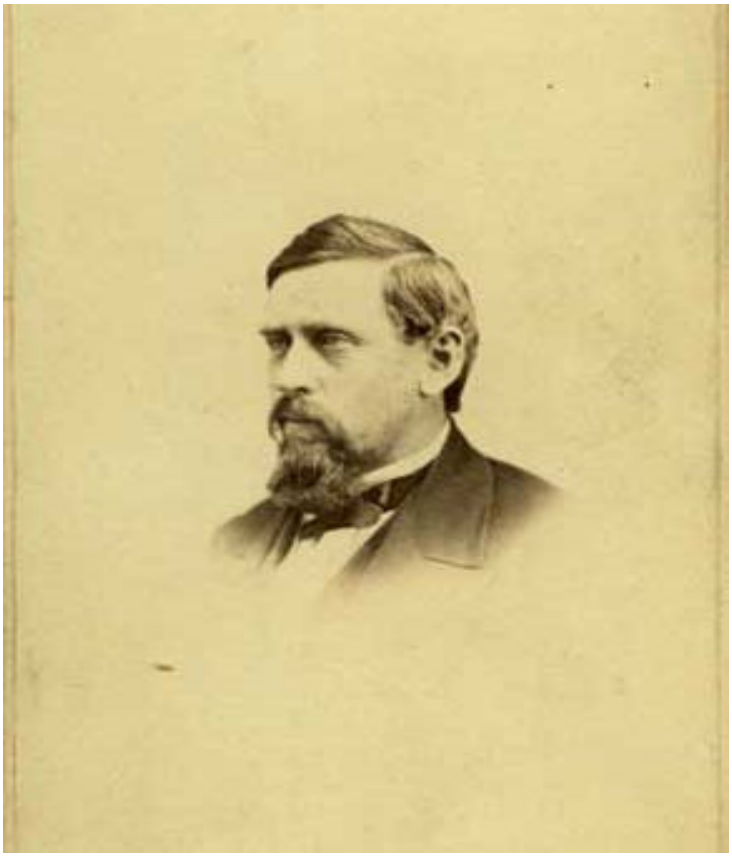
In Memoriam

Henry F. Masterson

(May 25, 1825 – March 19, 1882)

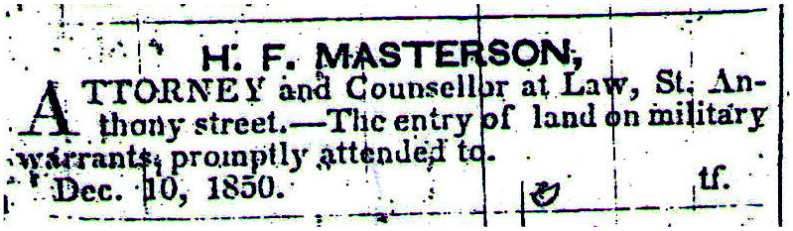


Ramsey County Bar Association
Court House
St. Paul
March 25, 1882

Minnesota Supreme Court
Capitol
St. Paul
April 4, 1882

Beginnings

In 1849, Henry F. Masterson, twenty-four years old and a member of the New York bar, arrived in Minnesota Territory with his close friend and fellow lawyer, Orlando Simons. Because there wasn't much law business, lawyers worked in other fields—insurance and journalism, for example. Masterson and Simons took different paths, working as manual laborers in a saw-mill and other trades until their fortunes improved. In 1851 Masterson's business card was published in the *Minnesota Democrat*: [1]

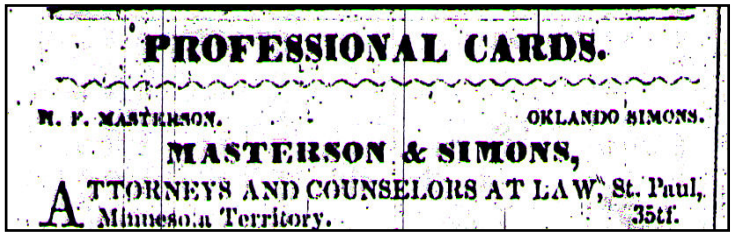


H. F. MASTERSON,

ATTORNEY and Counsellor at Law, St. Anthony street.—The entry of land on military warrants, promptly attended to.

Dec. 10, 1850. tf.

They formed a partnership that was the first firm in Minnesota. It lasted until 1875 when Simons was appointed by Governor Cushman K. Davis to the Court of Common Pleas for the Second Judicial District. In 1852 their card was placed in the local paper: [2]



PROFESSIONAL CARDS.

H. F. MASTERSON. ORLANDO SIMONS.

MASTERSON & SIMONS,

ATTORNEYS AND COUNSELORS AT LAW, St. Paul, Minnesota Territory. 35tf.

The firm had a general practice though Masterson was becoming the state's preeminent "railroad lawyer." Like other lawyers at this time, he also traded real estate, an activity that brought him before the courts as a defendant.[3]

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[1] *Minnesota Democrat*, July 29, 1851, at 1. He also placed his card in the *Minnesota Pioneer* at this time, e.g., June 5, 1851, at 1.

[2] *Minnesota Democrat*, November 3, 1852, at 1. They were among sixteen lawyers in St. Paul listed in *Livingston's Law Register* (1851) (it is posted in the Archives of the MLHP).

[3] *Wells et al. v. Masterson*, 6 Minn. (Gil. 401) 565 (1861). For a case involving his liability under a promissory note, see *Masterson & Foley v. Le Claire*, 4 Minn. (Gil. 108) 163 (1860) (Emmett, C. J., dissenting).

Domestic Tragedies

In 1852 he married Mary A. Hoyt, the daughter of Col. Albert S. Hoyt, of Warwick, New York. He built a home on Summit Avenue in St. Paul for his bride. On the grounds he created an exotic orchard of pear and peach trees, something no one thought able to survive in Minnesota's climate. [4] He succeeded and later distributed the fruit to friends and neighbors. [5]

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[4] The orchard became famous. From the *St. Cloud Democrat*, October 31, 1861, at 1:

> Mr. H. F. Masterson, of Saint Paul, has a fine lot of pears and peaches this season, although not quite so good a crop of the latter as was produced on his trees last year. It is needless to state that those trees were grown near the ground and covered in winter.
>
> Mr. Simons, near by, has also a fine lot of these choice fruits growing in his ground. One peach tree, especially, was loaded this season, and presented here in Minnesota a rare and magnificent spectacle.

[5] In a memoir published in 1915, Mrs. Rebecca Marshall Cathcart recalled:

> The panic did not materially affect Mr. Cathcart's business until 1862, when he compromised with his creditors, by giving or assigning to them all his property, and continued to carry on his dry goods store, the largest one in the city. We removed from our homestead on Summit avenue, between Rice and St. Peter streets, to another house on Summit avenue near where James J. Hill now lives. This house was built by Mr. Masterson, a young lawyer, who went East and brought back his bride to this far Western home, but his visions of happiness disappeared within two years, as his wife died; the house was closed, and it was not again occupied until we moved into it in the spring of 1863.
>
> Mr. Masterson had planted grape vines on his terraces, and also pear and peach trees; he was fond of gardening and took great care of the little orchard. Knowing that peaches and pears were too tender to endure our cold climate very well, he dwarfed the trees, training the branches on the ground so that they could be well covered during the winter; as a reward for this skillful care, the trees and vines were all bearing fruit in the fall of '63. He was proud of the results of his labor, as well as he might be; these delicate fruits had never before been raised in this climate out of doors, and, as far as my knowledge extends, they have never been grown successfully up to this time, 1913. Grapes of a hardy variety are grown in abundance, but Mr. Masterson was able to raise the choice varieties which have never been cultivated so far north.
>
> Wishing to give his friends a rare treat, he invited over a hundred of them to partake of the fruit on the lawn surrounding his former home, and urged every one to eat all he or she could, afterward distributing what was left among them. Our family received a quantity of pears, which being kept in a dark place improved with age. I have written about this little attempt at fruit growing in early days because I am almost the only one left to

She died in August, 1857, sometime after giving birth to their daughter, Mary. He was consumed by grief and, some thought, never fully recovered. The profound effect of the loss of his wife was noted in the following "Friend's Tribute" in the *Chicago Tribune* after his death in 1882:

A Friend's Tribute to the Late F. H. Masterson.

> ***Chicago Tribune*: Our dispatches a few days ago gave an account of a sad accident at St. Paul, Minn., in which one of the oldest citizens and ablest lawyers, F. H. Masterson, was struck by a locomotive and seriously injured. He has since died. The firm of Masterson & Simonds was among the very first law firms in the Territory of Minnesota. These gentlemen went to Minnesota in the early part of 1849, when there were not 5,000 people in the whole Territory. It was mainly all prairie, wilderness and lakes—most of it entirely unknown to civilization. St. Paul was a mere hamlet. Here these young men, with strong arms and honest hearts, pitched their tents to grow up with the country. Simons has for many years been judge of the criminal court of St. Paul. Masterson practiced his profession steadily, but he never attained the position to which his marked ability entitled him. His most important case was the prosecution of the great railway claims before the supreme court of the United States, and which, if we mistake not, were settled by the State mainly on the principles advocated in that suit. The shadow of a great domestic affliction brooded**

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remember this feasting on fruit which was supposed impossible to be raised in Minnesota; but Mr. Masterson's enthusiasm expired after he had proved his experiment to be successful, and he allowed both grape vines and fruit trees to die out, so that there was never again such a picnic on those grounds. A fine residence has now replaced the house built for his bride, and an automobile garage occupies the terrace where his grape vines grew.

Mrs. Rebecca Marshall Cathcart, "A Sheaf of Memories" 537-38 (15 Collections, Minn. Hist. Soc., 1915).

> over Masterson's entire manhood and palsied his best energies. He married Miss Mary A. Hoyt, the daughter of Col. Albert S. Hoyt, then of Warwick, Orange county, N. Y.—one of the most beautiful, refined and accomplished ladies that ever blessed a rising, ambitious young lawyer with her love. Soon after the birth of their first child she died, and Masterson was for many years an example of how greatly such a loss can control a man's destiny. Had she lived he would doubtless have made his mark among the leading men of Minnesota. Those who, as the writer of this, knew him well from boyhood can alone appreciate the sadness of that bereavement, whose shadow darkened all his hopes, and doubtless prevented that eminent success in life to which his talents entitled him. [6]

He and his daughter quit their home on Summit; it remained empty until sold in 1863. He never remarried.

Railroad Lawyer

In the last decades of the nineteenth century "railroad lawyers" were plentiful. Lawyers represented the roads in tax disputes, zoning controversies, personal injury suits, claims by creditors and complex mergers, reorganizations and bankruptcies, to name only a few matters. Some became wealthy.

But first a lawyer was needed to form the railway corporation, steer it through its initial years, secure rights of way, lobby the state legislature for favorable laws, do battle in the courts, etcetera. In Minnesota that man was Henry F. Masterson. He was (and is) considered the state's "first railroad lawyer." His most famous case is *Farnsworth v. Minnesota and Pacific Railroad Company*, 92 U. S. 45 (1875), which he lost.[7]

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[6] Reprinted in the *St. Paul Pioneer Press*, March 30, 1882, at 4 (misspellings have not been corrected).

[7] It is posted in the Appendix, at 30-52.

Oddly, on February 2, 1876, after argument in the *Farnsworth* case, he was admitted to practice before the U. S. Supreme Court on motion of John B. Sanborn. *Chicago*

While he was the consummate railroad lawyer, he never made much money from his work for the roads, notwithstanding his considerable contributions to their success. He lacked a drive to accumulate assets. To General Sanborn, he delighted in cases that raised "abstruse questions of law" that he over-researched while to others he became that familiar figure in the profession: a good lawyer who was a bad businessman.

The Death of Masterson

He was struck by a railroad train in St. Paul in the evening of Monday. March 13, 1882. It was reported in the *Globe*:

A SERIOUS ACCIDENT.

H. F. Masterson, Esq., Struck by an Engine and Seriously Injured.

> **On Monday evening Mr. H. F. Masterson, who is probably as well known as any citizen in St. Paul, had the misfortune to be hit by the tender of an engine and very severely injured. The accident occurred about 7 o'clock in the evening, just above the Seventh street bridge. At that time a train was going over one of the tracks, and the engine was backing down on the other. Mr. Masterson was not seen by the engineer till the engine came up very near to him. As soon as he saw him, the engineer whistled down the brakes, and reversed his engine. It was all too late, however. Mr. Masterson evidently attempted to step off the track, and as he started to do so the end of the tender struck him in the back. The blow was not a heavy one, but more in the way of a push which threw Mr. Masterson down. The engine was stopped as quickly as possible and**

Legal News, February 12, 1876, at 168. He had been admitted to practice in the territorial courts, and by the Minnesota Supreme Court on August 4, 1858. 1 *Roll of Attorneys: Supreme Court, State of Minnesota, 1858-1970* 4 (State Law Library, 2011).

Mr. Masterson was picked up, put on the engine and taken to the office of J. B. Rice, assistant superintendent of the St. Paul & Manitoba road, a short distance below the Union depot, when he was taken care of as well as he could be, and Drs. Murphy and Quinn were sent for, both of whom arrived in a few minutes. Subsequently, his brother, who resides on Virginia avenue was sent for and the injured man was moved to his home, No. 62 Stillwater street. When he was first taken to the office of Mr. Rice he was nearly or quite unconscious, but he recovered sufficiently to recognize Mr. Rice. Dr. Murphy reports that his left collar bone is broken, but otherwise he was not severely injured. Mr. Masterson is a heavy man, and in falling undoubtedly was badly bruised. He complained a good deal of pain and soreness all over his body. His daughter, who keeps house for him, says he left the house on Stillwater street about 6:30 p. m. for a walk. He went down on the track and was walking along there without knowing or thinking that two engines were coming, one in one direction and the other in another. It is thought that he will be out in a few days.[8]

He died on Saturday evening, March 19, 1882, at age fifty-six. The *St. Paul Sunday Globe* carried the story:

Henry F. Masterson.

The painful duty devolves upon the Globe this morning of announcing the death of Henry F. Masterson, Esq., which sad event occurred at 10 minutes of 6 last evening.

He was injured last Monday evening by being struck by an engine at the Seventh street crossing. While stepping from one track to avoid a train he did not notice an engine

[8] ***St. Paul Daily Globe*, March 15, 1882, at 1.**

backing down from the opposite direction on the adjoining track, and was struck and fatally injured. He was at no time fairly conscious after he was injured, and only at very brief intervals did he give even slight recognition of his surroundings. His talk was wandering and incoherent and even that ceased Friday night. The injuries seemed to paralyze his internal functions and they became practically dead after the fatal blow.

Mr. Masterson was born in Chester, Orange county, New York, on the 25th of May, 1825. He was educated in a common school, finally finishing his studies at Chester Academy. He studied law in the office of Asa D. Jansen, of Goshen, N. Y., and was admitted to practice in the supreme court in the spring of 1849. He and Judge Orlando Simons of this city were fast friends and schoolmates, and during the winter of 1849 both were teaching school at points about twenty miles apart. They met New Year's day 1849 and formed a partnership for the practice of law, selecting St. Paul as their place of location. They concluded their school teaching contracts, and on the 25th of May, 1849, started for this city, where they arrived on the 20th day of June. In October they opened a law office on the corner of Third and Market streets under the name of Masterson & Simons, and for over a quarter of a century the partnership continued. It was only broken when Judge Simons was elevated to the bench.

Mr. Masterson took high rank as an attorney and was employed in a very large number of important railroad and other suits. A close student and most careful in the preparation of his cases, he would appear in court with his authorities ready to cite and being withal, a ready speaker he was highly successful in the legal forum.

It is related of this firm that being detained in Chicago by sickness, they arrived in St. Paul with limited means, and spent some months at work at their trade of carpenters, making the nucleus of their law library from their earnings of that summer.

In August, 1852, Mr. Masterson married Mary, daughter of Albert S. Hoyt, of Orange County, New York. In August, 1857, his wife died, leaving an infant daughter, who, having grown to woman's estate, was keeping house for her father at the time of his death. In addition to his daughter, he leaves a brother, Thomas, a resident of this city, a sister in Nebraska, and also a sister in Orange county, N. Y. His father died when he was quite young, and his mother survived until five or six years ago. The funeral will be delayed until a message can be received from his brother-in-law.

Mr. Masterson was an able lawyer and a thoroughly honest, conscientious man. Politically he was a Democrat because he heartily believed in the tenets of the Democratic party and no hope of personal advantage could ever swerve him in the slightest degree from what he believed to be the path of political duty. Though active in politics and ever ready to aid others, he never held or sought a political office. He was unobtrusive in public affairs but a keen observer and able critic, and his views, whenever given, were forcible and convincing. He was ever ready to assist others. No grain of selfishness existed in his composition, and no man can truthfully say he was ever wronged by Henry F. Masterson. In his death the bar loses an able member, and the community a citizen who

will be remembered with naught but respect and affection.[9]

The following day, Monday, March 20th, the *St. Paul Daily Dispatch* published his obituary:

HENRY F. MASTERSON.

Fatal Result of Last Week's Distressing Accident.

Mr. Masterson's Death—A Sketch of His Career—His Characteristics and Achievements as a Lawyer—He Died on the Track of the Road He Helped Organize.

Proceedings of the Bar Meeting—The Funeral Today.

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[9] *St. Paul Daily Globe*, March 20, 1882, at 3. His death was also reported in *the Saint Paul and Minneapolis Pioneer Press*, Sunday, March 19, 1882, at 7 ("From Suffering to Peace"). The *Globe* reported the funeral:

> The last sad rites over the remains of the late Henry Masterson took place at the First Presbyterian church at 3 p. m. yesterday. A severe snow storm was in progress but considering the weather the attendance was large, those present embracing the larger number of our old and prominent citizens. Rev. Dr. Conn conducted the exercises in a plain but impressive manner, including in his remarks a personal review of the deceased.
>
> The casket bore beautiful floral decorations, and the large audience present wore sincere mourners. At 4 p. m. the sad cortege started for Oakland, where the remains were deposited. The pall bearers were Judge Wescott Wilkin, W. F. Murray, David Day, C. E. Flandrau, Major Allen, Wm. Barrett, J. I. Beaumont and R. J. Reid.

St. Paul Daily Globe, March 21, 1882, at 2.

Just before 6 o'clock Saturday afternoon death came to the relief of H. F. Masterson, whose condition had, as noted in the Dispatch of that date, been gradually growing worse with each departing day since the fatal occurrence on Monday, until all hope had been abandoned and the result was known and recognized by his friends to be merely

A MATTER OF TIME

and that too of a very brief limit. The particulars of injury on the Manitoba track below Seventh street on the evening of the 13th are already fresh in the public mind. There is no doubt he was taking one of his accustomed strolls at the time, and having passed out Seventh street was seeking to reach Third street by way of the tracks, and hence to return homeward, along the populous parts of the city. Darkness had fully set in and in stepping aside to avoid an advancing train, he was struck by one coming from the opposite direction. At first strong hopes were entertained by his friends that the injuries, which were known to be severe, were not fatal, but those gradually those were gradually abandoned, as stated above.

HIS CAREER.

Deceased was born May 25, 1825, at Chester, Orange county, N. Y., and was nearly 57 years old. Receiving a common school education he studied law and was admitted to practice in 1849. June 20, 1849 he in the present Judge Simons of the District Court (a partnership having already been formed between them which continued to the date of the latter's elevation of the bench) arrived in St. Paul, and shortly thereafter commenced the practice of law, in which profession he passed the remainder of his life.

HIS CHARACTERISTICS.

Mr. Masterson was of studious habits, and being gifted by nature with a clear perception, discriminating judgment, vigorous intellect, retentive memory, and last, not least, a thoroughly developed physical organization, he soon began to loom up among his brother practitioners, and speedily became what is known as the rising young lawyer. This reputation attaching to him, he soon became engaged in some of the most important lawsuits of that day. At this date, the railroad interests of the Territory and future North Star State were in their infancy. Mr. Masterson became the best-known

RAILROAD ATTORNEY

in the Territory, and at the date spoken of certainly did more work for these then infant corporations than all other lawyers in the city put together. This included not only court business, but extended to the halls of the legislature were deceased was active in securing the passage of bills drafted by himself in the interests of railroad construction. He was made attorney for the first division of the old St. Paul & Pacific, and in that capacity did an immense amount of work, having conducted a number of very important suits, several of which were taken on appeal to the Supreme Court of the United States and argued before that august tribunal.

THE RAILROAD CORPORATIONS

of that day, it is well known, had but little means, and hence, it is needless to say, Mr. Masterson received very inadequate compensation for his arduous and engrossing labors. One of the most eminent attorneys of the present bar is responsible for the statement that Mr. Masterson

did more work at less pay than all the railroad attorneys of that day put together, but that when the roads that emerge from their difficulties and were beginning to stand alone, so to speak, others who, during the stress of the hard times, had remained in the rear, came to the front and reaped the emoluments of the position previously filled by deceased, and for which he had borne the brunt of the struggle. In this connection

A SINGULAR COINCIDENCE

may be related. This is that the unfortunate gentleman met his death in his old age, as it were, at the hands of the very corporation (or rather a successor) for which he had performed so much unrequited labor in the past and which, it is said, he did as much as any one of that day and generation, to finally put upon the road to success and the great results now accomplished.

The circumstances, call it a coincidence or by any other name, is a curious one, at any rate and vividly recalls to mind Byron's famous lines in "English Bards and Scottish Reviewers."

"So the struck eagle stretched up on the plane,
No more 'mid rolling clouds to soar again,
Sees his own feather on fatal dirt
That winged that shaft which quivers in his heart."

MR. MASTERSON'S ABILITIES

as an attorney were universally recognized by his associates of the Ramsey county bar and throughout the State. “He was a first-class lawyer,” said one of the oldest members of the bar this morning to a Dispatch representative, “perhaps a little slow to reach conclusions, but yet thorough and discriminating in his judgment and always well versed in the law of his cases. His mind was inclined to the study of abstruse questions upon which he spent much more time than a lawyer immersed in general practice could afford to spend without neglecting matters which pertain more immediately to the great results aimed at by all —the material results for which all business is carried on. Delighting in

ABSTRUCE SUBJECTS,

he would take up old played-out and abandoned cases and spend months in working them up when in reality there was no money in them, even if he succeeded in winning them. He was also a man of peculiar character—eccentric in his habits and so thoroughly guileless and innocent of ways that are dark and tricks that are vain that he seemed to live a child all through life. His knowledge of the law was undisputed, and he seemed deficient only in one great essential—a qualification and capacity for business.”

HIS FAMILY

In August, 1852, Mr. Masterson married Miss May Hoyt of Orange County, New York—the lady dying some five years afterwards, leaving an only daughter, who is now grown and living with her father at the date of his death. He leaves also a brother, Thomas F. Masterson, inspector of

customs in this city, and two sisters, on a resident in Nebraska and the other in Orange, N.Y.

POLITICALLY

Mr. Masterson belonged to the Democratic party, but was never an active politician, having, indeed, at one time, entirely withdrawn from all participation therein. He never held office, and, it is believed, never aspired to office during his long residence here. But during this period he aimed to keep well versed in the history of party struggles, and could at all times converse intelligently and impartially on current topics.

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Ramsey County Bar Association Memorials

On Saturday, March 25th, the Ramsey County Bar Association held a memorial for Masterson in which resolutions and several of the older lawyers delivered eulogies. The *Globe* reported the proceedings:

Henry F. Masterson

Meeting of the Bar Yesterday, Eloquent Tribute to the Memory of an Able and Estimable old Gentleman—Universal Testimony Relative to his Worth.

A special meting of the Ramsey county bar association was held at the old court house at 2 o'clock yesterday afternoon, to receive the report of the committee of which Hon. C. E. Flandrau was chairman, appointed at previous meeting to prepare a tribute to the memory of the late Henry F. Masterson, Esq. The meeting was called to order

by C. H. Bigelow, Esq., president of the association, R. B. Galusha Esq., secretary in his position.

Mr. Flandrau, in presenting the report of the committee, said the bar of Ramsey county had been in existence since 1849. Since that time it had grown and expanded with the state, and he did not think he exaggerated when he claimed for it that it had filled as important a part the affairs of the county as had the members of any other calling. It was desirable, he said, that the honorable and influential past form in moulding and shaping the history of the county, and state in the past should be combined in the future. He had been connected with the bar of Ramsey county for thirty years, and in writing of it for a recent publication, he had felt called upon to say that it was a "graceful association of gentlemen." He saw no reason for changing that opinion of it in the least, and he trusted nothing would occur in the future to make it necessary to modify it in the least. With this view it had seemed to him that the bar in paying a tribute to a departed brother, should indulge in no blind eulogy, but rather seek to place upon the record a truthful estimate of his character for the benefit of history. Such had been the view of the committee in formulating the report to be presented. Mr. Masterson was one of the very oldest of the members of the Ramsey county bar, possessing rare legal attainments and very lovable and noble characteristics, but he was not free from his failings. In concluding, Judge Flandreau said he had spoken as he had for the purpose of impressing upon members the idea that reports of this character should be made of value as facts and not merely as simple eulogies.

Judge Flandrau then read the report of the committee as follows, concluding with a motion for their adoption:

Your committee in their endeavor to rescue from the custody of mere memory, the portraiture of the late Henry F. Masterson, who was of the early time, the events of which rest largely in tradition, and the remembrance whereof die with the last actor in them, are feelingly persuaded in their endeavor to commemorate him, that the bar has lost not only the lovable, guileless man but also its historian

He arrived in St. Paul on the 20th day of June, A. D. 1849, and from that time to the day of his death, was an active, earnest and prosecuting lawyer. In shaping the railway system of the state by the legislation enacted with such prescience of the manifest destiny of Minnesota and the new Northwest beyond, he bore a conspicuous part, and to his last day the consequence of that system out of which sprang the conception of the Northern Pacific railroad, the Canadian Pacific railroad, and the demonstration that beyond where even it was thought that frost and desolation had set a bound to man, there lies a region of great fertility, the future, home of millions, ministered to the just pride which he had in being one of those who conceived it and laid down the line upon which those results were built.

He was a learned and scientific lawyer. He wound the principles which lie within the cases. He had an instinct for the legal elements of any controversy. While he was for this reason a formidable antagonist, he was also a manly and generous one, for his arguments were always opened by statements of the true question at issue, and rejection of merely collateral and dependent facts.

There was a sort of chivalry about the man in this. The judicial records of the state abound with the evidence of his industry, learning and ability.

But it is after all the personal traits of men which enable or disvalue character, and he was the possessor of many of those which commanded respect, no matter whether their owner is a successful man or not.

In looking at him as he was, we find the truest courtesy, tolerant charity, active well doing, in all the social relations, self denying friendships, the frankness of the child, humility in success, and patience in adversity. If anything appears in his professional career that the bar cannot command, it nevertheless cheerfully exonerates his memory from any identical shortcomings in duty.

Gathering the recollection of such traits as these in the hope that they may remain long in memory, which is all too pleading when charged with a lawyer's fame, we attest that they existed in him to a degree which makes his death to be lamented.

We commend his memory to preservation by those who survive him for the good that was in him, and we share although we cannot lighten the grief which his death has caused to his kin and intimate friends.

In seconding the motion for the adoption of the reports, Mr. H. L. Moss spoke as follows:

Mr. President: In rising to second the resolution of the chairman of the committee for the adoption of the memorial, I wish to add my feeble tribute to the memory of Henry F. Masterson.

As I look around and call to mind the names of the attorneys now residing in Ramsey county, I am reminded that he was one of the small number who came to Minnesota during the first year of her territorial existence, most of whom have passed from earth — only a few remain.

The report of your committee brings before us the prominent characteristics of the life of our departed friend. Many incidents might be given in detail, in addition to the brief statements in said report did time, and space permit.

For many years, especially during the time Minnesota was a Territory, Mr. Masterson ranked among the foremost of her attorneys as a successful practitioner. As a lawyer it was his delight to become interested in causes, although of a personal character, yet in final results, pertained to the welfare of the citizen and the State. It was his ambition to secure success, and decisions founded upon well established principles of justice and right. In many cases, untiring labor and persistent application secured to him a triumph and reputation which time and adversity can never obscure or obliterate.

While Minnesota remains as a brilliant star in the canopy of the Federal Union, her judicial records will preserve the evidence of his legal acumen and ability.

I have spoken of Mr. Masterson as I knew him as a lawyer.

It was my privilege, in the early years of my acquaintance with him, to know him as a fellow citizen and neighbor.

In the secret relations of the family he was devoted, kind and affectionate.

In the social relations, with his friends many an "Old Settler" can tear testimony of his goodness of heart, his sympathetic nature, and unselfish benevolence.

He was always ready and willing to administer to and relieve the needy and suffering to the limit of his ability, and if material means failed him, personal attention and aid were ever freely rendered.

Mr. President it is a sad thing for me, the oldest member of the bar in Minnesota, to see one and another of my early associates pass away. The memories of Babcock, Hollinshead, Ames, Cooper, Sherburne, and others still linger with us. We now add to the number Henry F. Masterson, and I am reminded that but a few years at most will pass, ere I shall be one to follow them.

May the virtues of those that have come ever be a living and undying example to guide and influence each one of us who remain.

Mr. President, I second the motion for the adoption of the memorial.

Hon. I. V. D. Heard said it was just thirty years ago the present month he personally became acquainted with Mr. Masterson, though he had known him by reputation some time before, having been reared in the same county in New York with him, and studied law in the same office where he had learned the rudiments of the profession he later so much adored. Coming to Minnesota while a territory, he soon took a leading position in the ranks of the legal fraternity. His presence was commanding; his manner courteous and his kindly nature radiating from every feature of his sympathetic countenance, attracted to him respect and confidence. He early lost his

companion, but he bore up under the blow manfully and uncomplainingly. No lawyer was more untiring in his profession. His name is indissolubly connected with many of the controlling decisions of our jurisprudence from the earliest history of the territory and state. His end was tragic, in the black month of March, and at the hands of a brute creation into which he had helped to breath life. He now sleeps his last sleep, but his memory will not die.

W. J. Horn, Esq., said it was unnecessary for him to add anything to what has been said. The members of the bar had known him so long and well, his memory was enshrined in all their hearts. His was a kindly disposition, and he possessed in a remarkable degree that *esprit de corps*, so potent in creating a feeling of brotherhood. He had never heard him utter an unkind word of anyone, much less of a member of the profession. He always seemed happiest when doing something for some one needing assistance. Such could never call upon deceased without meeting sympathy and practical aid to the extent of his means.

Gen. Sanborn doubted not it was the inclination of all to speak a good word for deceased. All the qualities to make a good lawyer were rarely embodied in one man. Mr. Masterson appeared at his best when arguing abstruse questions of law, so frequently occurring in the early history of the state. It was his delight to get such cases, and by patient work illustrate when the darkness ended and light commenced. In such cases he doubted if the state ever had Mr. Masterson's equal. And it was not for the peculiar consideration that he delighted in these cases. This fact was strongly illustrated in a case involving only about $200, but in which the decision reached mainly through Mr. Masterson's untiring researches, had

resulted in a decision of great benefit to the people of the state. One of his latest, and probably the greatest effort of his life was before the United States Supreme Court in Washington in the old St. Paul & Pacific cases, and it delighted him at the time to be told by Justice Field that, although the case had to be decided against him, he had given the court more trouble to get over the points raised than in any case ever before them.

Deceased was a great lover of nature, and it was his practice to take long and solitary walks, admiring the beauties of God's handiwork. It would be remembered the care bestowed by him twenty years ago upon his then home on Summit avenue, where, if he mistook not were grown the first pears, grapes, etc., raised in the state. Now

> **"He sleeps amid the scenes he loved the most,**
> **Where many a well known and familiar sound**
> **Of water, earth and air forever dwelt around."**

Gen. Sanborn then referred to the last resting place of deceased in Oakland cemetery and closed with "Here let his body rest, where the calm shadow may glide above his breast."

It was then voted that the chairman of the committee cause the resolutions to be presented to the state supreme court, U. S. district court, and the district court of Ramsey county, and also that the secretary cause a copy to be properly engrossed and sent the daughter of deceased.

The meeting then adjourned. [10]

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[10] *St. Paul Daily Globe*, Sunday, March 26, 1882, at 7 (there were no quotation marks in the article).

Minnesota Supreme Court Memorials

On April 4, 1882, the Supreme Court received memorials to Masterson adopted by the Ramsey County Bar Association and ordered that they be made part of its records. The *Globe* carried the story:

Proceedings in the Supreme Court:

SUPREME COURT.

Meeting for the April Term.

The supreme court met at 12 m. yesterday, for the April term, with a large attendance of lawyers from different parts of the state, and all the members of the court present, as follows: James Gilfillan, chief justice; John Berry, William Mitchell, Daniel A. Dickinson and Chas. E. Vanderburg, associate justices, Samuel H. Nichols, clerk; Geo. B. Young, reporter, and W. J. Hahn, attorney general.

The court organized, Hon. Chas. E. Flandrau, chairman of the committee of the Ramsey county bar association, presented the testimonial adopted by that body upon the death of the late Henry F. Masterson. In presenting this action Mr. Flandrau said:

"Since the last term of this court the bar of this State has sustained a most serious loss in the death of Henry F. Masterson, one of its oldest, ablest and most beloved members, being a resident of Ramsey county, and a member of the bar association of that county, appropriate measures were taken to commemorate the sad event, and record the portraiture of our deceased friend. A memorial paper was prepared and adopted by the association, and I was appointed to present it to this court and ask that it be inscribed on its records.

"In pursuance of such instructions I lay before you a copy of the memorial, and move that it be entered upon your records, and, if your honor please, I can with unqualified sincerity add my individual testimony that Mr. Masterson was well worthy of the honor which his old associates seek to confer upon him."

The motion to enter upon the record was adopted and the clerk so instructed.[11]

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APPENDIX

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[11] ***St. Paul Daily Globe*, April 5, 1882, at 1. The minutes of the clerk of the supreme court are posted in the Appendix, at 29-32.**

Thomas Newson's "Pen Picture" of Masterson.

In 1886, Thomas Newson, a St. Paul journalist, published his Pen Pictures" of prominent denizens of St. Paul, including the following of Henry F. Masterson:

> **Mr. Masterson was a peculiar citizen, somewhat different from ordinary men in this particular, that he spent a life-time in helping others and getting little or nothing in return. While he may have had an appreciation of money, yet he had no capacity to accumulate it. He was born in New York in 1824 (sic); studied law came to St. Paul in 1849 with now Judge Orlando Simons. Both these men were carpenters by trade, and before arriving in St. Paul made a solemn vow to stand or fall together, and though not related, they were closely bound to each other by the strongest ties of friendship. They came from New York to Chicago by water, and hired a farmer to transport their baggage to the Mississippi river, it being stipulated "that when the walking was good they might ride, when it was bad they must walk." On arriving at St. Paul, Judge Simons went to work as a carpenter, while Masterson entered a saw mill at St. Anthony Falls, but soon after Simons was tendered a situation by the government to aid in building a fort on the frontier, but he would not accept the offer unless Masterson was also employed. Masterson was soon engaged, and the two spent the summer and the fall on the frontier, returning on the edge of winter with plenty of money, and then opening the law office of Masterson & Simons, which continued in this city for over twenty-five years.**
>
> **AS A MAN**
>
> **Masterson was a tall, robust-looking man, and was good for twenty years had he not been overtaken by the terrible**

accident which ended his career. He was social in his nature; full of reminiscences of the past, and a devoted friend. He was a profound lawyer, delving deeper into the law than others, and in one instance forcing the Supreme Court to reverse its own decision against him. During all the time he lived St. Paul, he never held an office; always gave way to some one else; so he spent his life giving to others; seemed to live for others more than for himself, and thus he continued until the day of his death.

I often saw him wandering about the city, and once found him musing upon the bridge, and as in imagination I now see him standing upon that structure, the touching lines of Longfellow come before me in all their beauty and their vividness:

"I stood on the bridge at midnight,
As the clocks were striking the hour,
And the moon robe o'er the city,
Behind the dark church tower

* * * * *

"And like these waters rushing
Among the wooden piers,
A flood of thoughts came o'er me
That filled my eyes with tears.

"How often, oh, how often,
In the days that had gone by,
I stood on the bridge at midnight,
And gazed on that wave and sky.

"How often, oh, how often,
I had wished that the ebbing tide
Would bear me away on its bosom,
O'er the ocean wild and wide.

“For my heart was hot and restless,
And my life was full of care,
And the burden laid upon me
Seemed greater than I could bear”

Then with the revulsion of feeling came the philosophical strain :—

“But now it has, fallen from me,
It is buried in the sea;
And only the sorrow of others
Throws its shadows over me.

“Yet whenever I cross the river,
With its bridge with wooden piers,
Like the odor of brine from the ocean,
Comes the thought of other years,

“And I think how many thousands
Of care-encumbered men,
Each bearing his burden of sorrow,
Have crossed the bridge since then.”

He was uncompromising in the interests of his clients; was timid in charging or collecting his own fees; was weak in the defense of himself; was a close student among the “musty volumes” in search of precedents; was exceedingly fond of music, was charitable; defended others when it was unpopular to do so; never spoke ill of a single person, had no business faculty; never disputed a bill, always paid when he had money. Elated with the idea of a $5OO fee, he pondered over the case he had in hand, and while walking on the railroad track in a fit of abstraction, was struck by the huge engine and received injuries from which he died. Just before the great change took place, Judge Simons, his old friend, sat at his bedside with his hand clasped in his, thus fulfilling the mutual vow the friends had taken years

before. George J. Flint, Esq., who was in the same office with Mr. Masterson for several years, writes:

"I was the last business man he spoke to before he received the injury which caused his death. He was more cheerful than I had seen him in a long time because of his brightening prospects. I was with him at his death and truly mourned him as a good man gone."

And thus—poor Masterson! "Life's fitful fever o'er, he sleeps well." [12]

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Charles E. Flandrau's Sketch of Masterson

The following sketch of Masterson and Simons written by Charles E. Flandrau was published as the second part of "The Bench and Bar of Ramsey County, Minnesota" in *Magazine of Western History* (May, 1888):

Henry F. Masterson and Orlando Simons arrived in St. Paul June 20, 1849. They were both from the state of New York, and were admitted to the bar of that state. They were partners before leaving New York, and continued the firm here by the name of Masterson & Simons. These gentlemen composed the first law firm ever established in Minnesota, and they remained together up to the year 1875, when the number of the judges of the court of common pleas of Ramsey county having been increased to two, Mr. Simons was appointed by the governor one of the judges of that court. He was subsequently transferred

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[12] Thomas McLean Newson, *Pen Pictures of St. Paul, Minnesota, and Biographical Sketches of Old Settlers: From the Earliest Settlement of the City, Up to and Including the Year, 1857* 146-48 (1886).

by statute to the district bench and then elected by the people to the latter position and now fills it to the entire satisfaction of the bar, enjoying the confidence of the people and being the terror of all wrong-doers. Judge Simons has long been a close student of the law and is endowed with a clear, logical brain. He is as free from bias, partiality, timidity or a fear of being criticised as a granite monument in a secluded church-yard. He has most of the attributes of a great judge.

Henry F. Masterson, like most of the young lawyers who came to the far west in those early times, was not possessed of much worldly means—in fact he had none. As the outlook for law business was not promising, he manfully went to work in a saw-mill at the Falls of St. Anthony, and in the construction of Fort Ripley, then Fort Gaines, earned sufficient money to start himself in the practice of his profession. Mr. Simons and himself then opened an office in St. Paul, where Mr. Masterson continued to practice until his death, some years ago. He was a good lawyer, a profound thinker and always got to the bottom of his cases. Mr. Masterson has been engaged in much of the important litigation of this judicial district and was for years the attorney for the St. Paul & Pacific Railroad company. He was a very genial and companionable gentleman, and delighted in reminiscences of what we have called the "traditional period" of Minnesota. The writer is indebted to Mr. Masterson for many of the facts contained in this paper.[13]

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[13] Charles E. Flandrau, "The Bench and Bar of Ramsey County, Minnesota: Part II" 27 (MLHP, 2008-2009)(published first in 8 *The Magazine of Western History*, Part II 59-60 (May, 1888).

Minutes of the Clerk of the Minnesota Supreme Court, April 4, 1882

1st Day State of Minnesota Supreme Court

General April Term A.D. 1882

At a General Term of the Supreme Court of the State of Minnesota, begun and held at the Capitol in the City of Saint Paul pursuant to law on the first Tuesday, Fourth (4th) day of April A.D. 1882, at 12 M. And of the Independence of the United States of America the One Hundred and fifth year

Present. Hon James Gilfillan: Chief Justice
Hon John M. Berry; Associate Justice
Hon William Mitchell Associate Justice
Hon Daniel A. Dickinson Associate Justice
Hon Charles E. Vanderburgh Associate Justice
and Sam'l H. Nichols, Clerk

The Court was duly opened by proclamation and the following proceedings were had

Hon Charles E. Flandrau of the Ramsey County Bar Association appeared in behalf of said association at the Bar and addressed the Court as follows.

May it please your Honors since the last term of this Court the Bar of this State has sustained a most serious loss in the death of Henry F. Masterson one of the oldest ablest and most beloved members.

Being a resident of Ramsey County and a member of the Bar Association of that County appropriate measures were taken to commemorate the sad event and record the portraiture of our deceased friend.

A memorial paper was prepared and adopted by the association and I was appointed to present it to this Court and ask that it be inscribed on its records.

In pursuance of such instructions I lay before you a copy of the memorial and move that it be entered upon your records: and if your Honors please I can with unqualified sincerity add my individual testimony that Mr Masterson was well worthy of the

1st Day Continued

Honor which his old associates seek to confer upon him. Thereupon the Court Ordered the following Memoriam spread upon the records of the Court

In Memoriam

Your Committee in their endeavor to rescue from the custody of men's memory the portraiture of the late Henry F. Masterson who was of the early times the events of which rest largely in tradition and the remembrance whereof die with the last actors in them, are feelingly engaged in their endeavor to commemorate him. that the bar have lost not only the lovable guileless man, but also its historian.

He arrived in Saint Paul on the 20th day of June A D 1849 and from that time to the day of his death was an active earnest and able practicing lawyer. In shaping the railway system of the State by the legislation enacted with such prescience of the manifest destiny of Minnesota and the New Northwest beyond, he bore a conspicuous part, and to his last day the consequence of that system out of which sprang the conception of the Northern Pacific railroad the Canadian Pacific railroad and the demonstration that even beyond where it was thought that frost and desolation had set a bound to man there lies a region of great fertility the future home of millions, ministered to the just pride which he had in being one of those who conceived it and laid down the lines upon which those results were built.

He was a learned and scientific lawyer, He found the principles which lie within the case. He had an instinct for the legal elements of any controversy. While he was for this reason a formidable antagonist he was also a manly and generous one for his arguments were always opened by statements of the true question at issue and rejection of merely collateral and dependent facts.

There was a sort of chivalry about the man in this. The judicial records of the State abound with the evidence of his industry learning and

ability. But it is after all the personal traits of men which ennoble or dissolve character and he was the possessor of many of those which command respect. No matter whether their owner is a successful man or not.

In looking at him as he was we find the most considerate tolerant charity active well doing in all the social strategies self denying friendships the frankness of the Chief humility in success and patience in adversity. If anything appears in his professional career that the bar cannot commend it nevertheless cheerfully exonerates his memory from any intentional shortcomings in duty.

Gathering the recollections of such traits as these in the hope that they may remain long in memory which is all too fleeting when charged with a lawyers fame, we attest that they existed in him to a degree which makes his death a loss to be lamented.

We commend his memory to preservation by those who survive him for the good that was in him and we share although we cannot lighten the grief which his death has caused. to his kin and intimate friends.

Messrs W. J. Walker, E. G. Rogers and Hiram F. Stevens Esqrs were appointed examining committee and Saturday the 15th day of April at 10 O'clock A.M. was fixed for hearing examination of Candidates for admission to practice as Attorneys and Counselors in this Court.

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

FARNSWORTH ET AL., TRUSTEES, *v.* MINNESOTA AND PACIFIC RAILROAD COMPANY ET AL.

1. On the 3d of March, 1857 (11 Stat. 195), Congress passed an act granting certain lands to the Territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the Territory. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever; and that they should be disposed of by the Territory or future State only as the work progressed, and only in the manner following: that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the Territory or the future State should certify to the Secretary of the Interior that any continuous twenty miles of any of the roads were completed, then another like quantity of the land granted might be sold; and so, from time to time, until the roads were completed. *Held*, that the

strictions contained in the act of Congress, and, on the 22d of the month, passed an act for the execution of the trust. By that act it authorized four different companies to construct the roads in aid of which the congressional grant was made, each company a distinct road. Three of these companies were at the time in existence: one of them, the Minnesota and Pacific Railroad Company, was created by the act. This latter company was authorized to construct the road from Stillwater, by way of St. Paul and St. Anthony, to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony to St. Vincent, near the mouth of the Pembina River; and, for the purpose of aiding in its construction, the act granted to the company the interest and estate present and prospective of the Territory and of the future State in the lands granted by Congress along the line of the road, subject, however, to the proviso that the title of the lands should vest in the company, as follows: Of the first one hundred and twenty sections, whenever twenty or more continuous miles of the road should be located, and the governor should certify the same to the Secretary of the Interior; and afterwards of a like number of sections, whenever and as often as twenty continuous miles of the road should be completed so as to admit of running regular trains, and the governor should certify the fact to the Secretary.

By the same act, the company was authorized to borrow money and to execute its bonds and mortgages and other obligations for the same, or for any liabilities incurred in the construction, repair, equipment, or operating of the line, upon any part of its railroad or branches, and upon the estate granted by the act, and upon any or all of its other property.

The company organized under the act, and accepted the grant made by its provisions upon the terms and conditions mentioned, and, during the year, had the greater part of the line of its road surveyed and located, and maps of the same filed with the governor of the Territory and the commissioner of the General Land-Office at Washington. The location was approved by the Secretary of the Interior; and, by his directions, the lands granted along the line were withdrawn from sale and settlement. A contract, as alleged, was also made with a responsible party for the construction of the main line

of the road; but work under it was only prosecuted for a month, when it was abandoned. No portion of the road was completed; and the failure of the company in this respect was ascribed to the general embarrassed financial condition of the country, in consequence of which it was unable to raise the necessary funds to proceed with the work.

The Territory of Minnesota became a State in October, 1857, though not admitted into the Union until May, 1858. Its constitution prohibited the loan of the State credit in aid of any corporation; but the first legislature assembled under it, being desirous of expediting the construction of the lines of the road in aid of which the congressional grant was made, proposed, in March, 1858, an amendment to the constitution, removing this prohibition so far as the four companies named in the act of May 22, 1857, were concerned. The amendment was submitted to the people, and, on the 15th of April of the same year, was adopted. This amendment provided that the governor should cause to be issued and delivered to each of the four companies special bonds of the State to the amount of $1,250,000, in instalments of $100,000, as often as any ten miles of its road was ready for placing the superstructure thereon, and an additional instalment of the same amount as often as that number of miles of the road was fully completed and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota State Railroad Bonds; were to draw interest at the rate of seven per cent per annum, payable semi-annually in the city of New York; were to be transferable by indorsement of the president of the company, and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of the interest and the redemption of the principal the faith and credit of the State were pledged. The amendment at the same time with this pledge declared that each company should make provision for the redemption of the bonds received by it, and payment of the interest accruing thereon, so as to exonerate the treasury of the State from any advances of money for that purpose; and, as security therefor, required the governor, before any bonds were issued, to take from each company an instrument pledging the net profits of

its road for the payment of the interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell, to protect the treasurer against loss on the bonds; and also required, as further security, that an amount of first-mortgage bonds on the roads, lands, and franchises of the company, corresponding in amount to the State bonds issued to it, should be transferred to the treasurer of the State with the issue of the State bonds. The amendment declared, that, in case either company made default in the payment of the interest or principal of the bonds issued to it, no more State bonds should be thereafter issued to that company, and that the governor should proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed to secure the bonds. The amendment further provided, that, in consideration of the loan, each company which accepted the bonds should, as a condition thereof, complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; and that any failure on the part of the company to complete the number of miles of its road in the manner and within the several times thus prescribed should forfeit to the State all the rights, title, and interest of any kind whatsoever in and to any lands granted by the act of May 22, 1857, together with the franchises connected with the same, not pertaining or applicable to the portion of the road by it constructed, and a fee-simple to which had not accrued to the company by reason of such construction.

The Minnesota and Pacific Railroad Company, after the proclamation of the governor of its adoption, accepted the amendment, and gave notice to the governor of its acceptance, and that it proposed to avail itself of the loan which the amendment provided.

On the 31st of July, 1858, the company executed to certain trustees named therein a deed of all that portion of its lines of road in aid of which the lands had been granted, and of the lands and alienable franchises connected therewith, in

trust for the holders present and prospective of twenty-three millions of bonds to be issued under certain restrictions. Nine hundred of these bonds were subsequently issued as therein provided, and some of them were put in circulation. The present suit is brought by the surviving trustees to obtain a decree that this deed is a valid and subsisting lien prior to all other liens and incumbrances upon all the lands, property, and franchises described therein, and to enforce the same.

Subsequently, during that year, the company graded thirty miles of its road, and made it ready for the superstructure, and thereupon executed the pledge of net profits, and the conveyance of two hundred and forty sections as provided by the constitutional amendment. But, in place of first-mortgage bonds secured by a separate deed of trust, the company offered $300,000 of its bonds secured by the trust-deed mentioned of July 31, 1858, and applied for State bonds of an equal amount. The governor refused to issue the State bonds until a deed of trust was executed specifying a priority of lien of the bonds which the company might deliver to the State. This refusal led to a great deal of controversy and some litigation with the governor; but ultimately, on the 27th of November, 1858, a supplemental deed of trust was executed by the company, authorizing and directing, in case of default in the payment of the interest or principal of its bonds delivered to the State, a foreclosure and sale by the trustees upon the demand of the governor, and, in case of their failure or refusal upon his demand, authorizing the governor to make such foreclosure and sale. The governor then issued to the company bonds of the State to the amount of $300,000. Subsequently, during that and the following year (1859), thirty-two and one-half miles more of the road were graded and ready for its superstructure, and $300,000 more of bonds of the State were issued to the company, and a corresponding amount of the first-mortgage bonds of the company were delivered to the treasurer. The interest on the State bonds was payable on the first days of June and December, and the interest on the company's bonds was payable on the first days of February and August, of each year.

The company made default in the payment of interest on

the State bonds delivered to it, falling due in December, 1859; and the governor demanded of the trustees, in the deed of July 31, 1858, that they should proceed to foreclose the same, and sell the trust-property. With this demand the trustees never complied.

The company also made default in the payment of interest upon its own bonds delivered to the State, due on the 1st of February, 1860. The legislature accordingly, in March following, passed an act making it the duty of the governor to foreclose the deed of trust, if in his opinion the public interest required it, and, upon a sale of the property, rights, and franchises covered by the deed, to bid in the same for the State.

The legislature at about the same time proposed an amendment of the constitution of the State prohibiting any law, which levied a tax or made other provisions for the payment of interest or principal of the State bonds issued to the company, from taking effect until the same had been submitted to a vote of the people and been adopted; and also prohibiting any further issue of bonds to the company under the amendment of April 15, 1858, and abrogating that amendment with a reservation to the State of all rights, remedies, and forfeitures accruing thereunder. This amendment was adopted in November, 1860. Whilst it was pending before the people, the governor proceeded under the act of the legislature, and had the property covered by the trust-deed of the company, with the connected franchises, advertised and sold, the same being purchased on behalf of the State. The sale took place on the 23d of June, 1860.

In March, 1861, the legislature passed an act, by which the road, lands, rights, and franchises possessed by the company previous to the sale, and all bonds and securities of the company held by the State, were upon certain conditions "released, discharged, and restored" to the company, free from all liens or claims of the State. These conditions required the construction and equipment of certain portions of the road within designated periods. One of the conditions provided that the company should construct and put in operation, and fully equip for business, that portion of the main line extending from St. Paul to St. Anthony, on or before the first day of the following January, in default of which all the rights

and benefits conferred upon the company by virtue of the act should be "forfeited to the State absolutely, and without further act or ceremony whatever;" and, in case the company should fail to construct the other and further portions of the road and branches within the time or times designated, it should forfeit to the State, in like manner, all the lands, property, and franchises pertaining to the unbuilt portions of the road and branch; and in either case, or in any forfeiture under the provisions of the act, the State should hold and be possessed of all the lands, property, and franchises forfeited, "without merger or extinguishment, to be used, granted, or disposed of, for the purpose of aiding and facilitating the construction of said road and branch."

This act the company accepted with all its conditions; but it never completed the portion of the road there designated to be put into operation before the first of the following January, or any portion of its road, as there provided, or as provided in the constitutional amendment of 1858; and on the 10th of March, 1862, the legislature, acting upon the forfeiture accruing, or supposed to be accruing, from the failure of the company in this respect, passed an act creating the St. Paul and Pacific Railroad Company, and granted to it all the rights, benefits, privileges, property, franchises, and interests of the Minnesota and Pacific Railroad Company acquired by the State by virtue of any act or agreement of the company, or any thing done or suffered by it, or by virtue of any law of the State or Territory, or of the constitution of the State, or from the sale made by the governor, and also all the rights, privileges, franchises, lands, and property granted to the company by the act of May 22, 1857. The new company, and a division company subsequently created out of it, have since constructed the main line of the road and a portion of the branches, and, to enable them to do so, have made various deeds of trust and mortgages upon the assumption that the rights of the old Minnesota and Pacific Railroad Company had ceased. These deeds of trust and mortgages amount to many millions of dollars, and are outstanding. These companies and the holders of their bonds, of course, resist the enforcement of the deed of trust in suit. The questions for determination relate, *first*, to the validity of this

deed at the time it was executed, or rather to the right of the company to include therein and bind all the lands granted by the act of the Territory of May 22, 1857; and, *second*, to the effect of the act of March 10, 1862, upon the title of the property and connected franchises embraced in the deed of trust.

Mr. Henry F. Masterson for the appellant.

The court below erred in holding, that, under the act of Congress, the legislature could not authorize the trust-deed, in advance of the construction of the road, so as to give a lien on all the lands, as against the State and her subsequent grantees "who actually built the road and earned the land," with notice of said deed.

As the lands were granted "to aid in the construction of the road," they could not effectually be so used except as a basis of credit and security. All previous grants for similar purposes, covering a period of over thirty years, had been made available and used in this way. *Trustees of Wabash & Erie Canal Co.* v. *Beers*, 2 Black, 448. Congress must, therefore, have intended such use.

The act of March 3, 1871 (16 Stat. 588), is a construction by Congress of the act making the grant, and shows that it was understood as authorizing the incumbering of the lands in advance of the construction of the road. A like legislative construction will be found in the act of March 3, 1873. 17 id. 634.

If, therefore, by the true construction of the act of March 3, 1857 (11 Stat. 195), it was lawful to mortgage, or to convey in trust, the lands, in order to raise money with which to construct the road, it then follows that such an instrument is an effectual and valid security for such money, whether the road was wholly completed with it or not; otherwise a subsequent lender and junior mortgagee would not only have the first lien, but the whole security. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *United States* v. *New Orleans Railroad*, 12 id. 362; *Dunham* v. *Railroad Company*, 1 id. 254. The true construction, however, of the act of Congress, in this regard, is immaterial. The United States does not complain, and no other party can. *Baker* v. *Gee*, 1 Wall. 333-337; 2 Bl. Com. 155; 4 Kent, 127; *Nicoll* v. *N. Y. & Erie Railroad Co.*, 2 Kern. 121-140; *Lamb* v. *Davenport*, 18 Wall. 307.

If the lenders took the risk of losing their security by reason of a forfeiture or a reversion to the United States, they assumed no such risk toward the State. Such title as she might acquire by forfeiture would be subject to the lien, (2 Bl. Com. 267; 4 id. 381–384; 4 Kent, 427); and the twenty-first section of the act incorporating the Minnesota and Pacific Railroad Company especially estopped her from claiming adversely to the trust any of the fund. A contract at once arose between the lenders and the State that she would not withdraw any of the fund, or impair their security. *Curran* v. *Arkansas*, 15 How. 304; *Hawthorn* v. *Calef*, 2 Wall. 10; *Von Hoffman* v. *City of Quincy*, 4 id. 535; *Woodruff* v. *Trapnal*, 10 How. 190; *Barings* v. *Dabney*, 19 Wall. 9; *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518.

The State having, by the sixteenth section of the charter, granted all her expectant or prospective interest in the land, she and her subsequent grantees are estopped from denying her title or that of her original grantee. If these sections have no other force and effect, they operate as a lawful and sufficient power to create the lien; and the State is equally bound as if the trust had been made by one of her executive officers acting under like legislative authority.

The court erred in holding that the State of Minnesota, or any one but the United States, could take advantage of the breach of conditions of the congressional grant, or be heard to object that said trust-deed was not authorized by the act. The United States was the grantor. Conditions can only be reserved for the benefit of the grantor and his heirs: these conditions will be held to have been waived, unless re-entry or its equivalent is made. 2 Bl. Com. 155; 4 Kent, 127; *Baker* v. *Gee*, 1 Wall. 333; *Smith* v. *Sheeley*, 12 id. 358; *Lamb* v. *Davenport*, 18 id. 307; *Nicoll* v. *N. Y. & E. R.R. Co.*, 2 Kern. 121–140.

The estoppel which precluded the State from denying the validity of the trust-deed extended to her subsequent grantees, because they not only took with notice, but paid nothing for the franchises, road-bed, and property acquired before the passage of the act of 1862.

The court was in error in holding, in effect, that the legislature could not authorize such trust-deed in advance of the

construction of the road and the acquisition of other property than that derived through the United States, so as to be a lien upon the road when constructed, and upon said other property when acquired.

It is settled law, that a railroad mortgage like that in question, although made before the construction of the road, attaches itself thereto as the work thereon is built, and to all subsequently acquired property of the company. *Galveston Railroad* v. *Cowdrey*, and *Dunham* v. *Railway Company*, *supra*.

The court was also in error in holding that there was or could be any forfeiture under or by force of the constitutional amendment in any way when taken in connection with the facts stated in the bill, and in holding, that, in any event, title could be acquired by such forfeiture without judicial process and judgment.

The constitutional amendment is not a deed or a legislative grant. Its conditions are, therefore, not conditions in deed. It created no estate whatever in any thing embraced by the trust-deed, as the condition of forfeiture is not attached to and does not accompany the grant upon which it is to operate, and cannot be taken advantage of by re-entry or legislative act. Litt., sect. 325; 2 Bl. Com. 154; 4 Kent, 123. Nor is it a condition in law in the sense that it is *implied* (Litt., sect. 378; 2 Bl. Com. 153; 4 Kent, 120; *Davis* v. *Gray*, 16 Wall. 223), or one which the State may in its own right annex to any or all property which a person has or may acquire, whether from her or another source; *ex. gr.*, a condition of forfeiture for crime or negligence. 2 Bl. Com. 267, 420; 4 Kent, 426. Even if it were a condition in law, in this sense, the forfeiture would not avoid the incumbrance. 2 Bl. Com. 421; 4 id. 381, 387; 4 Kent, 427.

The amendment was a contract of lending. The thing loaned was the credit of the State. The security was a pledge of the net profits of the road, a conveyance in trust of the first two hundred and forty sections of land under the congressional grant, and a portion of the first-mortgage bonds of the company to be issued under sect. 21 of its charter. The provision, that, in consideration of the loan, the company should construct its roads within a specified time, was intended as a penal pro-

vision *in terrorem*, and not for the purpose of further security and indemnity against loss on account of the loan, but as security for an *extra* diligent user of the franchises, and indemnity for a *non-extra* diligent use.

The forfeiture being for a non-extra diligent use, and no special remedy or mode of taking advantage of it provided, the State was left to the common-law remedy of judicial process and judgment. It could be enforced in no other way. *Davis* v. *Gray*, 16 Wall. 232; *Curran* v. *Arkansas*, *supra*; *Mumma* v. *Potomac Co.*, 8 Pet. 281.

Conceding that this provision for forfeiture was of the nature of a condition in deed, and could be taken advantage of without judicial action, it still remains true that the State lost the right to it, and barred even the judicial remedy, by her own illegal acts, and first and continued breach of the contract which created the condition.

The act of March 8, 1861, with its acceptance by the company, was a mutual rescission, and an agreed abandonment of all prior contracts, engagements, and obligations; a waiver and release of all previous defaults and forfeitures, if any there were; and a new contract in the premises, taking the place of the constitutional amendment.

The court erred in holding that the act of March 10, 1862, was intended as an enforcement or taking advantage of the condition of forfeiture in the constitutional amendment, because the State wished and intended to take under the act of 1861 "without merger or extinguishment."

This act of 1862 cannot stand as an equivalent for re-entry for a breach of condition in a deed, because the constitutional amendment was not such an instrument. It is not competent for the legislature, by its own act, to seize property for a breach of conditions which are imposed by a statute. While a legislative declaration may be equivalent to re-entry, a re-entry will not avoid a grant from strangers; nor an estate from the grantor, except it be conveyed by his deed containing the condition.

The only ground upon which the act of 1862 can be upheld is, that it was taking advantage of the forfeiture provided in the act of 1861, which took effect of itself, upon the happening

of the event. This forfeiture, it is conceded, would not affect the rights of bondholders secured by the prior deed of 1858.

The court erred in holding that the act of March 10, 1862, created a new corporation; and that the St. Paul and Pacific Company is not the same corporate entity as the Minnesota and Pacific Company, and so liable for its debts. The State, by the act of March, 1861, evidently intended, if she should take by forfeiture at all, to take under the provisions of that act. A change in the succession of corporators does not change the corporation in its existence or liabilities, no matter how such change is brought about; and because the St. Paul and Pacific Railroad Company and its successors have succeeded to and hold the franchise to be a corporation, created by the charter of May 22, 1857, they are in law the same being; the same invisible, incorporeal, personal entity; and so liable for its debts. 2 Kent Com., Lect. 33; 2 Bl. Com. c. 18; id. c. 3, p. 37. Story, J., in *Trustees of Dartmouth College* v. *Woodward*, *supra.*

Two things should be presumed by this court: first, that the legislature did not intend a violation of the provision of the Constitution which prohibited the formation of corporations of this character by special act (Const. of Minn., art. 10, sect. 2); second, that it intended that the grantees of said act of 1862, and their successors, perpetually, should have and enjoy all the rights and franchises conferred on the stockholders of the Minnesota and Pacific Company by the act of 1857. These premises necessitate the conclusion, that the grantees and their successors of the act of 1862 stand in the shoes of the corporators of the act of 1857.

If this is not the logical, legal conclusion from the premises, where and how do the stockholders and their successors of the St. Paul and Pacific Railroad Company get their corporate entity?

The State authorized the trust in question, and took the property charged with it. If the supplement and foreclosure were valid as between the State and the company, the lien of other bondholders was unaffected thereby, that is, all that the State did or could acquire were the rights and interests of the mortgagor, the company; because she paid nothing, but took

or attempted to take the whole trust-fund for the interest due upon her own bonds, without payment, or provision for payment, or *pro rata* payment, of the interest due to other bondholders. "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment." *Gue* v. *Tide-Water Canal Co.*, 24 How. 263.

Mr. H. R. Bigelow and *Mr. William H. Scott* for the appellees.

No part of the lands embraced by the congressional grant vested in the Minnesota and Pacific Railroad Company, inasmuch as the road was not *constructed*. *Schulenberg* v. *Harriman*, 21 Wall. 44.

But conceding that, at the date of the trust-deed, the company possessed a mortgageable interest in the lands and in her franchises and present and future property, they all became forfeited to the State under the constitutional amendment of April 15, 1858, by reason of the non-completion of the road within the specified time.

This forfeiture is a complete bar and defence to the present action.

The constitutional amendment, the acceptance thereof by the company, and her receipt of State bonds thereunder, amounted together to an amendment, with her consent, of her charter, whereby the provision of forfeiture was incorporated in that instrument. The rule in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, and other decided cases, that no alteration impairing the obligations of the charter of a corporation can be made by the legislature of a State, is laid down with the express qualification that such alteration must be "without the consent of the corporation." The consent was, in this case, founded upon a valuable consideration, — the issue of State bonds to the amount of $600,000.

If the ancient rule of the common law — that, as to things executed, a condition must be created and annexed to the estate at the time of the making of it, and not at any time thereafter — is still in force, this case, even viewed as between individuals, is still within the distinction laid down by Coke (Inst. 236). The grant was entirely conditional upon the re-

quired completion of the road. The estate of the company was, therefore, a purely "executory inheritance." Even if the rule could be held to apply to a grant by a *State*, its application is entirely superseded by the provisions of the constitutional amendment. They were designed to secure the completion of the road, or specified portions, within the time prescribed, by enabling the State, in case of default, to resume the franchises and lands pertaining to the uncompleted portion, or the whole if twenty miles had not been completed, and to seek other agencies or means for accomplishing the end in view. The reversion to the general government, provided for in the act of Congress making the grant, might be thus prevented.

The forfeiture is, moreover, maintainable upon strictly equitable grounds. It was the express contract of the parties, based upon a good, valuable, and adequate consideration. Respecting the State, the company was a mere donee. It received a most liberal grant of franchises and lands, and a loan of the credit of the State, upon the sole condition that it should proceed with the construction and completion of the road with the despatch required by the Territorial and State grants. This it undertook to do. Such completion within the time prescribed was not a collateral or incidental, but the exclusive, purpose of the amendment. Any default in this respect admitted neither compensation nor restoration of the *status in quo*. 2 Story's Eq. Jur., sects. 1314, 1316, 1324; *Peachy* v. *The Duke of Somerset*, 1 Str. 447, 453.

The forfeiture will be sustained (1.) because it was imposed by statute. 2 Story's Eq. Jur., sect. 1326; *Peachy* v. *The Duke of Somerset*, *supra*; *Keating* v. *Sparrow*, 1 Ball & B. 373. (2.) Upon considerations of public policy. Upon the same principle, courts of equity have refused relief against forfeitures incurred under the by-laws of corporations for the non-payment of stock-subscriptions. 2 Story's Eq. Jur., sect. 1325; *Sparks* v. *Liverpool Waterworks Company*, 13 Ves. 428. (3.) Because the case was one where time was emphatically of the essence of the contract. *Dunklee* v. *Adams*, 20 Vt. 415; *Baldwin* v. *Van Vorst*, 2 Stock. Ch. 517; 3 Lead. Cas. in Eq. 672. (4.) On account of the insolvency of the Minnesota and Pacific Railroad Company at the time the forfeiture was asserted

and declared by an act of the legislature of the State of Minnesota of the 10th of March, 1862, and of its conceded inability to complete the road as required. *Dunklee* v. *Adams*, *supra*.

In so far as the present action seeks to establish a lien in favor of the complainants, as trustees, upon the railroad constructed, and the property and appurtenances acquired by the St. Paul and Pacific Railroad Company, it must wholly fail. There is no privity whatever between that company and the Minnesota and Pacific Railroad Company in respect to the railroad, property, or acquisitions of the former company.

Although it must now be regarded as the settled doctrine of this court, that a mortgage executed by a railroad company, conveying and covering its subsequently acquired property, will render such property subject to the mortgage, *pari passu*, with its acquisition, yet it is equally well settled that this is so only "as against the company and its privies," and only as fast as the property covered by the terms of the mortgage "comes into existence as property of the company." *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459.

Even this doctrine is somewhat of an innovation upon the established maxim of the common law, that "a person cannot grant a thing which he has not." It has been allowed, in regard to railroad mortgages, upon considerations compounded both of equity and of public policy; and is, therefore, not to be extended.

The St. Paul and Pacific Railroad Company is in no privity whatever with the Minnesota and Pacific Railroad Company. It derives its title to all its property and franchises by a grant from the State of Minnesota in hostility to and in forfeiture of the title of the latter company.

The two companies are not, under different names, the same company. This has been expressly determined by the highest court of the State of Minnesota; and that adjudication, involving as it does a direct construction of the object and effect of an act of the legislature of that State, will be adopted and followed by this court.

MR. JUSTICE FIELD, after making the foregoing statement of the case, delivered the opinion of the court.

The act of Congress granting lands to the Territory of Minnesota imposed conditions upon their alienation, except as to the first one hundred and twenty sections, which the Territory could not disregard. It declared that the lands should be exclusively applied to the construction of the road in aid of which they were granted, and to no other purpose whatever, and should be disposed of only as the work progressed. It provided that their sale should be made in parcels as specified portions of the road were completed, and only in that manner. The evident intention of Congress was to secure the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first one hundred and twenty sections. The act made the construction of portions of the road a condition precedent to a conveyance of any other parcel by the State. No conveyance in disregard of this condition could pass any title to the company. It was so held by this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, where we had occasion to consider provisions of a statute identical in terms with the one before us.

The act of May 22, 1857, passed in advance of any work on the road, conveyed, therefore, no title to the Minnesota and Pacific Railroad Company in the lands granted by Congress beyond the first one hundred and twenty sections. Of course, the mortgage, or deed of trust, subsequently executed by that company, so far as it covered such lands, was inoperative for any purpose.

Whatever interest passed to the company in the one hundred and twenty sections was subject to forfeiture under the constitutional amendment of April 15, 1857. That amendment, which the company voluntarily accepted, provided, as already stated, that upon failure to complete certain portions of the work within prescribed periods it should forfeit these lands, and all other lands held by it, with the connected franchises, except such lands as were acquired by construction of portions of the road. The parcels thus earned were excepted from forfeiture. It was certainly competent for the company to subject its property, rights, and franchises conferred, or attempted to be conferred, by the act of May 22, 1857, or derived from any other source, to this liability. Its assent in this respect was one of

the conditions upon which it received the loan of the State credit provided by the constitutional amendment. When the assent was given, the relation of the State to the land and connected franchises was precisely as though the condition had been originally incorporated into the grant. The mortgage or deed of trust not having been executed until after the amendment was accepted, and the holding of the lands of the company, with its rights, privileges, and franchises, having been thus made dependent upon the completion of the road within the periods prescribed, the beneficiaries under that instrument took whatever security it afforded in subordination to the rights of the State to enforce the forfeiture provided. That forfeiture was enforced by the act of the legislature of March 10, 1862; unless we are to presume that at the sale made in 1860 by the governor, under the act of March of that year, and the supplemental deed of trust, the entire interest and right of the company were acquired by the State. It is averred in the bill of complaint that this sale was void, and that it was so adjudged by a district court of the State. If this adjudication was valid, and the sale was void, the forfeiture provided by the constitutional amendment was enforced by the act mentioned. A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination — that is, by judicial proceedings — is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee, —

such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object,—will be equally effectual and operative. It was so decided in *United States* v. *Repentigny*, 5 Wall. 211, and in *Schulenberg* v. *Harriman*, 21 Wall. 44, with respect to real property held upon conditions subsequent. In the former case, the court said that "a legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings." And there would seem to be no valid reason why the same rule should not apply to franchises held in connection with real property, and subject to like conditions, where the franchises were created for the purpose of carrying out the public object for which the real property was granted.

In this case there were special reasons for the provision for a forfeiture, and for its immediate enforcement by the State, in case of the grantee's failure to construct designated portions of the road within the time prescribed. The act of Congress provided, that, in case the road was not completed within ten years, the lands of the grant then remaining unsold should revert to the United States. It was, therefore, necessary for the State to see that the construction of the road was commenced and pushed forward without unnecessary delay, to prevent a possible loss of portions of the grant. By the clause of forfeiture, the State was enabled to retain such a control over the lands and connected franchises, that, in case the company failed to build the road in time, it could make arrangements with other companies or parties for that purpose. This control would have been defeated if the State had been subjected to the delay of judicial proceedings before a forfeiture could have been enforced. The entire grant would have been lost to the State whilst such proceedings were pending. A more summary mode of divestiture was therefore essential, and was contemplated by the parties.

The only inconvenience resulting from any mode other than by judicial proceedings is that the forfeiture is thus left open

to legal contestation, when the property is claimed under it, as in this case, against the original holders.

But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law. "Where any penalty or forfeiture," says Mr. Justice Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will." Story's Eq. Jur., sect. 1326. The same doctrine is asserted in the case of *Peachy* v. *The Duke of Somerset*, reported in 1st Strange, and in that of *Keating* v. *Sparrow*, reported in 1st Ball & Beatty. In the first case, Lord Macclesfield said that "cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain." In the second case, Lord Manners, referring to this language and taking the principle from it, said that "it is manifest, that, in cases of mere contract between parties, this court will relieve when compensation can be given; but against the provisions of a statute no relief can be given."

For these reasons, the forfeiture in this case declared by the legislature cannot be interfered with by the court. But, as stated by counsel, the forfeiture will also be upheld on considerations of public policy, as well as from the impossibility of obtaining compensation from the railroad company for its default, on the same principle upon which courts of equity refuse to relieve against forfeitures incurred under the by-laws of corporations for the non-payment of stock-subscriptions. To this subject Mr. Justice Story refers in his Commentaries, and after stating the general doctrine, that courts of equity will not

interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation for the breach, says, —

"It is upon grounds somewhat similar, aided also by considerations of public policy, and the necessity of a prompt performance in order to accomplish public or corporate objects, that courts of equity, in case of the non-compliance by stockholders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture. The same rule is, for the same reasons, applied to cases of subscriptions to government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan as to the time and mode and place of payment."

The case of *Sparks* v. *The Liverpool Waterworks Company*, cited by counsel, is a strong illustration of this doctrine. 13 Ves. 428. The company there was incorporated to supply the town and port of Liverpool with water; and the property in and the profits of the undertaking were vested in the company in such shares and subject to such conditions as should be agreed upon. By articles of agreement, a committee of the company was authorized to call upon the shareholders for the several sums payable by them on their respective shares; and it was, among other things, provided, that in case any shareholder made default in the payment of his calls for twenty-one days after the time appointed, and for ten days after subsequent notice addressed to his then or last usual place of abode, his share or shares should be absolutely forfeited for the benefit of the other members of the corporation. The plaintiff was the owner of certain shares of stock in the company, upon which payment had been made upon thirty-four calls. The payment of the thirty-fifth call was omitted through his failure to receive personal notice of the call; it having been sent to his town residence whilst he was absent in the country, and not having been forwarded to him. For the non-payment upon the call his shares were declared forfeited. Immediately upon receiving information of the call, on his return to the city, he gave directions for its payment; and on the following day

the amount was sent to the bankers of the company. The committee of the company, however, informed him that they could give him no relief, as they had acted according to the laws of the company, from which no deviation could be made. The plaintiff thereupon filed a bill for relief against the forfeiture, on the grounds of accident, and that compensation might be made, and no injury be sustained by the company; his counsel also insisting upon the invalidity of the by-law, as unreasonable, exorbitant, and uncertain: but the court dismissed the bill, for the reason that the enterprise was a public undertaking, requiring for its successful prosecution punctuality of payment from the shareholders. Considerations of public policy forbade the granting of relief; for, as the court observed, "if this species of equity is open to the parties engaged in these undertakings, they could not be carried on."

The act of March 10, 1862, is a clear assertion of forfeiture of the estate, rights, privileges, and franchises of the Minnesota and Pacific Railroad Company. It grants all of them in express terms to the new company, and makes them in its possession subject to be forfeited to the State if the conditions annexed are not performed. And the failure of the original company to complete any portion of the road, as provided in the amendment of 1858, is not questioned by the complainants. Their position is, that the State had previously lost the right to a forfeiture by her own breaches of the amendment; that forfeiture could not be effected without judicial process and judgment; and that the forfeiture, if any accrued, was waived by the act of March 8, 1861, and its acceptance by the company.

The alleged breaches of the amendment by the State, at least such as are entitled to notice, consist in the refusal of the governor to receive the bonds of the company secured by the trust-deed of July 31, 1858, as the first-mortgage bonds required to be delivered to the treasurer in exchange for the State bonds, the exaction of the supplemental trust-deed, and the adoption of the constitutional amendment of November, 1860, abrogating the amendment of 1858, and prohibiting any law which levied a tax or made other provisions for the payment of the bonds of the State from taking effect until submitted to a vote of the people and adopted.

The amendment of 1858 evidently contemplated that the first-mortgage bonds of the company delivered to the treasurer in exchange for State bonds should be secured by a separate deed of trust, or at least by a deed which could be enforced by the governor, and not by a deed executed to parties over whom he could exercise no control. Whether the supplemental deed of trust was a sufficient compliance with the provision of the amendment, and whether it could create a priority of lien in favor of the bonds transferred to the State over bonds previously issued by the company to other creditors, it is unnecessary to determine. If defective or inoperative in either of these particulars, the objection cannot be raised by the company. Besides, if it could be considered as a matter of serious doubt whether the State was entitled to require a separate instrument of the character executed, its voluntary execution and acceptance by the governor and the subsequent exchange of bonds would seem to be a settlement of the question.

The adoption of the constitutional amendment of November, 1860, certainly had the effect to impair the value of the bonds of the State. But it is the holders of those bonds who had a right to complain of this proceeding, not the company or the trustees under the deed in suit. The holders of those bonds looked, in the first instance, to the State for their payment: the State was primarily liable to them; and they were, therefore, injuriously affected by the amendment. Whether the company was liable at all to the bondholders on the bonds from the indorsement of its president, it is unnecessary to determine: but, assuming such liability, then, as between the company and the State, the company was the principal debtor, and the State only a surety; and, with that relation existing, the company could not complain that the State, its surety, did not pay the bonds, interest or principal. And the trustees could not complain; for no right or contract between them and the company, or between them and the State, was impaired by the proceeding.

The amendment of 1858 prohibited any further issue of State bonds, whenever the company made default in meeting the interest on those issued. The withholding, therefore, of any further bonds, after such default, violated no contract of the State with the company; nor did it impair the right of the

State to enforce a forfeiture of its grant if the stipulated conditions as to the completion of the road were not complied with. After such default (no redemption from it having been made), all obligation of the State to the company ceased: its obligation remained only to its bondholders. That obligation still remains, and will remain until the pledge of its faith for the payment of the bonds is redeemed.

As to the alleged waiver of the forfeiture by the act of March 8, 1861, and its acceptance by the company, only a word need be said. The waiver, if the provisions of the act can be construed as such, was only conditional; and the condition was not complied with. There had previously been, as already stated, a foreclosure and sale of the property, rights, and franchises of the company under its supplemental deed of trust, pursuant to the act of the legislature of the previous year; and, at the sale, the State had become the purchaser. The act of March 8, 1861, released and restored to the company the road, lands, rights, and franchises which it had possessed previous to the sale, and all bonds and securities of the company held by the State, free from all liens or claims thereon. The release and restoration were upon express conditions, one of which was that the company would construct and put into operation before the following January a designated portion of its road; and the act declared, that, upon the default of the company in this respect, all the rights and benefits conferred by virtue of the act should be "forfeited to the State absolutely, and without any further act or ceremony whatever," to be held by the State "without merger or extinguishment, to be used, granted, or disposed of, for the purpose of aiding and facilitating the construction of said road and branch." The designated portion of the road was not constructed within the prescribed period, and never has been constructed; and it was with reference to the forfeiture provided for its default in this respect, as well as the forfeiture provided by the amendment of 1858, that the act of March 10, 1862, was passed. That act operated to divest the company of all interest in the one hundred and twenty sections of land and connected franchises transferred to it by the Territory in 1857, or subsequently acquired.

It follows from these views that the court below properly sustained the demurrer to the bill. *Decree affirmed.*