

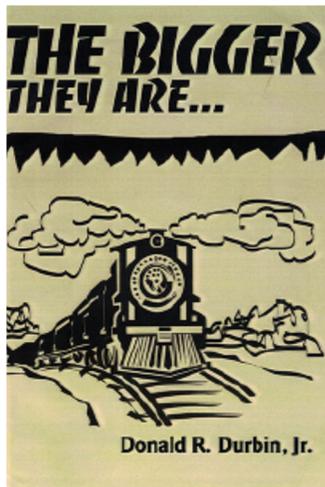
“The title of this book: “The Bigger They Are . . .” does not fit the story. After all, the Big Railroad won, and rightly so.

“The Bigger They Are . . .”

By Donald R. Durbin, Jr.

**Reviewed by David J. Meyers
(January 23, 2018)**

I seldom read a biography written by a family member. It usually falls into one of two categories. Either the subject is the devil incarnate and the source of all of the author’s personal problems and ruined life. Or, the saintly relative is treated like the second coming. This book falls into the latter, but not to the extreme. “The Bigger They Are . . .” is a 292 page saga written by



the great-grandson of Will Burfening. Will thought that he had hit the mother-lode and then spent his life and money on a claim that had no basis in law or fact. The book consists mainly of Administrative and Court filings and Orders, letters and newspaper accounts ranging from 1863-1957. The author is not a lawyer.

Federal and State Court Pleadings and Orders are often mixed in together.

Newspaper articles are sometimes taken out of context. I suspect that the

author found the family treasure trove of material handed down by his great-

grandfather, which he organized into a book with a family narrative. The book argues that a great injustice was done to an honest man.

Burfening was not a foolish man. His family of German immigrants ran businesses, including a beer garden or tippling house (a higher class of saloon), hotels and shops. They were the kind of people who built this country. In this case, Burfening thought he had stumbled upon three small, valuable islands in the Mississippi River in Minneapolis that government surveyors and everyone else had missed. He could never accept that his claim was no good. He never had a legal case. Despite evidence and law to the contrary, Burfening, and I suspect generations of his family members, all believe that he was cheated by the Big Bad Railroad. Still, it is an interesting story primarily because of the historic context surrounding the case.

The facts of Burfening's case are not disputed. In 1863, Burfening's father bought a couple of lots on the western shore of the Mississippi River near downtown Minneapolis. Burfening thought he had discovered three islands in the River near his father's land that were not shown on the 1853 original government survey. The islands are a little south of the Plymouth Avenue Bridge and northwest of Nicollet Island. They are visible today on Google Maps.

Burfening looked at the Government Land Office maps, realized that the islands were not shown, and convinced himself and, at first, the Government Land Office that there was a mistake in the Original Government Survey. In 1878, Burfening convinced the Government Land Office to survey the islands. Then a John Van Anker, who had used scrip to acquire a homestead on 155 - 11/100 acres in Kansas, used part of his remaining scrip to buy the islands. Van Anker was entitled to a full 160 acres (a typical quarter section) of scrip. After acquiring the Kansas homestead, he still had 4 - 89/100 acres worth of scrip left. Van Anker applied to homestead the three islands and used 1 – 95/100 acres of his remaining scrip to obtain the Federal Land Patent. In 1883, Van Anker transferred the islands to Burfening, who moved onto them to claim homestead rights. Burfening homesteaded on the islands until 1887.

In 1887, the Chicago St. Paul Minneapolis and Omaha Railroad signed a Purchase Agreement with Burfening's father to acquire the lots along the shore, and with Burfening to acquire the islands. The Railroad closed on the purchase of his father's lots, but decided that Burfening did not own the islands. The Railroad figured out that the 1878 resurvey of the islands was a mistake, and Burfening had no claim to the islands.

The past is never in isolation. Any good historical account should lead the reader to explore the context of the story. This story is filled with what lawyers would call sidebars.

The Federal Deputy Surveyors General were instructed to set meander lines along navigable rivers and lakes, and to survey larger islands. The shore land and islands then went into public ownership, but the lakes and rivers continued to change. The Courts have held that any change in the shore land through reliction or accretion belongs to the owner of the shore. The owner of the shore owns up to the middle of the river or lake. The government surveyed meander line was never meant to be a boundary. Instead it was used to determine the number of acres of land to be sold to the settlers. Lands adjacent to bodies of water were called Government Lots. Government Lots were sold by acreage, not by aliquot part, i.e. Quarter Section.

In Burfening's case, evidence at subsequent hearings and trial showed that Burfening's islands were most likely sandbars in 1853, when the Original Government Survey was completed. Through natural and man-made actions, the sandbars became islands.

The adjacent shoreline landowner, now the Railroad, owned the islands because the islands had been created by natural or man-made activity that altered the river. If the law were otherwise, outsiders could claim ownership

of land resulting from a change in the shoreline. Today ownership of changes in the shoreline is part of the riparian rights of the shore land owner.

The next interesting sidebar is that by 1883, the Mississippi River had been substantially changed by human activity. A December 18, 1902 decision of the Federal Department of Interior cited in the book confirms other accounts that in 1853, at the time of the Original Government Survey, the Mississippi River through Minneapolis was shallow, silty and filled with sandbars. Humans dredged out the river, blew out St. Anthony Falls and made the river navigable. In Burfening's case, opening the river helped create islands out of sandbars.

Burfening refused to accept that he did not own the islands or that his resurvey and homestead claim had no legal affect. He sued the Railroad claiming ownership of the islands.

In the first litigation, Burfening claimed that he had acquired the islands in 1883 and had established homestead rights by settling on them. His case was lost because Congress, in another interesting sidebar, had earlier adopted laws providing that any original public surveyed land in an incorporated city could not be homesteaded. Land in a city had become too valuable. Minneapolis was incorporated in 1881. By the time Burfening made his homestead claim in 1883, any land within the city limits was no

longer eligible for homestead rights. See: Burfening v. Chicago, St. P., M. O. Ry. Co., 46 Minn. 20, 48 NW 444 (1891); affirmed, 163 U.S. 321, 16 S. Ct. 1018 (1896).

In a second expensive and fruitless litigation, Burfening claimed title by Gerard Scrip. The technical aspects of scrip are lost on us today. Scrip was issued by the Federal Government to be used to purchase Government lands. It might have worked for Burfening, except by this time there was testimony and evidence that the islands did not exist in 1853, at the time of the original Government survey. The Court found that at the time of the original survey the three islands were sandbars. In the end, Burfening spent a lifetime on a claim that had no merit.

The premise of the book encapsulated in its title “The Bigger They Are . . .”, suggests that the Railroad, using its wealth and resources, beat a poor, good, honest man out of his property. That may have happened in some cases, but not here. And, the Railroads sometimes lost in Court by making the same unjustified claims that Burfening made in his case. See: In Schurmeier v. St. Paul and Pacific Railway Company, 10 Minn. 82, (1865); affirmed, 74 U.S. 272 (1868), In a reversal of the facts in the Burfening case, the railroad claimed that an island, which appeared at low water in the Mississippi River in St. Paul was public land. The Court found that the land belonged to the

adjacent shoreline landowner by the same legal principles that cost Burfening his islands.

As another sidebar, today we often criticize the Federal Government for giving away millions of acres of land to the railroads. We forget that government land was almost worthless without access and infrastructure. Raising a crop on the prairie would not be of much value, unless you could get the grain to market. Riding horses and wagons over very poor trails had its limitations.

Land was given to the railroads to entice them to build rail lines, ahead of settlements. The railroads had to be given an incentive to invest capital. The government's incentive was plenty of land.

This is not to say that it worked well for everyone. The railroads used their monopoly to their own benefit once towns and farms were established. But, without the Federal Government granting land in exchange for infrastructure, settlement would have had to wait for the automobile.

The most puzzling part of Burfening's story is that in 1915, Burfening and his wife settled with the Railroad for \$1,000. In return, they signed a Quit Claim Deed conveying the islands to the Railroad. As often happens even today, the Railroad probably paid the \$1,000 to make an unjustified claim go away. It was less expensive than litigation. The settlement language is clear,

and for a man who spent years trying to clear title, Burfening must have understood the import of signing a deed. Yet after he received payment and signed and delivered the deed, he continued to fight. The end result was inevitable.

In the end this book is an interesting read, and I think the author truly admired his great-grandfather's tenacity. It is a window into land speculation in the late 1800s.

The author does not put his family's story in historical context. There are a lot of fascinating questions about the period of history that he leaves out. He gives us several interesting leads, but does not explain how now forgotten points of law and terms fit into the story. That is the fun of reading this book.

It is also a lesson in knowing when to quit.

Perhaps the most interesting part of this story, which is long forgotten, was the use of scrip to acquire government land. Scrip provided a good income for speculators, brokers, lawyers and judges. Today, it is an historical footnote.

For most of the history of the United States, the Federal Government was land rich and cash poor. Prior to the Civil War (called the Rebellion by Northerners until the early 1900s), the Federal Government needed its land settled to protect it from foreigners and to build the nation.

The Government also had what I call the white people / Indian guilt problem in that Indian lands had been taken, which left native people with no place to go. In Minnesota, the Dakota (then called Sioux) Indians occupied most of Southern Minnesota. The Ojibway (then called Cherokee) occupied most of Northern Minnesota. As a way to compensate the Native Americans, the Federal Government issued scrip to Sioux and Cherokee tribe members and “half-breeds” to buy land, settle and hopefully make them more like the white people. (This is a historic fact. Don’t blame me for repeating it). Scrip could be used to acquire Government lands.

This was done at a time when the U.S. money supply was pegged to gold. The Federal Government and state and local banks could issue dollar bills only to the extent they had gold on reserve to back up the dollar bills. Today the hotly contested arguments over hard money (gold backed dollars = sound money) verses free silver (dollars backed with silver = easy money that would cause inflation), are lost to history.

Scrip was issued by the Government without gold backing, because it could be used only for the purchase of Government land. The idea was that the holder of scrip could acquire 160 acres of Government land anywhere that the land was available. Settlers would improve the land and would become part of the American civilization.

Scrip was a good idea, but it soon got out of hand. Gerard Scrip used in Burfening's case appears to be a particularly high quality of scrip that could be used almost anywhere that government land was available for settlement. There was also Sioux Half-Breed Scrip, Act of July 17, 1854, given to the Sioux Indians as part of the Treaty of Prairie du Chien, which ceded most of Southern Minnesota and parts of the Dakotas to the Whites; Gerard Scrip, Act of February 10, 1855, given to the children and heirs of messenger Indians killed in the Revolutionary War, under an Agreement between General George Washington and Joseph Gerard; Porterfield Scrip, Act of April 11, 1860; Agricultural Scrip, Act of 1862, which paid for Agricultural Universities; the First Reserved Land Scrip, Act of June 4, 1897; Military Bounty Warrants; the Homestead Scrip of 1860, and much more.

Scrip quickly ended up in the hands of speculators. Say you were eligible for scrip, but had no interest in acquiring land, or you did not need all of the 160 acres of land that could be purchased by your scrip, or maybe you needed quick and easy cash. You could sell your scrip at a discount for real cash. Brokers and speculators would buy the scrip, but had no interest in acquiring land. They would resell the scrip at a substantial profit to settlers and other speculators. Too often the intended beneficiaries of scrip got a few

dollars, and the speculators got rich. This is perhaps a necessary, but not unusual theme of American commerce.

The Federal Government tried to keep scrip out of the hands of speculators and to protect the original people it was intended to benefit. The Minnesota Supreme Court and ultimately the U.S. Supreme Court decided that Sioux Half-Breed Scrip was a personal right, which could not be assigned to rights by a power of attorney. Midway Co. v. Eaton, 79 Minn. 442, 82 N.W. 861 (1900); affirmed 183 U.S. 602, 22 S.Ct. 261 (1902). But, restrictions on the sale of scrip did not always work. The Minnesota Supreme Court had earlier ruled that Chippewa Half-Breed Scrip had no treaty restriction on transfer. Dole v. Wilson, 20 Minn. 356, 20 Gil. 308 (1874). In the Dole case, the person to whom the scrip had been issued was paid for the scrip and did not object to the transfer.

Scrip got out of hand. Andrew Volstead, a congressman from Granite Falls, Minnesota, authored a law by which all scrip would expire. So much scrip had been issued, most of it by this time in the hands of speculators, that there was no way to determine how much was left and what was valid. The law did not pass. Scrip seems to have run its course once all eligible federal land was in private ownership

As a final sidebar, Congressman Volstead's career was quickly ended by the passage of the Volstead Act. When the United States adopted the Eighteenth Amendment to the U.S. Constitution outlawing alcohol, Congress had to pass a law to enforce the Amendment. Volstead got the lucky job. Volstead's constituents, particularly the Germans in Stearns County, thought he was insane for banning alcohol. He was voted out of office at the next election. ▪

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