 218, (Gil. 140;) 14 Minn. 257, 550, (Gil. 188, 418.)

Ch. 15, art. 2, § 23.
12 Minn. 406, 407, (Gil. 289--291.)

Ch. 18, § 49 et seq.
19 Minn. 494, (Gil. 426.)

Ch. 31, §§ 4, 5.
11 Minn. 353, 355, (Gil. 251, 253.)

Ch. 33.
5 Minn. 485, (Gil. 388;) 8 Minn. 356, (Gil 315;) 21 Minn. 191.

Ch. 33, §§ 2, 3.
14 Minn. 230, 232, (Gil. 168, 170.)

Ch. 37.
5 Minn. 33, (Gil. 18.)

Ch. 38, §§ 4, 5.
15 Minn. 243, 244, (Gil. 188, 189.)

Ch. 48.
6 Minn. 271, 556, (Gil. 180, 392;) 9 Minn. 89, (Gil. 78;) 12 Minn. 39, (Gil. 14;) 13 Minn. 365, (Gil. 338.)

Ch. 49.
9 Minn. 81, (Gil. 70.)

Ch. 56, § 1.
15 Minn. 423, (Gil. 342.)

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Ch. 60.
25 Minn. 208.

Ch. 66.
13 Minn. 63, (Gil. 55.)

Ch. 69.
8 Minn. 308, 454, (Gil. 271, 403;) 13 Minn. 300, (Gil. 277.)

Ch. 70.
9 Minn. 61, 245, (Gil. 50, 231;) 10 Minn. 397, (Gil. 316.)

Ch. 70, § 1.
5 Minn. 349, (Gil. 281;) 9 Minn. 59, (Gil. 50.)

Ch. 70, §§ 2, 3.
5 Minn. 351, (Gil. 282;) 9 Minn. 245, (Gil. 231.)

Ch. 70, § 7.
5 Minn. 473, (Gil. 382;) 12 Minn. 284, (Gil. 184.)

Ch. 70, § 8.
12 Minn. 284, (Gil. 184.)

Ch. 70, § 10.
9 Minn. 61, (Gil. 50.)

Ch. 70, § 12.
5 Minn. 348, (Gil. 280.)

Ch. 70, § 13.
10 Minn. 167, (Gil. 135;) 15 Minn. 243, (Gil. 188.)

Ch. 70, § 14.
15 Minn. 243, (Gil. 188.)

Ch. 70, § 18.
5 Minn. 473, (Gil. 382.)

Ch. 70, § 24.
15 Minn. 243, (Gil. 188.)

Ch. 70, §§ 27, 28.
10 Minn. 167, (Gil. 135.)

Ch. 70, § 32.
15 Minn. 244, (Gil. 188.)

Ch. 72.
14 Minn. 161, 162, (Gil. 124, 125.)

Ch. 82.
11 Minn. 188, (Gil. 120;) 14 Minn. 302, 303, (Gil. 228, 230.)

Ch. 87.
4 Minn. 488, 494, (Gil. 378, 384, 385;) 5 Minn. 279, (Gil. 220;) 8 Minn. 391, 392, (Gil. 348, 349.)

Ch. 87, § 1.
21 Minn. 149, 321.

Ch. 87, § 2.
4 Minn. 490, (Gil. 380;) 12 Minn. 346, (Gil. 225.)

Ch. 87, § 3.
7 Minn. 54, (Gil. 38;) 16 Minn. 49, (Gil. 36;) 21 Minn. 149.

Ch. 91, § 51.
11 Minn. 88, (Gil. 53.)

Ch. 95.
7 Minn. 520, (Gil. 425;) 21 Minn. 304; 23 Minn. 438; 38 Minn. 304.

Ch. 95, § 1.
12 Minn. 574, (Gil. 494;) 16 Minn. 524, (Gil. 471;) 30 Minn. 85.

SESSION LAWS 1860, (Special.)

Ch. 1, subch. 8.
11 Minn. 325, (Gil. 227, 229.)

Ch. 40.
10 Minn. 434, 436, (Gil. 346 et seq.)

SESSION LAWS 1861, (General.)

Ch. 1, § 2 et seq.
11 Minn. 507, (Gil. 384 et seq.;) 12 Minn. 397, 400, (Gil. 282, 284.)

Chs. 2, 3.
19 Minn. 217, 219, (Gil. 179, 180.)

Ch. 6, § 2.
6 Minn. 219, (Gil. 140;) 14 Minn. 257, 550, (Gil. 188, 419.)

Ch. 11.
10 Minn. 348, (Gil. 274.)

Ch. 11, §§ 1, 2.
10 Minn. 446, (Gil. 358.)

Ch. 11, § 5.
7 Minn. 210, (Gil. 151.)

Ch. 11, §§ 37–39.
14 Minn. 258, (Gil. 189.)

Ch. 14.
12 Minn. 473, (Gil. 376.)

Ch. 15, § 31.
9 Minn. 236, (Gil. 221 et seq.;) 23 Minn. 446 et seq.

Ch. 15, § 43.
10 Minn. 111, (Gil. 83.)

Ch. 15, § 45.
9 Minn. 288, (Gil. 272.)

Ch. 15, § 49.
9 Minn. 236, (Gil. 221 et seq.)

Ch. 15, § 51.
10 Minn. 115, (Gil. 87.)

Ch. 15, § 52.
9 Minn. 236, 237, (Gil. 221, 222;) 23 Minn. 446 et seq.

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Ch. 15, § 56.
10 Minn. 110, (Gil. 82.)

Ch. 15, § 74.
19 Minn. 494, (Gil. 426.)

Ch. 19.
25 Minn. 208.

Ch. 21.
9 Minn. 153, (Gil. 143.)

Ch. 22.
11 Minn. 276, (Gil. 189;) 12 Minn. 162, (Gil. 97;) 34 Minn. 371; 50 N. W. 1037.

Ch. 22, § 1.
10 Minn. 172, (Gil. 139;) 11 Minn. 382, (Gil. 277.)

Ch. 25.
6 Minn. 570, (Gil. 405.)

Ch. 36.
8 Minn. 357, (Gil. 316;) 18 Minn. 530, (Gil. 474;) 32 Minn. 437.

SESSION LAWS 1861, (Special.)

Ch. 1.
17 Minn. 331, (Gil. 307;) 21 Minn. 251.

Ch. 1, § 10.
38 Minn. 235.

Ch. 1, § 16.
38 Minn. 416.

Ch. 5, §§ 1–4.
14 Minn. 305, 306, (Gil. 231, 232.)

Ch. 16.
34 Minn. 494.

Ch. 20.
8 Minn. 369, 370, (Gil. 328, 329.)

Ch. 20, § 3.
7 Minn. 397, (Gil. 315.)

Ch. 37.
14 Minn. 78, (Gil. 60.)

SESSION LAWS 1862, (General.)

Ch. 1.
10 Minn. 349, (Gil. 275.)

Ch. 4.
10 Minn. 60, 70, (Gil. 42, 50;) 13 Minn. 452, (Gil. 421;) 14 Minn. 421, (Gil. 316;) 37 Minn. 114; 45 Minn. 67.

Ch. 4, §§ 1, 2.
11 Minn. 488, (Gil. 366;) 15 Minn. 481, 482. (Gil. 395, 397.)

Ch. 4, §§ 3, 4.
15 Minn. 481, 482, (Gil. 396.)

Ch. 4, § 5.
11 Minn. 488, 489, (Gil. 366, 367;) 15 Minn. 482, (Gil. 396.)

Ch. 4, § 6.
10 Minn. 70, (Gil. 50;) 11 Minn. 488, 492, (Gil. 366, 369;) 45 Minn. 70.

Ch. 4, § 7.
10 Minn. 60, 70, (Gil. 42, 50;) 11 Minn. 490, 492, (Gil. 367, 369;) 13 Minn. 452, 453, (Gil. 421, 422.)

Ch. 4, § 9.
10 Minn. 296, (Gil. 234;) 11 Minn. 490, 492, (Gil. 368, 369.)

Ch. 6, § 4.
8 Minn. 465, (Gil. 415;) 19 Minn. 76, (Gil. 50.)

Ch. 8.
13 Minn. 442, (Gil. 406.)

Ch. 8, § 1. (Ex. Sess.)
14 Minn. 259, (Gil. 190.)

Ch. 8, § 2. (Ex. Sess.)
12 Minn. 129, (Gil. 73.)

Ch. 11.
7 Minn. 15, 27, 31, (Gil. 3, 12, 17;) 8 Minn. 117, (Gil. 91.)

Ch. 14.
12 Minn. 543, (Gil. 455.)

Ch. 15.
11 Minn. 274, (Gil. 187.)

Ch. 16.
9 Minn. 73, (Gil. 62.)

Ch. 18.
10 Minn. 373, (Gil. 298.)

Ch. 19.
41 Minn. 253.

Ch. 19, § 3.
47 Minn. 417, 419, 421.

Ch. 19, § 4.
7 Minn. 174, (Gil. 117;) 14 Minn. 292, (Gil. 219.)

Ch. 19, § 5.
21 Minn. 322; 45 Minn. 348.

Ch. 19, § 7.
7 Minn. 174, (Gil. 117.)

Ch. 24.
20 Minn. 320, (Gil. 275.)

Ch. 27.
11 Minn. 382, 383, (Gil. 277, 278;) 12 Minn. 577, 581, (Gil. 497, 503;) 14 Minn. 480, (Gil. 357;) 16 Minn. 240, 484, 486, (Gil. 206, 438, 439;) 17 Minn. 71, (Gil. 48;) 22 Minn. 382; 35 Minn. 541; 38 Minn. 362; 45 Minn. 232.

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Ch. 29.
10 Minn. 241, (Gil. 189.)

Ch. 38.
23 Minn. 171.

Ch. 39.
18 Minn. 530, (Gil. 474.)

Ch. 41.
9 Minn. 100, (Gil. 89;) 14 Minn. 166, (Gil. 128.)

Ch. 41, § 2.
8 Minn. 83, (Gil. 58;) 9 Minn. 100, (Gil. 90;) 14 Minn. 231, (Gil. 169.)

Ch. 67.
10 Minn. 131, (Gil. 104;) 12 Minn. 406, 407, (Gil. 290.)

Ch. 68, § 1.
10 Minn. 131, (Gil. 104.)

Ch. 68, § 6.
10 Minn. 241, (Gil. 189.)

Ch. 71.
8 Minn. 132, (Gil. 103.)

SESSION LAWS 1862, (Special.)

Ch. 1, subch. 5, § 1.
20 Minn. 400, (Gil. 351.)

Ch. 2.
14 Minn. 258, (Gil. 190.)

Ch. 17, §§ 1–4.
11 Minn. 416, (Gil. 304 et seq.)

Ch. 17, § 6.
21 Minn. 340; 38 Minn. 116.

Ch. 19.
11 Minn. 190, 252, (Gil. 122 et seq., 167;) 19 Minn. 424, (Gil. 368.)

Ch. 19, § 4.
11 Minn. 535, (Gil. 407, 410.)

Ch. 20.
14 Minn. 307, (Gil. 233;) 18 Minn. 31, 36, (Gil. 13, 17;) 19 Minn. 530, (Gil. 460;) 23 Minn. 147 et seq.; 34 Minn. 204; 35 Minn. 228; 36 Minn. 468.

Ch. 20, § 7.
22 Minn. 12.

Ch. 20, § 8.
27 Minn. 218.

Ch. 27.
14 Minn. 258, (Gil. 190.)

Ch. 56.
19 Minn. 104, 105, (Gil. 74, 75;) 26 Minn. 21.

Ch. 63.
10 Minn. 28, (Gil. 13.)

Ch. 86.
22 Minn. 373.

SESSION LAWS 1863, (General.)

Ch. 5.
13 Minn. 452, (Gil. 421.)

Ch. 13.
31 Minn. 453.

Ch. 31.
10 Minn. 80, (Gil. 57.)

Ch. 41.
11 Minn. 443, 445, (Gil. 326, 328.)

Ch. 58.
23 Minn. 92.

SESSION LAWS 1863, (Special.)

Ch. 3.
29 Minn. 210.

Ch. 4.
23 Minn. 158; 24 Minn. 576; 34 Minn. 204.

Ch. 6, subch. 6, § 1.
20 Minn. 400, (Gil. 351.)

Ch. 9.
14 Minn. 259, 260, (Gil. 191.)

Ch. 20.
10 Minn. 110, (Gil. 82.)

Ch. 24.
16 Minn. 257, (Gil. 231.)

SESSION LAWS 1864, (General.)

Ch. 5, § 4.
13 Minn. 452, 453, (Gil. 421, 422.)

Ch. 11.
12 Minn. 130, (Gil. 74;) 14 Minn. 259, (Gil. 190.)

Ch. 16, § 18.
14 Minn. 258, (Gil. 189.)

Ch. 23.
33 Minn. 520.

Ch. 41.
10 Minn. 410, (Gil. 326;) 11 Minn. 160, (Gil. 101;) 18 Minn. 521, (Gil. 465.)

Ch. 42, § 1.
47 Minn. 581, 585.

Ch. 42, § 3.
11 Minn. 234, (Gil. 153.)

Ch. 45.
11 Minn. 407, 408, (Gil. 300.)

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Ch. 45, § 2.
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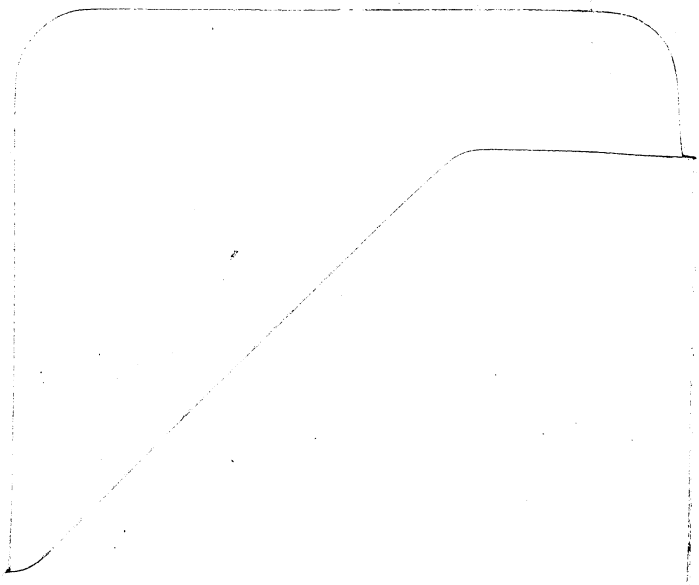
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