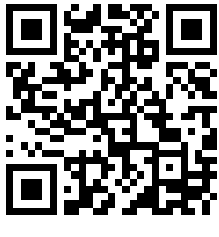

FOREWORD

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COVERING THE YEAR

1894

JOHN A. LARIMORE,
EDITOR.

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LIST OF PORTRAITS.

Hon. Hascal R. Brill, District Judge, Second District, - Facing 297
Hon. Calvin L. Brown, District Judge, Sixteenth District, - " 27
Hon. Pierce Butler, County Attorney, Ramsey County, - - " 208
Hon. Leon T. Chamberlain, Corporation Attorney of St. Paul, " 235
Hon. H. W. Childs, Attorney General of Minnesota, - - - " 141
Hon. Loren W. Collins, Associate Justice of Supreme Court, " 221
Hon. Charles B. Elliott, District Judge, Fourth District, - - " 27
Hon. J. D. Ensign, District Judge, Eleventh District, - - " 245
Hon. George W. Holland, District Judge, Fifteenth District, - " 167
Frank B. Kellogg, Esq., of St. Paul Bar, - - - - - " 271
Hon. Frank M. Nye, County Attorney, Hennepin County, - " 208
Hon. Gorham Powers, District Judge, Twelfth District, - " 91
Cordenio A. Severance, Esq., of St. Paul Bar, . - - - " 281
Hon. David F. Simpson, Corporation Attorney of Minneapolis, " 234
Hon. Charles M. Start, Chief Justice of Supreme Court, - - " 195
Hon. Wescott Wilkin, late District Judge, Second District, " 121
Hon. John W. Willis, District Judge, Second District, - - " 1

HON. JOHN W. WILLIS,

Judge of District Court, Ramsey County, Minn.

THE

MINNESOTA LAW JOURNAL.

JANUARY, 1894.

STRIKES AND TRUSTS.

FROM AN ADDRESS BY U. M. ROSE, ESQ., BEFORE THE AMERICAN BAR ASSOCIATION AT MILWAUKEE.

We hear so much in these days of the conflict between capital and labor that many are lead to believe that the phenomenon is peculiar to our age, or that it is assuming threatening proportions unknown to former times; but investigation will serve to show that these apprehensions are not well founded. The labor problem is probably no more capable of solution than that of squaring the circle. It troubled those who came before us, and it will trouble those who are to come after us; but it is a source of satisfaction to know that in most respects the conflict between these two forces is upon a safer and more hopeful basis than at any former time; a fact that must be ascribed partly to ameliorations in the law, and partly to a more general diffusion of intelligence among workmen and employers; economic ideas, based on experience, having to some extent taken the place of the crude notions that formerly prevailed.

In an age of material progress conflicts between different interests are unavoidable, and the more rapid the progress the more eager and intense the conflict must be. When society is stagnant the conflict languishes. Hence the existence of the conflict is no ground for discouragement, though it is an admonition that we should seriously consider the methods by which the opposing forces may be regulated so as to produce the maximum of

benefits with the minimum of injury. Strikes and lockouts are serious evils, both being attended with loss and hardship to both parties, both being liable to disturb the public peace, and to end in the destruction of life and property. They are the ultima ratio of the contending parties; like international wars, they are costly, demoralizing and dangerous, victory even being often purchased at too high a price. Men engaged in the same calling, though separated by rivalry, are usually drawn together by the ties of sympathy and by mutual interest which lead them to combine for their common good and for mutual protection. Though corporations, as we understand the term, are of modern creation, the unions of handicraftsmen so far antedate the dawn of authentic history that the Athenians ascribed their foundation to Ægeus, or to his son Theseus, the destroyer of monsters, the Romans to Romulus or to Numa; so that it is safe to conclude that they probably existed before the pyramids were built. But at a time when nearly all labor was done by slaves, who had no participation in such combinations, strikes and lockouts could hardly have been very common.

The first historical account that we have of a strike is recorded in the pages of Livy. It occurred three hundred and ten years before Christ, and broke out among the flute-players who were employed to play at the public sacrifices because they were not allowed to hold their repasts in the temple of Jupiter. It was compromised by a concession to the strikers. This strike was not regarded as a novelty, since the historian says that he only mentions it by reason of its connection with religion.

In 1883, a fragment of a Greek inscription was discovered relating to an ancient strike, being a proclamation made by a Roman governor of Magnesia during the time of the Empire of the East, on the occasion of a strike on the part of the bakers. It forbids them to organize into fraternities, and commands them to obey the magistrates by furnishing labor for the making of bread, so that there should be no lack of it.

In the reign of Zeno, who ascended the imperial throne in the year of Christ 474, workmen engaged in building would, after having begun their work, strike for higher wages. In such cases the employer could not engage others in their place, because they all belonged to an association that forbade all members to continue or finish a work begun by other members. Under these circumstances, the employer could only accede to the demands of the strikers or abandon his undertaking. This evil occasioned an imperial ordinance that denounced a punishment for the strikers, and for

those who refused to continue or finish their work. This ordinance reveals the existence of labor organizations that had long been known, having succeeded to the clans of ruder times, and which were succeeded in their turn by the working guilds of the Middle Ages, conspicuous among which were the guilds of masons and builders that erected the churches and cathedrals that at present adorn all the cities of Europe, and which by the unity of their architecture betray the unity of their origin.

As most of the work was then done by the piece in the homes of the workmen, the relation between them and the master was much less exacting than that which subsists between the same classes in modern times. With the recent inventions for the transmission of power by electricity, it is possible that in the future the former system may be restored. If so, many of the existing difficulties of our present labor system will disappear.

With the increase of capital and invention of labor-saving machinery, large numbers of workmen collected together in factories under the eye of the master, working not by the piece, but by the day. Under such methods the grievances of the several workmen went to make up a common grievance. Then came the modern aristocracy of wealth, which took the place of the former aristocracy of the patricians or land owners, after which the standard of living of the master rose far above that of his laborers, and his communication with them was usually made through agents and superintendents, by means of which was introduced between master and servant a new and very disturbing element, class prejudice and animosity.

Under this phase of evolution it was inevitable that a new differentiation should assert itself. From that time the workmen began to organize themselves separately for purposes of defense against their masters, and the modern labor problems developed themselves. The bond of peace was broken, employers and employes came to occupy separate and hostile camps, and hostile camps bred distrust and suspicion. Present conditions show the unfortunate results. Thus, if the manager or superintendent possesses virtues, he will himself get credit for them; if they have vices or faults, these are ascribed to the common employer on the principle of adoption.

If the employer is a corporation, as commonly happens, the evils of the situation are greatly enhanced; for, if it be true that men acting in a corporate capacity will consent to do many things which their consciences would not permit them to do as individuals, it is none the less true that when they act in a corporate capacity they are subject to imputations that they would

be exempt from as individuals. The employe is apt to regard the corporation solely as a gigantic and selfish monopolist; not a thing of flesh and blood, but a cold, calculating mechanism, a sort of modern Frankenstein, an alien in race, destitute of superhuman origin, capable of no language save the jargon of profit and greed, a grotesque abstraction, created and operated for the sole purpose of making money. To love or sympathize with such an incorporeal and unresponsive entity is impossible; and it seems to be excluded from the divine injunction that we shall love our neighbors as ourselves, since no one ever regarded such an invisible and intangible thing as his neighbor. If all men must have something to love, the eternal law of contrast requires that they must have something to hate; and as hatred is naturally attracted to those things that are incapable of exciting affection, it happens that, in a competitive examination of objects worthy of animosity, corporations are apt to attain to prominence and distinction. That they are often made scapegoats for the sins of others is undoubtedly true; but it is also true that the hostility which they excite in the minds of those who are subjected to their power, and who cope with life under its harder and more difficult aspects, is often justified by the events that ensue; and as they are immortal, death does not extend to them the mantle of oblivion for past offenses, while their immortality excludes them from the charity which among natural persons proceeds from the sadness of a common destiny which puts an end to all quarrels, an event whose anticipation goes far to deaden the resentments and to temper the ordinary asperities of life. If the corporators are thought of, they are confounded with the corporation itself, and are, in any event, conclusively presumed to be rich.

Strikes are more destructive than formerly, not only because of the great expansion of the agencies of production and the grouping of vast numbers of laborers together, but because, owing to the minute subdivision of labor that exists in modern times, there is a more complex interdependence between different classes of laborers. Thus the strike among the cotton spinners of Preston, England, in 1839, including only 660 operatives, had the effect to throw out of employment 7,840 weavers and others who had nothing to do with the subject matter of the quarrel.

Friction produces discontent, discontent produces controversy, and controversy leads to strikes. The disastrous effects of strikes can hardly be computed; and their most heavy burdens fall upon the laboring classes. In the recent strike in the cotton trade in Lancashire, at the end of the first

twelve weeks the operatives had lost in wages alone $4,500,000. Four strikes that occurred in England between 1870 and 1880 involved a loss in wages of more than $25,000,000. Of 22,000 strikes investigated by the National Bureau of Labor it was estimated that the employes suffered a loss of about $51,800,000, while the employers only lost about $30,700,000. In some cases where strikes have been attended with riots the losses to the employers have been immense. Thus the Pittsburg strikes of 1877 resulted in a loss of $30,000,000 of railway property. But it cannot be said that the strikers made anything, though they lost heavily in wages. Of 351 strikes that occurred in England from 1870 to 1880, 189 were lost by the strikers, 71 were gained, and 91 were compromised. During this time there were 2,001 other strikes of which the results are unknown. The victories on the part of the strikers were no doubt often rather nominal than real. In one case the success attained was an increase of wages; but it would take twenty years of such increase to make up the loss sustained by the strikers in obtaining it.

Though the working classes may and should exercise a large influence on legislation, yet they cannot, even when most united and most oppressed, control it by resort to violence or threats, as was conclusively proved by the fiasco of chartism in England. Nor can they by uniting with other classes by like means destroy the union of authority, individualism and socialism upon which modern civilization essentially depends. The outburst of the French Revolution, based on theories of ideal equality, had no other effect than to transfer the power of the crown to an irresponsible lot of demagogues, and in the end Napoleon may be said to have succeeded to the the throne of Louis XVI. with a vast increase of power. Intelligent workmen know these things, and the great body of their class are deterred from joining in the wild and headlong schemes of socialists and arnachists by moral principle, which is as well developed in them as in other classes of the community. Apparently, however, these schemes and those who advocate them will, for a long time, require looking after by those who prefer a reign of law and order to scenes of violence. The Labor Exchange, in Paris, which was closed a short time ago, established under government protection to serve as a place of reunion for about three hundred trades unions, embracing about four hundred thousand members, and as a general intelligence office, soon became a focus for the diffusion of the dogmas of anarchy, a rallying-point for the idle, the vicious and the refractory.

In order to meet the preparations for strikes made by workmen, employers form counter-organizations, of which the "Western Iron and Steel Manufacturers' Offensive and Defensive Alliance," in this country, may be regarded as a type. The policy of the strikers is to attack the enemy in detail; that is, to strike against one factory or mill at a time. If the first strike succeeds, then they attack the others successively until all succumb. By this means all the laborers interested can assist in the support of each strike, while most of them are drawing wages from the common enemy. To prevent the success of this policy, the coalitions of employers insure each other against strikes in sums proportioned to the amount of capital invested in each mill, the number of hands employed and the duration of the strike. This enables the immediate victim of the strike in each case to hold out longer, with a better prospect of success. In the meanwhile, if times are good, the other mill owners are running their mills at a profit. If this course seems not to be advisable whenever a strike is declared against one employer, all the rest of them declare a lockout, thus throwing all of the workmen out of employment at the same time, and adding to their distress. In these ways each party tries to cripple the enemy as much as possible.

It has been contended that as strikes are attended by such ruinous consequences, they should be forbidden by law, as they were by the English common law, and as they are to-day in Russia. But in a free country, where hiring between citizens *sui juris* can only rest on contract, the law cannot force one man to work for another, nor can there be any reason for giving any other than a civil remedy for the violation of labor contracts that would not equally apply to all other contracts; and if one laborer may quit his employer, you cannot prevent two or more from quitting at the same time. Persons engaged in the same calling usually consult about matters in which they have a common interest. Consultation would be of no utility if it could not lead to concert of action. In France associations of workmen were long forbidden by law. The consequence was that secret societies were formed, which proved to be far more dangerous than open ones. In both France and England, after many legislative experiments, liberty of association is now conceded to workmen. Neither are strikes forbidden; but certain invasions of rights of property and of personal liberty, by threats and overt acts commonly attending strikes, are specially prohibited under penal sanctions. Like principles prevail in America and all parts of

Europe, save Russia. Thus modern jurisprudence, after much vacillation, coincides with the law of the twelve tables, which conceded the power of association to all citizens, subject to liability to punishment for any infringement of the public peace.

Two plans have been presented for the total prevention of strikes, both alike in respect of the fact that they contemplate the blending of all the interests of production in the same persons. The first is the plan of co-operation, which is alluring in theory, but disappointing in practice. When the employer and employes are working under a fixed tariff of wages, they have placed a valuation on the portion of the prospective profits that shall go to labor; and, since it is to be paid at all events, the employer becomes an insurer that this portion shall be unconditionally paid; while under the system of co-operative labor the laborers furnish the capital, dispense with insurance, and take their own risk; and the risk has always proved to be great.

Another proposed remedy is that of the socialist. We are all more or less familiar with the benevolent dilettanti who delight to draw attractive pictures of a community in which there shall be neither rich nor poor, great nor small, in which all the members being placed on a perfect level, shall work harmoniously according to their several abilities for the public good, forming one happy family from which dissension shall be forever banished. Appropriately enough, these seductive plans are usually clad in the garb of fiction, which allows the writer a complete control over the materials with which he works, and enables him to ignore all the facts which lie at the foundation of his theories. According to his contention, good government first of all requires the total suppression of all inequalities of condition. As all men cannot be brought up to the highest standard of wisdom and ability, those who excel in these respects must be constrained to some level which may be approximately reached by the multitude. Titian must be cut down to the level of a sign painter, and the style of Milton must be made to conform to that of the nearest local editor.

Under such conditions there could be but small aspiration towards individual excellence; and as civilization could not advance, and nothing in the universe can remain still, it would follow that its standard must continually decline until society would dissolve into its primitive elements, and mankind would relapse into barbarism.

The establishment of courts of arbitration has been attended with most

gratifying results, particularly in England. For these we are chiefly indebted to Mundella, an English manufacturer, and to Robert Kettle, an English county judge.

Their plans differ in some respects that I have not time to dwell upon. Dr. Brentano, who had given to this subject his most profound attention, says that wherever a court of arbitration has been created in any industry "there has been, since that time, neither a strike nor a lockout." By the act of Parliament of August 6, 1872, passed at the instigation of Mr. Kettle, a legal sanction has been given to these tribunals. These are constantly being extended from place to place, from industry to industry. They are composed of equal numbers of judges chosen by employers and workmen, with an umpire agreed upon by both parties. When a dispute has actually arisen it is often found to be difficult to unite on the choice of an umpire; but that difficulty is lessened when the umpire is chosen for the period of a year or longer. The courts of arbitration hold a session every three months, hear testimony, and settle all disputes that arise between the employer and his employes. As nations are now learning that international disputes may be settled more cheaply and more satisfactorily by arbitration than by war, it may be that the parties to the conflict between capital and labor may learn to profit by their wholesome example.

The chief advantage of courts of arbitration consists in the fact that they furnish an inexpensive method of settling disputes before they become envenomed by a war of words. After a strike has once begun, amicable settlement becomes difficult, if not impossible.

The old laws were simply punitory, and therefore inefficient. In Magdeburg, in 1301, ten representative strikers were burned alive in the market place. At Cologne, on the 21st day of November, 1371, thirty-two striking weavers were executed; the next day, many others were murdered; finally eighteen hundred, with their wives and children, were banished, and their guild hall was demolished. After the great strike of weavers at Nottingham, in the early part of this century, many were condemned to death and to transportation. The efficacy of punishment depends more on its certainty than its severity. When multitudes of men combine to violate the law it is impossible to punish them all, and when punishment is meted out to a few only, the greater number of persons equally guilty who go unpunished are rather exasperated than subdued, and by the arbitrary selection of victims the moral example contemplated by the law is lost. But until re-

cently nothing like preventive process seems to have ever been thought of.

To meet these evils the "Anti-Trust Act" of Congress was passed and approved on the 2d day of July, 1890. It smites with illegality all the combinations made in restraint of trade, all monopolies, and all contracts leading up to them, and imposes heavy penalties on the individuals that become parties thereto. It provides that suits may be brought in the Federal courts to restrain violations of the act, for forfeiture of property used under any contract, or by any combination, or pursuant to any conspiracy mentioned in the act, and for private remedies for persons injured by the forbidden acts perpetrated by the classes against whom it is directed.

The act has been criticised because it contains no definitions; but the common law terms used in it seem to be sufficient. The language is searching and the provisions are drastic. If properly supplemented by State legislation and enforced by the courts in the spirit in which it was enacted, the various combinations against which it is leveled may in all probability as well as make up their minds to retire with their ill-gotten gains, to seek less devious methods. No doubt those who have once tasted the sweets of monopoly will not willingly repair to less profitable pursuits. We know something of that secrecy, worthy of the Council of Ten in Venice, with which the business of our great corporations is conducted; but in this instance if secret measures are adopted, they will be attended with unusual perils, and the courts will possess very ample powers of investigation in proceedings both civil and criminal.

NOTE AND COMMENT.

REMEDY OF PARTY WHERE JUSTICE FALSIFIES HIS RECORD.—A subscriber has submitted a query as to the proper practice to bring about a correction of the record, and whether there is any other way of doing so than by requiring an amended return.

There is some difficulty in answering this query so as to cover all cases. But, generally speaking, when an appeal has been or can be taken, the proper practice certainly is to require an amended return. This can certainly be done in the case suggested, when he refuses to take down motions, or make the facts as to proceedings before him correctly appear in his record. Here the only thing which requires care is that the evidence of the demand for a correction be clear, and properly preserved, and the court will not hesitate to order that it be made to conform to the facts.

But many times the error of false entry is such that it is not discovered until the time for appeal is past. Then this remedy is obviously useless and inapplicable. And this is so whether the false statement or omission is a wilful one or a mere mistake on the part of the justice, for he is an absolute stranger to his judgment, even as to correcting his own mistakes, after the time limited by statute for entry of judgment is concerned, especially when no appeal has been taken. In such a case, and especially when the validity of the judgment or proceeding hinges upon the correct recital of the facts, the proper, and, indeed, the only, remedy is by *mandamus* to compel the justice to amend his record to conform to the facts. We are of the opinion that the justice is not justified in voluntarily altering his docket entries in any material particular, and should not do so save when ordered by the court. Mandamus will not lie in the first case mentioned, as there is then a plain, speedy and adequate remedy at law, viz.: The right on appeal to require an amended return. But if the facts sought to be shown by the record would not appear by the amended return, it would be proper then to seek a remedy by mandamus as in the other case.

The writ should be applied for, as in any other case, upon affidavits showing the error or falsification, and upon the hearing oral or documentary evidence should be produced to substantiate the statements of fact relied upon. See index to *Cases Reported*, December number of JOURNAL, under *Mandamus* and *Justice of the Peace*.

RHODES VS. WALSH, ET AL.—This case is getting to be the *cause celebre* of the Northwest, and deserves its reputation. On Dec. 21st, 1893, the Supreme Court reversed the order of Judge Otis, of the Ramsey County District Court, and the trial of the case against the defendants, who appealed, will come off some time in the near future. Those who were compelled by waivure of their supposed exemption from service were recently forced to trial, which resulted in a verdict in favor of Mr. Rhodes in the sum of $3,500, which should go far towards soothing his wounded feelings. But the moral of this result is more important than what the agent of the alleged coal combine suffered or recovered. Upon it hinged the right of a committee of a state legislature to invade the personal rights and liberties of the citizen without redress. It makes them responsible as individuals for such attacks and their consequences, and should have a good effect throughout the country upon the crank legislators, who, "clothed in a little brief authority," think the citizen an object of no importance, and his rights of less. The committee in question ordered the sergeant-at-arms of the House of Representatives and his assistant to go to the office of Rhodes and to enter same and bring certain private letters and books belonging to him and deliver them to the committee. This they did, but not without a struggle. Rhodes tried to prevent the officers from taking anything, but was overpowered and thrown aside and the books disappeared, the doughty officers making for the capitol with all convenient speed. There are few people who regret that the result is as chronicled above, as there are many legitimate ways of obtaining all the knowledge a legislative committee has any right to acquire of a citizen's business.

CONVEYANCES IN FRAUD OF CREDITOR.—In the case of Thompson, assignee, vs. Johnson et al., 57 N. W. Rep., 223, Chief Justice Gilfillan, for our Supreme Court, decides that where a creditor of an insolvent debtor secures an unlawful preference by the transfer of property, the transfer will, at the suit of the assignee in insolvency, be wholly void; and it will not be valid in part because the creditor, to secure such preference, paid in money part of the agreed price of the property. And, further, that if the transfer is made to the person preferred and others, which other persons were not creditors, but paid for their share in the property, the transfer will also be void as to them, if they knew that it was the purpose of the insolvent to give preference to his creditor. This will have a most salutary effect, as

the more closely the lines are drawn in such matters the more safely can business be transacted. Emphasizing this fact is the remark made to us a few days since by a lawyer of large experience in commercial law, that of the insolvency proceedings which in many years had come under his notice, "not more than one out of four were wholly untainted with fraud."

GERMAN JURISTS AND POETS.—In the current issue of the *Green Bag* there appears an article of some six or seven pages upon this subject. It comes from the pen of Arthur Hermann, Esq., of Minneapolis, and is a comprehensive and entertaining dissertation upon many phases of German legal and poetic life. Mr. Hermann has been in this country for several years, traveling about it largely with the purpose of studying our institutions, and is at present taking the post-graduate course in the Law Department of the University of Minnesota. Mr. Hermann is an old newspaper man, having edited a daily paper in Berlin before coming to our shores.

JUDGE CHARLES B. ELLIOTT.—We take pleasure in recording the appointment to the District Bench of Hennepin County of Charles B. Elliott, of Minneapolis, to fill the vacancy created by the elevation of Judge Canty to the Supreme Court. In making this choice we believe Governor Nelson has acted wisely, and has avoided the friction which must necessarily have been the result had any of the known candidates for the place been appointed.

All who know Judge Elliott personally, and many who do not, join in upholding the governor in the course he has taken, as Judge Elliott is believed and known to have one of the brightest legal minds in the Northwest; and we predict for him a long and useful career on the bench, of which we trust this is but a beginning.

Judge Elliott was born near Chester Hill, Morgan county, Ohio, in 1861, and spent the first fifteen years of his life on a farm, working in the summer and attending the district school during the winter season. When fifteen years of age, he received the advantage of a winter at a high school in the neighboring villlage of Pennsville. In the spring following he obtained a teacher's certificate and taught a country school during the next year. About this time his father removed to Iowa, and young Elliott went to Marietta, Ohio, and entered the preparatory department of Marietta College. During the next three years he pursued the classical course of study, broken by intervals of country school teaching. In 1879 he left Marietta and entered the State University of Iowa, and graduated from the depart-

ment of law in June, 1881, being then under twenty-one years of age. As he was too young for admission to the bar, he entered the law office of Brannan & Jayne, at Muscatine, Iowa, where he remained until the spring of 1882. In the meantime he had become a contributor to the Central Law Journal of St. Louis, and in April of that year was offered and accepted a position on the editorial staff of that journal, and removed to St. Louis. Here he spent about a year and a half, devoting all his time to the preparation and writing of special matter for the pages of the Central Law Journal, Southern Law Review and Western Jurist.

Failing health, caused by overwork, drove him from this congenial labor, and necessitated a removal to Dakota. For about a year he resided at Aberdeen, S. D., representing, as agent, the Muscatine Mortgage and Trust Company and practicing law as a member of the law firm of Elliott & Dennis.

In January, 1885, after a summer and fall spent in travel, Mr. Elliott removed to Minneapolis and followed the practice of law until appointed judge of the municipal court, on Jan. 15, 1891, by Governor Merriam, to fill the vacancy caused by the resignation of Judge George D. Emery. He served under this appointment until Nov., 1892, when he was elected for a full term of six years.

For several years he has been a contributor to the Atlantic Monthly, Political Science Quarterly and other leading journals and reviews. His monograph, entitled "The United States and Northeastern Fisheries," published in 1887, was cited as the highest authority on the subject on the floor of the United States Senate, in the discussion of the fisheries treaty during Cleveland's administration. His reputation as a writer on questions of international and public law is recognized by the leading authorities of this and foreign countries. A list of the writings of Judge Elliott fills two pages of the report of the American Historical Association, and includes: "The United States and Northeastern Fisheries (1887)"; "The Bering Sea Question," Atlantic Monthly, 1890; "The Legislature and the Courts," Political Science Quarterly, 1890; "A History of the Supreme Court of Minnesota," and "Lectures on Private Corporations," 1892.

He is an active member of the American Historical Association and of the American Academy of Political Science, and is Professor of Corporation and International Law in the College of Law of the University of Minnesota. In 1887 he received the degree of Doctor of Philosophy from the University of Minnesota for special work in constitutional history and international law.

THE CONSTITUTIONAL AMENDMENT PROHIBITING SPECIAL LEGISLATION.

THIS important subject is now being considered by the Supreme Court of this State on the rehearing granted in the case of *State of Minnesota ex rel. Board of Court House and City Hall Commisioners* vs. *Clayton R. Cooley*, as Auditor of Hennepin county. The whole question of the proper construction to be placed upon this amendment is being considered, and we know of no better way of placing before the members of the bar the questions at issue than by quoting thus liberally from the brief of Judge Daniel Fish, counsel for the relator. We quote:

"Now whatever may have been intended (by the amendment), affirmatively, we very well know that one thing was not intended. We may safely appeal to current history, and to our common knowledge of public affairs, upon the proposition that if, by the amendment in question, we have in fact cut off all legislative control over this and kindred subjects, then we did it unwittingly. We know that the fate of the Minneapolis city and county building was not a recognized issue of the campaign, and that 'we, the people,' were never polled, consciously at least, upon the question whether in cases requiring legislation, the legislature might or might not continue to pass special laws, no other kind being fit or possible. We know to a certainty, that in the effort to improve legislation by pruning away its superfluities and excesses, we did not intend to cripple or destroy it; and what the judges must know as a condition of intelligent citizenship they may know and act upon officially. * * *

"We come now to the final clause of the amended section which is totally unlike any constitutional provision elsewhere to be found. It reads as follows:

'The legislature may repeal any existing local or special law, but shall not amend, extend or modify *any of the same*.'

"Of this language the opinion (par. 2,) says: 'It seems obvious that it applies to all special or local laws on all subjects as to which special or local legislation has been prohibited, namely, the various subjects distinctly enumerated in the preceding paragraph; no other effect can be given to this portion of the section.' But why limit its operation to the subjects enumerated or to those as to which special legislation is prohibited? The language is not so restricted. If resort be had to the wording only, it is plain that all special acts are included whether now prohibited or not. For instance, an appropriation bill might need amendment, (see Ch. 223, Laws 1893,) or an act like Ch 224, Laws 1893, providing for the defence of a legislative com-

mittee sued for damages; or Ch. 326, Special Laws of 1887, ceding to the United States jurisdiction over the site of a proposed public building in St. Paul. It did become necessary to amend this last named act, (Spec. Laws, 1891, Ch. 19) and still further changes may be needful. But if this constitutional clause be taken as it reads, no such acts can be either 'amended, extended or modified.' They are clearly special laws and 'any of the same' is within the terms of the prohibition. The solution of the difficulty is that the clause is not to be taken as it reads. To do so would be absurd. As was said in *Dike* vs. *State*, 38 Minn., *supra*, 'the language of the constitution was never intended to apply to such a case.' Why? Not because the words do not literally cover it, but because 'the object of the constitutional amendment' was something altogether different.

"What then was the 'object' or aim of this clause of the section? First, it was, presumably, the promotion of the same general purpose sought to be accomplished by the amendment as a whole, viz: the suppression of the vice of unnecessary special legislation. Second, it was *not* the binding and riveting down of the legislature so that it could not 'move and perform its *necessary* functions.' Third, its design plainly was, and is, to prevent the evasion of the restrictions resolved upon, by the method of engrafting objectionable special legislation upon local or private acts already existing. True, the purpose is not very lucidly expressed, but in that respect it harmonizes very well with the rest of the section. So lacking in perspicuity is this clause that we instinctively agree that it does not mean all that the words declare. Counsel for appellant says in his brief, (p. 8,) that the language 'would seem, by its terms, to embrace any and all special or local acts. But as the *intent must govern* and this clause be constructed in the light of the first clause, which provides 'that no special law shall be enacted where, (when) a general law can be made applicable,' we have no doubt the court will hold that the special acts referred to include only such as are prohibited.' Very well, but if we may ignore the language in order that the intent may govern, then the question is wholly one of intent and the whole intent may have free play. If any special act may still be amended, extended or modified, why not any other special act, when the proposed alteration in no way conflicts with the actual 'intent' of the constitution? And especially when such alteration is necessary to the public welfare and that welfare can be subserved by no other means?

"It is agreed that the act of 1887 was and is perfectly valid, that under its provisions a public enterprise was begun, involving great municipal interests and a very large expenditure of borrowed money; that there has been no purpose on the part of anybody to suspend or cripple that undertaking, that it must be completed in order not only to protect the interests of the city aud county, but to keep faith with holders of the bonds already sold; that further legislation was originally contemplated, and is now

necessary, for the further prosecution of the work; that from the very nature of the case such legislation cannot be general but must be local and special; that the act of 1893 now attacked was enacted in good faith to meet this exigency, and that such act in no respect violates the real purpose of the constitutional restrictions upon local legislation. It is also agreed that the wording of the last clause of Sec. 33, which is chiefly relied upon to invalidate this act, does not mean what it says but must be greatly narrowed in order that the 'intent may govern.' Even therefore, if this act of 1893 be 'in effect nothing more than an amendment,' it is not destroyed unless the constitutional intent to destroy it is clear beyond reasonable doubt. *Ames vs. R. R. Co.*, 21 Minn., 282.

"It is easy to see that without some limitation of the power of amendment, a vast amount of objectionable special legislation might be accomplished by the simple alteration of special acts already in force. Unnecessary local laws, almost without number, could be thus propogated, and the era of 'reasonable uniformity' in municipal law be thereby indefinitely postponed. A conspicuous instance of this method was before the court in *Ames vs. R. R. Co.*, 21 Minn., *supra*, where it was claimed, and at first decided, that a new railway corporation had been evolved out of an old one by the amendment of a territorial special act in violation of Sec. 28 of Art. 4. It was a hard case and, on re-argument, the court found a way to uphold the latter act, reversing the opinion first given.

"It is also easy to see that it was this open door that was sought to be closed against the evil in question by the final clause of Sec. 33 now under examination. And it is this 'intent' to cut off vicious and superfluous special legislation, manifested in every other part of the amendment, which should 'govern' in the interpretation of such final clause. There is no better reason for prohibiting the amendment of an act like that of 1887 than of any special act that might be passed today. There is no reason for supposing that one prohibition was intended any more than the other, for neither is at all essential to the proposed constitutional end, which is merely the *substitution* of general for special enactments wherever such substitution is practicable. In this case the situation is unique. Uniformity' is out of the question. The business was begun under special legislation and must be prosecuted under the original plan if it is to be continued at all. It is not within the meaning of the prohibition of Sec. 33 and should not be held to be within the letter. * * *

"Another rule of construction leads to the same result and relieves the court from the necessity of holding this necessary and salutary act to be inhibited. The constitutional amendment in all its parts is the joint declaration of the legislature and the people. It was proposed by one and ratified by the other. The practical interpretation put upon a writing by the parties thereto is entitled to great weight in cases of doubt.

"The legislature of 1893, (the chosen representatives of the people,) passed this act and "we will presume that it has considered and become satisfied of its constitutional power" to do so. This is a practical interpretation of the constitutional provision which they had adopted and the purpose of which they understood. Of course if the constitutional language were perfectly clear such considerations could have no great weight, but in a case where 'extrinsic evidence can be invoked no evidence is more reliable nor entitled to greater consideration, as manifesting what that intention was, than the acts and conduct' of the people themselves. *Ins. Co. vs. Doll*, 35 Md. 89."

And, in conclusion,

"It was a condition of the act of 1887 that this building should be completed and that those who furnished the means should have a lien upon the finished building for their security The building cannot be completed without further legislative aid, and this was known to all when the first bonds were sold. That the legislature should grant this aid entered into and became 'a term or condition of the contract as much as though expressed in the bonds.' *29 Minn. 538.* To disqualify the legislature from so doing is a clear infringement of the obligation of that contract and therefore, if the amendment means what the first opinion implies, it is void.

"But it is clear that it does not mean anything of the sort. Full scope may be given to its obvious purpose without going to any such extent. There is no need of exalting the means above the end. The object of the amendment of 1891, as well as that of 1881, was to cut off special legislation in cases where general laws could be practicably substituted, *in order* to suppress a nuisance and bring about uniformity and harmony in municipal law. In cases where general legislation is wholly inapplicable and where uniformity is neither possible nor desirable, the prohibitions of Sec. 33 were not intended to apply, and 'as the intent must govern,' the courts should hold that they do not apply."

NOTES ON RECENT DECISIONS.

LIABILITY FOR USING PERSON OF ANOTHER TO WARD OFF THREATEND ATTACK.—BURDEN OF PROOF AS TO INJURY.—"A letter had been handed to defendant, by a visitor, containing a threat that if he did not give said visitor a large sum of money the latter would immediately explode a package of dynamite then in his possession. Plaintiff, who was ignorant of the contents of the letter, and that any threat had been made, allowed defendant to gently draw him toward defendant and turn him around so as to bring plaintiff's body between defendant and the visitor. An explosion then occurred through which plaintiff sustained severe injuries. *Held*, that such facts presumptively established a cause of action in favor of the plaintiff against defendant; that the burden of proof was not on plaintiff to show that he would have been less seriously injured or not injured at all if he had been let alone, but that the burden of proof was on defendant, if he wished to avail himself of such defense, to show that without defendant's act plaintiff would have been equally injured."

Thus reads the syllabus in the case of *Laidlaw vs. Sage*, in the Supreme Court of New York, and is especially interesting since it grows out of the attempt made by one Norcross to kill Russell Sage in his office in Wall street on Dec. 4, 1891. The question arose upon the order of the court below for dismissal, and that order is reversed. In considering the question of the rights and liabilities of persons under such circumstances, the court gives expression to the following sound and sensible statements of the law:—

"Now, if the defendant put his hand upon or touched the plaintiff, and caused him to change his position with that intent, he was guilty of a wrongful act toward the plaintiff; and if the plaintiff was injured by the happening of the anticipated catastrophe, then the burden is thrown upon the defendant of establishing that his wrongful act did not in the slightest degree contribute to any part of the injury which the plaintiff sustained by reason of the explosion. It is not necessary for the plaintiff to show that he would not have been so severely injured if he had been left standing in his original position; but the defendant having wrougfully placed him in the changed position with the intent of using him as a shield, and he being injured by the explosion which was anticipated by the defendant, in order to escape liability for this wrongful act toward the plaintiff in thus using him as a shield, he is bound, at the least, to show to the satisfaction of the jury that the plaintiff would have been injured to the same extent had he been left untouched."

THE SOUTH CAROLINA DISPENSARY LAW.—HOW IT WORKS.—Last August it appears that a constable of the state above named, under authority supposed by him to be conferred by the state dispensary law, seized a quantity of liquors stored in the station warehouse of the South Carolina Railway Company, which railway was in the hands of a receiver appointed by the Circuit Court of the United States. Seizure was made without warrant or authority from owners. It seems that he took such action without consultation or direction from anyone, but from his own suspicions and his position as constable. It is not the first time that a little authority has gotten one into trouble. He remained in quiet possession of his booty for about a week, when the receiver filed in the Circuit Court a petition asking that the constable be punished for contempt and compelled to deliver the cask to the receiver for re-delivery to the consignee. Swan, the constable, made no offer to return the goods, but justified under the act above named. The court ordered that Swan be committed to the custody of the marshall, to be imprisoned in the Charleston jail until he returned the barrel to the custody of the receiver; "and when that has been surrendered, that he suffer a further imprisonment for three months, and until he pay the costs of these proceedings." Upon application for a writ of *habeas corpus* to the Supreme Court of the United States, the order was affirmed. It is safe to say that Mr. Swan will leave lonely casks of whiskey severely alone hereafter, and will temper his zeal as constable with a little dose of discretion.

CH. 66, LAWS OF 1893, MINN.—THE ANTI-SCALPER LAW—UNCONSTITUTIONAL. Judge Willis, of the Second District, has rendered a decision of more than usual interest and importance in sustaining the demurrer which was interposed in the State vs. Corbett, which was an indictment under Laws of 1893, Ch. 66, for having sold a ticket over the Northern Pacific Railroad without a license so to do, contrary to the provisions of said act.

The railroads aided the state by furnishing able counsel.

The indictment was for having sold a ticket from St. Paul to Little Falls over a line entirely within this state, thereby avoiding the question of the law being invalid as a regulation or tax upon interstate commerce.

It was argued by the state that the act was a valid police regulation. Upon this point the court, in its memorandum, says: "That (the police) power has never been allowed to achieve the destruction of private property unless its exercise was directed toward the preservation of life, health or morals. The various statutes of Iowa and Kansas prohibiting the manu-

facture of intoxicating beaverages have been upheld, on that ground, as constitutional measures for the exercise of the police power. This statute does not declare the selling of transportation tickets to be a business dangerous to health or morals, nor could such a declaration be sustained. The sale of such chattels is *per se* innocent. The legislation under which the pending prosecution is based aims at the complete prohibition of such sales, and the suppression of traffic in transportation tickets except by a privileged class, the persons designated by the owners of the railways and steamships and licensed by the state government pursuant to such designation. This favoritism is repugnant to the entire scope and spirit of our state constitution."

The court further holds that the provision for the issuance of a license, restricting the issuance to persons designated by the "owhers of any railroad or steamboat" is an unconstitutional delegation of the licensing power.

And further that the act violates Sec. 33 of Article 4 of the Constitution which provides that "the legislature shall pass no law * * * granting to any corporation or individual any special or exclusive privilege."

Also that the act in not providing for the redemption of tickets in every possible contingency is in conflict with Art. 1, Sec. 7, Const., that "no person * * * shall be * * * deprived of life, liberty or property without due process of law."

Finally the court in a comprehensive clause, a great extension of the judicial power to declare statutes unconstitutional and void, and one of doubtful expediency, if not of very dangerous tendency, but for which there is positive authority in this state, says that "it may be that some sections of this statute are not justly open to the objection that they are unconstitutional; but it is evident that the entire scope of the act is controlled by the unconstitutional provisions; and the latter are so interwoven with the other provisions of the act that no chirurgical art known to jurisprudence could dissect the void from the valid portions of the statute and leave any vitality in the subject of the operation," and holds the entire act unconstitutional and sustains the demurrer.

EFFECT OF FOREIGN DIVORCE.—The District Court of Ramsey County has recently decided a question of great importance in the law of divorce, upon a point which has not, so far as we can learn, been passed upon before in this state.

The case referred to is entitled Maria E. Thurston vs. Charles E. Thurston et al., and was brought to obtain a limited divorce, and for alimony out of property conveyed by Thurston to the other defendants. The pleadings

and evidence disclosed the following state of facts: Thurston and wife lived together in this state until some time in the year 1892, when he left her at Lake City and went to the state of Washington, where he acquired a *bona fide* residence, she remaining in Minnesota. Early in 1893 he brought suit against her in the Superior Court of Washington for an absolute divorce upon grounds authorized by statute in that state. The summons was served upon her by mailing and publication, under a statute similar to our own, but she did not appear in the action and was never within the state. In February, 1893, the Washington Court granted Thurston an absolute divorce, by a decree which made no provision for alimony to the wife. That decree has ever since remained undisturbed. Subsequently, in June, 1893, Mrs. Thurston brought this action for a limited divorce, in the District Court of Ramsey County.

The defendants contended that the effect of the Washington decree was to terminate and dissolve the marriage tie between the parties in all places and for all purposes; that upon its rendition the plaintiff Maria ceased to be the wife of the defendant Thurston; and consequently she, being already divorced, could not maintain her action for separation and alimony.

M. L. Countryman, of the Ramsey County bar, presented the legal arguments for the defendant,

It was contended by H. J. Horn on behalf of the plaintiff that inasmuch as she had always remained a resident of this state, and had not been personally served with process in the state of Washington, nor voluntarily submitted herself to the jurisdiction of the court of Washington. the decree was a nullity so far as it purported to affect her marriage *status* or her right to sue here for alimony. It was also claimed that the evidence showed that Thurston had not resided in Washington for the required statutory period of one year before bringing his action, and therefore that the Washington Court had no jurisdiction to grant him a divorce. The court held that the Washington decree was valid and put an end to the marriage relation between the parties, even though Mrs. Thurston was not within the state and made no appearance. Consequently that she could not maintain her action for alimony. The court also held that inasmuch as Thurston was an actual, *bona fide*, resident of Washington at the time the decree was rendered, it was immaterial that he had not resided there for the length of time required by statute.

An appeal will probably be taken to the Supreme Court.

UNKIND TREATMENT WITHOUT VIOLENCE AS A CAUSE FOR DIVORCE.—Upon this question the Supreme Court of this state has lately taken a decided stand and one which, though operating in many cases with manifest justness, yet, we fear, opens the door to abuses much more flagrant than those now too prevalent in this class of cases. The decision referred to was handed down on January eighteenth, through Judge Canty, and was in the case of *Emma H. Marks vs. Jeremiah Marks.*

The syllabus is as follows:

"A systematic course of ill treatment consisting of continual scolding and fault finding, using unkind language, studied contempt, and many other petty acts of a malicious nature may, when sufficiently long continued, and when producing sufficiently serious results, constitute cruel and inhuman treatment and be sufficient ground for the granting of a divorce."

While it is doubtless true that to many sensitive natures such treatment as is here considered may tend to injury much more serious in its effect than mere violence, yet, in many cases, the imagination is brought to bear upon some trifling grievance, and it will be very difficult for the courts to distinguish between such a case and one where the injury is really very great. The trial judge sees the parties but for a few moments, especially in *ex parte* cases, in which advantage will chiefly be taken of the rule so established. The opinions of those who have devoted themselves to the social side of the question agree that all that can be should be done to restrain the granting of decrees with the facility now in too many places apparent. We doubt not but that the step thus taken is abreast if not in advance of any expression from courts of last resort in this country, in thus constituting the acts here complained of "cruel and inhuman" treatment. Yet we are glad to note that the decision has in itself an element of safety, as the court may consider when and in what cases the treatment has been "sufficiently long continued" and when producing "sufficiently serious results." That it is a radical departure from the law as generally understood by the bar of the state is unquestionable, as there are but few lawyers who have not advised clients on this state of facts not to institute proceedings, but to try and become reconciled.

OUR EXCHANGES.

CROSS-EXAMINATION UNDER ADVERSE CIRCUMSTANCES.—"Let me give you my dying advice," said Rufus Choate. "Never cross-examine a woman. It is of no use. They cannot disintegrate the story they have once told; they cannot eliminate the part that is for you from that which is against you. They can neither combine nor shade nor qualify. They go for the whole thing, and the moment you begin to cross-examine one of them, instead of being bitten by a single rattlesnake, you are bitten by a whole barrelful. I never, excepting in a case absolutely desperate, dared to cross-examine a woman."—*Green Bag.*

LIABILITY OF CITY FOR ABATING A NUISANCE.—*Orlando vs. Pragg*, (Florida Supreme Court), 19 Lawy. Rep. Ann. 196, is rather amusing. It was an action against a city for breaking up the plaintiff's shop and destroying his property. "It appears that he kept a kind of curiosity shop and museum; that in the front shop he kept various fancy wares, jewelry, shells, stuffed animals, etc., and in the yard in the rear he had animals of various kinds, among others, water-turkeys, coons, snakes, alligators, turtles, snipes, chickens, owls, lot of shells, etc." Also sea-fowl and a fox. That the city marshal came there, with policeman and carts, "and carried away all the animals, shells, etc., which witness had in the yard, and took them out of the city limits, and turned them loose,"—shells and all. He recovered none, except some of the shells, which it seems he overtook. He had a judgment for $300. One defense was that his shop and yard were a deleterious public nuisance, complained of by neighbors, which he had been duly and reasonably notified to abate, and that the proceeding in questiou was taken at the official direction of the county board of health. This defense was proved and not contradicted, and the Appellate Court reversed the judgment. So this Old Curiosity Shop is scattered, and Sol Gills is without remedy.—*Green Bag.*

WOMEN AT THE BAR.—The Bar Association of Carlisle, Pa., has declined to admit a young woman to be examined for admission to the bar. In explaining its action its representative publicly said:

"Whenever the men stay at home, nurse the children and do the housework, while the women battle with the world, it will be time enough for the Carlisle bar to modify its rules and admit women to membership."

Nonsense! The Carlisle Bar Association ought to awake from its Rip Van Winkle sleep, and try to catch up with the procession.—*American Lawyer.*

PHOTOGRAPHS AS EVIDENCE.—Photography played an important part in a suit now on trial in the United States District Court at Cincinnati. The suit is one of long standing, involving the title to 1,500 acres of valuable farm lands. It is based on a deed made nearly seventy-five years ago by the owners of the land, and turns on the point whether the deed had five signatures or only four. In order to test this question it was decided to have the deed photographed, and the clerk of the court was ordered to give the matter his personal supervision. For that purpose it was taken to Washington and submitted to an expert photographer of that city. The original deed, discolored and yellow with age, showed traces of four signatures and a space where there might have been a fifth, but no trace of it. The photographing was done in the presence of the clerk of the court, who refused to let the deed go out of his sight. The negative revealed traces of the missing signature, and when it was enlarged ten times the entire name became as plain as when first written. The court pronounced the evidence conclusive, and the result will be the reversal of a former decision and a change in the ownership of the land.—*American Lawyer.*

THE DISTRICT COURTS.

EMBANKMENT; OVERFLOW; RIGHTS OF ABUTTING OWNER:—Plaintiff brought action to recover damage done to his land and crops by the overflow of surface water, which had been gathered in a highway ditch and turned by means of embankments erected by defendant on his own land, and across the highway ditch fronting his land. On motion by defendant to dismiss the action on the ground that plaintiff's complaint does not state facts, etc., *held*, that defendant had a right to raise embankments and dams on his own land, even to the center of the highway, and turn the surface water off his own land for the purpose of improving the same and cannot be held liable for damages resulting from such acts.

O'Brien vs. City of St. Paul, 25 Minn., 331, and Brown vs. Winona & S. W. Ry. Co., 55 N. W., 123, followed; action dismissed.—Ristad vs. Henderson; Ives, J., District Court, Norman County.

RETURN FROM JUSTICE COURTS; EVIDENCE MUST BE RETURNED:—In case of an appeal from a Justice Court on questions of law alone, appellant paid the usual fee of two dollars for the return of the justice, completed his appeal and demanded the return of the evidence, as is provided in Gen. Stat. 1878 and amended by Laws 1883, ch. 61, which demand was refused by the justice, who claimed extra pay for the return of the evidence as a condition precedent to its return. *On motion* by appellant for an order requiring the justice to return the evidence, the motion was *granted*.

Diricks vs. Maher; Crosby, J., District Court, Dakota County.

CHANGE OF VENUE; DIVORCE CASE; NOT APPLICABLE:—Action for divorce was commenced in St. Louis County by wife and service made on defendant in Hennepin County, whereupon defendant made a motion for change of venue on the ground that the defendant was not a resident of the county within which the action was brought, under Sec. 49, ch. 66. *Held*, that although a divorce was a civil action under the code, the provisions of ch. 66 as to change of venue do not apply. Motion denied.

Cormany vs. Cormany; Ensign, J., St. Louis County, District Court.

NATIONAL BANK STOCK; INDIVIDUAL LIABILITY THEREON:—Action was brought to enforce the statutory liability of a holder of National

Bank stock; service was made by publication, judgment entered by default and attached property sold. The grantee of purchaser at sale brings action to quiet title against grantee of defendant in attachment suit. Question involved was whether the attachment sale was void under subd. 3 of sec. 64, ch. 66, previous to the amendment of 1881. *Held*, that the suit to enforce the statutory liability was an action which arose on contract—that the liability arose at the time of the subscription for stock.

Hencke vs. Twomey; Lewis, J., District Court, St. Louis County, Minn.

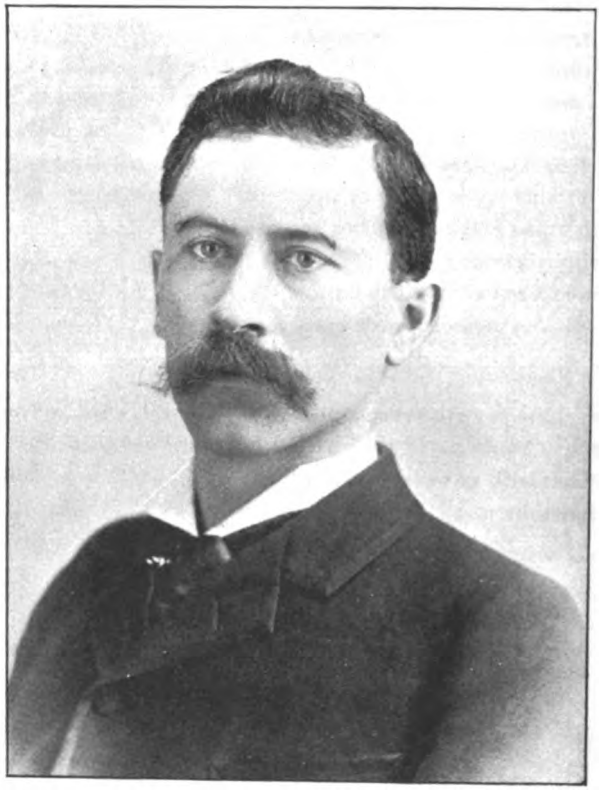
RULE.

The following Special Rule No. 1, District Court of Ramsey County, has been adopted:

"It is ordered, that in insolvency proceedings in this Court, the assignee or receiver at the time of giving notice of his appointment as required by law, shall also in the same manner give notice that creditors must file their claims with him within twenty days after the publition of the notice, or be barred from participating in the distribution of the estate of the insolvent."

This rule is but an enforcement of Sec. 11, Ch. 148, Laws of 1881, the original insolvency act. We deem it important to call the attention of the bar to this new rule, as we notice that it is being disregarded in some assignments made since its adoption, which may cause trouble and inconvenience.

Attorneys are requested to send to THE JOURNAL a short report of their practice cases in District Court, together with the memorandum of the Court, if any is filed.



HON. CHARLES B. ELLIOTT,

Judge Hennepin County District Court.

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FOLLOWING TRUST FUNDS.

The development of the rule of following trust funds through various transmutations and seizing them or their product, whenever identified, and appropriating them to the trust affords, perhaps, the best illustration of the manner of the growth of our law by the extension, either slight or great, of a principle; and of the curious manner, as Sir Henry Maine says, in which the English, and I may add American, bench and bar regard a case involving a new principle, or the extension of an old one, before its decision assuming that there is a rule of law directly applicable to it, and which will decide it, if it can only be discovered, and immediately after its decision assuming—what may be the fact—that in it there is laid down a new rule of law, one not theretofore existing in our jurisprudence. It also affords an illustration of the errors into which our courts are liable to fall, where, under the code, equitable principles are applied by common law judges.

The origin of this principle appears to have been in the ruling of Lord Holt in *L'Apostre* vs. *Le Plaistrier*, a suit at law, in 1708, cited and followed in *Copeman* vs. *Gallant* in equity (1 Peere Williams, 320), in 1716, where Lord Cowper held that the property of a principal in the hands of a factor at the time of bankruptcy of the latter does not pass to the assignees. In both of these cases it appears that the identical goods of the principal were found in the hands of the assignees after bankruptcy, and to allow a recovery would seem to have been but a simple application of the rule. But prior to *Copeman* vs. *Gallant*, although after *L'Apostre* vs. *LePlaistrier*, we find the first real instances in equity of the following of trust property and applying the proceeds thereof to the trust in *Burdett* vs. *Willett* (2 Vernon, 637, 1708), *Wiseman* vs. *Vandeputt* (2 Vernon 203). In the former action it appeared

that the plaintiff had intrusted goods to a factor to be sold; that the latter sold them on credit, and before payment died, being indebted by specialty more than his assets would pay. The administrator claimed the proceeds as part of the general estate, but Lord Chancellor Cowper held that "the factor is in the nature of a trustee only; and, although he has the right at law, yet he is in equity but a trustee."

This case, in the statement of the general rule, goes as far as is advisable in the extension of this doctrine, although, as we shall see, its limitation upon the *cestui que trust* of applying to the trust only the trust property, or what can be shown to be the actual proceeds thereof, has been disregarded, and the effect thereof appears to us to be disastrous to our statutes for the equal distribution of the estates of insolvents or decedents. The next application of this principle appears to have been called for in *Whitcomb* vs. *Jacob*, (1 Salkeld, 160, 1711), in which *Burditt* vs. *Willett* was followed as to goods—but which enunciated that principle, now not law, but which required over a century of litigation and argument to overrule, that "if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, etc., for in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor."

The question under a similar state of facts next arose in the Court of Common Pleas, *Scott* vs. *Surman* (Willes, 400, 1742). The Lord Chief Justice explained the *dicta* in *Whitecomb* vs. *Jacob*, saying (p. 403): "We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in this action, but must have come in as creditors under the commission. * * * But the reason of this is so very plain that I need not cite any other, because money has no earmark and therefore cannot be followed." These *dicta* both seem clearly to limit the power to follow trust money only where it has been so commingled with other money that it is impossible to separate it from the mass.*

*Other early, but not especially important cases, following the general rule: Godfrey vs. Furzo, 3 Peere Williams 185 (1733); Zluck vs. Walker, 2 Wm. Blackstone 1154 (1777), in which bills of exchange unpaid are held to be governed by the same rule as goods unsold consigned to a factor: Ex parte Chion (1721) Note 3 Peere Williams 186; Rex vs. Eggington, 1 T. R. 369; Farr vs. Newman, 4 T. R. 721; Ex parte Dumas 1 Atk. 232; Ryall vs. Rolle, 1 Atk. 165 (vide 172) (1749); Miller vs. Race, 1 Burr 452, bank bills held to be currency, and which contains Lord Mansfield's well known dictum that the reason for excluding money from the general rule was "upon account of the currency of it," and not that it cannot be ear marked.

Lord Mansfield well summarized the equitable doctrine of his time, and which from his passion for innovation and improvement he would doubtless like to have made the legal rule, in a *dictum* or note to *Howard* vs. *Jemmett* (3 Burr 1369, 1762) as follows: "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in *money* which *specifically can be distinguished and ascertained* to belong to such testator, and not to the bankrupt himself."

The English doctrine on this subject, however, would seem to be thoroughly and wisely settled by the three familiar cases of *Taylor* vs. *Plummer*, 3 Maule & Selwyn, 562, decided by Lord Ellenborough in 1815; *Pennell* vs. *Deffell*, 4 DeG. M. & G. 372, decided in 1853; and *Knatchbull* vs. *Hallett*, L. R. 13 Ch. Div. 696, decided in 1879.

The first of these was an action *in trover* brought by the assignees of an absconding bankrupt against defendant who had been defrauded by the bankrupt, and who had secured his arrest and recovered from him certain securities which had been purchased with his funds. The court held that upon these facts the relation of trustee and *cestui que trust* would be presumed, and that the latter could follow the trust funds into whatever property he could trace them, saying: "An abuse of a trust can confer no rights on the party abusing it, nor on those who claim in privity with him." And, further: "It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* vs. *Surman*, or into other merchandise, as in *Whitecomb* vs. *Jacob*, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; *i. e.*, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as not to fall within the rule on this subject."

Lord Mansfield's *dictum* on this subject, *supra*, that the true reason for

excluding money from the operation of the rule was on "account of the currency of it," is a far better reason than the one given by the court, and one which was, in effect, followed when this question of identification was brought before the court for determination in *Pennell* vs. *Deffell*, *supra*. In this case a deceased assignee in bankruptcy had commingled his private monies with trust funds in his account in his own name with his bankers, and they were so commingled at the time of his death, when he had a balance to his credit composed partly of trust funds and partly of private monies. The executors claimed the whole as part of the general estate. But the court simply compares the bank to the chest or sack in Lord Ellenborough's illustration, and holds that the commingling in the one case will no more render it impossible for the *cestui que trust* to follow the funds than in the other. "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it been specifically placed by the trustee in a particular repository and so remained." In the words of Lord Justice Turner: "It is, I apprehend, an undoubted principle of this court that as between *cestui que trust* and trustee, * * * all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." But the court felt constrained by authority to hold that where the trustee had drawn cheques against this account, they should be charged against the deposits in the order in which the latter were made, notwithstanding their character. The opinion in the third case mentioned, *Knatchbull* vs. *Hallett*, by Master of the Rolls Jessel, is in itself a treatise on the question we are now considering. He overrules *Pennell* vs. *Deffell* in the last point mentioned, using the comparison of the bank to a chest containing the commingled funds, and holding that if the trustee who has wrongly commingled them, and take some money from the chest, or from the bank, he will be held to have taken that which he had a right to take.

The case was one where a solicitor had sold bonds which he held as bailee and deposited the proceeds in his private account with his bank, and died leaving a balance to his credit, but before his death had checked out these

trust funds if the cheques had been held to have been drawn against his deposits in the order of their deposit. "Suppose he (the trustee) has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out, for his own purposes, £100, is it tolerable for anybody to allege that what he drew out was the first £100 in the bag, the trust money, and that he has misappropriated it, and left his own £100 in the bag? It is obvious that he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes?"* And this sensible view is now the settled law in England.

This general rule that a *cestui que trust*, or any one for whom money or property is held in a fiduciary character, can follow the same and claim it or its proceeds wherever he can identify it, providing the subject matter of the trust be not dissipated and has not passed into the hands of *bona fide* purchasers, is, we apprehend, the accepted doctrine of all the courts in this country.† But in some courts, as we intimated in the beginning of this article, this doctrine has been carried or 'developed' to a dangerous extent—to one which will, we apprehend, in some jurisdictions, call for legislative action to prevent the appropriation of most bankrupt and assigned estates by a few preferred creditors.

This results from the doctrine of holding one who by fraud obtains possession of the property of another a trustee *ex maleficio*, and then by an extension of the doctrine of following trust funds, or more strictly, by extreme laxity in holding what amounts to an identification of the fund, merely requiring the alleged *cestui que trust* to show that the estate of the trustee *ex maleficio* has received his property or been benefited by it, even where it appears that the entire fund has been dissipated. Thus in *Peak* vs. *Ellicott*, 30 Kan. 156, it appeared that the insolvent bank had lent the plaintiff certain monies, taking his note therefor; that in the usual course of

*See also Frith vs. Cartland, 2 H. & M. 417.

†Overseers of the Poor vs. Bank of Virginia, 2 Gratt (Va.) 544; Whitely vs. Foy, 6 Jones Eq. (N. C.) 34; Farmers' & Mechanics' Natl Bank vs. King, 57 Pa. St. 202; National Bank vs. Insurance Company, 104 U. S. 54; Matter of LeBlanc, 14 Hun. (N. Y.) 8; Thompson vs. Gloucester, 8 Atl. Rep. (N. J.) 95; Davenport Plow Co. vs. Lamp, 45 N. W. (Ia.) 1049; Merchants National Bank vs. Wiems, 6 S. W. Rep. (Texas) 802; Harrison vs. Smith, 83 Mo. 210; Brocchus vs. Morgan, 5 Cent. L. J. 51; VanAlen vs. American National Bank, 52 N. Y. 1; State vs. City Bank, 96 Id. 32; Craigie vs. Hadley, 99 Id. 131; Kipp vs. Bank of N. Y., 10 Johns 63; Schuler vs. LaClede Bank, 27 Fed. 424; Third Nat'l Bank vs. Gas Co., 36 Minn. 75; Kraemer vs. Deutschman, 37 Minn. 471; Leland vs. Collver, 34 Mich. 418; Fletcher vs. Sharpe, 108 Ind. 276; Cook vs. Tullis, 18 Wall. 332; Cavin vs. Gleason, 105 N. Y. 256; Atkinson vs. Rochester Printing Co., 114 N. Y. 165.

its business it had discounted said note; that before the note became due the plaintiff, wishing to take the same up, applied for it at the bank, and was told that it had been sold, but the bank offered to get the same for him; that thereupon, and relying upon such promise, he paid to the bank the amount of the note, and received a receipt stating for what the money had been paid; that the bank never took up the note, has failed and that plaintiff was compelled to pay the note a second time. The court held the plaintiff entitled to judgment against the assignee for the full amount of his claim. "As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner."

The Supreme Court of Missouri has gone to the same length in *Harrison* vs. *Smith*, 83 Mo. 210.

The Supreme Court of Wisconsin, however, in three cases arising out of the assignment of one Hodges, reported respectively in 66 Wis. 401, 69 Wis. 115, and 71 Wis. 133, has carried this doctrine to the greatest length. In each of these cases the insolvent had rendered himself a trustee of the plaintiff by converting his funds, and, it appears, utterly dissipating them. Thus in the first case. *McLeod* vs. *Evans*, in the 66th Wis., the plaintiff had left with the insolvent a draft on New York for collection, which the latter placed to his credit with his Chicago banker. Against this account he drew in the usual course of his business, and at the time of his assignment there was nothing due him from the Chicago bank. He had refused to pay plaintiff the amount of the draft before his assignment, telling him that he had sent the same to New York for collection, and that he had not received the money therefor.

Upon these facts the court held that the trust fund had not been dissipated, but that it had benefited his estate and that the latter in the hands of the assignee was liable therefore. "It is irresistible, from the facts, that the proceeds of the trust property found its way into Hodges' hands, and were used by him, either to pay off his debts or to increase his assets. In either case it would go to the benefit of his estate. It is not to be supposed that the trust fund was dissipated and lost altogether, and did not fall into the mass of the assignor's property; and the rule in equity is well established that so long as the trust property can be traced and followed into the property into which it has been converted, that remains subject to the trust."

We know of no other authority which goes to this length. The Minnesota Supreme Court considered the question in *Third National Bank* vs. *Gas Co.*, *supra*, but held that it was not necessary to go to such a length in that case. The court seems entirely to have overlooked the other equitable principle involved, viz., that where the identical funds can be traced into the hands of *bona fide* holders without notice, as it could be in that case, the fund has passed beyond the reach of the *cestui que trust*.

Judges Cassody and Taylor, in able opinions dissented in each of these cases—their dissent apparently growing more vehement with each application of the rule.

This question was subsequently presented for adjudication in New York upon a similar state of facts, in *Cavin* vs. *Gleason*, 105 N. Y. 256. The court says: "It is clear, we think, that upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim, that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such a contention." *McLeod* vs. *Evans* appears not to have been cited to the court. The court expressly holds that if the trust property, or what can be identified as its proceeds, is found among the assets, they will be appropriated to the trust; "but it is the general rule as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they must be identified."*

And this would appear to be the only rule sanctioned by the authorities, or which is equitable or just in its operation.

JOHN A. LARIMORE,
St. Paul.

*See also Appeal of Hopkins, 9 Atl. Rep. (Pa.) 867.

JUDGES OF OUR PROBATE COURTS.

SHOULD THEIR TERM OF OFFICE BE LENGTHENED?

Some time since we took occasion to propound the above question to a number of the Probate Judges of the state, and take pleasure in publishing their views on this quite important question. A perusal of the articles will show the great necessity of a change, and we shall be glad to add farther to the literature on this subject in subsequent issues, until some legislative action shall have been taken.

Editor Minn. Law Journal:

Sir:—You request my views as to changing the term of office of the Probate Judges of this State from two years, as it is now, to a greater number of years.

Article VI, sec. VII, of the Constitution of the State of Minnesota, fixes the term of the probate judges of this state at two years, so that the question of a change would have to be submitted to a vote of the people, and any change made could not take effect until 1898, and hence could not effect the judges holding office at present.

At the time the constitution was adopted, in 1858, and the state was admitted to the Union, the population of the state did not equal the population of one of our great cities at present, and the aggregate wealth of the state was not equal to the wealth of one of these cities. Since that time our population, wealth and mortality has vastly increased, and with this increase the business of the probate courts has kept pace, so that to-day the general public does not fully comprehend the importance of the work done by the Probate Courts, nor the questions coming before them affecting persons and property.

It is estimated by competent authority that all property, both real and personal, in this state, passes through the probate courts once at least in every thirty-three years. In addition to the work and litigation connected with the estates of deceased persons, the Probate Courts of this state have jurisdiction of matters of guardianship, estates of wards, insanity, and state pub-

lic school matters; so that the work of the Probate Court covers the span of life from cradle to grave, and after death, adjust and settles the business left undone. The office of Probate Judge requires a man of at least average legal and business ability, although the law, as it now stands, does not require that a man should be a lawyer to be eligible to the position. The law in this respect should be changed as well as the term of office, so that the position would command at least a man of average business ability and standing in the legal profession.

At the time the constitution was adopted there might have been some excuse for placing this office in the list of county offices and making the term of office two years, on the theory of rotation in office and on account of the unimportance of the office and the scarcity of business at that time, but now it should be removed as far as possible from political uncertainties. In our large cities, having municipal courts, the terms of judges are usually six years. Are our probate courts of so much less importance that they should be subject to change every two years?

I am strongly of the opinion that the term of the probate judges of this state should be changed so as to make the term either four or six years. If the term were four or six years the office would command better material and the lawyer of business and legal ability, especially in our large cities, could afford to give his time and experience to the office. Where the judge and his clerk are subject to change every two years, it effects the business in the office, for it takes experience to enable them to do their work well and become familiar with the details of their respective positions.

It seems to me that this is a matter worthy of consideration aside from any personal or party interest.

JOHN H. STEELE,
Judge of the Probate Court.

Minneapolis, Feb. 8th, 1894.

Editor Minn. Law Journal:

Sir:—In reply to your request of recent date I beg to submit the following: As far as I have been able to judge, the main objection which has been raised as to the lengthening of the term of office of Probate Judges is that it would involve a change in the Constitution, leading to others, which in conservative minds would prove detrimental in the end. However, a good and proper administration of the Probate Court, involving estates of different magnitudes, where the Judge is the guiding hand and where in all instances his sense of justice or interpretation of such, to all persons interested, prevails, demands the change.

It is not proper that he should be retired before he has accomplished the bulk of the task imposed on him. It leads to confusion. His successor, entertaining possibly a different sense of right and wrong and viewing matters in their business aspect in another light, would probably undo what had been contemplated and impede the performance of what might have been suggested.

Especially is this true in guardianships where the Probate Judge is supposed to have decided on his line of action for the protection and disposal of estates of minors.

The office of Probate Judge is not of an inviting character as far as salary is concerned, but can be made so if the term is extended to four or six years. It would then be an inducement to men of experience and mature minds to accept the position before their final retirement from the active scenes of life.

The only reason that I can see why the term of office was made so short is that it was a fee one and supposed to amply pay off political debts.

As long as the office remains a political one, political changes will bring about repeated injurious changes in the competency of the personnel of the office and the dispatching of business.

In the oldest established States of the Union the Probate and Surrogate Courts are synonymous with handsome incomes.

It would be a matter of surprise to the good people of Ramsey County were they acquainted with the volume of work done in the Probate Court, the number and value of estates being daily opened and settled, to make no mention of what additional labor is put upon it by acts of every legislature, the most recent of which compelled an examination of over 7000 files in order to ascertain the solvency of bonds in estates and guardianships.

I am decidedly of the opinion that the term of Probate Judges be of the same duration as that of a District Judge.

St. Paul, Minn. JOHN B. OLIVER,
Judge of the Probate Court.

Editor Minn. Law Journal:

Sir:—You ask for an expression of my views on the question "Should the term of Judges of Probate in this State be lengthened?" I would say, that in view of the policy of the State with referenee to its Judiciary, it would seem to me consistent and proper to lengthen the term of office of the Probate Judge to at least four years.

The same arguments used toward that question in connection with the Supreme and District Courts, and the clerks of the latter, apply with equal force to Probate Courts.

While it may appear hardly proper for an incumbent of a public office to argue for a longer term, yet I have been told by so many citizens that the term should be at least four years that I may be acquitted of any personal motive.

I would not increase the term beyond four years, for I do not believe in taking county offices too far away from the people; but I do believe as a whole that a four year term would result in better service, more settled practice and more certain results.

H. L. BUCK,

Winona, Feb. 7th, 1894. Judge of the Probate Court.

Editor Minn. Law Journal:

Sir:—Will say a person in business is considered valuable on account of the experience he has had. I do not think a two-year's experience would be considered of much value.

Yet, when the title of property depends upon proper administration, one would think people would prefer a man with long experience. A man cannot become a specialist in any branch of law or business in two years.

The amounts involved in estates are generally large; larger than in causes in other courts. Besides, the probate judge has to advise people and assist in the management and investment of funds, and needs time to carry out and settle affairs, and as many matters run for years, it would appear best, I think, to have the term of the Probate Judge run for a longer term. Every argument that can be urged for granting long terms to the judges of other courts will apply with equal or greater force in favor of the proposition of granting at least equally long terms to the Judges of Probate.

Albert Lea, Feb. 8th, 1894. H. BLACKMER,

Judge of the Probate Court.

Editor Minn. Law Journal:

Sir:—I consider the office of Judge of Probate, the *most important office* in the State. By its decrees the title to all real estate is established.

The Judge of Probate is the only person that stands between the executor, administrator and guardian, and the widows and orphans and heirs of the dead. It is only through and by his watchful care and honesty that justice will be done.

Having such sacred views of the office, I deem that the term should be the

same as Judge of the District Court, and that politics should *never* be allowed to enter in the selection of the judge.

Wm. B. TORREY,
Judge of the Probate Court.

Mankato, Feb. 7th, 1894.

Editor Minn. Law Journal:

Sir:—My opinion is, that the term of Judge of Probate should be changed. The term should be made at least for four years. I see no particular reason for making it any more than four years. My principal reasons are, that it takes about one year to get acquainted with the duties of the office. I know from experience that I can myself accomplish twice the amount of work in a given time than I could one year ago, and I can do it much easier. There must of necessity be a large amount of mental strain resting upon the incumbent the first year of his term, in becoming acquainted with the duties and details of the office, and then comes with the second year the anxiety and nervous strain for a re-election—even Judges of Probate are human—so that it is impossible for one to give his very best services to his constituents in a short term of two years.

I do not think, however, that the reasons above given will apply any more forcibly to the office of Judge of Probate than to any other county office, having had some experience in this matter prior to my election to the office of Probate Judge. I could never see the feasibility of the law making the terms of Clerk of District Court and Court Commissioner four years, and all others two years. If the voters of this state are desirous to get the best services possible from their public officers, make the terms of office at least four years. In connection with the office of Judge of Probate I would make it incumbent on the County Commissioners, State Examiner, or some other official, not yet designated by law, to see that the records are kept up as required by law. It ought certainly to be incumbent on some one to see that this is done. In our own county, for instance, there is no record of any orders, wills or letters recorded, from November, 1882, to October, 1890, except in a minute book without an index. None of the files have been recorded. The county has furnished the necessary books of record, but former judges have neglected to do their duty. So that you can conclude for yourself how interesting it has been for my predecessor and myself to turn over the pages of a minute book to look up any matter in connection with an estate probated during that time.

JOHN COSTAIN,
Judge of the Probate Court.

MOORHEAD, Feb. 8.

OUR INSANITY LAW.

THE INSANITY LAW OF 1893.—One of the most important and far reaching decisions lately rendered in this State is that embodied in the opinion filed by Judge Collins on reargument of the case of the State ex rel Blaisdell vs. Billings, Sheriff, wherein Ch. 5, Laws of 1893, is declared unconstitutional (57 N. W. 794).

The most serious effect seems to come from the fact that the provisions of that law were very different from those of the Probate Code formerly obtaining, and as a result all commitments made since April, 1893, being under the law of 1893, are illegal.

Judge Collins reviews the provisions of the statute as follows:

"Let us turn to the statute in question. It must be observed at the outset that private, as well as public, hospitals are within its terms, and for this reason, if for no other, the rights of the citizen should be closely guarded. Section 17 requires that every person committed to custody as insane must be so committed in the manner thereafter prescribed. Section 19 provides that whenever the Probate Judge, or, in his absence, the Court Commissioner, shall receive information in writing (the form being given) that there is an insane person in his county needing care and treatment, he shall issue what is called a "commission in lunacy" (the form thereof being prescribed) to two physicians, styled "examiners in lunacy." This section permits the filing of an information not even sworn to by anybody. That it has opened the door to wrong and injustice—to the making of very serious and unwarranted charges against others by wholly irresponsible and evil-minded persons—is evident, although the method of instituting the proceedings does not effect the validity of the act. The commission directs the two physicians designated, who, under section 18, must now possess certain qualifications, to "examine" the alleged lunatic, and certify to the Probate Judge or Court Commissioner, within one day after their examination, the result thereof, with their recommendation as to the special action necessary to be taken. The form of this certificate and recommendation is laid down in section 20. This certificate must be duly sworn to or affirmed before the officer issuing the commission. If (section 19) the examiners certify that the person examined is sane, the case shall be dismissed. If they certify the person to be insane, and a proper subject for commitment, for any of the reasons specified in section 17, it is made the duty of the officer to visit the alleged insane person, or to require him to be brought into Court; "but he

shall cause him to be fully informed of the proceedings being taken against him." In all cases, "before issuing a warrant of commitment," the County Attorney shall be informed, and it is made his duty to take such steps as are deemed necessary to protect the rights of such person. If satisfied that the person is insane, and that the reason for his commitment is sufficient, under the provisions of the act, the Probate Judge or the Court Commissioner approves the certificate of the examiners, and issues an order or warrant in duplicate, committing him to the custody of the superintendent of one of the state hospitals, or to the superintendent or keeper of any private hospital or institution for the insane, which, under the same law, has been duly licensed. This order or warrant may be executed by the sheriff or by a private individual, and through it the person named therein is placed in the custody of the superintendent or keeper to whom it may have been directed.

We now reach a consideration of the controlling provisions of the statute. The commission issues to the examiners, and they are authorized and directed to "examine" the alleged lunatic. Their examination is not made under oath. It may be formal or informal, as they choose, and the person under examination may not have the slightest idea that he is the subject of inquiry or investigation. The examination may be at any place where the subject can be found, or at a place convenient for the examiners. It may be public or private, and, judging from the questions found in the form to be answered by the examiners, it may consist simply in observing the alleged lunatic, and in making inquiries of him or of his acquaintances, or for that matter, accepting common street gossip. When this examination, of which the subject need not be informed, and in which he takes no part, is completed, the examiners are required to make a verified written report and recommendation, and on this the officer may commit without any other or further act, except that he must see the subject, either in or out of Court, informing him fully of the proceedings, andmust also notify the County Attorney of what is going on. Not until after the examination, report, and recommendation, upon which the officer may commit, if he so chooses, need there be any notice whatsoever to the person charged with being a proper subject for the insane asylum, nor need the County Attorney be advised of the proceedings.

If personal rights are of any consequence, and if they need protection at any time, such notice should precede the examination, not follow it. But, aside from this serious defect in the law, it will be seen that there is no provision which assures to the accused a trial at any time, either before or after notice, under the forms of law; no provision which guarantees to him a judicial investigation and a determination as to his sanity. Nor is the officer obliged to hear a particle of testimony, although he is at liberty so to do. The accused or the county attorney might appear before him with an army of volunteer witnesses; but if their testimony was received or heard,

or if there was the slightest approach to a trial, it would be through the grace of the officer, not as a matter of right to the person whose personal liberty is jeopardized by the proceeding. The objection to such a proceeding as that authorized by this statute does not lie in the fact that the person named may be restrained of his liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against him are true; not in commiting him to the hospital, but in doing it without first giving him an opportunity to be heard. We are compelled to the conclusion that the enactment of the sections referred to is unconstutional, because they allow and sanction a denial of the protection of the law, and the deprivation of personal liberty without due process of law. The provisions of the chapter on this subject being invalid, those which they were designed to supersede, found in the Probate Code, are in force, and must be observed."

The Attorney General subsequently gave it as his opinion that each person who had been so committed should be informed at once that he was at liberty to go where he chose, and the various counties are now endeavoring to avoid the expense attendant upon re-examination of each person at the county from which they were sent, under the provisions of the code now revived.

It seems strange that, with so many good lawyers in our legislature, such an act should pass without more serious attention than seems to have been given to this one. The defects are so patent and glaring, going straight to the rights secured to each person by the constitution, that such an error seems inexcusable. A few minor corrections are all most of our laws need, and the practice of each legislature in re-enacting or altering the entire law upon certain subjects—laws which have stood the test of time—is exceedingly unwise, and costly, as well.

NOTES ON RECENT DECISIONS.

COUNTRY NEWSPAPER PRIZES AND THE ANTI-LOTTERY LAW.—Out in Idaho there is a country paper which attempted to induce its delinquent subscribers to pay up by means of offering a prize to one of those who should pay up within a certain time. A sewing machine was promised to the subscriber who held the ticket bearing a number corresponding to the number on a duplicate ticket, drawn from a box in the usual manner by a blindfolded person. Although each ticket represented the payment of a valid subscription, past or future, yet the District Court of the United States for that District held, upon arrest of the proprietor under the anti-lottery law, that the scheme was essentially a lottery, within the meaning of the law. *United States* vs. *Wallis*, 58 Fed. Rep. 942.

In conclusion the Court, Beatty, J., says: "It is most probable that the public generally, including the proprietors of newspapers, have supposed that such publications—which have been common—may be lawful, and their transmission through the mails not prohibited; yet, after a careful examination of the law and the decisions thereunder, the conclusion seems imperative that the demurrer must be overruled, and it is so ordered." We believe this is the first instance wherein this class of cases has been considered by the Courts of the United States.

PATRIOTISM IN THE WRONG PLACE.—In the case of *Jones* v. *Snow*, 57 N. W. Rep. 478, Judge Buck gives the defendant the benefit of some remarks calculated to dampen his ardor in the matter of displaying the stars and stripes. 'Tis best told in the words of the Court:

"It appears from the evidence that the defendant was using his wagon as a medium for advertising his business of selling bicycles, and to this end the wagon had upon it several nickel-plated bicycles, with flags also upon the wagon, flying from one side to the other. The evidence clearly shows that the wagon was so arranged and decorated as to readily frighten horses of ordinary gentleness, and that the display was not such as was really necessary for carrying on defendant's business except in the way of advertising it. There did not appear to be any carelessness or negligence on the part of the plaintiff or Mrs. Griswold, and they were lawfully in the street. The de-

fendant, in giving his testimony on the trial, stated that he did not know that it was hardly imperative to decorate his wagon in the manner proven, but that he carried flags, and so decorated his wagon, to let people know that his people were true Americans. However admirable such an unusual display of loyalty and patriotism might be if exhibited on a Fourth of July, it is of rather questionable practice to let it ooze out and bubble over on other days, in a great thoroughfare of a populous city, to the extent proven in this case, endangering not only the property of other citizens, but putting their lives in peril."

CONSTITUTIONAL LAW; *in re* MAINTAINING A UNIFORM STAGE OF WATER IN LAKE MINNETONKA.—On February 12th last the Supreme Court of this State, through Judge Mitchell, reversed the order of the late Judge Hooker of the Hennepin County District Court in the above entitled matter, thus avoiding the act authorizing the proceedings, principally because no compensation to the abutting land owners was provided for. The raising of the stage of water to a point below high water mark was claimed by the land owners to result in covering and depriving them of the use of all the low lands between low water mark and the point to which it was raised. This the lower Court denied, holding that the state had a right in aid of commerce and navigation, thus to take such intervening lands for its use without compensation.

This view is not taken by the Appellate Court, whose views are as follows:

"'High water mark,' as a line between the public and riparian owners and navigable waters, where there is no ebb and flow of the tide, is to be determined by examining the bed and banks and ascertaining where the presence and action of the water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as the nature of the soil.

"It is co-ordinate with the limit of the bed of the water, and that only is to be considered the bed which the water occupies so long and continuously as to wrest it from vegetation and destroy the value for agricultural purposes.

"The bed does not include low lands which, although subject to frequent overflow, are valuable as meadows and pastures; and the state has no right, even in aid of navigation, to raise the water by artificial means, so as to injure or destroy such lands without making compensation. To support a special assessment for a local improvement the benefit for which the land is assessed must be secured.

"The assessment in this case held invalid because no provision is made for

compensating riparian owners for injuries to their land, caused by raising the waters of Lake Minnetonka, pursuant to the provisions of Sp. L. 1891, Ch. 381."

For a full report of the case in the lower court see *Minn. Law Journal*, Vol. I., pages 17 and 18.

THE STATE ELEVATOR CASE.—Some of the remarks made by Judge Mitchell in the course of the opinion delivered by him in the case of *Rippe* vs. *Becker, et al.*, (57 N. W. Rep. 331–333), are so representative of the more safe and conservative views of the powers of the state to embark in an ordinary business venture, that we feel compelled to quote them here. The decision in this case will prove more beneficial in its results in putting a check upon utopian schemes than anything else which could have been devised. Judge Mitchell says in part:

"It seems to us as plain as words can make it—too plain to admit of argument—that the provisions of this act have no relation or reference whatever to the exercise of the police power to regulate the "grain elevator" business. We cannot discover, and counsel have failed to point out, a single provision of the act that has any relation to, or any tendency to accomplish any such purpose. Aside from the provisions of sections 3 and 4, for what we may term a bureau of information as to the state of the markets and rates of transportation, (which has no relation to the exercise of any police power, and the connection between which and an elevator of a capacity of 1,500,000 bushels, with 'all necessary spur tracks, terminal yards and other facilities to receive and ship grain,' is not apparent,) the evident sole purpose of the act is to provide for the state erecting an elevator, and itself going into the 'grain elevator' business. All the provisions of the act as to receiving, handling, storing, and delivering grain clearly have reference only to the management of the business conducted by the state in its own elevator. The keynote to the object of the law is, we apprehend, to be found in the last clause of section 4 above quoted as to the intention of the act; and so far as relates to the right of the state, under the police power, to regulate this business, the position of defendants' counsel really amounts to this: That whenever those who are engaged in any business which is affected with a public interest, and hence the subject of governmental regulation, do not furnish the public proper and reasonable service, the state may, as a means of regulating the business, itself engage in it, and furnish the public better service at reasonable rates, or, by means of such state competition, compel others to do so. The very statement of the proposition is sufficient to show to what startling results it necessarily leads. It needs no argument to prove that if, in the exercise of the police power to regulate this business, the state

itself has a right to erect and operate one elevator at Duluth, it has the power to erect and operate twenty, if necessary, at the same point, and also to erect and operate elevators at every point in the state where there is grain to be handled and stored. Railways are also, under this same police power, the subjects of state regulation; and if it should be deemed that they were not furnishing the public with proper service, or charging unreasonable rates, it could with equal propriety be claimed that it would be a proper means of exercising the police power of regulating the business for the state itself to construct and operate competing railways. The hack business, the pawnbrokers' business, the manufacture and sale of intoxicating liquors, and numerous other kinds of business that might be named, are also the subjects of state regulation; and, if counsel's contention is correct, we do not see why, as a means of regulating' these kinds of business, the state itself might not engage in running hacks, pawnbrokers' shops, building and operating distilleries and breweries, or even running saloons. But further illustration cannot be necessary. The police power of the state to regulate a business does not include the power to engage in carrying it on."

HOMESTEAD EXEMPTIONS UNDER A HOTEL LEASE; AN UNUSUAL PROCEEDING.—"March 12th, 1889, petitioner leased the property known as the Spalding Hotel, for a term of ten years from and after May 1st, 1889. Thereafter, on March 18th, 1891, petitioner entered into a second lease which was in terms, substituted for the original, under which last named lease he continued to occupy said premises until Sept. 9th, 1893, at which time he was declared insolvent and a receiver appointed to take charge of his property and effects.

At the time of filing an inventory of his property, petitioner included therein the second lease, and also included certain provisions and fuel, together with the furniture described in his petition. At or near the time of the execution of the first lease petitioner and wife took possession of the certain rooms described in his petition and have ever since occupied them as their home.

The petitioner asks that the rooms so heretofore and now occupied by himself and wife be declared to be his homestead as against his creditors and the receiver, and that the receiver be restrained from in any manner interfering with the petitioner's use and occupancy thereof.

Petitioner, from the time of the appointment of the receiver, until Jan. 5th, 1894, occupied the rooms in question and was furnished his meals by the receiver, and no demand for payment was made therefor. Jan. 5th, 1894, the receiver notified petitioner that from and after Jan. 1st, 1894, he (peti-

tioner) would be required to pay $5.50 per day for board and use of the rooms occupied by himself and wife.

Petitioner prays the court for an order restraining the receiver from in any manner interfering with petitioner's use and occupancy of such rooms as a homestead, and for an order directing the receiver to furnish petitioner and his wife with provisions and fuel for one year, or, in lieu thereof, that he furnish them meals and heat. Counsel for receiver contends that petitioner, under the terms of the lease did not, nor could he, obtain homestead rights in the rooms in question.

It is substantially conceded by counsel for receiver that a leasehold for a term of years is a sufficient interest upon which to base homestead rights, but it is insisted that a clause in the lease under which petitioner holds this property, forbids and prohibits him from acquiring any homestead rights therein, the clause in question being as follows: 'The said party of the second part, as a further condition of his occupancy of the said premises, agrees to conduct or operate thereon or thereat, a public inn, first class in all its appointments and accommodations, give to it so much of his personal time and attention as may be necessary, and exert his best efforts for the successful management, and to maintain the reputation of the house and continue it in favor of the public, as well for his own profit as for the good name of the property and plant.'

The lease in the case at bar contains a provision as follows: 'known as the Spalding Hotel * * * to be used for hotel purposes and operated as such.' This brings it more nearly in line with the case of *Green* vs. *Pierce*, 60 Wis. 672, to my mind, than the clause first quoted and to which attention is specially directed by counsel. Under the first clause petitioner might and very properly could use a portion of the hotel as a residence, and still fully comply with its conditions, viz: 'to conduct and operate thereon and thereat a public inn.' Conceding, however, that the language used has substantially the same meaning as that used in the cited case, is that a sufficient reason for holding that the petitioner is not entitled to a homestead as prayed for?

I think not, for the reason that, in my judgment, the creditors cannot raise the question of the insolvent's rights under the lease, that being a matter for the lessor to take advantage of or not, as it may see fit.

The homestead right is given for the protection of the debtor and his family, and it must be wholly immaterial to the creditors whether the homestead tenure is slight or of the highest character.

In the case of a deed the grantor would be the only person that could insist upon the conditions, and it would seem that the same reasoning is applicable to a lease. Why should a clause made wholly for the benefit of the lessor or grantor, and enforceable only by him, enure to the benefit of creditors of the lessee or grantee?

The receiver obtained no greater rights or interest in the lease than would a judgment creditor levying an execution thereon. It is immaterial that no claim of homestead has ever been made prior to the commencement of this action.

In my opinion the petitioner is entitled to hold and occupy the rooms described in his petition as a homestead as against the receiver or creditors.

Dated this 30th day of January, 1894.

S. H. MOER, Judge."

The above is a portion of the memoranda filed by Judge Moer, of the St. Louis County District Court, Duluth. It allows a claim which most attorneys would at first glance consider frivolous, but is in accord with the policy of our laws in that it is liberal toward the claimant of the exemption.

BUILDING AND LOAN ASSOCIATIONS; WHEN WITHDRAWING MEMBER BECOMES ENTITLED TO JUDGMENT.—Judge Kelly of the Second District has determined the rights of withdrawing members of building and loan associations in a manner which, if his decision is appealed from, we trust will be affirmed and become the settled rule in this state. The plaintiff, being entitled so to do, gave notice in proper form of his intention to withdraw. At the expiration of the time that notice was required to be given, he duly tendered his stock to defendant and demanded its withdrawal value, which was refused on the ground that there were no funds in the defendant's treasury applicable to the payment and withdrawal of said stock.

In the words of the court, the question before it was: "Can the holder of the stock of a mutual building association, desiring to withdraw therefrom, who has brought himself within the rules by notice, be permitted to take judgment against the corporation where, under the by-laws of the association and the laws of the state, there are no monies in the treasury legally applicable to pay his claim?" And, answering its question in the negative, the court says: "It seems not only to be the theory of the defendant's own laws, but also of the General Laws of the state (Sec. 27.

ch. 131, G. L. 1891) 'that no more than one half of the amount received on payments on stock * * * shall be used to pay withdrawals, without the consent of the board of directors.'

The Supreme Court of Pennsylvania, in *U. S. Building and Loan Association* vs. *Silverman*, 83 Pa, St. 394, in construing a statute almost identical in words with our statute and defendant's by-law, held that a non-borrowing member, situated as plaintiff is here, was entitled to judgment against the association, notwithstanding the law The Court say that the power of the courts to stay execution will be sufficient protection, and it intimates that the statute of limitations might run against the plaintiff if judgment be denied. With due deference to this learned court, this decision is neither good law nor good sense. The plaintiff has no standing in court until his debt, by the terms of the contract he has made, becomes payable. He has agreed that but one half of the receipts of the association shall be applicable to the payment of his claim. Until there is in the treasury, from the fund thus set apart, sufficient monies applicable to his claim, his claim does not become due; and it is elementary that until the right of action accrues, the statute of limitations does not begin to run. Of course, failure of the proper officers to set aside the fund applicable to such debt, or other like cause, might give a right of action where in fact sufficient monies were not in hand. But that is not this case. The contract plaintiff has made is reasonable. In fact, it is the only feasible plan upon which the corporation can do business safely. To order judgment in plaintiff's favor is to prefer him to every other stockholder. Even if execution be stayed, by docketing his judgment he obtains a lien upon all the real property owned by the association, and thus obtains an undue preference.

The error into which the Pennsylvania court has fallen has arisen in assuming that a withdrawing member becomes, upon perfecting his notice of withdrawal, *eo instanti*, "a mere creditor of the association," and that he has all the rights of every other creditor, This is plausible, but it is fallacious in this, that it loses sight entirely of the peculiar contract relationship of the several stockholders of a building association one with another. Such withdrawing member, on complying with the terms of the by-laws regulating withdrawals, surrenders certain rights and is relieved from certain obligations of active membership. For example, he can no longer vote or take part in the management of the corporation; but he is relieved from further payments on his stock; and his share in the business is

determined as of the date that his notice of intention to withdraw becomes effectual. But he is unlike an ordinary creditor, because he is bound for his share of the losses, if any, occuring during his active membership, and is relegated to the terms of his contract as to the time and manner of enforcing his claim against the association.

If looking for a definition, I would call him a passive member of the association, with the right of a creditor to enforce his claim against the association monies applicable thereto and in the order of notice given. Any other view of the law of this case than the one I have taken would put in the hands of the non-borrowing members the power in times of financial and business depression to wreck the association. The business contemplates a sort of co-operative partnership, where those who wish to loan their money put it into the treasury in monthly installments, expecting the same money, or at least half of it, to be loaned at a premium and interest to such members as desire to borrow: this plan to continue until the monthly payments of dues plus premium and interest received and less expenses, if any, mature the stock or equal its value at par. The period contemplated to reach this result, under ordinary circumstances, is never less than one hundred, nor more than two hundred months. Therefore, I am sure I do the plaintiff no wrong when I hold him to the strict letter of his contract, and require him to wait for his judgmement until, in accordance with his contract, the fund is ready to be paid to him.

Claus Heinbokel vs. *National Savings, Loan and Building Association*, District Court of Ramsey Co.

EVIDENCE—HOW FAR A PARTY MAY BE ALLOWED TO GO IN DISCREDITING HIS OWN WITNESS.—We observe that the case of *Selover* vs. *Bryant*, 56 N. W. Rep. 58, (Minn.), commented on in No. 5 of the *Journal*, page 112, in which our Court very materially limits the rule that a party shall not be allowed to discredit his own witness, is being commented upon by other periodicals. The *University Law Review*, elsewhere noticed, contains an able review of the case, and, as an illustration of the excellence of this new magazine, we take the liberty of reprinting it in full.

"Justice Dickinson, in delivering the opinion of the Court in the recent case of *Selover* vs. *Bryant* (Minn. 1893), 56 N. W. Rep., 58, says: 'We deny that, by calling a witness to the stand, a party becomes responsible for his credibility in any such sense that he is absolutely precluded, when surprised by

adverse testimony, from showing that the witness had made statements of the facts contrary to his testimony. It is at least within the discretion of the Court to allow this. One has not all the world from which to choose the witnesses by whose testimony he must prove his case. He has not the freedom of choice that one has in the selection of an agent. He can only call those who are supposed to know the facts in issue. He is entitled to have their testimony before the jury, not as the statements of his agents or representatives by which he is to be concluded, but as the testimony of witnesses whose credibility he cannot be expected to vouch for, but which the jury are to determine.'

"This is somewhat further than most courts have gone in this matter, but adopts by decision of court the rule which has been placed by the legislatures of many states upon the statute books.

"It is well settled that a party who produces a witness cannot afterwards offer general evidence to discredit him. If he could, he would have it in his power to destroy the witness if he spoke against him, and to leave him a good witness if he spoke for him; and no man should be placed on the witness stand with the prospect of having his reputation destroyed if he does not come up to the expectations of the attorney producing him. Besides, a party is presumed to know his witness and impliedly to vouch for his general credibility.

"But a party can certainly show the facts to be otherwise than as stated by his witness. For such facts are competent evidence in the case, and the later testimony is not offered solely for the purpose of discrediting the witness. But in thus showing the facts to be different, the party cannot go so far as to introduce evidence tending to impeach his witness, and evidence of bias against the party is such evidence within the rule in New York. (*Matter of Mellen*, 56 Hun. 553; *Pollock* vs. *Pollock*, 71 N. Y. 137, 152; *Coulter* vs. *Am. etc. Ex. Co.*, 56 N. Y. 585; *Tice* vs. *Drumgoole*, 53 Hun. 365.)

"Between these two settled positions there is a middle question: Can the party producing a witness prove contradictory statements made by him? In the United States courts he can, at least where the contradictory statements were made to the party or his attorney preparatory to the trial. (*Chicago & C. R. Co.* vs. *Artery*, 137 U S. 507. Compare *Dixon* vs. *State*, (Ga.) 13 S. E., 87.)

"In New York (see *Becker* vs. *Koch*, 104 N. Y. 394) it has been laid down without qualification that a party cannot prove the contradictory statements of his witness; but this was merely a dictum, and the rule will hardly be found to be so strict. You certainly cannot prove, either by another witness or by documents, inconsistent statements of the witness where the sole effect of such statements would be to discredit him and not to adduce any material evidence on an issue in the cause. (*Thompson* vs. *Blanchard*, 4 N Y. 303, 311; *Coulter* vs. *Am. etc. Ex. Co.*, *supra*.) But you may inter-

rogate the witness as to previous inconsistent statements made by him, for the purpose of probing his recollection, and by showing the witness that he is mistaken, inducing him to correct his testimony, and also for the purpose of showing the circumstances which induced the party to call him; and such inquiries will not be excluded merely because they may result unfavorably to the witness. (*Bullock* vs. *Pearsall*, 53 N. Y. 230; *People* vs. *Sherman*, 133 N. Y. 349.)

"But, in Iowa, where the same rule prevails, it has been held that while plaintiff might ask his witness whether he had not before the trial given a written statement, and had not made statements to plaintiff and others, contrary to his present testimony, it was error to admit in evidence such statement, and the testimony of plaintiff and such others, to prove the admissions by the witness (*Hall* vs. *Chicago, R. I. & P. Ry. Co.*, 51 N. W. 150); see also *People* vs. *Fleming*, 60 Hun. 576; *Hill* vs. *Froehlick*, Id. 580; *Jamison* vs. *Baggot*, 106 Mo. 240; *Perkins* vs. *State*, 78 Wis. 551. And even in those jurisdictions where it is permitted to prove contrary statements of the witness, this can only be done where his present testimony is damaging to the party calling him, not merely where he now refuses to testify to what he previously stated. (*People* vs. *Mitchell*, 94 Cal. 550, s. c. 29 Pacif. 1106.)

"How far a party may go in showing that the testimony of his witness has taken him by surprise, and is contrary to what he had reason to believe the witness would testify, or to the examination of the witness preparatory to trial, must always be in the discretion of the trial judge. (*Morris* vs. *Welles*, 26 N. Y. State Rep. 9; 7 N. Y. Supp. 61.) This is held even in those states where by statute a party has the right to contradict his witness on the ground of surprise. (*Miller* vs. *Cook*, 127 Ind. 339; *Williams* vs. *Dickinson*. 28 Fla. 90.) And although it is said by Best, Ch. J., in *Clarke* vs. *Saffery*, Ry. & M. 126, that where a party calls his adversary as a witness, he has a right to contradict him, this is expressly denied in the recent case of *Price* vs. *Manning*, L. R. 42 Ch. D., 372, where it is laid down that the permission of such contradiction even of one's adversary is a matter of discretion in the trial judge."

NOTE AND COMMENT.

LAW BOOK NEWS—This is the title of the latest candidate for favor in the legal journalistic field, and comes marked with those words, which are guarantees of good things, present and to come, "West Publishing Co., St. Paul, Minn."

The first number consists of thirty-two pages of reading matter, reviewing new law books and digesting the contents of all the legal periodicals.

We take it that the reviews of new works, under the caption of "Contents of New Books" will prove most valuable to the profession at large, while the digest of current literature will be a great assistance to busy lawyers who keep abreast of the times. The latter covers about seventy-five publications, and the arrangement under headings of legal subjects is a good one.

A department is given to extracts from the reviews of new books made by other legal periodicals, supplementing its own descriptive reviews. A number of other interesting features combine to make it, in our opinion, a valuable assistant to the busy lawyer, in any portion of the country. It takes the place in legal literature which is occupied in general literature by the *Literary Digest* and *Public Opinion*, and will receive a warm welcome.

MRS. MYRA BRADWELL.—The founder and editor of the *Chicago Legal News*, Mrs. Myra Bradwell, died at her home in Chicago, Ill., at noon, February 14th last, after a long and painful illness.

Mrs. Bradwell was one of the most unique and interesting characters in the legal world. She was the wife of Judge James B. Bradwell, of Chicago, under whose direction she studied law. Upon the completion of her studies, having passed a satisfactory examination, she made application to the Supreme Court of Illinois for admission to the bar. This was the first serious attempt made by a woman to obtain a call to the bar in this country. The Court denied her application solely upon the ground that she was a woman. She thereupon sued out a writ of error to the Supreme Court of the United States, and her case on the hearing, in 1871, was ably presented by Senator Matt Carpenter, of Wisconsin. In 1873, the Court, through Mr. Justice Miller, affirmed the decision of the Lower Court, thus denying her admission to the bar. She never again renewed the application, and subsequently was surprised to receive a certificate of admission upon her original application, from the very court which had refused her admission years before.

The *News* was founded by Mrs. Bradwell in 1868, and she has been its manager and editor ever since. It was the first weekly legal publication in the western states.

Mrs. Bradwell was the first woman who became a member of the Illinois Press Association; also the first woman who became a member of the Illinois State Bar Association; was a charter member and patroness of Miriam Family of the Eastern Star (Masonic) organized October 6, 1866, being the first body of that order in Illinois. She was one of the charter members of

the Washingtonian Home; was a member of the Woman's Club, the Daughters of the American Revolution, the Grand Army, the Woman's Press Association and the National Press League.

The *Legal News* says of her: "Mrs. Bradwell was one of those who live their creed instead of preaching it. She did not spend her days proclaiming on the rostrum the rights of women, but quietly, none the less effectively, she set to work to remove the legal disabilities under which women labored.

A pioneer in opening the legal profession for women, with keen foresight she saw that the stepping stone to the emancipation of her sex was to secure the property rights of women. A case in point, so monstrous in its injustice, gave an added impetus to her zeal. A drunkard, who owed a saloonkeeper for his whisky, had a wife who earned her own living as a scrub woman, and the saloonkeeper garnisheed the people who owed her and levied on her earnings to pay her husband's liquor bill.

It needed but an application like this for her to succeed in her efforts to pass the bill which she drafted, giving a married woman the right to her own earings."

THE UNIVERSITY LAW REVIEW.—The University of the City of New York has issued the initial number of a monthly of the above name, under the editorial supervision of Austin Abbott, LL. D., Dean of the Law Department of the Universiry. It is published nine months in the year. The December issue contains several pages of valuable notes on recent cases, a collection of the cases from all the courts of this country upon "The Pecuniary Value of Life and Limb;" a valuable treatise upon the descent of property by Dr. Abbott; an interesting disquisition upon "Judgments as Evidence against an Assignee;" a review of the questions of evidence brought out and considered in *Selover* vs. *Bryant*, 56 N. W. Rep., 58 (Minn.), under title "*Contradicting Your Own Witness*," and other interesting and instructive matter. May it succeed and be with us always.

EXCHANGES.

TRIAL BY JURY.—They seem still to idealize trial by jury down in Alabama. In the late case of *Western Railway* v. *Mutch*, 21 L. R. A. 316, the Chief Justice said:

"Trial by jury is a bulwark of American, as it has long been of English, freedom. It wisely divides the responsibility of determinative adjudication, of punitive administration, between the judge, trained in the wisdom and intricacies of the law, and twelve men chosen from the common walks of nonprofessional life; chosen for their sound judgment and stern impar-

tiality. The one declares the rules of law applicable to the issue or issues formed, in the light of the testimony adduced; the other weighs the testimony, determines what facts it proves, aud, moulded by the law as declared by the Court, renders its verdict. In the jury box, and under the oath the jurors have solemnly sworn on the holy evangelists of Almighty God, there is no room for friendship, partiality, or prejudice; no permissible discrimination between friends and enemies, between the rich and the poor, between corporations and natural persons. The ancients painted the Goddess of Justice as blindfolded, and jurors must be blind to the personal consequences of the verdicts they render. If the testimony convinces their judgments of the existence of certain facts, they must be blind to the consequences which result from those facts. A wish that it were otherwise furnishes no excuse for deciding against thrir convictions. Justice thus administered commands the approbation of heaven and earth alike; and a verdict thus rendered meets all the requirements of the juror's oath, in the fullest sense of the word,—a true expression of the convictions fixed on the minds of the jury by the testimony."

This was the ideal. The practical seems somewhat different, for the Court reversed the judgment because "the verdict of the jury was so palpably against the evidence." The "bulwark" does not serve the purpose of "stern impartiality."—*Green Bag*.

AN ARTISTIC CERTIFICATE.—The following is a literal copy of an endorsement on the back of a warrant returned by a Michigan constable:

"I do hereby sertify that I arrested the within *wiles* as I am directed, and Should have taken the horses, but they ware with held from me by warren wiles and Biger Wiles by fisical Strength, and the defendant Biger Wiles was taken from me by a writ of Habo Scorbous.

—— ——Cons Table."—*Green Bag*.

LIABILITY FOR DAMAGE WHERE NO PHYSICAL CONTACT.—A decision of Judge Rumsey, in the New York Supreme Court for the Seventh District, granting a new trial in an accident case, is based upon a principle which is apparently new in that State. It has been frequently held by the courts in that state that no damages can be recovered from a negligent person or corporation for purely mental suffering caused by the negligence. In some other states the courts have held corporations responsible for anguish and mental suffering, caused by failure to deliver a telegram or by some other careless act, but in this state there has been a different rule. In the case in which Judge Rumsey gave a decision a woman was about to take a street

car in Rochester, and as she was standing ready to step upon the platform, another car going in the opposite direction approached, and the horses became frightened so that they almost ran over the woman, although they were checked just before they touched her. The fright and excitement caused the woman to faint, and the shock resulted in a serious illness. Judge Rumsey holds that, although the verdict could not be founded upon the mental suffering alone, when that suffering caused a physical ailment, the injured person might recover a verdict against the corporation whose employes had been negligent in causing the injury.—*American Lawyer.*

REMISSION OF SENTENCE FOR CONTEMPT OF COURT has recently been held in England to be within the royal prerogative when the sentence is *merely of a punitive character.* (In the matter of a Special Reference from the Bahama Islands, '93, A. C., 138.) The decision although not binding upon American courts is interesting in that it is the expression of the opinion of a high authority, that a contempt of court is an offense against the State, and that, therefore, the State through its executive has the right to pardon the offense. It will be noticed that the decision goes no further than that the crown has power to pardon when the sentence is merely punitive. This leaves the question open whether or not the crown has power to remit the sentence when the object of the sentence is not punishment, but merely to compel the offender to act in some particular way, e. g., to testify in a cause pending. In our own state, the question of executive pardon arose when in December, 1892, Governor Hill pardoned the Onondaga Supervisor, Welch, for contempt of court in disobeying the mandate of the Supreme Court in respect to election returns. The governor's or president's power to pardon is strictly limited by the provisions of the state or United States Constitution. The governor has power in New York (Const., Art. 4, §5,) to pardon "after conviction," so that the whole question depends on whether or not commitment for contempt is a conviction, within the meaning of the constitution. The question of the governor's right to act as he did, was not decided.—*Univ. Law Review.*

NOT SATISFIED.—An old negro being on trial, his lawyer challenged a number of the jury who, his client said, had a prejudice against him. "Are there any more jurymen who have a prejudice against you?" inquired the lawyer. "No, sah, de jury am all right, but I want to challenge de judge." —*Green Bag.*

THE DISTRICT COURTS.

EXCESSIVE DAMAGES; CERTAIN VERDICT HELD TO GRANT; EXCEPTION TO REQUEST TO CHARGE; WHEN OBTAINED BY GENERAL STIPULATION:—Lawler, Durment & Bigelow for plaintiff; McLaughlin & Morrison for defendant. Verdict for plaintiff for $28,000 for personal injuries. Evidence showed that plaintiff was a common laborer of ordinary earning capacity, and failed to show that he was capable of earning an amount in excess of $400 per annum; as the case was not one for punitive damages the verdict was *held* to be excessive and the result of passion or prejudice on the part of the jury.

Where it was stipulated, "and the Court consented, that both parties might except to the instructions given at the request of either party, or the modification of such, and to the refusal to give, as requested, any instructions later on," and the Court gave, on request, an erroneous charge: *Held* that such charge came within the stipulation and that it was not necessary for the other party in order to retain the benefit of an exception to especially object and except thereto, or to call the Court's attention thereto.

Nowak vs. *Northwestern Cordage Co; Otis, J.*, 50,719 Second District.

COMMON LAW MARRIAGE; WHAT HOLDING OUT NECESSARY TO CONSTITUTE:—51,127, *In Re* Estate of Frederick Terry, deceased. Appeal of Ellen Terry. Stevens, O'Brien & Glenn for appellant; M. L. Countryman for respondents. Where the relations from which a common law marriage may be presumed are concealed form the relatives of the husband and their acquaintance, but the parties treat each other and hold each other out in their own circle as husband and wife: *Held*, that such concealment does not prevent the law presuming a marriage from their intercourse and their holding each other out in their own circle as husband and wife.

Kerr, J., Second District.

ASSIGNMENTS; CLAIM MAY BE PROVEN AGAINST ASSIGNED ESTATE FOR CLAIM FOR WHICH CREDITOR HOLDS OTHER SECURITY:—Where the assignee disallowed claims on the ground that the assignor was liable only as an endorser, and alleged that the makers of the paper were good, and that the claimant had not attempted to collect the claim, other than formally to present the same for payment and to protest it, and that he had neglected and refused to

turn the paper over to the assignee, or to transfer the liability of the maker on the note to the assignee; *held*, on motion for judgment on the pleadings, that in such case the claimant may prove his claim and collect a dividend thereon without transferring the note or his other security—not being a part of the assigned estate.

In Re Assignment of Beaupre Mercantile Co., Appeal First Nat'l Bank of Faribault et al. Second District 49429. *Kerr, J.* Bunn & Hadley for assignor; Bachelders & Davis, Kellogg & Severance for appellants.

BUILDING ASSOCIATIONS; EVIDENCE; BURDEN OF PROOF—Where in an action by a withdrawing member of a building association for the withdrawal value of his stock, the association relies upon the defence that there are no funds in its treasury which may be applied to the withdrawing of such stock, the burden of showing this fact is upon the association, and it should be pleaded and proven as a defence.

Heinbokel vs. *National Savings, L. & B. Ass'n*; *Kelly, J.*, 50,989 Second District. Holcombe & O'Reilly for plaintiff; C. E. Hamilton for defendant.

LANDLORD AND TENANT; DEFECTIVE PREMISES; WHEN LANDLORD LIABLE TO TENANT OR THIRD PERSON FOR INJURIES RESULTING THEREFROM: —Defendant owned a tenement, in the rear of which there was an elevator operated by hand, for the use of al, the tenants, jointly, in lowering or raising heavy articles. Plaintiff, at at the request of a tenant, was on the premises and using the elevator in lowering a heavy article, when the floor or bottom of the elevator gave way, precipitating him to the ground to his alleged injury. On motion for judgment on the pleadings: *Held* that plaintiff being on the premises at the request of a tenant, and using the alleged defective elevator at the request of a tenant, must look to the tenant —to the person who invited him into a dangerous situation—for damages resulting to him therefrom. "The mere fact that defendant owned and controlled the elevator and suffered his tenant, Goff, to use it, would not make him liable to another there at Goff's invitation, and using it under Goff's direction. * * * Even if the elevator was constructed and attached to the building at the time Goff became a tenant, and, if by his contract of tenancy, he acquired the right to its use, and it was defendant's duty thereafter to keep it in repair, still, defendant could not be charged with negligence in the absence of any knowledge or notice on his part of its defective condition, since not he but the tenants operated it."

Hanson vs. *Burris*; *Otis, J.*, Second District, 45,753.

JUSTICE OF THE PEACE; APPEAL FROM JUDGMENT IN UNLAWFUL DETAINER: BOND; JURISDICTION:— Defendant appealed from a judgment of a Justice for restitution of premises given pursuant to the provisions of Ch. 84 of Gen. Stat. 1878, but instead of giving the

bond required by Sec. 13, Ch. 84, gave a bond conditioned as required by Sec. 114 of Ch. 65, Gen. Stat. 1878, being an ordinary bond on appeal. *Held*, that the giving of the bond required by Sec. 13, Ch. 84, Gen. Stat. was jurisdictional, and on motion the appeal was dismissed, although on the hearing defendant offered to give the proper bond to pay rent, etc.

Mills vs. *Wilson; Powers, J.*, Twelfth District, Lac qui Parle County.

"GENERAL CREDITORS"—TERM DEFINED: — The term "general creditor" in a composition agreement, *held* to mean, in the mercantile world, "unsecured creditors, not those having specific liens or recourse by reason of indorsements."

D. R. Noyes et al vs. *Chapman Drake Co; Otis, J.*, 53,540 Second District.

SLANDER; WHAT NECESSARY TO CONSTITUTE: — Plaintiff alleged that defendant had said of her, "you are a liar, and you are both (meaning plaintiff and her husband) liars," with the proper inuendo that the words were spoken concerning material testimony given by plaintiff in court, under oath, and that the bystanders understood that thereby the defendant meant to impute to the plaintiff the charge of having committed perjury: *Held*, on demurrer, that the words alleged were not actionable.

Stotesbury vs. *Frazer; Williston, J.*, First District. Bishop H. Schriber for plaintiff; Henry C. James for defendant.

LACHES; RIGHT TO PROCEED UNDER RETURN ON EXECUTION *nulla bona*: WHEN LOST BY: — Charles Bechoeffer for plaintiff. Judgment May 19, 1890, Execution returned unsatisfied July 24, 1890. July 31, 1890, defendant voluntarily submitted to examination on supplementary process and disclosed the ownership of certain lands January 19, 1894, on order to show cause why a receiver for defendant should not be appointed: *Held*, that after the lapse of so long a time the return *nulla bona* will not be interfered with, and that the plaintiff having declined to follow the defendant further had exhausted his remedy under that return.

Stromberg vs. *Rogers et al; Kelly, J.*, 36,729 Second District.

COSTS; WITNESS FEES; WHEN PARTY ENTITLED TO ON CONTINUANCE: — Where a cause is properly on the calendar at a particular term of court, and the parties are present at such term with witnesses, and before the same is reached for trial, by stipulation it is continued over the term, the party who ultimately prevails in the action is entitled to tax fees for the witnesses who attended the term at which the cause was so continued, even though such continuance was at his own request, the stipulation being silent as to such fees.

Brown vs. *Burns; Brown, J.*, Sixteenth District, Big Stone County.

PLEADINGS IN JUSTICE COURT; WHEN TO TAKE PLACE: — J sued N in the City Justice Court in assumpsit on a *quantum meruit*. On the return day, November 29th, a complaint n

writing was duly made and filed. N's attorney made and filed an affidavit for change of venue, but no answer. No further time in which to answer was asked for or given; but by consent of the parties the action was transferred to the Justice of the Second Ward of Rochester, and the parties ordered to appear for trial before him on December 3rd at 9 o'clock a. m. On that day, plaintiff moved for judgment upon the return from City Justice Court, and objected to the filing of an answer by defendant. The objection was overruled. On appeal to the District Court upon questions of law alone, the judgment was reversed under G. S. 1878, ch. 65, sec. 23.

Jones vs. *Neville; Start J.*, Olmsted County.

COSTS IN CRIMINAL ACTIONS: LIABILITY OF CITY FOR:—A municipal corporation is not liable for the costs in a criminal prosecution under the state laws for an offense not indictable committed within the city limits, upon an acquittal or dismissal of the action, where its charter provides that "all fines imposed by the City Justice for offenses committed within the city limits shall belong to and be a part of the finances of the city," but fails in terms to make the city liable for the costs in cases of acquittal or dismissal.

Charles F. Hammond vs. *The City of Rochester*; *Start, J.*, District Court, Olmsted County.

The Court in its memorandum says:—"This is an action to recover from the defendant city the fees of the jury and witnesses in *State* vs. *Joslyn*, the prosecution against him having failed. * * * If there had been a conviction in this case and fine paid it would have belonged to the city. Therefore, in equity, the city ought to be required to pay the costs of the prosecution. * * * It is, however, elementary, that costs are a creature of the statute, and a juror or witness is bound to serve the public, in a criminal case, without compensation; unless there is a statute giving him compensation and imposing the liability for its payment upon the state, county or municipal corporation.

Now, when the legislature gave to the City of Rochester the fines paid in criminal cases under the general laws of the state, arising within the city, which are imposed by the City Justice, it failed to provide that the city should be liable for the costs of prosecution in cases of acquittal or dismissal. This is a serious defect in the charter, for it is manifestly wrong for the city to be permitted to reap all financial benefits, if any there are, of a criminal prosecution, and repudiate all responsibility in case of its failure, leaving jurors and witnesses, who are in no manner responsible for the prosecution and who are compelled to serve by law, to lose their fees, unless they can collect them from the county. But the Court has no power to supply the omission in the charter; this would be judicial legislation forbidden to district courts.

There being no statute expressly making the city liable for the fees in

this case, the Court is constrained, much against its sense of justice, to hold that the judgment appealed from must be reversed.

This decision is not to be understood as having any application to cases arising under the ordinances of the city. START, J.

PLEADING; AMENDMENT; ATTACHMENT:— Plaintiff first pleaded on an open account; answer, a general denial. Within twenty days after service of the summons, but after the case had been noticed for trial by defendant, plaintiff served an amended complaint declaring upon promissory notes which had been assigned to him. Plaintiff on his original complaint had attached and moved to be allowed to make his affidavit for attachment conform to his amended complaint. *Held*, that the amendment of the complaint was a proper one and that plaintiff was entitled to amend his affidavit for attachment as prayed. The Court says: "There being no decision in this state directly upon the point, I feel disposed to follow the consideration of the same statute in *Brown* vs. *Leigh*, 49 N. Y. 78, rather than the narrower and more technical view of the Wisconsin Courts.

Benedict vs. *Heidel; Kerr, J.*, Second District, 53,651. Ambrose Tighe for plaintiff; T. R. Palmer for defendants.

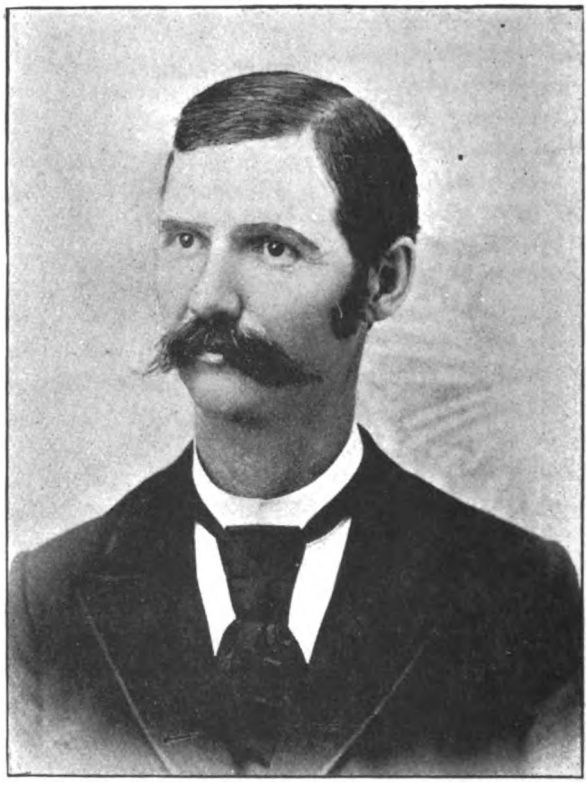
Hennepin County Rules 1 and 2.

The following special rules for Hennepin County have been adopted:

Special terms will be holden every Saturday (except on holidays), at 9 o'clock in the forenoon. The preliminary call of the Calendar will be followed at once by the peremptory call, at which hearing will be had and causes finally disposed of as reached. No hearing will be set down for the afternoon, nor continued beyond the morning session, unless for urgent reasons. Only causes properly on the calendar when the court opens will be heard unless they have been omitted by mistake or inadvertence of the clerk. All pleadings, orders, notices, affidavits and other papers proper to be filed must, to entitle them to be read, be filed with the clerk before the day on which the special term is held, unless for some reason other than neglect, the paper could not have been sooner filed, or unless the occasion for the use of the paper arises at the hearing, from some cause not previously apparent. The strict enforcement of the provisions of this rule may be relaxed in favor of attorneys from other counties.

Upon the rendering of a verdict of a jury, or the filing of a decision by the court in any case, no stay of proceedings after the first will be granted without notice to the counsel or consent of counsel for opposite party.

Attorneys are requested to send to THE JOURNAL their cases and other news of interest to the legal profession.



HON. CALVIN L. BROWN,

District Judge, Sixteenth Judicial District.

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THE MECHANIC'S LIEN FOLLY.

The Mechanic's Lien is a stranger alike to the Common Law and to English Legislation. It is confessedly an instance of flagrant class favoritism, yet we who live under the Common Law system, modified and vastly improved (as we profess), in the particular direction of "equal rights," have cultivated this bastard "remedy" until it has become not merely an absurdity but a nuisance. For about twenty years last past, upward of forty Legislatures and as many Supreme Courts have been running a headlong race, each apparently resolved to outstrip all competitors in promoting a mere socialistic fad, based upon false pretenses and false reasoning, and as unnecessary as it is mischievous. Minnesota is well to the front in this race, a position due in part to some fine bursts of speed on the part of the Legislature, but chiefly to the splendid mettle of her Courts. The judicial gait, albeit somewhat eccentric, and requiring for its best display both sides of the track as well as the middle, is yet exceedingly effective; so effective, indeed, that the Legislative nag has now dropped contentedly to the rear, leaving the record of the commonwealth to the care of its running mate.

It is known, of course, that the first lien law in this country was enacted by the Maryland Legislature, a century ago, in the interests of a "real estate boom." It was openly proposed as a measure for the encouragement of speculative building in the new capitol city of Washington. It gave to "Master Builders," who should venture there, a charge for their security upon the premises impoved. Neither mechanics nor laborers were mentioned or at all considered. A dozen years later, Philadelphia, the former

capitol, awoke to the advantages of such a stimulus and secured for herself a like enactment. Thence the experiment spread to other cities, but for many years it was confined to designated towns, outside of which it was not called for. "Master Builders" could take care of themselves well enough where their business was natural and legitimate, but the forcing process entailed risks that they were unwilling to take without statutory protection. These local acts were defended upon purely local grounds, but in time a broader basis for such legislation was found to be necessary. Then they began to be put upon grounds of an alleged "equity" in favor of those whose contributions had enhanced the value of the property. But the building craft only was thus favored, all other forms of improvement being left unprotected. Along with the equitable theory came a pretended solicitude for "labor." At first the mere mechanic was not thought of but in the search for pretexts he was too obvious to be overlooked. No lien law ever failed to provide for the "Master Builder," but all except the earliest were passed ostensibly in the interests of labor.

In practice, as is easily demonstrable, the mere laboring man derives no appreciable benefit from such laws. Men who live by wages must necessarily be paid at short intervals. If not, they must and do seek employment elsewhere. Their arrearages of pay very rarely reach a sum large enough to warrant proceedings to enforce a lien. An analysis of the Minnesota Reports of decided cases shows but a trifling percentage of labor claims among the many thus enforced, and most of these appear to have been assigned, presumably at a discount. No sane and honest legislator would now propose, in the interests of labor, i. e., for the collection of mere wages, a remedy so slow, inconvenient and expensive as the so-called mechanics' lien. But for the class of capitalists who are able to operate as contractors or dealers in building materials, it has advantages; and it is in this element alone, in nowise more deserving or less capable of self-protection than other creditors, by which lien laws are procured to be passed, and for which they are administered. The cry is "labor," but the voice is the voice of capital. And so the lien law in its operation and effect is but a mischievous interference between classes of capital; between interests which without such meddling would be, as they should be, upon substantially equal terms.

Notwithstanding the spurious basis of these laws, they were at first framed and applied with some regard to vested rights. They were recognized as departures from settled legal principles, and were treated by the

Courts with the same strictness accorded to other statutes in derogation of the Common Law. In Minnesota, prior to 1878, the right to a lien was confined to those who had contracted directly with the owner; or at least to the sum due from the owner to the person with whom he had contracted. *Laird* v. *Moonan*, 32 Minn., 360. The most mischievous feature up to that time was the rule that the contractor might hold, for a period of six months after his work was done, a *secret* lien, against which a purchaser of the premises in good faith and without notice could have no protection. *Cogel* v. *Mickow*, 11 Gil. 354. *Atkins* v. *Little*, 17 Id., 333. The wholesome theory of the registration acts was thus broken without the slightest need; for if liens of this sort must be granted, protection to those dealing with the land might easily be afforded by requiring those who have engaged to contribute to its improvement to record at the beginning a simple notice of that fact. But, bad as this was in the particular mentioned, the owner of the land was protected from gross outrage. He could choose with whom he would deal and have the benefit of contracts made, and his property was not subject to seizure and sale at the instance of strangers to the title for the debts of others, and for sums exceeding his promises or his ability to pay.

Then came the amendments of 1878, extending the lien right to sub-contractors and others. *Gen. St. 1878*, ch. 90, secs. 2, 3 and 4. The only limit then was the "value or contract price" of the thing furnished. The Supreme Court, in *Laird* v. *Moonan*, *supra*, nonchalantly struck out "or contract price," and so limited such liens to value; but the aggregate liens might still exceed the contract price, and the owner must pay all sub-contractors and employees whether he had even heard of them or not. And it was no defense that he had paid his contractor in good faith, the full sum agreed upon for the completed job. The constitutionality of this act was promptly assailed, but it was upheld upon the ground that under the act the owner might protect his property from unknown claimants by requiring his contractor to file a bond for the benefit of those to whom he should become obligated, whereupon no liens in their behalf could be asserted. *Ch. 90, supra*, sec. 3. By this means it was said that "adequate provision is made for entire exemption" from the liens of persons other than those dealing directly with the owner. In vain was it urged that such "adequate provision" unreasonably limited the number with whom the owner might safely contract to such as were able and willing to give this bond, and the principle was there announced which, logically applied, enables the Legisla-

ture to attach to all contracts whatever consequence it may deem proper. *Laird* v. *Moonan*, *supra*. About the time this act began to be understood by the bar, the Legislature produced the so-called Lucas Act of 1887. After upholding a few liens under that monstrosity, the Supreme Court wearied of the task, and strangled it in its cradle. *Meyer* v. *Berlandi*, 39 Minn., 438. Among its minor faults was said to be, that, owing to its crudity, it "would be very difficult to execute it, except by a system of construction by the Courts closely bordering on judicial legislation" (p. 441). The amount of judicial legislation required to work the succeeding act of 1889 (ch. 200) recalls this remark and excites a smile.

Space will not permit of an adequate exposition of the abominations of the latter act. While other states are abandoning the "direct method" of enforcing sub-contractors' liens, this act enlarges and extends it without limit. The bond feature of the former law, before alluded to, was eliminated so that the owner now has no protection against sub-contractors' liens, "adequate" or otherwise. It is a disgraceful fact that under the present law, a dishonest contractor may deliberately engage to erect a house for a sum which he knows will pay but half the actual cost and at once sub-let the contract so as to charge the owner with twice the amount he has agreed to pay. The Supreme Court says this is good law because the owner shouldn't be such a fool as to build by contract unless he is willing to pay more than he promises. If he doesn't want to deal with everybody, he must not contract with anybody, for to his contract with A, the Legislature may, as it has, "annex" as an "incident," an obligation to pay A's debts to B, C and the rest of the alphabet. By agreeing to pay A $2,000 for a completed house, he has "consented" that A may mortgage the premises to whomsoever he pleases, for whatsoever sum the house may reasonably cost. That is to say, by entering into a contract while this law is in force, he agrees that his contract shall not protect him. It matters not that he has but $2,000 to invest in a house and no means of earning any more, or that he has already paid the full sum agreed upon; if his contractor be dishonest, or incapable, or unfortunate, so that by any means any person contributing is not paid, he must pay or lose both house and land. *Bardwell* v. *Mann*, 46 Minn., 285. The result of this principle seems to be lost to view in the fog of Mechanic's Lien logic. The right to contract for the improvement of one's real estate would seem to be a right naturally within constitutional protection, yet it is held that such contracts cannot be made, except upon

terms which practically destroy them. If the conditions above outlined may be "annexed," why not any other and why may not such contracts be prohibited altogether?

The Supreme Court of Michigan, dealing with a similar though less drastic statute, promptly held it void, saying: "It strikes at the foundation "of all property in land. There is no constitutional way of divesting a "man's title except by his own act or default. Here his own act is not "required and his freedom from default is no defense. * * * Such a gross "perversion of all the essential rights of property is so plain that no explan- "ation can make it plainer." *John Spry Lumber Co.* v. *Trust Co.*, 43 N. W. R., 778. The Wisconsin Court ruled to the contrary in *Mallory* v. *Abattior Co.*, 49 N. W., 1071, but the vigorous dissenting opinion of Cassoday, J., gives augury of better things; and a Court in far-off New Mexico is still of the opinion that lien statutes "are in derogation of the common law and must be strictly construed." *Minor* v. *Marshall*, 27 Pac. R., 481.

Having sustained the act of 1889, the Supreme Court of Minnesota has ever since been busy in "executing" (and execrating) its provisions, and the resulting tangle of decisions would be ludicrous were it less painful. In *Gardner* v. *Leck*, 54 N. W. R., 747, a note almost of despair is sounded, but the Court, by a majority of one, proceeds laboriously to extricate itself from the consequences of its former holdings. In attempting this, a most remarkable feat of judicial legislation was performed. Sec. 8 of the act requires the lien claimant to insert in his recorded statement "the time when the first and last item" of his contribution "was furnished"; and the declared effect of the filing is to continue the lien "from *the time*" of such furnishing. By sec. 5, all "prior bona fide" mortgages and incumbrances *were* protected. Yet by sec. 10 the proceeds of the lien sale are directed to be paid to the several lien claimants "without priority among themselves." In the common case of an intervening incumbrance, it was obviously impossible to "execute" all these provisions, but when the difficulty was first pointed out in *Bardwell* v. *Mann*, the Court thought that "with their extensive and somewhat elastic powers" the thing could be done. In *Finlayson* v. *Crook*, 47 Minn. 49, an attempt was made to show how it could be done, but the only precedent for that decision was the case of the man who prevailed in a fist fight "by main strength and awkwardness." In *Gardner* v. *Leck supra*, the Finlayson case and all of its class were overruled. There was but one way to solve the unsolvable, and that was to amend the statute.

Two of the Judges dissented, but the thing had to be done else "the extensive and somewhat elastic powers" of the Courts would be proven less effective than had been supposed. The change enacted by this ruling was in the time from which the several liens shall attach. By the statute as printed, each is to continue from the time when the first item is *furnished*. As revised by this decision, it is the time of the *beginning of the* building. This not only "borders" on judicial legislation, but laps over, a method of construction with which the New Mexico Court before cited could not possibly agree.

Legal foolishness is more disastrous than any other sort, and when law makers and law expounders abandon sound doctrine, trouble is inevitable. The particular nonsense under review is demoralizing in the extreme. Like reasoning applied in other branches of the law would be anarchy. The lien has become a sort of fetich. One lien was granted to a non-resident concern because it was not permitted to contribute to a building erected in this state; for damages as it were. *Howes* v. *Reliance Co.*, 46 Minn., 44. Another for materials furnished for, but not used in, the building. *Burns* v. *Sewell*, 48 Minn., 425. Yet the pretended basis of the whole lien scheme is that the charge is equitable because the lienor has enhanced the value of the premises to the extent of the value of his material entering into the construction. On the same theory, a lien has lately been affixed to the interest of the owner of premises leased for ninety-nine years, on account of buildings erected by the lessee. *Congdon* v. *Cook*, 56 N. W. R., 253. And so mortgagees are continually being charged with the payment of liens because their security has been enhanced! No Court enveloped in the mists of the Mechanic's Lien foolery has been able to see that there is no enhancement of security in improvements which the incumbrancer himself has to pay for. It is time for us to attend to such warnings as that of Herbert Spencer: "We are certainly tending toward State Socialism, which will be a worse form of tyranny than that of any government now existing in civilization."

MINNEAPOLIS. DANIEL FISH.

OPINIONS OF ATTORNEY GENERAL.

NURSERY STOCK—WHO REQUIRED TO GIVE BOND BEFORE SELLING—CH. 196 G. L. 1887 CONSTRUED.

Hon. F. P. Brown, Secretary of State:—

In your communication of the 19th inst. you call attention to the provisions of Ch. 196, Gen. Laws 1887 and inquire, in effect, whether each person selling nursery stock, whether as principal, agent or sub-agent, is required to furnish to the State a bond of $2,000, or may the principal or agent furnish such bond to the State for each person so selling nursery stock for him?

By section 1, of the said act, it is provided, that it shall be unlawful for any person, corporation or association to sell or offer for sale any tree, etc., grown in the State of Minnesota, without first filing with the Secretary of State an affidavit setting forth his name, age, occupation and residence, and if an agent, the name, occupation and residence of his principal, and a statement as to where the nursery stock aforesaid to be sold is grown, together with a bond to the State of Minnesota in the penal sum of $2,000, conditioned as therein provided. The section closes with a proviso to the effect "that the bond aforesaid shall, when the principal is a resident of this State, be given by such principal and not by the agent."

The manifest purpose of the act is to prohibit any person, corporation or association from selling or offering for sale any of the objects therein named without first filing the bond therein provided, with the Secretary of State. Two classes of principals are therein recognized: First, those residing in this State, and second, those residing elsewhere. The force of the said proviso is to require the agent when his principal is a non-resident, to give the bond. Whenever the principal is a resident of the State, the bond shall be executed by such principal and conditioned to save harmless citizens of the State who shall be defrauded by any false or fraudulent representations, by the agent who is required to file the affidavit. The act clearly implies that their agent shall file such affidavit together with a bond. There must therefore, be as many bonds filed as there are agents appointed where the principal is a resident of the State. It certainly was not the purpose of the act to discriminate against our own citizens in favor of non-residents.

You are, therefore, advised that it is my opinion that a bond should be

filed by every agent, before issuing your certificate of authority. In the case of resident principals the bond must be executed by the principal in place of the agent.

Yours respectfully,

December 20, 1893. H. W. CHILDS, Attorney General.

LIQUOR LICENSE—FOR WHAT TERM MAY BE GRANTED.

A. Sitzman, Village Recorder, Pierz, Minn.

Under the liquor law as it now stands, a village council cannot grant a license for a period of less than one year; but such license can be issued for the period of one year from the date of issuance, provided, however, that such license is subject to termination before one year by a vote of the electors determining in favor of no license; and in such event, provision is made for the refundment of the license money for the unexpired portion of the license period.

Yours respectfully,

January 2, 1894. H. W. CHILDS, Attorney General.

"NOTICES"—WHAT ARE LEGAL AND WHERE TO BE PUBLISHED.

C. P. Kelley, Le Sueur Centre, Minn.:—

The financial statement to be published pursuant to Sec. 11, Ch. 8, Gen. Stat. 1878, falls within the contemplation of the term, "legal notices" employed in Ch. 33, Gen. Laws 1893, and cannot, therefore, be published in any other newspaper than that contemplated by the said laws of 1893. The term "notices" as therein used must be held to comprehend all publications required by law to be made.

Yours respectfully,

December 29, 1893. H. W. CHILDS, Attorney General.

NOTARY PUBLIC—COMMISSION AVOIDED BY REMOVAL FROM COUNTY.

Mr. Finley A. Gray, Redwood Falls, Minn.:—

Sec. 4, Ch. 26, Gen. Stat. 1878, provides that the commission of a Notary Public is good for the period only in which he resides within the county for which he was appointed. Inasmuch as you have changed your place of residence since the issuance of the commission to you, it has ceased to be of any force or effect whatever. It therefore follows that you will not be authorized to perform official acts as a Notary Public in the County of Redwood.

Yours respectfully,

December 26, 1893. H. W. CHILDS, Attorney General.

VILLAGE LIQUOR LICENSE—FOR WHAT TERM GRANTABLE—CH. 194 G. L. 1893 CONSTRUED.

W. G. Peters, St. Vincent, Minn.:—

The provisions of Ch. 194, Gen. Laws 1893 are applicable to but a limited number of cases, and was designed in fact to help out cases where licenses

have been paid under a misapprehension as to the effect of the law. The effect of Ch. 189, Gen. Laws 1893 which amends Ch. 5 of the Gen. Laws of 1887, is to authorize village councils to issue licenses for a period of one year regardless of the time when issued. Your village council, may on January 1, in pursuance of the said law, grant a license good for a period of one year. The council has no authority, however, to enter into an agreement with a licensee that he shall be appointed to a village office upon a stated compensation, in consideration of his taking out a license. Such an agreement, not only would be wholly void, but it would be a case of serious official misconduct on the part of the members of the council who voted in favor of the same.

There is no authority for the dating back, as you term it, of licenses issued or to be issued by the council. There can be no rebating of any portion of the license money heretofore paid, unless the applicant falls clearly within the purview of Ch. 194. Yours respectfully,

H. W. CHILDS,
Attorney General.

December 20, 1893.

COURT HOUSE—COUNTY AUTHORIZED TO ISSUE BONDS THEREFOR.

Hon. A. Bierman, State Auditor:—

Application having been made to the State by the Board of County Commissioners of Le Sueur County, for a loan from the permanent school fund of the state to aid the said county in the construction of a court house, I am asked whether the said county is authorized to construct such building, and if so, whether it is also authorized to issue its bonds for that purpose.

A somewhat similiar question was presented to this office in 1879 and the opinion was then reached that a county is authorized to issue bonds for the construction of a court house. That opinion was based upon a decision of the Supreme Court of this state in the case of *Chaska County* v. *Supervisors of Carver County*, 6 Minn. 133, wherein it was declared that such power resides in a Board of County Commissioners. The decision in that case was based upon a statute providing that such Board "shall provide for the erecting and repairing of court houses, jails and other necessary buildings for the use of the county." Assuming that requisite authority had been conferred by the said statutes, the Board of County Commissioners of Carver County issued its bonds. The Court held that the statute plainly authorized the Board to enter into contracts for the construction of the building, and that it "had undoubted authority to issue the bonds" wherewith to raise the re-

quisite funds to meet the expenses thereof. The decision was adhered to in *Niniger* v. *Commissioners*, 10 Minn. 106; followed in *Cushman* v. *Carver County*, 19 Id. 252, and cited as authority in so late a case as *Auerbach* v. *Le Sueur Mill Company*, 28 Minn. 295.

The statute now in force to which the Commissioners must look as their authority, empowers them to provide offices for county officers (G. S. 1878 Ch. 8, S. 110).

It is thus seen that there is no substantial difference between the statute as it existed when the bonds of Carver County were issued, and as it is to-day. To provide a court house implies no greater grant of power, than to provide county offices. It follows, therefore, that the Board of County Commissioners has authority to provide for a court house, and further, in view of the decision above cited, the authority to issue the bonds of the County for that purpose.

In addition to the foregoing I call attention to the language of the amendment of the Constitution adopted in 1886, authorizing the loan of the permanent school fund "to the several counties or school districts of the state, to be used in the erection of county or school buildings." Attention is also called to the provisions of Ch. 193, Gen. Laws 1887, Sec. 1, where it is provided that "when any county in this state wishes to obtain a loan from said permanent school fund, the Commissioners shall at a regular or special session adopt a resolution that the County of ——— makes an application to the State for a loan." If this is not an express grant of power, it is the recognition of a grant already assumed to exist. You are therefore advised that it is my opinion that both of your questions should be answered in the affirmative. Yours respectfully,

H. W. CHILDS,

December 20, 1893. Attorney General.

CO-OPERATIVE ASSOCIATIONS—VOTE OF MEMBERS—CH. 29, G. L. 1870 CONSTRUED.

Mr. George P. Lattin, Freeborn:

If your company was formed under the provisions of Ch. 29, Gen. Laws 1870, it is very clear that no member shall be entitled to more than one vote at a corporate meeting, however many shares of the stock of the company he may own. The law expressly provides that no member upon any subject shall be entitled to more than one vote. This is in contradistinction with provisions of law governing incorporated companies, as usually a share of

stock represents a vote. It is needless to say that nothing in the articles of incorporation or the by-laws of your company could contravene the terms of the statute under which you are organized. Whether Ch. 29 governs in the case of your company depends, of course, upon whether or not you were incorporated under that law. Yours respectfully,

H. W. CHILDS,

January 11, 1894. Attorney General.

THE PASSING OF THE INTERSTATE COMMERCE LAW.

ONE of the most important decisions made by the Federal Courts for years is that recently handed down by Judge Grosscup, of the Northern District of Illinois, *in re Rule on James and McLeod*, for contempt. It deals with the power of the Federal Grand Jury to compel witnesses to testify as to violations of the Interstate Commerce Act under the act of February 11, 1893. The Court holds that a refusal to answer questions, or produce books or property, is justified, under the fifth amendment to the Constitution of the United States, where such refusal is based upon the ground that an answer, or the production of the books and papers, would tend either directly to incriminate the witness, or to disclose sources of evidence which would tend to incriminate him, and that said act is, therefore, unconstitutional. The commission or the prosecution, being thus deprived of the power of compelling the production of evidence of an alleged violation of the act, and as in almost every instance all the evidence of such violation is possessed solely by those who would be incriminated by its production, the whole framework of the act falls, because no penalty, in practice, can be enforced against any offender. Should the decision be sustained, the railroads will have things pretty much their own way, except as injunction or mandamus may be resorted to in certain cases by aggrieved parties to compel observance of the provisions of the act. We quote from Judge Grosscup's opinion the salient features of his views upon the question:—

"The act of February 11, 1893, in effect provides that no person shall be excused from testifying or producing books, papers, tariffs, contracts, agreements and documents in any case or proceeding, criminal or otherwise, based upon the Interstate Commerce Act, on the ground that the same may tend to criminate him or subject him to a penalty or forfeiture, but that any

person so testifying shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce the documentary or other evidence.

"Every man's life is, so far as society is interested, a series of personal acts. Each act, not impinging unlawfully upon the rights of others or falling within the definitions of the criminal statutes, is a personal right of the individual. The criminal code is a series of definitions which, for the purposes of public safety or welfare, designate certain of these personal acts, either isolated or in connection with other acts or intentions, as crimes against the commonwealth. The identification of acts with the definitions of the criminal code is dependent upon such knowledge as can be obtained either from the observations of others or the disclosures of the person himself. The methods of such identification have been formulated into what may be called the science of evidence.

"These personal acts, however, like the events of natural law, are interlinked with others, and are each a part only of a connected and cohering series of acts. The student of nature uncovers its unknown events by seizing upon a known event, and with the knowledge and suggestions thus acquired, proceeds, according to the laws of known connection, to others. Thus an event, remote from the one that is the ultimate object of the inquiry, becomes the clew, or break, from which the process of unraveling begins. Judicial tribunals in search of personal acts that fall within the criminal code are served by a like law of connection and cohesiveness. A known act in a person's life is made the beginning of the tribunal's work of unraveling and, though apparently remote from the actual criminal deed, is so linked therewith that the judicial following out of the intervening thread will eventually bring out the full disclosure of the criminal act. The disclosure of such a remote act is, therefore, indirectly but effectually a disclosure of the criminal act itself.

"Since the Counselman case, 142 U. S. 547, it is admitted law that every person is protected by the fifth amendment against self-disclosure in any proceeding, civil or criminal, of such of his own acts as would subject either the act or any connected act to the dangers of incrimination. * * * The accused can stand, as against the menace of the law's penalties, upon the sanctity of his own personal knowledge; and the constitutional guarantee puts a seal upon that knowledge that no legislative or judicial hand can break. * * * To avoid its misuse upon such pretexts and at the same time secure to the person's knowledge the sanctity that is intended, it devolves upon the court in each instance to determine from all the circumstances of the situation, when the question arises, whether the disclosure sought for carries any real menace of self-incrimination.

"But while the Counselman case establishes this guarantee to the extent thus pointed out, it leaves undecided the most interesting and important

question connected with the subject. In the case under investigation now it is claimed that the act of February, 1893, affords all the immunity that the fifth amendment was intended to provide. * * * The act of February, 1893, is a broad prohibition against the prosecution of a person for any act to which the disclosure relates. It unquestionably refers to a criminal procedure like this, and the immunity stated in the latter clause of the act relates undoubtedly not simply to the causes or proceedings before the Interstate Commerce Commission, but to any cause or proceeding, criminal or otherwise. * * *

"The question then comes back to this: What was the real purpose of the framers of the fifth amendment? Did they intend to guarantee immunity thereby against compulsory self-accusation of crime so far as it might bring to the witness law inflicted pains and penalties only? Or was it the purpose to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure? The Counselman case leaves this question undecided. Some of the dicta of the opinion seem to show that the Court purposely left it undecided. As, for instance, the opinion states: 'It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one at least unless it is so broad as to have the same extent in scope and effect.' So far, therefore, as the Supreme Court of the United States is concerned, I regard the question as an open one. * * *

"The case at bar, like those cited, inspires no wish in the Court to protect the witnesses. The Interstate Commerce Act is a law of the land and the witnesses ask for the protection of the amendment under circumstances which indicate that, having violated it before, they have no intention to cease violating it now. It is the contest of people who disbelieve in the expediency of the law against the attempt to enforce it. The protection is asked not so much to keep inviolate the secrets of the human breast as to have immunity in further violating a law of the land. Judged by this specific instance the fifth amendment, if construed broadly enough to afford the witness immunity against testifying, is an obstruction in the path of the administration of law. But the fifth amendment must not be judged by a single specific instance. It was placed in the organic law of the land for a purpose, and that purpose, when ascertained, must be enforced, howsoever it may effect sporadic cases or even the great body of cases that may come before the Court. * * *

"The privilege which the framers of the amendment secured was silence against the accusation of the Federal Government; silence against the right of the Federal Government to seek out data for an accusation. This privilege of silence was, as they believed and events then looked, in the interest of progress and personal happiness as against the narrow views of adventitious power. Did they originate such privilege simply to safeguard

themselves against the law inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside, but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or the unfathomable disgrace not susceptible of formulation in language which a known violation of law brings upon the offender?

"Then, too, if the immunity was only against the law inflicted pains and penalties, the government could probe the secrets of every conversation or society by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of his own penalties upon a condition of disclosure that would bring those to whom he had plighted his faith any loyalty within the grasp of the prosecutor? I cannot think so. * * *

"The battle for personal liberty seems to have been attained, but in the absence of the din and clash we cannot comprehend the meaning of all the safeguards employed. When we see the shield held before the briber, the liquor seller, the usury taker, the duelist, and the other violators of accepted law we are moved to break or cast it aside unmindful of the splendid purpose that first threw it forward. But whatever its disadvantages now, it is a fixed privilege until taken down by the same power that extended it. It is not certain, either, that it may not yet serve some useful purpose. The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege of silence against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequences of disclosure."

The decision is a masterly exposition of the question of immunity from compulsory inquisition in criminal matters from the earliest times, and is as well a scholarly document.

NOTES ON RECENT DECISIONS.

STILL AFTER THE CHINAMEN.—A few weeks ago a Chinaman named Ah Yow, who claimed to be a restaurant keeper, was denied admission to this country at San Francisco, and made application by *habeas corpus* for an order releasing him and permitting him to land. The question of whether or not he was a laborer within the meaning of the Exclusion

Act was there raised and considered, and an explicit and comprehensive statement of the classes not permitted to enter is made by Judge Hanford He says:—

"A restaurant keeper is a caterer, who keeps a place for serving meals, and provides, prepares and cooks raw materials to suit the tastes of his patrons. A person in that business is not a merchant, nor does he come within the definition of any of the terms used in the statutes to describe the class of Chinese who are privileged to enter the United States; and I hold that, to the word 'laborer' in these statutes, meaning must be given broad enough to include master mechanics and tradesmen, such as blacksmiths, cabinet makers, tailors, and shoemakers, who receive orders, and cut and make up materials in such forms and of such dimensions as their customers require. Those who, in following such callings, employ journeymen, and perform no manual labor themselves, still represent themselves to be, and they are, in popular estimation, blacksmiths, cabinet makers, tailors, and shoemakers—that is to say, skilled workmen. All Chinese persons who follow such callings are barred from coming to the United States."—*In re Ah Yow*, 59 Fed. Rep. 561.

THE INSOLVENCY LAW IS EFFECTUAL.—An interesting state of affairs is brought out in the case of *Burt* v. *Minneapolis Stock Yards & Packing Co., et al.*, 57 N. W. Rep. 940, bearing upon the powers of the Court to deal with dishonest insolvents.

Burt, a commission merchant, was adjudged insolvent, and, upon proper disclosure, was shown to have received three thousand dollars for which he could not or would not account. The Court found that he had the money, ordered him to turn it over to the receiver and he refused. Thereupon he was committed for contempt, until the said sum was paid, not exceeding six months. Upon appeal he contended that such committment was unlawful, as being imprisonment for debt, contrary to section 12, article I of the state constitution.

The Court, Buck, J., says in part:—

"If Burt was not the main instigator and mover in this scheme to cheat and defraud his creditors, he was at least cognizant of the principal acts which constitute a palpable fraud and swindle upon them. It would be an intolerable weakness of the law if there was not some way to reach this class of men, who prey upon the credit of the community, and then, when caught in their nefarious schemes, appeal to the technicalities of the law, or the sympathy of those who administer it. Fortunately for the due administration of the law, and as a warning against swindling commercial ventures, the party has not escaped that justice which the evidence clearly

indicates that he deserves. The victims of commercial dishonesty may congratulate themselves that one of those who prey upon other people's property and labor has received the penalty of the law.

"There is nothing in the assignment of error that he is imprisoned for debt. He is not imprisoned because he cannot or will not pay a debt which he owes, The Court found that he had a specific sum of money which belonged to his creditors, and should have been turned over to the assignee for their benefit in pursuance of the order and judicial determination of the Court, and which order he refused to obey. This refusal was a contempt of court, and punishable as such by imprisonment. After a hearing and judicial determination of this kind, parties must obey the orders and judgments of the Courts, or suffer the punishment imposed by law. The Court is not collecting debts, but punishing contempt of its judicial authority. The result may be that more property will be secured for the creditor, or longer imprisonmsnt for the debtor, but this does not constitute imprisonment for debt. *State* v. *Becht*, 23 Minn. 1. When an insolvent debtor has taken the initiative under the insolvent law, and seeks its benefit by making an assignment, in the expectation that he may be released from his debts, and he swears that he has assigned all of his property, and turned it over to the assignee, when in fact he has not done so, it is not depriving him of his property or liberty without due process of law to compel him to disclose what other property, if any, he has concealed, and, in default of his doing so, punish him for contempt of court. If the assignor can in such cases defy the law and the Courts, he can retain large sums of money after making a fraudulent assignment, and the insolvent law will become an instrument for the perpetration of fraud and swindling, instead of one intended for the equal protection of all. The insolvent law of this state has been of great practical benefit; and while the sharp practitioner, with unusual facilities for the collection of debts, and for obtaining the earliest information in regard to insolvent debtors, may criticise or find fault with some of its provisions because he is not enabled to grasp and secure all the assets which such debtor has, and thus exclude other meritorious creditors from securing a pro rata share in the assets, yet the law, properly and justly administered, stands as a barrier between the oppressive creditor and the unfortunate debtor."

This is in line with the spirit of the former and recent decisions of the Court, and should have a good effect. So many assignments are fraudulent that the law cannot be too strictly enforced.

INFANTS AND LIFE INSURANCE: DISAFFIRMANCE.—The unusual spectacle of a minor who has insured his life disaffirming upon arriving at his majority, tendering his policy and demanding a return of the premiums paid, is presented in the case of *Johnson* v. *Northwestern Mutual Life Ins.*

Co., 57 N. W. Rep. 934. Upon action being brought to recover premiums paid on a policy which was for the benefit of the assured, being on the 20 year payment plan, the company demurred, and the demurrer was overruled.

In considering whether such a policy was void or voidable, Judge Buck says in part:

"Was this contract void or voidable? We are of the opinion that it was not void. It was for the benefit of the infant. That is to say, construing it in accordance with the well-understood business principles and practical experience of the age, it should be deemed one beneficial to him. It was the ordinary policy of insurance upon the usual terms, and in a solvent company. Was the policy voidable, and, if so, was it of that character which would not only permit the plaintiff to defend against the collection of anything further on the policy, but, by reason of his infancy, entitle him, when arriving at his majority, to collect back whatever he had paid while an infant? We are of the opinion that the contract was voidable. Even if the contract was beneficial to him while he was an infant, in the sense that if he retained it there might be certain contingencies which would arise whereby he would be entitled to receive the actual benefits mentioned in the policy, yet he does not seek to retain the policy, or claim any actual benefits under its terms, either at present or in the future. All that he could return or surrender up he offered to do at the very earliest opportunity after arriving at full age. He has secured no money or property under it or by virtue of its terms, and no consideration other than the contingent one which we have mentioned. He has not squandered anything which he has received from defendant. He retains nothing either of actual value or any right. In no way has he appropriated any of the fruits of the contract to his own advantage, nor does he seek to do so. The defendant has had the use of the money paid it for several years. As between the two parties, the defendant so far has profited by the contract. If the plaintiff succeeds in this action, the defendant suffers no loss or damage except to return to plaintiff just what it got of him while an infant. It did not obtain the money of plaintiff, it is true, through deceit, fraud, or concealment of any fact, nor in any way impose upon the infant, but it did obtain and receive a fund belonging to him which it was not necessary for him to part with. This was done at a time when the law adjudges him incapable of determining whether it was for his benefit or not. To leave this question of making contracts to the immature judgment of infants who are easily influenced or misled, and frequently to their great injury, and then have the courts continually called upon to decide whether the contract was of such a beneficial nature to the infant that it might be enforced against him, would lead to an endless variety of decisions. The interest of the infant will be best subserved by holding such contracts voidable. It is a rule which can be appropriately

applied in this case, for the plaintiff has performed all that can be reasonably asked of him to do."

We apprehend that this decision will materially limit the amount of insurance written on the lives of minors, and may lead to considerable litigation. The decision makes such a contract decidedly one-sided, but is certainly in accord with the only safe principles applicable to such cases.

OUR EXCHANGES.

CAN A PERSON IN NEW YORK HAVE TWO WIVES OR TWO HUSBANDS?—Whether one person may lawfully have two wives or two husbands at once under the Revised Statutes (2 R. S.; 139, § 6; id. 8 ed. vol. iv., p. 2596, § 6), where a second marriage is contracted under the mistaken supposition that the former spouse of one of the contracting parties, who had been absent and unheard of for more than five years, is dead—is a question which Judge McAdam, of the New York Superior Court, has recently had to deal with. His decision (*Safford* v. *Safford*, 31 Abb. N. C.), while recognizing the technical validity of such second marriage, yet holds that cohabitation under it after discovering that the first spouse is living is improper and immoral, and that neither party thereto can afterwards be regarded in an action to annul the second marriage as "the innocent party" entitled to the custody of the children, under Code Civ. Pro., § 1745; but under such circumstances the Court may award the custody to either parent, as the interest of the child requires.—*University Law Review.*

A POLICEMAN who had arrested a man for disorderly conduct was trying to tell his story as a witness in court against the culprit, when the judge interrupted with this inquiry:

"What did the man say when you arrested him?"

"He said he was drunk."

"I want his precise words, just as he uttered them. He did not use the pronoun *he*, did he?"

"Oh, yes, he did; he said he was drunk—he acknowledged the corn!"

The Court (getting impatient at witness' stupidity)—"You don't understand me; I want the words as he uttered them. Did he say, '*I* was drunk?'"

"Witness (zealously)—"Oh, no, your Honor; he didn't say you was

drunk. I wouldn't allow any man to charge that upon you in my presence!"

A fledgling attorney, occupying a seat in the court, here desired to air his powers, and said: "Pshaw! you don't comprehend at all. His Honor means, Did the prisoner say to you, '*I* was drunk?'"

Witness (reflectively)—"Waal, he might have said you was drunk; but I didn't hear him."

Counsel for the prisoner—"What the Court desires is to have you state the prisoner's own words, preserving the precise form of pronoun he made use of in his reply. Was it in the first person, *I;* second person, *thou* or *you;* or in the third person, *he, she* or *it?* Now, then, sir," (with severity) "upon your oath, did not my client say, '*I* was drunk?'"

Witness (getting angry)—"No; he didn't say you was drunk, neither. D'yer suppose the poor fellow charged the whole court with being drunk?"

—*Criminal Law Magazine.*

PROCESS SERVING.—The code of civil procedure (New York) differs from that of most states in the methods appointed for obtaining service of process. Under its provisions a civil action is commenced by the service of a summons, which may be served by any person other than a party to the action, except in the limited number of cases where it is otherwise specially prescribed by law. Under the operations of this benign law have evolved a class known as "process servers," who make a specialty of serving summonses, and whose adventures would fill a book. I recall an amusing instance, in which a young friend of mine quite distinguished himself by executing process upon a wealthy brewer of this city, who had succeeded for months in evading the most expert process servers. Donning his dress suit, and with all the airs of a grandee, this young limb of the law —a handsome fellow, by the way—rang the door-bell at about eight o'clock one evening, presented his engraved card, was shown to the parlor, and soon had the pleasure of handing his papers to the unwilling defendant, a choleric old German, whose rage was unbounded. The amount involved was very large, but he speedily made a satisfactory adjustment. My friend has just enough vanity to aver to this day that the old gentleman was doubly incensed, as he thought the young man had called to ask for his daughter's hand. The *bete noir* of the process server is, however, the ultra fashionable clubman about town, with no stated calling or place of business.

Though these curled darlings usually boast "a local habitation and a name," they not infrequently abjure both for the time, and retire from the world into a hibernation too dense even for the penetration of the patient process server. In such cases it sometimes becomes necessary to have the aid of the courts invoked in the effort to run to earth this human quarry.

A case in point has just come to light, in which one George Whitaker, an English tailor, may thank Judge L. J. Coulan, of the City Court, for providing the means to reach the debtor, a young swell residing on Fifth avenue. After many unavailing efforts to secure an audience, always meeting the response "Not in," though his calls were made at all hours of the day and night, one process server after another gave it up. Finally the plaintiff's attorney applied to the court for an order for substituted service, on the ground that the defendant was trying to avoid service. The Court ordered that if no person was found to receive the summons it should be tacked upon the debtor's door. The hammer and tacks were procured, but not needed, as our gay bachelor capitulated and his valet was delegated to receive the odious papers.—*The Collector.*

SUSPENDING SENTENCES.—It has for years been quite a common thing in the police court of Cincinnati to suspend sentences on prisoners, on condition of their leaving the city, and the practice is probably followed in other cities of the state. The question of the legality of this practice came before the common pleas court of Hamilton county, in the habeas corpus case of Bartley Kelly, in which was involved the question whether the police court could suspend a sentence given a man, on condition that he leave the city. Kelly had been given a suspended sentence and left town. He returned after the period of the sentence had expired, was arrested, charged with suspicion and sent to the workhouse. A writ of habeas corpus was issued, which came up before Judge Huston.

Judge Huston at once decided the matter, and said that it had been the practice to suspend the sentence of criminals on condition that they leave the city. Under such an agreement between the Court and a criminal, the criminal would be at liberty to go to some other place and commit a crime. This practice should not be. The prisoner should be punished as the law requires, if he is guilty.—*Weekly Law Bulletin.*

THE DISTRICT COURTS.

Pleading—Appeal from Justics Court.

Action in Justice Court; plaintiff alleged for board and lodging furnished and for money had and received; answer general and specific denials. Motion by defendant in District Court on appeal to amend his answer so as to set up payment and satisfaction that the facts as shown in Justice Court might be proven; denied as not a proper exercise of discretion.

Wagner vs. *Zelch*, Second District. *Otis, J.* Edwin J. Gribble for plaintiff; J. A. Larimore for defendant.

Insolvency—Failure of Assignee to File Bond within Five Days.

The failure of an assignee under the insolvency act of 1881, who has accepted the trust, to file his bond as therein required within five days after the filing of the schedules does not deprive the Court of its jurisdiction; and the Court may, in its discretion, without notice, order the bond filed with the same force and effect as if the same had been duly filed within said five days.

In Re Assignment of Blake; Otis, J., Second District. Henry C. James, for assignee.

Insolvency—Claim Filed after its Expiration by Limitation—Disallowed.

Claim was filed duly with an assignee of an insolvent insurance company for a loss which had occurred more than one year prior to the date of the filing of the claim. The policy contained a provision requiring that any suit or proceeding on the part of the insured to enforce any claim under the policy should be brought within one year from the time of the occurrence of the loss for which claim was made. The assignment was made within one year after loss, but the claim was not proven until more than one year after loss, and was on that ground, among others, disallowed. On demurrer to answer, *held*, that such disallowance was proper and should be affirmed with costs.

Appeal of Screven In Re Assignment of St. Paul German Ins. Co; Brill, J. Second District. Ambrose Tighe for appellant; C. D. & Thos. D. O'Brien for respondent. (Appealed.)

New Trial—Newly Discovered Evidence—Contradictory Affidavits.

Plaintiff moved for a new trial on the ground of newly discovered evidence. Defendant had obtained affidavits from plaintiff's affiants contradicting their former affidavits in material matters. *Held*, that these contradictory statements so weakened the effect of the first affidavit as to render it questionable whether the granting of a new trial would be a proper excercise of discretion.

Nichols vs. City Ry. Co.; Otis, J. Second District. Hawthorne & Davidson for plaintiff; Munn, Boyeson & Thygeson for defendant.

Assignments—When claim may be proven against assigned estate for a debt for which creditor holds other security.

The Beaupre Mercantile Company,

in the usual course of its business, received from its customers notes payable to its order; these notes were by it discounted with the appellants, The Beaupre Mercantile Company endorsing the paper; at their maturity, the notes not being paid, they were duly protested and notice of non-payment and protest was duly given to said Beaupre Mercantile Company; thereafter the Beaupre Mercantile Company made a voluntary assignment for the benefit of its creditors under the law of 1876. Pursuant to notice given by the assignee to creditors, appellants duly filed proofs of their claims against the Mercantile Company on the said notes, but retained the notes in their possession. The assignee disallowed the claims upon the ground "that your assignee is informed and verily believes that the appellant is not entitled to have any dividend paid upon his said claims, nor said claims allowed until said appellant has first exhausted its remedy against the makers of said notes, and each of them, or surrendered said notes and all right, title and interest of the appellant therein to your assignee;" and further alleged that the makers of the notes were financially responsible and that the appellants have failed and neglected to collect said indebtedness from said makers, and have refused to surrender the said notes to said assignee. The question arose under Sec. 5, Ch. 44, Gen. Stat., which is as follows: "Provided that no debts for which the creditor holds a mortgage, pledge or other security shall be so paid until the creditor shall have first exhausted his security, or shall surrender and release the security to the assignee or assignees." It was urged on part of appellants that applying the principal of *ejusdem generis* in the construction of the section referred to the phrase "other security" referred to and meant security of the same nature as that previously specifically mentioned viz: mortgage or pledge. Further that the security referred to in the law was property of the bankrupt which had been mortgaged or pledged by him, and which, therefore, lessened the value of the estate which was to be distributed among all the creditors. That the claim against the insolvent after protest became as fixed and certain as the claim against the maker. That the maker and insolvent were, in effect, jointly liable, and that, therefore, if a joint debt of two or more debtors is to be treated as secured and not provable under our statute, the claim against each debtor being treated as security for the debt against others, and each should become bankrupt at the same time, in such case, the creditor would be without remedy against the estate of either debtor. On motion for judgment on pleadings—the Court orders that the claims be allowed.

Appeal of First National Bank of Faribault et als.; in re assignment of Beaupre Mercantile Company. Second District. *Kerr, J.* Buun & Hadley for assignee; Batchelders & Davis, Kellog & Severance for appellants.

(See Vol. 2, No. 2, page 56 Reported more at length on request.

Appeal with Supersedeas Bond—When Bond not duly Served Insufficient to stay Proceedings in Action to sequestrate Property of a Corporation—Venue—Change of not allowed on Motion of Corporation when other Parties Defendant are Residents of County.

Action under Ch. 76 Gen. Stat. 1878, against a corporation and stockholders, asking that a receiver be appointed. Plaintiff duly alleged that an execution had been issued and returned unsatisfied. "The answer sets up matter which, as defendants claim, operated as an appeal, with supersedeas bond, from the judgment on which the complaint is predicated. I do not think the defendant's claim well founded. It is true an appeal was duly taken, but became ineffectual upon failure of the sureties to justify, so that the proceeding stood as if no bond had been given. The statute gives respondent the right to except to the sureties within ten days after notice of appeal, and to make this right at all times available it requires the bond to be served with the notice of appeal. Otherwise notice of appeal might be served, and then by waiting the ten days within which respondent might except to the sureties, and then serving the bond, as was in effect done in this case, the respondent would be deprived of this valuable right. In such a case the statute requiring the bond to be served with the notice of appeal should be construed as mandatory, and not directory. This is the construction put upon the New York statute upon the subject, which before the amendment was identical with our own.

Kelsey vs. Campbell, 38 Barb. 238. *Chamberlain vs. Dempsey*, 13 Abb, Pr. 421.

The case cited by defendant's counsel from 75 N. Y. 611 is not in point, for it is a construction of the statute after it had been amended so as to permit the service of a bond at any time after notice of appeal and before the expiration of the time for appealing had expired. Such an action is subject to the same rules as to place of trial as other civil actions; and where motion for change of venue is made by the corporation alone on the ground that its principal place of business is in another county; and where it appears that one or more necessary parties defendant are residents of the county in which action was brought, such motion of the corporation alone will be denied.

Danforth vs. National Chemical Co.; Otis, J. Second District. 54,071. E. M. Card and C. D. & T. D. O'Brien for plaintiff; F. B. Hart for defendants.

Principal and Agent—Vendor not liable for misrepresentations of a broker also agent of vendee.

Action by plaintiff to recover from defendant Shanley $66.45 on past due interest coupon upon note secured by mortgage on the real property described in the complaint, afterwards conveyed by the mortgagor and owner Smith to defendant Shanley, who assumed the payment of said mortgage by a covenant in said deed, as a part of the purchase price of the land. The defendant Shanley by his amended answer sets up fraud and deceit on the part of one Kingsley, who he alleges was the agent of Smith in effecting said conveyance to

him, Shanley, and Smith having been made a party to the action on the application of Shanley, the latter seeks herein to recover damages from said Smith for said deceit, and to have said damages applied on the mortgage debt of plaintiff. The only question which I deem it necessary to consider on this motion is the sufficiency of the evidence to entitle the defendant Shanley to recover such damages. It is not disputed that the question must be considered as though this was an ordinary action for damages for deceit brought by Shanley against Smith. It was contended by plaintiff upon the trial and is again urged that no such agency of Kingsley was established by the evidence, as would hold Smith responsible for damages in an action for deceit for the false representation of Kingsley alleged in the answer and set forth in the testimony of Shanley, conceding for the purpose of the argument that they were made by Kingsley as alleged. The allegations of agency in the answer of Smith, is denied in the reply of plaintiff and in the answer of Smith, and the determination of that question depends therefore upon the evidence. While the evidence on that point is not entirely clear, I think it may be reasonably inferred from it, that Smith had empowered Kingsley to dispose of lots 4 to 9 inclusive of block one (Sunnyside), and that neither Smith nor Kingsley had any interest in or control over lots 14 to 19 inclusive, of said block; that afterwards Smith executed a deed of these lots to Shanley which was delivered through Kingsley as broker, and through the said medium, Smith received in exchange the deed of Shanley to his lot. Smith in said deed assuming a mortgage of about $3,000 on Shanley's lot and Shanley in his deed from Smith assuming a mortgage of about the same amount on Smith's lots. This is the extent of the knowledge and connection of Smith with the transaction, as shown by the evidence. The connection of Shanley is as follows: Seeing an advertisement of Kingsley's in the papers that he had real property to exchange, Shanley called upon him, and asked him what he had to exchange for Shanley's lot 4 block 7 Terry's addition. Kingsley, so Shanley alleges, pointed out to him on the map lots 14 to 19 inclusive on the corner of Hamline avenue and St. Clair street, as lots that he had for exchange, and Shanley, after going out and looking at the lots so pointed out to him, as he says, agreed to give Kingsley $50 for making the trade of those lots for his, Shanley's lot; and Kingsley agreed in a memorandum in writing signed "G. Kingsley, agent," and delivered to Shanley to make such exchange and acknowledged therein the receipt from Shanley of $10 as earnest money on said lot 4; but in said memorandum agreement, and in said deed from Smith, lots 4 to 9 inclusive and not lots 14 to 19 were described. The remaining $40 commission was paid by Shanley to Kingsley, as so agreed when the deeds were passed. Shanley discovered soon after the deeds were delivered that he had not

got the lots he says he bargained for, and as he states, informed Kingsley of the fact, but there is no proof that Smith had any notice or knowledge of any such conduct on the part of Kingsley or of any claim of fraud or injury on the part of Shanley until the answer of Shanley was served in this case.

Whether under such circumstances, either principal could recover damages from the other for the deceit of the broker who represented both is a question not necessary here to determine for the reason that the case is squarely within the rule laid down in Davis vs. Lyon 36 Minn. 425. The most that can be claimed for the defendant Shanley here, is that Kingsley was the special agent of Smith for the sale or disposition of certain specific lots. It is not claimed that he ever authorized Kingsley to represent him with respect to any other lots or that he knew Kinsley had made any such false representation as Shanley asserts. Certainly he never ratified any such statements on the part of Kingsley in any proper sense of the term "ratification" as applied to such a transaction. Merely accepting Shanley's deed from Kingsley and delivering his own deed to Kingsley for Shanley, without more appearing, is not sufficient, so long as the case referred to in 36 Minnesota stands as the law of this state, to make Smith liable to Shanley in damages for such deceit as is here alleged on the part of Shanley. See also Kennedy vs. McKay, 43 N J law 288. Nichols vs. Brown 37 N W (Dak) 753. I am not unmindful of claim of counsel, that the learned judge who wrote in Davis vs. Lyon (supra) seems not to have been in full accord with the reasoning of the majority of the Court, and that there are authorities to the contrary, but so long as the decision stands unquestioned by the Court that made it, I feel bound to accept it as the law of this state.

Ickler vs. *Shanley*; *Kerr, J.* Second District. T. D. Merwin for plaintiff; S. P. Crosby for defendant.

Jurisdiction of Justice of the Peace in Replevin —Bond.

The filing of a proper bond with a justice of the peace is a necessary prerequisite to the issuance of a writ of replevin by him, and is jurisdictional. If no proper bond is filed before the writ is issued, the defendant has the right to a dismissal of the action upon objection seasonably made. A bond with one surety is not a sufficient bond under the justice court replevin statute which provides for a bond with "sufficient *sureties*."

Nolting vs. McDermid; Brown, J. Stevens County. Sixteenth District. Geo. E. Darling for plaintiff; W. C. Bicknell for defendant.

Assignment—Delivery of Deed.

Defendant Clark executed a deed of assignment in the usual form, under the act of 1881 and acts amendatory thereof, assigning all unexempt property to defendant Cant, who was his attorney, for the benefit of his creditors. This deed was made and dated February 15, 1893, at which time Clark departed for Europe to raise money to pay his indebtedness, and the deed was given to Cant,

who was to file it should Clark fail to secure the necessary funds or should creditors press Clark and his property too severely. It was not the intention of Clark to make an assignment at all when he executed and left said instrument in the custody of said Cant, but it was the intention that the same should not be filed or in any manner become operative at that time, and it should never be filed and become operative, if he should succeed in raising the desired funds in Europe. Cant kept the deed until April 13, 1893, when he filed it without Clark's knowledge, just two days before plaintiff recovered judgment against Clark, who was still absent.

Held, that said assignment was void as to plaintiff (who had not since participated with other creditors) as there was no legal delivery of the deed.

"It is argued on the part of defendants that these conditions in no manner affect the validity of the assignment for the reason that it is claimed that under the statute, section 23, chapter 41, a deed of assignment has no force or effect until filed and that it derives its entire life and being from the date of filing, without regard to its date and acknowledgement, and without regard to the conditions under which the deed was placed in the hands of the assignee, providing the necessary facts warranting an assignment existed when filed. But the date of the filing of the deed of assignment is in no sense the date of the making of the assignment as the filing is an act required by law to be done in order to give effect to an instrument theretofore executed and the requirement of filing presupposes prior making, and if this be true, the date of the execution must be taken in order to determime whether or not facts then existed warranting the assighment."

"While fraudulent intent of either assignor or assignee, or both, will not void a deed of assignment made in pursuance of the provisions of law, still there must be an actual, unconditional delivery and intent to make an assignment."

"Under the common law, an unconditional delivery of a deed of assignment is necessary in order to render it valid as against creditors refusing to participate therein. In order to complete the transfer intended by the assignment, it is necessary not only that the instrument shonld be executed with all the requisite formalities, but that it should be actually delivered to the assignee, and the delivery, to be valid must be such as to deprive the grantor of the power to recall the deed."

"In view of all the evidence, I am of the opinion that Defendant Clark did not intend to make an assignment at the time he executed the deep in question, and that such deed, left in the possession of Defendant Cant, was at all times subject to be recalled by the defendant Clark, and that therefore, there was never, in law, any actual delivery of the said deed, and that the same is void as against this plaintiff."

"No subsequent act of Clark could give the assignment any validity.

The objection that there was no legal delivery of the deed, is, in my opinion, well taken."

Charles Holtoquist vs. *Simon Clark et al; Moer J.* District Court, St. Louis county.

Garnishment– Contingent debt.

At the time of the service of the garnishee summons on the insurance company, proof of death of insured had been made to local agent, and was still in his office, ready to mail to the home office. This proof was afterwards forwarded and was accepted by the company as satisfactory. *Held*, that the debt of the garnishee to defendant, the beneficiary, was contingent until proof of death was received at the home office in Boston and there accepted. Garnishee discharged.

Louis Rouchleau vs. *Mary Dodge et al* and *N. E. Mutual Life Ins. Co.*, garnishee; *Moer J;* District Court, St. Louis Co.

Promisory Note—Maker of—Pleading..

Complaint, on promissory note, after alleging incorporation of plaintiff and defendant, alleged the making and delivering of a note as follows: "We, the subscribers, jointly and severally promise, etc., signed, National Iron Works, per C. J. West." Defendant, National Iron Work, entered a general demurrer to complaint, citing Bradley vs. Boston Glass Co. 16 Pick., 347.

Complaint in suit on three promissory notes alleged incorporation of plaintiff and defendant in first cause of action, and then alleged: "In addition to the allegations in the first cause of actiou, and for a second cause of action, plaintiff alleges etc." *Held*, on general demurrer, that the allegations of the second cause of action were sufficient. Demurrer overruled.

Marshall-Wells Hardware Co. vs. *National Iron Works; Ensign, J.*, District Court, St. Louis Co.

Pleading.

In an action for personal injury, *held*, upon general demurrer to complaint, that allegations in substance as follows, did not show license to cross defendant's tracks; to-wit: That a large number of persons including laborers, and women, and children, had for more than a year last past daily crossed and re-crossed said tracks, that they were never forbidden so to cross, and that said daily crossing was well known to defendant.

Held further, on demurrer, that it is necessary that the complaint allege that the defendant "wilfully" ran over the child, notwithstanding the fact that the complaint contained the allegation that it was through defendant's carelessness, recklessness, negligence, and want of care, and improper conduct" that said child was so injured.

Joseph Bamka vs. *C., St. P. M. & Omaha R. R. Co.; Lewis, J.* District Court, St. Louis County.

Warranties—Breach of.

Defendant conveyed certain real estate to plaintiff by warranty deed free from incumbrances. Plaintiff was afterwards compelled to bring action to quiet title to cancel an outstandiug contract to sell, formerly given by defendant. Plaintiff then

sued defendant for breach of warranty against incumbrances for damages to the extent of the costs of the action to quiet title. General demurrer to the complaint was sustained on the ground that a contract to sell is not an incumbrance, and suit should have been brought on breach of the covenant of seisin.

C. J. Petre vs. *Bartlomi Plotnizke el al; Ensign, J.*, District Court, St. Louis Co.

Municipal Assessments—Constitutional Law—

A re-assessment for certain street improvements had been made under the provisions of Ch. 206 of the laws of 1893, and to the confirmation of this re-assessment, the property owners objected, contending that the said act was unconstitutional and void, contravening section 27 of article 4 of the Constitution of the State and further, that by the terms of the act under which the re-assessment was attempted to be made, the street was exempt from the provisions of the act. Both objections were overruled and the re-assessment confirmed. The case has been appealed.

In discussing the points raised, Judge Ensign, in his memorandum says: "The only question raised by the objectors under the last objection was as to whether the act in question is prospective. The objectors claim that the words "shall be set aside" (in 2d section) are prospective and that inasmuch as the judgment of the Court setting aside the original assessment upon this avenue was made prior to this enactment, that the law is not applicable thereto."

"The nature, reason, and spirit of the act clearly indicates the intention of the legislature, and that it was intended to be applicable to all cities of the State and to all cases when a city by making improvements had conferred benefits upon the owners of property without regard to particular days or time. If the facts exist that are specified in the act, a remedy was intended to be provided by this law."

"The doctrine that statutes retrospective in their effect are unconstitutional is held not to apply to remedial statutes which may be of a retrospective nature, provided they do not impair vested rights. This act does not impair any vested rights and it seems clear that it was intended to apply to all such cases as this. If the legislature had intended it only for cases where the assessment was set aside subsequent to the act, it would have been easy to add the words that would have precluded the literal construction that is given by courts to remedial acts."

"It is contended on the part of the city that this point cannot arise in this case, as the case was pending in the Supreme Court on an order for reargument until May 11, 1893, when it was finally determined. My construction of the statute renders it unnecessary for me to consider this question, but the fact that it was so pending would be an additional reason for the construction I have adopted."

In re application of City of Duluth to re-assess the cost of the improvement of Piedmont Ave. E.; Ensign, J. District Court, St. Louis County.

Garnishment—notice to defendant.—

Plaintiff failed to serve notice of garnishment on the defendant before the return day of the garnishee summons.

On return day defendant appeared specially and moved to dismiss the garnishee proceeding on that ground. On motion the Court continued the matter two weeks when defendant's motion to dismiss was renewed. Plaintiff in meantime had served on defendant a notice of the adjournment. Plaintiff's motion was denied on the ground that sec. 166, ch. 66, G. S., as to the service of notice of garnishment was directory and not mandatory.

Webb vs. *Capitol Consol Co.*, and Metropolitan Trust Co., Garnishee; *Elliot, J.*, 4th District.

Manufacturing Corporations—one organized to publish a Newspaper not a.—

"The printing and publishing of a daily and weekly newspaper is not a manufacturing or mechanical business within the meaning of sec. 3, art. 10, of the State Constitution; and a corporation organized for that purpose is not organized for the purpose of carrying on a manufacturing or mechanical business within the meaning of said section three."

Oswald vs. *St. Paul Globe Pub. Co.*, *Pond, J.*, 4th District.

Costs—Verdict less than $100.00:—

Where amount prayed for exceeds $100, but where the amount recovered is less than that amount plaintiff is entitled to tax $10 statutory costs against defendant.

Snow vs. *Street Ry. Co.*, 4th District.

Assignee—Liability of, under covenants of his assignor's lease:—

On demur—*Held*: That an assignee in insolvency is liable under the covenants of a lease made by his assignor to pay taxes on the demised premises, if the taxes accrued while the assignee, as such, was in possession of the premises. Held further, that an assignee in insolvency is liable under the covenants in the lease that run with the land, for any default occurring while he is in possession as assignee in the same manner and to the same extent as any assignee of the lease would be.

Cook vs. *Parker*, *Elliot, J.*, 4th District. Ripley, Brennan & Booth, for Plaintiff; H. M. Parker, *pro. se.*

Service of summons by publication—Insufficient affidavit:—

Summons served upon defendant by publication. Defendant appeared specially and objected to the service upon the following grounds, to wit:

That the affidavit for publication herein does not state that the affiant has deposited a copy of the summons in the post-office directed to the defendant at his place of residence, and does not state that the residence of the defendant is not known to affiant.

The affidavit stated that his address—not his residence, was at a certain place; it did not exclude the idea that he knew his actual residence. Motion granted.

Hay, Assignee, Plaintiff vs. *Tuttle*, Defendant; *Chas B. Elliott, J.* District Court, 4th District. McNeir & Bacon, attorneys for plaintiff; Arctander & Arctander, attorneys for defendant.

HON. GORHAM POWERS,

District Judge, Twelfth Judicial District.

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PHOTOGRAPHS AS EVIDENCE.

Photographs have been held to be admissible in evidence for three purposes, viz., to identify persons, to identify things or places, and to prove handwriting.

We propose to consider only the first class of cases, being led thereto by the recent decision in *United States* vs. *Lot of Jewelry*, 59 Fed. Rep. 684 (Jan. 9, 1894), in which Judge Benedict, of the Eastern District of New York, held that it was competent for the purpose of proving the identity of a person alleged to have passed under different names in different places, to show a photograph to a witness who knew the person passing under one of the alleged names and allow him to testify that it looked like the person he had so known. The Court says:—

"During the trial it became important for the government to show that a man named Vollkringer, who had a stock of jewelry in a store in Paris, of which the jewelry proceeded against is shown to have been a part, came to New York, as a passenger, by the steamship 'New York,' under the name of Flamant. In order to prove this, a witness who knew Vollkringer in Paris, was shown a photograph of a man, and he testified that Vollkringer's appearance corresponded with the picture in the photograph. Another witness, who had known the man called Flamant at the hotel in New York, on being shown the same photograph, testified that Flamant's appearance corresponded with the photograph. When the photograph had been taken, and whether or not it was taken from Vollkringer, did not appear. This line of testimony was objected to, but, it seems to me, without good reason. It was only another, and more definite, method of proving the appearance of the man Vollkringer, and of the man who called himself Flamant. The resemblance of feature could surely be proved, to show that the man Vollk-

ringer and the man called Flamant were the same person. Such testimony would not of course be conclusive, but in my opinion, it was some evidence pertinent to the inquiry then in hand."

The earliest adjudication of this question was in England in 1864, when Justice Willis, in a prosecution for bigamy, to prove the identity of the first husband, permitted a witness, who was present at the marriage, to be shown a photograph taken from the prisoner, who had said that it was that of her first husband, and asked if it represented the man who had been seen married, to which the witness replied that there was a resemblance, and she believed the man was the same. To the jury the justice said: "The photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and, therefore is, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory." *Reg.* vs. *Tolson*, 4 F. & F. 103.

This question of the admissibility of a photograph to identify the person was for the first time presented to the Pennsylvania Court in 1874, in *Udderzook* vs. *Commonwealth*, 76 Pa. St. 340. The witness had known a man by the name of Goss, and the purpose of the evidence was to show that Goss was the same person as one Wilson, whom appellant was alleged to have murdered. The Court admitted the testimony, saying:—"In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends upon the reliability of the photograph as a work of art and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as a means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and presenting views as well as likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent upon the same general laws which produce the images of outward forms upon the retina through the lenses of

the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses."

In 1871 the question was presented in New York in *Ruloff* vs. *People*, 45 N. Y. 213. Three persons were discovered in the commission of a burglary. In their attempt to escape they killed one of their discoverers, but two of them received wounds from which they died. Photographs of these, taken after death, were offered to identify them as persons "intimately connected and associating with the accused." The Court held them to be admissible, saying:—"Evidence was given of the manner in, and disadvantageous circumstances under which they were taken; and the evidence was that they were not artistic pictures, nor in all respects the most perfect likenesses that could be taken. * * * They were submitted to the witnesses not as themselves, and alone, sufficient to enable them to identify the persons with entire certainty, but as aids, and, with other evidence, to enable the jury to pass upon the question of identity. * * * We are of opinion that it was not error, under the circumstances, to admit them as evidence for what they were worth."

The question was presented to the Alabama Court in 1875 in *Luke* vs. *Calhoun County*, 52 Ala. 115. The Court follows the two last cited cases, saying:—"A Court cannot refuse to take judicial cognizance that photography is the art of producing *fac similies*, or representatives of objects by the action of light on a prepared surface. As such it has long been recognized, the mechanical and chemical process employed, and the scientific principles on which it is based, are so generally known, that it would be vain for a court to decline cognizance of it." But the Court weakens the effect of this strong *dictum* by holding that, as the question was one of identity, the photograph should have been submitted to the jury under the rule that in questions of personal identity great "latitude is allowed in the admission of evidence authorizing, in the absence of positive evidence, the introduction of facts, slighter and more insignificant than the resemblance of the photograph to the person whose identification is the matter in issue."

This case, following a previous case in the same state,* also establishes the rule that it does not require an expert to decide whether the photograph is a good "likeness."†

*Barnes vs. Ingalls, 31 Ala. 193
†See also Barnes vs. State, 58 Ind. 530.

In 1892 the question arose in Rhode Island. The defendant, by the growth of a moustache and otherwise, seems to have changed his personal appearance between the time of his arrest and the time of trial. The Court permitted a photograph taken at the time of arrest, evidently for the purpose of being placed in the "rogues' gallery," to be introduced for the purpose of showing how the defendant looked at the time it was taken as compared with his appearance at the time of trial, on the ground that it was relevant for the purpose of identification. *State* vs. *Ellwood*, 17 R. I. 763; 24 Atl. 782.

This ruling is similar to that in a Pennsylvania case, decided in 1873, where, however, the question was not one of identification. The action was against an insurance company on its policy; defense, false representations in the application for insurance. Plaintiff offered a photograph of the deceased, which was shown to be a good likeness at the date of the application, and which showed her to be in apparent good health. Judge Thayer, allowing the offer, said:—"If it was competent for witnesses to portray her physical appearance to the jury by words, it is difficult to assign any good reason why the same might not be done by a picture, recognized and proved by her friends to be a truthful and correct representation of her person." *Schaible* vs. *Ins. Co.*, 9 Phila. 136.

The Massachusetts Court has recently decided this question in the same way in *Commonwealth* vs. *Morgan*, 34 N. E. 458 (1893), 159 Mass. 375.

One of the government witnesses said that the defendants, at the time of the alleged larceny, had side-whiskers and a moustache. As bearing on the question of identity, certain witnesses for the defendant testified that they had known him since the spring of 1887, and that he had never worn side-whiskers. A photograph was held to have been properly admitted for the purpose of showing that when it was taken, which was in July, 1887, the defendant wore side-whiskers, and thus of contradicting the witness who had testified to the contrary. The Court further held, that whether the photograph was sufficiently verified was for the presiding justice, citing *Blair* vs. *Pelham*, 118 Mass. 420, which, however, was a case where a photograph of certain premises was admitted to enable the jury fully to comprehend the situation.

In 1881 the question of the reliability of photographs was again presented to the New York Court in the case of *Cowley* vs. *People*, 83 N. Y. 464, and the Court, by Chief Justice Folger, says:—"And we are now

to consider whether they (photographs) are, under a proper state of facts, and for a proper purpose, competent evidence. We know not of a rule, applicable to all cases, ever having been declared, that they are not competent. Nor do we see, in the nature of things, a reason for a rule that they are never competent. We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. * * * 'The Rogues' Gallery' is the practical judgment of the executive officers of the law on their efficiency and accuracy. They are signs of the things, taken. * * * So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person, we see not why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being open, like other proofs of identity, or similar matter, to rebuttal or doubt."

Recently in New York in a trial of a charge of homicide, where one plea was self defense, a photogroph of the deceased, admitted by the defendant to be a "just picture," was admitted for the purpose of showing the jury "the kind of man the defendant claimed his assailant was." Judge Maynard observed, "that where self defense is the plea, the physical characteristics of the slain are, obviously, a proper matter of proof. * * * Witnesses who had known the deceased might have been permitted to describe him as accurately as the imperfections of human speech would allow, and the evidence is no more objectionable when his form and features are delineated by means of the photographer's art." *People* vs. *Webster*, 34 N. E. 730.

Recently, also, the question was directly presented to the Pennsylvania Court on a trial for larceny of money from a bank, alleged to have been committed by the defendant and two confederates. Photographs of the men, recognized by the bank officials as being the ones who were in the bank when the robbery was committed, one of which is a likeness of the defendant, and the other two of which were likenesses of persons recognized by others as his companions on the day of the robbery, were held to be admissible in evidence, without preliminary proof that the photographs are correct representations of defendant and his confederates. "The photographic exhibits complained of were neither incompetent nor irrelevant They tended, in connection with other testimony, to identify the prisoner, and

convict him of the commission of the crime." *Commonwealth* vs. *Connors*, 27 Atl. Rep. 366.

This question of the admission of a photograph for the purpose of identification does not seem ever to have been directly presented to our Court. But the question of the admissibility of a photograph generally was presented in the recent case of *Cooper* vs. *City Railway Co.*, 56 N. W. Rep. 43, and this case would seem to decide the question under consideration. The action was one for damages for personal injuries. Plaintiff was unable, on account of his personal condition, to be present at the trial personally. "Against the objection of defendant's counsel, a photograph, which, according to the testimony, had been taken a few days before the trial, and was 'a true and correct picture and representation of those parts of Mr. Cooper's body that it purports to show,' was received in received evidence." Mr. Justice Collins, affirming the ruling, says:—"We are assured by counsel, in their brief, that the expression upon the face of a lost soul, as portrayed by the combined imaginations of Dore and Dante, would be extremely jovial in comparison with that depicted upon the plaintiff's face in this work of art. * * * But the portrait in question has not been forwarded on this appeal, and we have no means of knowing whether it purported to represent anything more than those parts of plaintiff's body which could not have been effected by temporary effort or exertion, or, if the whole figure did appear, that the facial expression was of the hideous character so graphically described by the able counsel for the defendant, and could have had the effect upon the jury they insist it had," citing a similar New York case.*

From this examination of authorities, which we believe to be exhaustive, it would appear that, although the question seems novel, there is no doubt of the admissibility of a properly authenticated photograph to prove the identity of a person.

*Alberti vs. Railway Co., 118 N. Y. 77.

OPINIONS OF ATTORNEY GENERAL.

OFFICIAL COUNTY PAPER—EFFECT OF BOARD OF COUNTY COMMISSIONERS DESIGNATING A PAPER NOT THE LOWEST BIDDER.

A. R. Holston, Crookston, Minn.:

You state that pursuant to the notice of the County Auditor of Polk County, bids for County printing were made by the proprietors of the *Tribune*, the *Crookston Times* and *Polk County Journal*, papers printed and published within said County; that the *Crookston Times* made an offer for the publication of the financial statement, the proceedings of the Board of County Commissioners, the delinquent tax lists, etc.; naming the prices at which it would publish the same, but attaching thereto as a condition upon which it agreed to do such work, that it should be given "all the job work, stationery, legal notices, financial statements, delinquent tax lists, Commissioners proceedings and all other matters required to be published;" that its formal bid furnished to the Board of County Commissioners contains the following provision: "for publishing the delinquent tax lists, two cents a description for each of such papers, namely: The *Crookston Times*, *East Grand Forks Courier* and the *St. Hiliare Spectator*, said list to be published in all three of said papers." You state further that the amount at which the said *Crookston Times* offered to publish the delinquent tax list was not the lowest sum offered therefor at the time bids were received and considered by the Board. Notwithstanding the facts aforesaid, the paper was designated by said Board, as appears from the following resolution, a copy whereof has been furnished me: "*Resolved*, That the contract for the County printing and stationery be awarded to W. E. McKenzie, publisher of the *Crookston Times*, under his bid on file with the County Auditor. Be it resolved by this Board that the *Crookston Times*, a weekly and daily newspaper published by W. E. McKenzie, be and the same is hereby designated the official paper of Polk County for the ensuing year, in which shall be published the delin-

quent tax list, financial statement, and all other official notices in compliance with his bid and for the prices mentioned therein, said bid being on file with the County Auditor."

You now inquire, in substance, whether the designation of the said paper for the publication of delinquent tax list, is valid.

The law provides, Gen. Stat. 1878, Ch. 11, Sec. 72, "that the newspaper in which such publication (delinquent tax list) shall be made, shall be designated by resolution of the Board of County Commissioners of the County in which the taxes are levied at their annual meeting in January, a copy of which resolution certified by the County Auditor, shall be filed in the office of the Clerk of the Court, provided that if the County Commissioners shall fail to designate such paper, then it shall be designated by the County Auditor." It is further provided that, "the County Commissioners shall let the advertising of the delinquent tax lists to the publisher or proprietor of a newspaper, who will offer to do the same in some daily or weekly newspaper * * * for the lowest sum not to exceed twelve cents for each description."

The law clearly implies that the paper possessing the requisite qualifications offering to publish the list for the lowest sum, shall receive the designation of the Board. Assuming that the *Crookston Times* did not offer the lowest bid, it therefore follows that the Board could not properly designate it as the paper in which to publish the delinquent tax list.

In view of the fact that the Board has assumed to act in the matter, it may be seriously questioned whether a case is now presented where the County Auditor is authorized to designate pursuant to section 72. The Board may have acted improperly and perhaps their action may be reviewed in a proper proceeding by the District Court.

I am unable to advise you, however, that the Auditor would now be justified in treating their action as a nullity and proceed to a designation himself. The statute may be regarded as contemplating action on the part of the Auditor only in case of failure by the Board to make a designation; but that body having assumed to act, it is in my opinion, a case where the powers of a Court might be invoked, rather than one where the Auditor should assume to act. Yours respectfully,

H. W. CHILDS.

January 9, 1894. Attorney General.

VILLAGES—QUO WARRANTO PROCEEDINGS LOOKING TO DISSOLUTION OF. PETITION OF MAJORITY OF CITIZENS. IN THE MATTER OF THE VILLAGE OF MINNETONKA.

APPLICATION having been made on behalf of certain persons having property interests in the Village of Minnetonka in Hennepin County in this State, for the institution by this office of Quo Warranto proceedings looking to the dissolution of said Village, a day for an informal hearing was appointed by me, whereat there appeared as counsel for said persons, C. D. Smith, Esq., Rea & Hutachek, and Mr. McDonald, and for the village, Hon. A. H. Young and Mr. C. H. Burwell, by whom the question was thoroughly discussed, pro and con.

It appears by the papers with which I have been furnished by the respective interests, that the petition for the incorporation of the territory embraced within the village, was presented on or about the 19th day of March, 1893, to the board of county commissioners of said county; that in pursuance of the filing of said petition, the board of county commissioners convened and considered the matter therein set forth, and appointed a time and place for an election to be held by the electors residing within the territory therein described; that an attempt was made by one Daniel E. Dow to secure an injunction restraining George W. Coburn and other defendants from holding said election, but the court refused to grant such remedy for the reason, as stated in the memorandum signed by Hon. Seagrave Smith, that the plaintiff had an adequate and complete remedy at law, and that the connty had no right or power to interfere by way of injunction with the election; that thereupon the incorporation of the said village progressed until the final consummation thereof.

It is therefore apparent that timely action was taken to prevent the incorporation of the said territory, and laches cannot properly be charged against those by whom the intervention of this office is now sought. It may be further stated that a similar application was made to this office during the incumbeney of my immediate predecessor, and that he refused to proceed against the incorporation for the reason that public opinion did not, in his opinion, warrant such action on his part.

As now organized the village comprises some thirty-three sections of land or an aggregate area of about forty square miles, a great part of which is farming lands, and more or less of which is still in a wild uncultivated condition. At the time of the incorporation, some seventeen

distinct and separate portions of said territory had been platted into blocks and lots, only two or three of which contained any considerable population. Very much of the unplatted portions of the village are remote from the platted parts, and cannot, in any just sense, be deemed adjacent thereto. I am clearly of the opinion that it is not the intention of the statute to authorize the incorporation of territory so remote as is much of that embraced within the said village, from the platted portion; but as I have been presented with petitions signed by nearly all the residents of said village, evincing satisfaction with the present organization, and protesting against the institution of any proceeding by this office, looking to its dissolution, in view of such sentiment of the part of the residents of the village, I feel that I should be wholly unwarranted in complying with the requests of the applicants. I consider it to imply for all intents and purposes that the public welfare will not be advanced by the dissolution of the corporation. It is a rule of this office that the attorney general ought to be concluded by a clear and unmistakable expression of the popular will in a matter affecting public interets.

I therefore decline to permit the official name and sanction of the office to be used for the purpose above named. H. W. CHILDS.

Dec. 31, 1893.

AUCTIONEERS—LICENSE LIMITED TO COUNTY IN WHICH ISSUED.

P. McGovern, Waseca:

Sir:—In my opinion a license issued by a board of county commissioners to an auctioneer has force only within the limits of the county in which issued. This is in accord with the general rule that the authority of county officers is limited and confined to the territory of their respective counties, where not otherwise expressly provided.

Yours truly,

Dec. 9, 1893. H. W. CHILDS,
Attorney General.

VILLAGE CONSTABLES—WHERE VILLAGE IS SITUATED IN TWO COUNTIES MAY ACT IN BOTH.

S. M. Waldron, Justice of the Peace, Eden Valley, Minn.:

Sir:—You state that the village of Eden Valley embraces territory lying in both Meeker and Stearns counties, and inquire whether a village constable duly elected and qualified therein is authorized to act officially in each of said counties.

The law expressly provides (1885 ch. 145 § 41, as amended 1887 ch. 53 § 2) that "the justice of the peace and constable of such village shall have and possess all the powers and jurisdiction conferred (by the law of 1885) in each of the counties in which such village is situated, and shall file their bonds in each of said counties."

The jurisdiction of the village constable is not confined to the territory embraced within the corporate limits of the village, but is co-extensive with the territory of the two counties in which the village is situated. In addition to his authority to act as village constable, he enjoys all the powers, authority and jurisdiction in any case, possessed by a constable elected in the county or counties in which the village is situated. I do not see how I can state the fact any more plainly than in the very terms of the statute itself.

Yours truly,

Dec. 4, 1893. H. W. CHILDS,
Attorney General.

BOARD OF GAME AND FISH COMMISSIONERS'—FORFEITED BAIL NOT PROPERTY OF.

Hon. W. P. Andrus:

Sir:—In your communication of the 16th inst. you state that a party who was bound over to the grand jury of Crow Wing county for his appearance to answer in a criminal charge, failed to appear for trial, and that his bond was declared forfeited by the court, and the amount thereof directed to be paid into the county treasury of Crow Wing county; that your board requested that the sum thus forfeited should be paid into the state treasury for the use of the said board; that the board declined to make an order to that effect for the reason as stated by him, that the law does not contemplate such disposition of moneys arising from the forfeiture of bonds.

I agree with the views of the court as above indicated. The bond was given for his appearance at the district court for trial. The board is entitled only to moneys collected by fines following convictions. It is true that the law provides that moneys recovered on any bond given to or contract made with the board of game and fish commissioners, or received by them for the sale of any birds, shall be paid into the state treasury; but it is quite apparent that the bond therein contemplated is altogether different from the one given by a person held for appearance before a grand jury.

Yours truly,

Dec. 21, 1893. H. W. CHILDS,
Attorney General.

LEGAL ETHICS.

Chief Justice Huston, of Idaho, in a singularly clear and well written opinion, has recently stated those ethical principles which should underlie the conduct of members of the profession, and points out the causes of the decadence of legal ethics, of which we hear so much in these degenerate days.

"There is no duty imposed upon a court more important than that of preserving, to the best of its power and ability, the professional integrity and purity of its bar. Courts are established for the administration of law and justice. The attorneys who constitute its bar are an integral part of the court. Without them the court would be a dead engine, so far as the accomplishment of the ends of its creation go. The duties and obligations imposed upon the judges of courts are no more binding or obligatory than are those to which their position constrains the attorneys who constitute the bar of the court. The professional conduct of each and every member of the bar is a matter in which all are specially interested. No member has the right, nor should be permitted, to so conduct himself in his profession as to bring reproach upon the guild. There was a time when any scoff or jibe the poet or the romancer saw fit to cast upon the lawyer was received, without question, as deserved obloquy. But that rule has never obtained in this country. The history of the legal profession in this country is the history of the republic. America can proudly and fearlessly challenge comparison of her lawyer sons with any that the world has ever produced. No grander models can be found for the student of the law than our own country presents. And it should be the earnest desire and endeavor of every member of the profession that the standard of professional excellence be not lowered. That unworthy members will be found in the ranks is inevitable; 'for where's the palace whereinto foul things sometimes intrude not?' While the standard of ability and integrity of the American bar is second to none, it is to be regretted that defections from the line of professional duty are becoming disturbingly frequent. Perhaps, under all the circumstances, this is less a matter of surprise than regret. Lawyers are only men, and subject to the same influences that act upon other men; and it

would perhaps be unjust to expect that in an age and in a country where the worship of the golden calf has become the accepted and almost universal creed, the legal profession alone should be excluded from the shrine. But the lawyer, if he is a lawyer in the true acceptation of the term, will ever temper his devotion at that altar with the recognition of those eternal truths which he has drawn from the fountain head of jurisprudence. I cannot myself conceive how a man with ordinarily honest instincts, who has been a careful and thoughtful student of Coke, Blackstone, Kent and Story can ever be induced to resort to unscrupulous and dishonest methods in the practice of his profession. It may be that it is to the lack of familiarity with the writers mentioned that some of the looseness so painfully apparent in the practice of some members of the profession is attributable. Perhaps another reason for the lowering of the professional standard may be found in the monstrously heretical idea which many, both professional and profane, have of what constitutes true professional success. To be a lawyer is and should be understood and recognized as being well versed in the law, and possessed of ability to make a just and proper application thereof to the facts in a given case. It is an erroneous and unreliable rule which gauges the ability of a lawyer by the number of cases he wins in the courts of first instance. The true test should be, did he show that he was thoroughly conversant with the law of the case, and did he ably and honestly make a just and proper application of the law to the facts, and not the simple inquiry, 'Did he get away with the case?' No matter what the means resorted to may have been, though to reach it he may have been obliged to

"Distort the truth, accumulate the lie,
And pile the pyramid of calumny."

"The attainment of the end sanctified the means, no matter how unprofessional, dishonest or vile.

"And I apprehend it is an overweening desire for temporary and ephemeral success unrestrained by knowledge or recognition of those ethical principles which underlie all the writings and teachings of the fathers of the profession, that much of the moral decadence of the legal profession is attributable. The lawyer who, to secure success, either for himself or his client, will violate, wilfully and knowingly, either the express or implied obligations of his professional oath, is on a par with the minister of the gospel who, to gratify his avarice, would drag the pure vestments of the altar through the turbid pools of mercenary traffic, or, to encompass an unholy ambition, would 'hang the tatters of a political piety upon the cross of an insulted Saviour.' The restraints which both the common and civil laws laid upon lawyers in matters of compensation for their services have been greatly relaxed, but the reasons which prompted this relaxation were beneficent, and the action should not be made to serve the purposes of oppression or cupidity. There

is no reason why a lawyer should not acquire wealth as well as another, if he does it honestly and legitimately; but as his temptations, in the way of opportunity, are greater than others, so are his obligations to keep strictly within the lines of probity and integrity. And that in so doing he is adopting the course best calculated to insure success, all experience verifies. Go through the ranks of the profession, in this country or elsewhere, and it will be found to be a rule, with scarcely an exception, that the successful members of the profession are those who have practised upon lines of strictest integrity, and it is a matter of just pride to the profession that deviations from the line of duty are exceptional. The rule given by Burns to his young friend Aiken may well be adopted by every member of the profession as a check upon his zeal either for the acquisition of pecuniary results or the attainment of professional success:

"But where you feel your honor grip,
Let that aye be your border:
Its slightest touches, instant pause—
Debar all side pretenses:
And resolutely keep its laws,
Uncaring consequences."

In re Badger, Feb. 6, 1894, 35 Pac. Rep. 839.

NOTE AND COMMENT

INTIMIDATION—WHAT AMOUNTS TO—Judge Sanborn, of the Circuit Court of Appeals, in his usual lucid manner, defined the word "intimidation," as used in the injunction issued against various persons, prohibiting them from interfering by force, threats or intimidation with interstate commerce on the Great Northern railroad, at the request of one of the parties enjoined. He is reported to have said:

"The employes have the right to organize for their mutual benefit and for the purpose of advancing their wages. They have the right to induce others by argument and persuasion to join their organization, to quit the service of their employer or to refuse to enter his service, but they may not induce such action by intimidation. The meaning of intimidation in this case is well illustrated by the case of *United States* vs. *Kane*, 23 Fed. Rep., 748, in which a large party of strikers undertook to stop the operation of a railroad by gathering in a surging crowd and overawing the engineers by the threat of superior force; they did not seek to destroy an engine; they did not seek to destroy property; but they assumed to try to stop the oper-

ation of the road; tried to prevent the engineers from running out the trains and tried to prevent the train men from working. Judge Brewer, now Mr. Justice Brewer, of the Supreme Court, said:

"'I have no doubt that some men, who are excessively bold, might have laughed at it and waited, believing that no personal violence would be used; but men are not equally bold and courageous; the average man has a feeling that it is his duty to regard his own personal safety; we all know that, and we act upon that presumption, and when these men met there in that fervor of excitement, when the crowd surged backwards and forwards, fromone end of that yard to another, approaching now this engine and now that, they knew and every man knows that kind of a demonstration was calculated to intimidate.' And he punished one of the leaders of the party for contempt of court. In the opinion he illustrates the meaning of intimidation by supposing that two men are working for a farmer and one is discharged and the other wants to stay, 'and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them, * * * a party with revolvers and muskets—and the one that leaves comes to the one that wants to stay and says to him: "Now, my friends are here, you had better leave; I request you to leave;' the man looks at the party that is standing there; there is nothing but a simple request—that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration of force, a demonstration intended to intimidate, calculated to intimidate, and the man says: 'Well, I would like to stay. I am willing to work here. Yet there are too many men here. There is too much of a demonstration. I am afraid to stay.' Now, the common sense of every man tells him that that is not a mere request—tells him that while the language may be very polite and be merely in the form of a request, yet is accompanied by that backing of force intended as a demonstration and calculated to make an impression, and that the man leaves really because he is intimidated.'"

NEW YORK SEEKING REFORM IN ADMISSIONS TO THE BAR—In the report of the proceedings of the State Bar Association of New York, at its meeting on Jan. 16th and 17th last, we note its approval of the effort now being made before the legislature of that state in the direction of uniformity of admission to the bar. Heretofore examinations have been conducted by department boards of examiners, serving gratuitously, and in most cases under compunction, while the proposed change contemplates the appointment by the Court of Appeals of a board of law examiners, three in number, each of at least ten years' standing, and who shall hold office for three years; provides for examinations at least twice a year;

or a system of rules to govern examinations, to be promulgated by the court; and charges each applicant a fee sufficient to cover the cost of the examination.

It is believed that the bill will pass, and the matter become properly centralized and systematized. Almost, if not quite the same, system is in vogue in this and some other states, and here, at least, has proved very beneficial. Theretofore many persons were admitted through no other qualification than that they "stood in" with the local examiners, who passed lightly over their lack of knowledge. Now, the board of examiners is impartial, the standard of knowledge required much higher, and the general effect upon the administration of the law is good. It is a matter of some surprise that New York has not accomplished this reform much sooner, since she has been the leading state in "legal reforms" for many decades.

Editor Minn. Law Journal:

Sir:—In the March number of the JOURNAL you cite a Cincinnati case which holds that the practice of the Police Court of that city, of indefinitely suspending the sentence of an accused person after conviction and sentence, is illegal. It may be of interest to the profession in Minnesota to know that the same question has been passed upon by one of the most thorough district judges of this state, Judge M. J. Severance, of the Sixth Judicial district. In March, 1892, one, L., was arrested and brought before the Municipal Court of the city of Mankato charged with drunkenness in violation of chapter 13, General Laws of 1889, commonly known as the "Scheffer Law." See Kelly's Statute, vol. 1, sec. 1874. It was L.'s third offense under the same law, and upon his plea of guilty the Municipal Court gave him the prescribed sentence of ninety days in the county jail; but, immediately, the Court entered in his record a suspension of the sentence and discharged L. "during good behavior," which was in accordance with the practice of the Court. In February, 1893, L. was brought before the Court again on the same charge, but the Court, instead of trying him on the new charge, announced to him that he would commit him to serve out the suspended sentence of ninety days. To this proceeding the prisoner made proper objection and was then duly committed to jail to serve out the sentence pronounced nearly a year before. Mr. L., through his attorney, W. R. Geddes, applied for a writ of habeas corpus, which was granted; and upon the hearing and after a thorough review of the authorities, Judge Severance

held that the restraint of the prisoner by the sheriff was unlawful, and discharged him on the grounds that the indefinite suspension of the sentence at the time it was pronounced, followed by the liberation of the prisoner, amounted to a dismissal of the case and a discharge of the prisoner; and that his commitment afterwards to serve out the sentence was depriving him of his liberty without due process of law.

The same question may have been adjucated by other courts of the state, but the fact of its adjudication by so good a lawyer as Judge Severance certainly gives the doctrine great force, and it occurred to the writer that it should be known to the bar that the question has been passed on in Minnesota; hence this communication.

Respectfully,

Mr. Arthur Herman, whose "German Jurists and Poets" in the *Green Bag* for January, 1894, we noticed in the January number of THE JOURNAL, continued his interesting account of German poetical jurists in the February *Green Bag*. It is possible that in our former notice Mr. Herman was done an injustice in that the impression may have been conveyed that he is only temporarily residing in Minneapolis. Mr. Herman is permantly located there, giving his attention principally to the settlement of estates of inheritance between Germany and the United States.

EXCHANGES.

INCONSISTENT SENTENCES.—Some of the criminal sentences imposed by English magistrates seem very inconsistent and capricious. Here are a few samples: A man for stealing a hand-cart, five years' penal servitude; and another man for assaulting a fellow-workman and knocking out his eye, forty shillings fine! A man for begging bread when he was unable to obtain employment, ten days' imprisonment at hard labor; and another, for going to the workhouse rather than accept employment at three shillings a day, a month's servitude and twelve strokes of the cat-o'-nine-tails! Again, a man for stealing a cotton shirt, five years' penal servitude; and another man for criminal assault upon two infants, three months, imprisonment! The *Law Times* says: "We are not surprised to see some comments in the press on the sentences inflicted by Mr. Justice Day. Eighteen months'

imprisonment of a clergyman for marrying a person who was under age without due publication of banns, penal servitude for life on a boy for attempting to extort money by threats of false accusation, and eighteen months' imprisonment of a young man called Rowden, or Rawden, for falsely publishing in a newspaper that he was engaged to marry a young lady of high rank, are really a group of cases which must excite amazement in the ordinary mind. Indeed, when we compare them with the punishments often awarded by judges for offences complicated with violence, they would appear to be eccentric, and passed with a view to invite the interference of the home secretary." Down in Texas, as we may have remarked before, they sometimes punish a man more for stealing a mule than for killing a man; but then perhaps the mule is worth the more. All this matter of sentences depends on the magistrate's digestion. If he makes a good breakfast, and his wife has not nagged him, the criminals get the benefit. Sometimes we are inclined to believe in the practice of letting the jury assess the punishment. It may be that one man is as little fit to decide continually on the measure of punishment as he is to pass upon disputed questions of fact. —*Albany Law Journal.*

Judge: "Have you anything to say before the Court passes sentence upon you?" Prisoner: "Well, all I got to say is, I hope yer Honor'll consider the extreme youth of my lawyer, an' let me off easy."—*Criminal Law Magazine.*

Lawyer (to timid young woman)—"Have you ever appeared as witness in a suit before?"

Young woman (blushing)—"Y-yes, sir, of course."

Lawyer—"Please state to the jury just what suit it was."

Young woman (with more confidence)—"It was a nun's veiling, shirred down the front and trimmed with a lovely blue, with hat to match."

Judge (rapping violently)—"Order in the court!"—*Criminal Law Magazine.*

THE DISTRICT COURTS.

Venue when the State is a Party.

Action by the State for the recovery of certain logs alleged to have been wrongfully cut upon state lands. The logs at the time of the commencement of the action were in Hennepin county; action was brought in Ramsey county. Defendant moved for a change of venue to Hennepin county upon the ground that the property at the time of the commencement of the action was in that county. "It is not disputed that it is within the power of the legislature to determine where actions, including those in which the state is a party, shall be brought and tried. The legislature has, by general laws, regulated the entire matter, and the rule that the King may lay the venue in any county in certain cases has no application here. The exception made in favor of the State in sec, 49, ch. 66, Gen. Stat. 1878 (first appearing in 1877, ch. 68, Gen. Laws), in certain cases —of which the case at bar is not one —is a recognition by the legislature that the state is not excepted in other cases.

The statute, sec. 47, ch. 66, provides that actions for the recovery of personal property detained for any cause, shall be tried in the county in which the subject of the aetion is situated. Section 49 contains a provision that an action for the claim and delivery of personal property *wrongfully taken* may be brought and maintained in the county where the wrongful taking occurred, or where the plaintiff resides. The latter provision was passed after the former, and modifies the former, but the former is still in force when the taking was not wrongful. The complaint in this case alleges that the plaintiff is the owner of the property sought to be recovered; that it is situated in Hennepin county, and that the defendant wrongfully detains the same. There is no allegation regarding the taking, and there is no claim that the answer shows a wrongful taking. The reply had not been made at the time the motion was heard, and is not before the Court. Under the provisions of section 47 before referred to, defendant has the right to have the case tried in Hennepin county." Motion granted.

BRILL, J

State of Minnesota vs. Shevlin-Carpenter Co. Second District. 55,406. H. W. Child and Warner Richardson, and Lawrence for plaintiff; J. B. Atwater and A. B. Jackson for defendant.

Venue—Conversion of Logs.

Action by the state for the conversion of certain logs alleged by it to have been cut by defendant upon certain state lands in Pine county. Mo-

tion for change of venue to Pine county upon the ground that the action is for injuries to real property, and that the real property, which is the subject of said action is and was at the time of the commencement of the action, in Pine county. Denied. "This is an action for damages for the conversion of certain logs, the damages claimed being the value of the logs. There are certain allegations in the complaint which are unnecessary in such an action, among others, of the place where the logs were cut. That the logs were cut upon certain land, and that the title to the land was in plaintiff, it would be necessary to prove, whether alleged or not; but these facts are incidental and they do not bring the case within the provisions of ch. 169, Gen. Laws of 1885.

The allegations that defendant paid a certain amount into the treasury of the state do not raise a presumption of settlement, nor are they sufficient to show that the state is estopped from recovering the value of the logs." BRILL, J.

State of Minnesota vs. *Shevlin-Carpenter Co.* Second District. 55,487. H. W. Childs and Warner, Richardson and Lawrence, for plaintiff; J. B. Atwater and A. B. Jackson, for defendant.

Negotiable Instruments—Liability of Indorser.

Action against payee and indorser of an ordinary coupon mortgage note on his indorsement. Defense, that the mortgage note and coupons were not negotiable instruments under the law merchant: and that in the sale and indorsement of same to plaintiff it was not intended that defendant should guarantee payment of same or be in anywise responsible therefor; that the note and coupon were secured by mortgage upon real estate of far greater value than the amount due on said note. Motion for judgment on the pleadings granted. "The note sued upon is a negotiable promissory note, to be protected in the hands of a *bona fide* holder for value according to the law merchant. 48 Minn. 560; 136 U. S. 286. The contract evidenced by the ordinary indorsement upon a promissory note is well settled law, and the effect of it cannot be varied by parol."

KELLY, J.

Clarke vs. *Patrick*. Second District. 54,719. Briggs and Countryman, for plaintiff; C. D. & T. D. O'Brien, for defendant.

Assignment for Benefit of Creditors—Preferences—On Demurrer.

Action by the assignee for the recovery of money alleged to have been paid defendant by his assignor with the intent of making a preference. The complaint did not allege whether the assignment was under the act of 1881 or at common law. "The complaint is defective in this, that it does not appear whether the plaintiff claims under a statutory assignment or a common law assignment. Either is lawful in this state, and preferences are not ordinarily unlawful except as forbidden by the statute. Having failed to show his assignment to be under the insolvency law (1881), or to plead facts, if any exist, that would make that alleged preference

to defendant fradulent at common law, the demurrer must be sustained." *Mackellar vs. Pillsbury et al*, 48 Minn. 396. KELLY, J.

Young, Assignee, vs. *Ulmer*. Second District. 50,445. G. E Young and J. M. Burlingame, for plaintiff; Stevens, O'Brien & Glenn and A. Albrecht, for defendant.

Error of Court—Rescinding Order and Vacating Judgment Therefor.

Action for the satisfaction and discharge of record of a real estate mortgage for $1,400. The plaintiff mortgagor, in her complaint, admitted having received thereon $565. The Court, after trial and verdict for plaintiff, inadvertently and by mistake, made an order that plaintiff have judgment for the relief prayed for in the complaint, to-wit, the satisfaction and discharge of record of said mortgage, without making equitable provision for the return of the money plaintiff had received upon the mortgage. Plaintiff entered judgment in accordance with the order.

Held, that the Court on defendant's application, or of its own motion upon discovering the error so inadvertently made, could correct the same by rescinding the order for judgment and vacating the judgment entered thereon, unless plaintiff within a certain time should return to defendant the money she had received upon the mortgage with interest. POWERS, J.

Payne vs. Loan and Guaranty Co. Twelfth District, Meeker County. F. P. Olney, for plaintiff; A. Humphrey, for defendant.

NOTE.—This case is reported on appeal in 55 N. W. Rep. 1128, and the above proceedings were had after the decision of the Appellate Court affirming the judgment was rendered.

Justice Practice—Pleadings.

On return day plaintiffs made and filed their complaint; defendants neglected to file an answer. but moved that the case be adjourned for one week. The justice denied the motion, to which ruling defendant excepted. Plaintiff then moved for judgment, which motion was granted. Defendant appealed on questions of law, and on these facts the District Court *held*, that when the plaintiffs had filed their complaint and the defendant had failed to file an answer, and moved for an adjournment for one week, the pleadings were "closed" within the meaning of sec. 34, ch. 65, Gen. Stat. 1878, and the defendant under the said section had an absolute right to have the case adjourned for one week. Judgment of the justice reversed. POWERS, J.

Quent & Co. vs. *Hallstrom*, Twelfth District. Conant, for plaintiff; Crowell, for defendant.

Costs—Stenographer's Fees for Transcript Disallowed.

Appeal by defendant from clerk's taxation of costs and disbursements.

Clerk taxed and allowed to plaintiff as a part of his disbursements the following item: "Paid court reporter for transcript of proceedings $33.75."

Ordered on hearing that said allowance and taxation be reversed, and said item disallowed and stricken out of the bill of costs and disbursements of plaintiff.

"It was not claimed that the court ordered the transcript mentioned in bill of costs to be prepared by the reporter. It must be presumed that such transcript was procured for con-

venience of plaintiff and his counsel, or for the court. The court is of the opinion that the money paid for such transcript does not, when such copy is procured by the party of his own motion, and not upon order of the Court, under the statute constitute a 'disbursement necessarily paid or incurred.'" WILLISTON, J.

Sanborn vs. Webster, Washington county. First District.

Garnishment—Stock of Foreign Corporations Subject to.

The disclosure in this proceeding showed that the defendants, prior to the service of the garnishee summons had deposited with the garnishee certain shares of the capital stock of the Seattle Gas and Electric Light Company as collateral security under a contract between the parties; that these shares of stock were still held by the garnishee under said contract at the time of the service of the garnishee summons, the indebtedness of the defendants under the contract having been reduced at the time of the disclosure to the sum of about $10,000. It was admitted that the garnishee had the right under its contract to hold the stock as collateral security until the full payment of the indebtedness to it.

It further appeared that prior to the service of the garnishee summons the garnishee had received notice from certain third parties that all of this stock of defendants had been assigned to them, and that they claimed to hold it subject to the lien of the garnishee.

It further appeared that the Seattle Gas and Electric Light Company is a corporation of the state of Washington, and has no office and does no business in the state of Minnesota.

Upon these facts the garnishee moved for its discharge on the ground among others, that these shares of stock in its possession are not "property, money or effects," within the meaning of the statutes of this state, arguing that at common law certificates of stock were not subject to levy by execution or attachment, and that consequently liens upon it by process of the courts could only be acquired in accordance with the statutes, and only in case there be specific legislation prescribing in substance all necessary procedure; and that the Minnesota statute prescribes no procedure for the garnishment of the stock of a corporation, although it does expressly prescribe a method of procedure for its attachment.

The Court denied the motion, saying: "The entire stress and weight of the argument in this case was placed upon the question as to whether the stock or certificates of stock in controversy were capable of garnishment under the proceeding in question. The Court holds that under the statutes of this state such stock or certificates of stock are garnishable whether the stock be that of a domestic or foreign corporation."

EGAN, J.

Puget Sound Nat'l Bank vs. Elliot et al, Defendants, Minneapolis Trust Co., Garnishee. Second District. 50529. Davis, Kellogg & Severance for plaintiff; J. B. Atwater for garnishee.

Witnesses—Experts—Fees of.

Motion for allowance of fees as an expert upon an affidavit setting up that affiant is a regular practicing physician in St. Paul, Minn. That in his professional capacity he was called to make an examination of plaintiff; that said examination was made for the purpose of ascertaining the physical condition of plaintiff, and especially to ascertain what injuries, if any, he suffered, and what traces remained, if any, of the injuries suffered to one of his limbs by reason of an alleged fall upon a sidewalk; that affiant made said examination at the request of attorneys for the parties to the above entitled action, and upon the appointment of the Court for said purpose; that thereafter he testified in said cause as an expert witness to the facts so ascertained by said examination, and that said services were reasonably worth and of the value of $50.

Upon hearing the Court ordered an allowance of $10. EGAN, J.

Cornfeldt vs. St. Paul. Second District. 53671.

S. B. Crosby and Ben Davis for plaintiff; Leon T. Chamberlain for defendant.

Evidence—Expert Testimony—Improper Admittance when Ground for New Trial.

Action for personal injuries causing death. Upon the trial certain expert testimony was improperly admitted. On motion for new trial the Court granting the motion said: "Upon a careful examination of the evidence I am satisfied that justice demands a new trial of this case upon the merits. Aside from this, I am forced to the conclusion that there was error in admitting certain expert testimony on the part of plaintiff.

Where the evidence, as a whole, is clear and convincing in support of plaintiff's case, the Court will go far towards disregarding such errors unless the prejudice is manifest. But here the most favorable view that can be taken leaves the plaintiff a bare margin for recovery upon the merits. In such case I think it should be very clear that the improper evidence could not have affected the verdict in order to justify the Court in holding the error harmless."

KERR, J.

Leonard, Adminx., vs. M. St. P. & S. Ste. Ry. Co. Second District. John S. Sanborn, for plaintiff; Alfred H. Bright, for defendant. 51483.

Exception to Charge—When Obtained by General Stipulation.

The following portion of memorandum sufficiently states the facts upon which ruling was based:

"I should not hesitate to reduce the verdict and let it stand as so reduced were it not for error contained in a charge given at request of plaintiff's counsel, rendering a new trial proper, if not absolutely necessary. * * * The special objection made to the request by defendant's counsel at the time of the trial was that it contained the element of mental suffering, an objection which the Court did not consider well taken, while no reference was made to the words mental impairment.

Counsel, however, mutually agreed, and the court seems to have consented, "that both parties might ex-

cept to the instructions given at the request of either party, or the modification of such, and to the refusal to give, as requested, any instructions later on." The exception to this charge requested by plaintiff was within the stipulation and must be allowed, counsel not being limited to the special objections urged at the trial, and as it clearly contained error, a new trial must be granted. *Comasky vs. N. P. R. R. Co.*, 45 N. W. 752. Even if, as plaintiff's counsel contends, the defendant by the agreement cannot be permitted to urge any objection not pointed out specifically at the trial, or rather should be limited to such specific objection, still it is proper to consider this erroneous submission upon the question of excessive damages as tending to mislead the jury, and by reason thereof it becomes more difficult for the Court now to control the verdict by reducing the amount.

OTIS, J.

Nowak vs. N. W. Cordage Co. Second District.*

Attachment—Non-Resident—Jurisdiction.

Action was brought in Ramsey county; summons served by publication upon defendant, a resident of Wisconsin; a writ of attachment issued by District Court of Ramsey county to Otter Tail county where same was levied on real and personal property of defendant. Defendant moved to vacate the writ upon the grounds that he never resided in or owned any property in said Ramsey county; that the property levied upon consisted largely of farming implements and tools actually used in carrying on defendant's farming operations; that no writ of attachment had been issued to the sheriff of Ramsey county, and that defendant had never been served with process in Ramsey county, or at all. Upon these facts the Court says:

"Under sec. 50, ch. 66, Gen. Stat. 1887, this action should properly have been brought in Otter Tail county, but the provisions of sec. 51 show that this court had jurisdiction of the action. The case of *Gill vs. Wadley*, 21 Minn. 15, is decisive of the question. The cases cited by defendants from other states are not in point. The right to issue an attachment was dependent upon the provisions of the statute construed in *Wasson vs. Millsap*, 30 N. W. 612. The right to issue an attachment in this state is in no way dependent upon sec. 50. The right to an attachment is by the provisions of title 9 of chapter 66." BRILL, J.

Barnet vs. Thoraldson.. Second District.

Negotiable Instruments—Motion to open Judgment—No Defense Alleged—Denied.

Plaintiff alleged on promissory notes which had been duly indorsed to it. Answer admitted notes, but set up an agreement with the payees to pay a portion thereof; that payees were officers of the indorsee and that the latter took with notice of agreement. At the trial defendant did not appear, and verdict was ordered upon motion by plaintiff. Motion by defendant to open judgment:

"Aside from the other questions in

* Vide Vol. II, No. 2. page 56. reported at greater th upon request.

the case, the answer does not set up a defence. The allegations regarding the agreement attempted to be set up are vague and uncertain. When the agreement was made does not appear—it may have been after the bank took the notes, unless the allegation that the bank took them 'with notice and knowledge of the aforesaid facts' is sufficient to fix it before. An agreement by the payees to pay themselves, if not impossible, is so unusual and improbable that it ought not to be left to inference or doubt. The most that can be made of the answer is, that in some prior transaction out of which the notes arose S. & H. agreed to pay to some third person half the amount for whicn defendants afterwards gave the notes. Such an agreement would not constitute any defence to the notes." BRILL, J.

Anchor Investment Co. vs. *Hartman.*

Fred N. Dickson, for plaintiff, and F. D. Culver for defendants. Second District. 53896.

Supplementary Proceedings — Adjournment — When not Contempt not to Appear — Exemptions — Implements — Musical Instruments.

Order to show cause why defendant should not be punished for contempt for not appearing before referee, and why he should not turn over for sale and application upon judgment against him a silver watch and certain musical instruments.

"The original order in supplementary proceedings required defendant to appear on March 6, 1894, before the referee and answer concerning his property. He did so, and, so far as the report shows, answered fully. The report shows an adjournment until March 7th, at 1:35 p. m., "by consent of parties." The defendant, in his affidavit on this motion, says he did not appear at this adjourned meeting because he had answered fully and could make no further disclosure. Nothing appearing to the contrary, he should not be punished for contempt.

As to the property disclosed, the watch "of value of two dollars" is not exempt, though worn and used in his business to keep time.

Rothschild vs. *Bollter*, 18 Minn. 361.

It is probably a "Waterbury," and useful as a correct timekeeper to defendant, but under the maxim, "*de minimis non curat lex*," it will scarcely serve the plaintiff to go to the expense of a legal sale of the watch for what might be realized. As I deny the motion without costs, the plaintiff cannot complain.

The musical instruments are exempt, either under the second subdivision of sec. 310, ch. 66, Gen. Stat. 1878, as "musical instruments for use of family," or under the eighth subdivision as "the instruments of * * * any * * * person used and kept for the purpose of carrying on his trade," or as "the implements of any professional man." In this case, in my opinion, the defendant being a teacher of music, these instruments are the "implements" of his profession, whereby he gains a livelihood, and are not

subject to seizure under execution.

KELLY, J.

Rogers vs. *Latomelle*, Second District, 54,160. Oliver J. Cook for plaintiff; Ralston J. Markoe for defendant.

Service by Publication.

Plaintiff, after mailing to defendant, a foreign corporation, a copy of the summons and complaint, published the summons, which stated in the ordinary form where the complaint is served, as follows: "Which complaint is hereto annexed and herewith served upon you," but failed to state where the complaint was filed. Upon motion of defendant, who appeared specially, the service was set aside as irregular.

LEWIS, J.

Charles T. Abbott vs. Gamewell Fire Alarm Co. Eleventh District, St. Louis county. Mann & Corcoran, for plaintiff; Towne & Harris, for defendant.

Corporation—Appointment of Receiver for on Request of Simple Creditors After Assignment.

Action by creditors, whose claims were not reduced to judgment, against a corporation, alleging that it is insolvent; that payments were being made by it to some creditors, which amounted to giving preference; and that other creditors were about to put their claims into judgment, and thereby obtain a preference; and that the action was brought under ch. 76, Gen. Stat.; and praying that the Court sequestrate the property of the corporation, and enforce the stockholders' liability so far as necessary.

After the service of the summons and order to show cause in said proceeding, the corporation made an assignment under the insolvency law.

It was urged on the part of the defendant that the Court should not exercise its equity powers in favor of the plaintiffs until they had exhausted their remedy at law, i. e., reduced their claims to judgment; and further that the assignment rendered the making of the alleged preferences impossible.

Held: That, the allegations of the complainant having been found to be true, the plaintiffs were entitled, under sec. 17, ch. 76, Gen. Stat., to an order appointing a receiver.

JAMISON, J.

Klee et al. vs. *E. H. Steele Co. et al.*, 4th Dist. Hennepin Co., 60686. Fletcher, Rockwood & Dawson for plaintiff; G. B. Spencer for defendant.

Res Adjudicata—Abandonment of one Cause of Action and General Verdict on Complaint.

On motion for new trial by plaintiff. In a previous action on two counts, the introduction of evidence on the second was objected to by defendants on the ground that the same was incompetent, which objection was sustained. Plaintiff did not amend or strike out the second cause of action, but proceeded with the trial and had a general verdict, and judgment had been entered thereon. Action was afterwards begun upon the same facts as those set up for a second cause of action in

the former suit. Defendants objected to the introduction of any evidence in this action upon the ground that the matter was *res adjudicata;* that the plaintiff was estopped from again setting up this cause of action as he had had his day in court upon it; that in the first action he had offered proof to establish this cause of action and it was rejected; that if amendment of the complaint in the first action would have rendered the admission of evidence on the second cause of action therein proper, he should either have moved to amend or have dismissed, but not having done so, and having recovered a general verdict, it and the judgment thereon concluded the plaintiff from pursuing his claim under that cause of action. Motion denied.

POND, J.

Spooner vs. *Christian*, 4th District Hennepin Co. Boardman & Boutelle for plaintiff; Wilson & Vanderlip and Ferguson & Kneeland for defendants.

Mortgages—Foreclosure—Land in Different Counties—Notice Where to be Given.

Action praying that a certain mortgage foreclosure sale by advertisement be set aside as to certain premises on the following grounds, to wit: That the mortgage was on separate and distinct tracts of land lying several miles apart; one of said tracts being wholly in Hennepin county, and the other wholly in Anoka county. The premises were advertised to be sold in Hennepin county in a paper printed and published in that county; that no notice was given in Anoka county; that there was printed and published in Anoka county a newspaper which had complied with the requirements of the law and was a proper paper for the publication of legal notices; that pursuant to said notice in Hennepin county the premises described therein were sold in Hennepin county in one tract. General demurrer was interposed. It was admitted that the principal question presented was the construction of sec. 5, ch. 81, Gen. Stat. 1878. Plaintiff urged that the only reasonable construction of the section requiring notice to be given in the county where the lands or some portion thereof are situated is that notice must be given in every county where any portion of the mortgaged premises is situated if the tracts be separate and distinct tracts, and where the prospective bidders in one county are in nowise conversant or interested in the affairs, either socially or politically, or in a business way in the other county. Demurrer sustained.

SMITH, J.

Paulle vs. *Wellis*, Anoka County, 4th District. J. L. Dobbin for plaintiff; McNeir & Bacon for defendant.

Order to Show Cause—When Dismissed as Unnecessary under Special Rule No. 2, Hennepin County.

An examination in supplementary proceedings had been continued by the referee with the consent of the parties. At the adjourned hearing the defendant did not appear, whereupon the plaintiff obtained an order, returnable within five days, requiring the defendant to show cause why he should not be punished for contempt

for such non-appearance. No exigency or other reason was made to appear why the plaintiff could not proceed upon notice of motion, or that he would be prejudiced by so doing. On motion the order to show cause was dismissed under Rule 2 of the Additional Rules of the District Court of Hennepin County.

JAMISON, J.

Hill et al. vs. *Houston*, 4th District, Hennepin County.

Negotiable Instruments—Plaintiff must be Owner as well as Holder of Instrument Sued on.

Action upon a promissory note. It appeared from the admissions in the pleadings that, although the plaintiff was the holder of the note sued on, he was not the owner thereof. Motion was made by the defendant for judgement on the pleadings. Granted. POND, J.

Hill et al. vs. *N. W. Benefit Ass'n.*, 4th District, Hennepin County.

Statute of Frauds—Parol Assignment of Insurance.

The vendor of certain real property orally agreed with the vendee to assign and transfer to him the insurance thereon. No written assignment was made. A loss occurred. In an action by the vendee against the vendor on the parol promise to assign, the defendant objected to the introduction of any testimony on the ground that the promise was to answer for the default of a third person. Objection sustained.

ELLIOTT, J.

Hagelin vs. *Wachs*, 4th District, Hennepin County.

Alimony—Denied when Sham Answer Interposed

When on the hearing of an application for alimony it appears to the satisfaction of the Court, from the admissions of the defendant or otherwise, that the answer interposed by her is sham, alimony *pendente lite* will not be granted, notwithstanding the rule that in an action for divorce, when an issue is joined, alimony should always be allowed. The answer being sham, a real issue is not made. HICKS, J.

Andrus vs. *Andrus*, 4th District, Hennepin County. Larrabee & Gammons for plaintiff; Penney, Welch & Hayne for defendant.

Assignment for Benefit of Creditors—Fees of Attorney in.

Under Rule 12 of District Court Rules held that the attorney of the assignee is not entitled to a claim against the insolvent estate for services rendered prior to and in the making of the assignment, i. e., drawing the deed of assignment and bond, and preparing the schedules.

In re Assignment of A. E. Horton, 4th District, Hennepin County.

RULES.

The following special rules have been adopted by the District Court of the Eleventh Judicial District (Duluth).

I. Jury cases will be tried in their order on the calendar; then court cases will be heard in their order on the calendar; but on the preliminary call of the calendar, the order of the trial of cases may be changed by the

order of the Court upon good cause being shown upon affidavit.

II. Special terms will be holden every Saturday (except on holidays) at 9:30 o'clock in the forenoon, for the nearing of issues of law, applications, motions, and all matters except the trial of issues of fact.

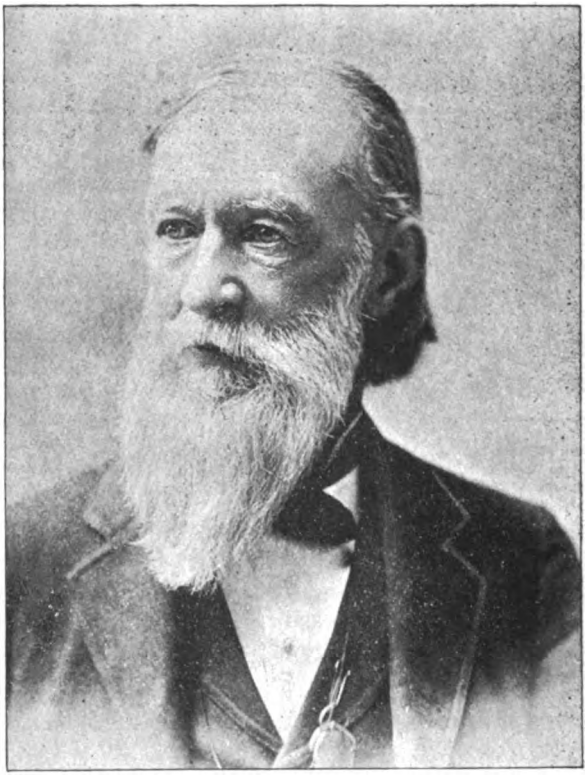
The preliminary call of the calendar will be followed at once by a formal call, at which hearing will be had in cases in their order in which both parties are ready, and that will be followed at once by the peremptory call, at which hearing will be had and causes finally disposed of as reached.

III. Divorce cases in which the defendant does not appear will be placed upon the general term calendar, upon filing notes of issue with the clerk as in other cases.

IV. When a jury fails to agree to a verdict in any case and is discharged, the said case shall be placed at the foot of the civil jury calendar for further trial at the same term.

V. When judgment is entered in an action upon a promissory note, draft, or bill of exchange under the provisions of sec. 210 of ch. 66 of General Statutes of 1878, such promissory note, draft, or bill of exchange shall be filed with the clerk and made a part of the files in said action.

VI. That Rule 29 of the District Court rules as to this Court be amended by striking out the words "within ten days after issue joined," and inserting in place thereof the words "ten days before the term of Court at which the case is set for trial."



THE LATE JUDGE WESTCOTT WILKIN.

THE MINNESOTA LAW JOURNAL.

VOL. II. MAY, 1894. No. 5.

ANNOUNCEMENT.

WITH this number begins the second year of THE JOURNAL'S existence, and we are glad to say that, notwithstanding all the obstacles usually found in the way of such ventures, this magazine has met with marked success.

The principal purpose of THE JOURNAL was to report the practice and other important cases in the district courts of this state. This program has been carried out, and many other features have been added. The number of reported decisions has been greatly increased, and will continue to be the main feature. The judges of the various districts are kindly interesting themselves in our project, and many send in reports direct, thus insuring their accuracy.

As to the general features, notes on recent decisions and matters of interest to the bar will be continued, while in every issue one or more articles on topics of present interest to the profession and from the pens of members of the state bar, will appear. During the coming year such articles will include, among other subjects, the discussion of the advisability of establishing an intermediate court of appeals between the district and supreme courts; the utility of the present system of municipal courts, and various phases of practice, all by well-known authorities upon such questions. We here take the liberty of inserting a few of the letters we have recently received, commendatory of our work:

Minneapolis, Minn., April 13, 1894.

GEORGE H. SELOVER, Esq.,
Care Frank P. Dufresne,
St. Paul, Minn.

Dear Sir: Will you permit me to express my approval of the March number of THE MINNESOTA LAW JOURNAL. If the publication keeps up to this grade it is going to be of considerable practical value to members of the bar. The absence of windy articles, which ordinarily incumber the pages of such publications, and the numerous citations of district court decisions on practice questions, commend themselves especially to me. You are making a *succes d'estime* surely. I hope, also, a financial one.

Yours very truly,
SELDEN BACON.

St. Paul, Minn., May 31, 1894.

MR. F. P. DUFRESNE,
Pioneer Press Bldg., City.

Dear Sir: For the last five or six months I have been a subscriber to THE MINNESOTA LAW JOURNAL, and must say I have been much pleased with it. I have felt that we needed some journal to report the important decisions of our district courts. We have decisions on novel questions of law and questions of practice which have not been, and may not be for a long time, passed upon by the appellate court, and the only way in which the profession can have any benefit of such decisions is through some journal like the one you are publishing. These decisions are generally rendered

by able judges, and are of themselves instructive, and authority until reversed or modified on appeal. I therefore hope for the success of THE MINNESOTA LAW JOURNAL. Respectfully yours,

N. M. THYGESON.

Duluth, May 21, 1894.

F. P. DUFRESNE, Esq.,
St. Paul, Minn.

Dear Sir: We find THE MINNESOTA LAW JOURNAL of much practical value, and believe that every attorney, as well as every judge, in the state should read the practice cases as reported therein. You are at liberty to publish any good word for THE JOURNAL over our names.

Respectfully,
TOWNE & HARRIS.

Red Wing, Minn., May 15, 1894.

F. P. DUFRESNE, Esq.,
St. Paul, Minn.

Dear Sir: Please continue my subscription to THE LAW JOURNAL for the next year, as I am much pleased with its appearance and contents. The practice cases reported during the last year seem to have been very carefully selected and reported, and their value has been demonstrated to me on several occasions.

Hoping that your venture is a success financially also, I am,

Yours truly,
F. M. WILSON.

Jordan, Minn., April 25, 1894.

MR. F. P. DUFRESNE,
St. Paul, Minn.

Dear Sir: THE MINNESOTA LAW JOURNAL is filling a long-felt want. Each issue seems to be an improvement on the previous one. F. J. LEONARD.

In spite of many discouraging conditions, THE JOURNAL has completed its first year and has come to stay. What it may be in the future will depend largely on how thoroughly it may be supported by the bar of the state. We have tried to make THE JOURNAL a magazine which would prove a material aid to the members of the bar in their work, and believe we have, in part, at least, succeeded. In the future we shall require the continued support of the bar, and shall enlarge and improve THE JOURNAL as fast as that support warrants it. Each practitioner in the state ought to support his home law journal, and we are confident it will be found worthy of support.

Our advertisers are all responsible houses, and in ordering of them a great service will be rendered THE JOURNAL by mentioning it in the order.

Many thanks are due to those who promptly recognized the necessity of such a journal and sent in their subscriptions to help it along. But we want more, and shall not be content till THE MINNESOTA LAW JOURNAL reaches every law office in the state.

ATTORNEYS who may be participants in any case involving novel points of law will greatly assist us by furnishing a statement of facts, with a memorandum of the decision, to any of the following correspondents, who will forward them to us, with the names of the attorneys, for publication:

J. A. LARIMORE, St. Paul, Minn.
GEO. H. SELOVER, Wabasha, Minn.
A. E. DOE, Stillwater, Minn.
M. S. SAUNDERS, Rochester, Minn.
W. J. STEVENSON, Duluth, Minn.
F. B. ANDREWS, Waseca, Minn.
A. COFFMAN, St. James, Minn.

PROBATE FEES AND INHERITANCE TAXES.

THE recent debates in congress over the income tax and the inheritance tax have renewed the discussion as to the merits of both measures, to the detriment, generally speaking, of the former and the advantage of the latter.

Senator Hill, although he antagonizes the income tax, recommended, in his last message to the New York legislature, that the provisions of the law taxing inheritances be strengthened and a new section added providing for a graduated tax progressing as the value of the inheritance increased.

The scheme as a method of taxation has been criticised on the ground that it is "undemocratic," "communistic" and "discouraging to capital;" but the great majority of the opinions expressed in the last Minnesota legislature were decidedly in favor of such a law, and the subject will no doubt continue to be agitated until it finds expression in some form among our legislative acts.

The responsibility for introducing the subject into the State of Minnesota must be laid at the feet of the instigators of the case of State vs. Gorman, 40 Minn. 232. Prior to the decision in that case we had been working for fourteen years under a law which required a probate fee to be paid in all estates of the value of $2,000 or over as compensation to the county for maintaining the probate court.

The fee was a progressive one, based upon the value of the estate as inventoried; the smallest fee required being $10 when the estate was less than $5,000 and the largest $5,000, when the value of the estate exceeded $500,000.

When the estate of the late Commodore Davidson reached that stage in its administration where the fee was required to be paid, the learned counsel for the estate was appealed to, to search diligently for some avenue of escape.

The payment of the fee, which in this case amounted to $5,000, was resisted on the ground that the law was unconstitutional. The supreme court sustained the contention on two grounds: First, that the law was repugnant to sec. 1 of art. 9 of our state constitution which says that: "All taxes to be raised in this state shall be as nearly equal as may be;" and secondly, because it also violated sec. 8 of art. 1 of the constitution which says that every person ought to obtain justice "freely and without purchase."

The courts and the lawyers submitted gracefully to the decision of the court in State vs. Gorman, and since 1889 no fee has been charged, so far as I am aware, for any service performed by the probate judges or their clerks.

Whether rightfully or wrongfully, the opinion commonly prevails that the people who use the probate court and derive a benefit from its decrees establishing the title to their property should pay something towards its maintenance.

Most people would also prefer to see the small estates of $2,000 and under go free, and the larger estates taxed enough to make up, or more than make up, for the deficiency.

On the supposition that he was familiar with the subject, the writer was asked to prepare a bill which would accomplish the objects contemplated in the legislation of 1875, but which would not, like it, be vulnerable to the shafts of the constitutional critics.

In order to do this it was necessary to avoid anything that resembled a fee bill, and also any measure of taxation that appeared to be a taxation of property.

A bill was therefore prepared, formulated after a law of the State of New York, taxing the privilege of inheriting property under the laws of the State of Minnesota.

While the ordinary layman has, because of long usage, come to consider the devolution of property after death as a matter of right, every lawyer recognizes

that it is given and taken away at pleasure by the state, and, of course, what the state has the power to withhold entirely it can grant upon condition.

The bill provided for a tax upon the transfer of any property made by gift in contemplation of death, as well as by will or the laws of intestacy, but exempted the sum of $10,000 in favor of any direct heir, and the sum of $500 in favor of any collateral heir; that is, no tax was imposed as against any father, mother, husband, wife or child of the deceased unless the value of the inheritance exceeded $10,000. The tax was not based upon the value of the estate as inventoried, but upon each distributive share after all the debts of the deceased had been paid and subtracted. Upon each distributive share of $10,000 or over, the recipient, if a direct heir, was required to pay a tax of 2 per centum. Collateral heirs receiving an estate of the value of $500 or over were required to pay 5 per centum of the appraised valuation.

The judiciary committee of the house of representatives, after patiently listening to the arguments pro and con, seemed to be convinced of the wisdom and justice of the measure and recommended House File No. 96, introduced by the Hon. D. C. Hopkins, to pass. Subsequently, a claim having been made that other interested parties had not been heard, the committee reconsidered its action and sent to the house for discussion two bills similar in their main provisions, but differing in the method of collecting and enforcing the tax. Owing to the inability of the legislators to agree upon these details, and the pressure of other matters considered to be more important, none of the bills upon this subject except Senator Leavitt's ever reached the governor's desk.

Had this bill become a law it would no doubt have been amenable to criticism, but so far as its constitutionality is concerned I am satisfied such a law would be sustained. It is not a taxation of property, and sec. 1 of art. 9 of the state constitution requiring equality in taxation is not applicable. It grants a privilege upon payment of a fee and is based on the same principle as is the law requiring a fee of $500 to incorporate a company whose capital stock is $950,000; although to incorporate a company whose capital is $50,000 a fee of but $50 is required. The courts have frequently had such legislation under consideration and have sustained it.*

Senator Leavitt, foreseeing, perhaps, the fate of this bill, and in order to put at rest any question that might arise concerning the power of the legislature to provide for progressive taxation, introduced a constitutional amendment, which has since been adopted, and reads as follows: At the end of sec. 1, art. 9, add the following: "And provided further, that there may be by law levied and collected a tax upon all inheritances, devises, bequests, legacies and gifts of every kind and description, above a fixed and specified sum, of any and all natural persons and corporations. Such tax, above such exempted sum, may be uniform, or it may be graded or progressive, but shall not exceed a maximum tax of five per cent."

My reason for assuming that a tax on inheritances will eventually be added to our methods of raising revenue is found in contemplation of the drift of public opinion and the growing tendency to consider equality of sacrifice as the fundamental maxim in framing laws of taxation.

It is admitted that a property tax based upon all the property of all the citizens of a state, and valued impartially regardless of its location, would be as near perfection as any scheme of taxation that could be devised. We are committed to that theory in Minnesota, and are operating under it as best we can, but everybody realizes that, while

*Mager vs. Grima, 8 Howard U. S. 491. In Re McPherson, 104 N. Y. 306 (322). Eyre vs. Jacobs, 14 Gratt. 422.

all real property pays something and most of it pays its proportionate share of the expenses of the government, the great bulk of the personal property pays nothing at all.† Most of the taxpayers who own valuable personal property are also possessed of more or less real estate. By the time the real estate tax has been paid, and such parts of the personalty disclosed as cannot well be concealed, the total contribution appears enormously large to the man who has it to pay; and, moreover, if his neighbors do not disclose all their personalty, why should he? He would be willing to increase his valuation, if the rate of taxation would thereby be proportionately reduced, but the rate cannot be reduced unless by concerted action, and it is too much to ask of the ordinary man of business to expect him to shine as a lone star of integrity, with full knowledge that his brothers who enjoy equal advantages are assessed but a fraction of the amount for the privilege.

The realization of this fact—that personal property, during the lifetime of its owner, so generally escapes taxation—is one of the principal reasons why the inheritance tax is so favorably regarded. The legatee who comes into a large amount of personal property is required to equalize to a certain extent the exemption which the property has enjoyed during the previous years.

An income tax is as hard to estimate as a personal property tax. The same difficulties are met in both. The man on a salary and the man whose only possession is his homestead pays to the full limit, while the man whose income is derived from stocks and bonds, or who keeps his personal property in a bank vault, pays only on what he is honest enough to disclose. The inheritance tax works on all classes alike; that is, on all of that class who are fortunate enough to inherit anything. The records of the probate court describe the property, disinterested appraisers are appointed to mark its value, and on this valuation the tax is assessed.

It is sometimes charged that the inheritance tax is a tax on frugality, is a menace to capital, etc.; but I do not see that the argument is tenable. There is a vast difference between confiscating an estate by limiting the amount which any one person can inherit—the balance to escheat to the state—and taxing it a small per centum in aid of the public revenue.

The purpose of limiting the value of an inheritance, as I understand it, is to prevent the concentration and perpetuation of wealth to such a degree as to endanger our republican institutions.

The object of a tax on inheritances is to increase the public revenues, and to increase them equably and fairly, requiring the same sacrifice from all citizens of the same class, and yielding to the appeals of philanthropy only to the extent that our constitution warrants.

The right of property is co-ordinate in the constitution with the right of liberty and the right of life, and no lawyer of my acquaintance has ever shown a desire to violate or ignore it.

Born with a regard for the constitution equal at least to that of other men, lawyers are taught, from the commencement of their legal education, to revere each and every phrase of it, and, finally, before they are permitted to practice law, they are severally pledged to its support by the solemnity of an oath.‡ This is not mentioned as something for regret;

†The value of the personal property in our large cities is estimated at 60 per cent of the value of the real estate. The returns for Ramsey county for 1892 show the amount of personalty assessed for taxation as $16,654,802; real estate, $114,050,339.

‡Judge Dillon, in his lecture to the students of Yale College, said: "Law has not reached its full development until it attains complete supremacy by binding alike the sovereign and the subject. This matured, and it is not extravagant to say sublime, conception—the great gift of America to the world—has only been made a reality by the American device of written constitutions." * * * "The Fourteenth Amendment, in the most impressive and solemn form, places life, liberty, contracts and property, and also equality before the law, among the fundamental and indestructible rights of all the people of the United States. It sets the seal

on the contrary, I realize that in a democracy like ours a conservative body is a valuable and oftentimes necessary element. But it is mentioned as an assurance to capitalists that, so long as our judges are composed of educated lawyers, we stand in no immediate danger of confiscation of property by legislative act.

However, it might be well to consider whether overzealousness for the rights of property will not do the property owners more harm than good; whether reasonable concessions will not prevent too sweeping and violent changes. History furnishes numerous examples of the total extinction of valuable privileges because of an undue tenacity in attempting to hold on to doubtful and comparatively invaluable ones, and while our lawyers and judges are vigilantly guarding the rights of property, prominent writers, and frequently the capitalists themselves, are inculcating ideas which if expressed by one of us would be characterized as communistic.*

While many, and probably most, of our wealthy men at some time and in some manner fully meet the obligations to society which their wealth imposes, it must be admitted that some do not, and it is unjust to assume that the advocate of an inheritance tax is opposed to the accumulation of wealth or that he is prejudiced against capital or capitalists.

The wise legislator will avoid extremes. As lawyers, our inclinations as well as our oaths will prevent us from ignoring any constitutional limitations; but within those limitations he is derelict in duty who does not endeavor, at every opportunity, to neutralize those inequalities of nature under which so many of our fellow men are suffering and struggling in vain. As lawyers, our professional duties bring us in contact with these matters and force them upon our attention.

If we are sometimes called upon to assist the heir to a million to preserve his right to live in affluence, we are likely to pass within the same hour to the assistance of another whose tax should rightfully be but $8 but who is assessed for $18. This man's property is all in sight. His cattle, his furniture, his home—if he is so fortunate as to have one—are in plain view. He cannot escape his share of the burden, if he would. He pays on all he owns, and, as a rule, he pays without complaining.

Observing these contrasts; observing the amount of sacrifice required of the man working for $1.50 a day to pay even the smallest tax; observing the amount of money required to be collected by direct taxation to support our schools, hospitals and asylums; observing that only about one-fourth of the personal property owned by our citizens is ever disclosed for taxation; and observing the large sums received in other states† where this law is in force, and the favor with which it is there regarded, it is not surprising to find that there are so many lawyers in favor of an inheritance tax.

ALBERT B. OVITT.

St. Paul.

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of national condemnation upon Proudhon's famous maxim that 'property is theft' (La propriété c'est le vol—property holders are thieves). This pernicious doctrine has hitherto found no general acceptance among our people or their legislators; and under the constitution as it now stands this doctrine can obtain no foothold as to any species of property, if the courts are faithful to their high trust as the guardians and defenders of the constitution. Bear in mind ever that this, like all other provisions of the constitution, was put into the constitution 'to be enforced by the judiciary as one of the departments of the government established by the constitution.'"—Dillon's Laws and Jurisprudence, 213, 382.

*Bentham suggested the abolition of inheritances, except to immediate relatives. John Stuart Mill proposed to limit the amount which anyone should be allowed to take, either by inheritance or bequest. Prof. Ely, in his work on taxation, strongly advocates a tax on inheritances; and Andrew Carnegie, speaking of such a tax, wrote as follows: "Of all forms of taxation this seems the wisest Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community, should be made to feel that the community, in the form of the state, cannot be deprived of its just share By taxing estates heavily at death the state marks its condemnation of the selfish millionaire's unworthy life."

†The amount received from this source in the State of New York in 1892 was $1,786,218.47. Hon. John B. Olivier, judge of probate at St. Paul, estimated that the receipts under the Hopkins bill would average $100,000 a year for the first five years.

THE LATE HONORABLE WESTCOTT WILKIN.

THE Hon. Westcott Wilkin, who for twenty-seven years sat on the bench of the Second district, died on the 12th day of May last. From the nature of his calling, his life was of necessity uneventful.

In 1856, at the age of 32, he removed to St. Paul and formed a partnership for the practice of law with Mr. I. V. D. Heard. In 1864 he was nominated for the office of district judge of the Second judicial district, and after a spirited contest was elected. Thereafter he was re-elected successively four times and retired in 1891.

The character of Judge Wilkin is probably best portrayed in the addresses before the Bar association, and at his funeral, by his life-long friend, Judge Charles E. Flandrau, which by kind permission we are allowed to print:

"If your honors please, I beg leave to interrupt the ordinary business of this court by an announcement which must carry with it a profound interest to both bench and bar. On the 11th day of May, 1858, the territorial court of this district ceased the exercise of its functions and was followed by the present jurisdiction of all matters civil and criminal presided over by your honors. The whole functions of this tribunal were then vested in a single judge, and Edward C. Palmer was chosen to administer the important trust. As we all well remember, he presided over the destinies of this judicial district successfully until the expiration of his term in 1864, when he was succeeded by Hon. Westcott Wilkin, who ascended the bench alone to grapple with the immense and complicated interests of the capital district of a phenomenally growing and expanding country. How well we all remember the cultured professional knowledge and equable temperament that he brought to bear on the administration of the vast duties he had assumed. How, solitary and alone, he grappled with the conflicting questions which are the outgrowth of a new, prosperous and advancing community, and how well he succeeded in solving them all to the entire satisfaction of the litigants and the demands of an exacting public.

"We remember when his duties became so onerous that no one man could meet their demands; the state afforded relief through the medium of a court of equal jurisdiction known as the court of common pleas, and how, as time passed, and the requirements of a growing community increased, this auxiliary court was blended into the present and original tribunal, and the judicial force was increased until it at present embraces six judges.

"During many of these transitions, and for twenty-seven years, Judge Wilkin was consecutively elected his own successor without any opposition and by the unanimous voice of his fellow citizens. Such distinction cannot be enhanced by comment.

"His mind was purely judicial. Nothing could or ever did divert his methods of thought from the straight and narrow line of exact justice as he understood it, and his understanding was superlatively correct.

"His early education was rigidly religious and orthodox, as such matters were understood more than half a century ago, and while more modern and advanced ideas had prevented his uniting with any church or professing any particular creed, he lived up to all the good that is found in all churches and all creeds. He was a religion unto himself. He knew what was right. He loved his fellow man, and his conduct in life was governed by these considerations. He was a cultivated and genial gentleman, beloved by all who knew him, generous to a fault, if to be too generous can be called a fault. He lived a long life of usefulness, and died regretted by all who knew of his existence.

What better fate can any man have in this world of trouble, temptation and disaster? He is dead. If there is any future for the inhabitants of this world, I feel assured that he will enjoy its choic est gifts and pleasures. I think I will not be asking too much if I move your honors to adjourn this court for one day in recognition of the sublime character and exalted merit of our deceased brother and his past services to this court. I therefore make such motion."

At the funeral Judge Flandrau said:

"I find myself in a novel position—standing within these consecrated walls to give expression to my thoughts on the subject which has assembled us to day.

"I am not much in favor of saying anything about the dead, because the proverb which declares that we must say nothing of the dead but what is good has led to many unmerited eulogies, and much insincere and untruthful assertion. I had decided in regard to myself that if anything were said about me it should be said by Judge Wilkin, as I thought he knew me best, and was too honest to utter an untruth, even in adulation of a friend. But Providence had decided otherwise, and reversed the conditions. As I thought he knew me best, I think I knew him best. For nearly forty years we have been to each other as close as brothers, and for the greater part of one year were never out of the sight of each other.

"He was a lovable man. He carried his heart on his sleeve. He had nothing to conceal, and he concealed nothing. He was a gentleman in its broadest signification; cultured in mind, pure in heart, sincere and considerate in all his dealings. Pleasing in manner, brave as a lion and gentle as a woman, and, as a consequence, beloved by everybody in all his relations in life.

"As a judge he was an exemplar of the past and an example for the future. As a man and a citizen, he fulfilled all his duties and gained the love of all who knew him.

"Of his religion I know nothing. Lord Beaconsfield once put into the mouths of some of his characters these words: 'All wise men are of the same religion.' 'And what religion is that?' 'Wise men never tell.' The idea the author intended to convey by this colloquy is that wise men never wish to intrude their own religious views on others, and by reason of superior wisdom unsettle belief which, be it sound or unsound, may be the foundation of godly lives. So it was with Judge Wilkin. Whatever may have been his belief, he was never inclined to assert it, except through his every-day life. His works compose his eulogy. Nothing I could say to this community could enhance his standing and popularity. He has been for many years Judge Wilkin—beloved of all—and for many years will remain Judge Wilkin in the affectionate remembrance of all. No more can be said.

"When I look upon that casket which contains the remains of my dear friend of so many long years, I cannot, and do not, express a regret that he has gone. He lived the limit of three score and ten. He died full of honors. A prolongation of his life under the existing conditions would not have added to his usefulness or happiness. I know that if a life of righteousness leads to a future of bliss, his is assured.

"In the words of the psalmist: 'Mark the perfect man, and behold the upright, the end of that man is peace.'"

OPINIONS OF ATTORNEY GENERAL.

MUNICIPAL TREASURER—The Treasurer of a Municipal Corporation Is a Ministerial Officer, and Is Not Required to Inquire Into the Validity of Orders Presented to Him Which Upon Their Face Appear to Be Fair and Correct, Nor Is He Justified in So Doing.

A. P. BLANCHARD, Esq.,
City Attorney,
Little Falls, Minn.

Dear Sir: I have considered the question submitted by you, touching the authority of the city treasurer of Little Falls to pay a certain order drawn upon him pursuant to the action of the common council of said city.

It appears that the city of Little Falls sometime since issued its bonds, pursuant to a special act of the legislature to aid the Little Falls Water Power Company, a private corporation doing business in said city. The bonds so issued are deemed invalid, as falling within the spirit of the case of Coats vs. Campbell, 37 Minn. 498. Recently the city has voted aid to the Mississippi & Leech Lake Railway Company, pursuant to the provisions of ch. 34, Gen. Stat. 1878, and acts amendatory thereof. The issuance of the last named bonds is made in pursuance of an agreement whereby both the city and the said water power company are to place in escrow the bonds issued by the city to the water power company and the bonds last above named, pending the performance by the railway company of the terms of said agreement. It further appears that the city of Little Falls heretofore adopted certain ordinances whereby it acquired certain rights to a portion of the water power of the said water power company in said city, the amount of water power thus acquired by the city being, I assume, in the aggregate the equivalent of 110 horse power, and that the said city is now in full enjoyment thereof. An agreement has been entered into by and between the city and the water power company whereby in consideration of the payment by the city to the water power company of the sum of $1,250, and the release by the water power company to the city of all claims arising out of the issuance of said bonds hereinbefore first named, the city is to retain permanently the use of the said horse power thus acquired, and all further matters in controversy between the said parties growing out of the issuance of the bonds first aforesaid will thereby be adjusted and determined. It further appears that there is now in the city treasury moneys collected by taxation designed for the purpose of the payment of interest upon the bonds so issued to the water power company, sufficient to pay the said $1,250, and that an order for the payment thereof has been issued pursuant to the direction of the city council and presented to the city treasurer for payment.

The question now arises whether the city treasurer would, in view of the foregoing statement of facts, be justified in paying the said order from the moneys aforesaid. I find that the courts of New York have in a number of instances held that, where an officer has money in hand with which to pay a claim, he cannot resist the payment thereof on the ground that the claim is illegal (31 N. Y. 606; 55 N. Y. 187; 72 N. Y. 201). The authorities generally hold that a treasurer is a ministerial officer, and is not justified in inquiring into the validity of the orders which are presented to him for payment. None of the cases above cited are clearly in point; but it is doubtless true as a legal proposition that a treasurer is not required to inquire into the validity of every order with which he is presented and which is fair upon its face. But the money in this case, out of which the order in question is directed to be paid, was raised for the purpose of the payment of interest upon the bonds issued to the water power company. By sec. 3 of an ordinance adopted by your city, it is provided that moneys raised by taxation

to redeem such bonds shall be kept distinct and paid out only on an order designating the object of payment as redemption money. In view of the fact that the council has thus set apart the moneys so raised for a specific purpose, the treasurer cannot properly pay the said order therefrom until the council shall by a modification of the said ordinance authorize him so to do.

Independent of the question whether or not the treasurer is required to inquire into the validity of orders drawn upon him, the facts presented clearly indicate that the order in question was issued in pursuance of a final adjustment or compromise of conflicting claims between the city and the water power company which would doubtless be regarded by the courts a sufficient consideration for the payment of an order. The treasurer would therefore be authorized, in my judgment, assuming this to be the case, to pay the order so soon as the council shall have acted in compliance with the views hereinbefore expressed.

It is only as an act of courtesy that I have assumed to express an opinion upon this question. The matter is one with which this office is not concerned, and I should much prefer that you advise your city treasurer, using the views herein expressed, in so doing, for whatever they may be worth.

Yours truly,

H. W. CHILDS,
Attorney General.

Feb. 20, 1894.

TOWNSHIP—By-Laws Enacted by Must Be General in Their Nature.

MR. W. J. S. STEWART,
Oak Park, Minn.

Dear Sir: The electors of a township could not enact a valid by-law prohibitive of hunting within the corporate limits of the town by non-residents, no matter how meritorious the purposes of the law might be. This is not saying that they might not adopt some suitable by-law to prevent fires within the township; but whatever law is enacted must not discriminate against any individual, whether a resident or a non-resident. Laws enacted for a given territory, in order to be valid, must be general in their application and contemplation.

Yours truly,

H. W. CHILDS,
Attorney General.

Feb. 24, 1894.

TAXATION — Must Be for Public Purposes—To Reimburse Owners of Glandered Horses Killed Pursuant to Chapter 200, General Laws 1885, Unauthorized.

P. P. SMITH, Esq.,
County Attorney,
Slayton, Minn.

Dear Sir: You state that some years since the authorities of the town of Slayton condemned and killed a number of glandered horses, pursuant to the provisions of ch. 200, Gen. Laws 1885; that subsequent thereto the electors of the township voted the issuance of bonds whereby to reimburse the owners of animals so killed for the loss sustained by them; that the bonds were issued but have never been delivered by the township officers. You have advised the township officers that the issuance of the bonds for the purpose aforesaid was unauthorized.

The view taken of the question by you was, in my opinion, correct. It was nothing more or less than an attempt on the part of the township to raise money by taxation for a private purpose. Under no view of the law can taxation for such purpose be sustained. No matter how severe the loss sustained by the individual, he has no reason to expect, nor is there authority to afford, relief by taxation. In principle his case is not different from that of the man whose house is destroyed by a stroke of lightning or by an incendiary, or whose crops are ruined by storms. The animals became afflicted with a disease which rendered their destruction imperative, and the mere fact that such destruction was ordered by public authority does not present a rea-

son why the public should, in the one case more than in the other, afford compensation.

Yours truly,

H. W. CHILDS,

March 5, 1894. Attorney General.

SALOON LICENSE—Not Transferable.

CHAS. W. MAIN, Esq.,
City Attorney,
Tracy, Minn.

Dear Sir: There is no provision of statute which authorizes the transference of a saloon license from one licensee to another. I am aware that such authority has been assumed by certain local authorities, but it is, in my judgment, wholly without warrant of law. A license issued to a given party can be enjoyed only by him. No other license can be issued without the payment of the minimum fee prescribed in the statute.

Yours truly,

H. W. CHILDS,

March 6, 1894. Attorney General.

LEGAL NEWSPAPERS—Change in Name of—Effect of Consolidation of Two.

LETTER OF INQUIRY.

Alexandria, Minn., 1894.

ATTORNEY GENERAL,
St. Paul, Minn.

Dear Sir: Will you kindly give your opinion of sec. 33 of the laws relating to the legality of newspapers, in so far as it applies to the following: A purchases a paper, The Bugle, the same being a legal publication; he then consolidates with The Advance, also a legal paper, using the name Bugle-Advance. Does he in thus changing the name virtually start a new paper? Does not the new name destroy the papers as to legal standing? Can this new name be construed as a continuation of the old ones, in the sense of continuing two papers under one head?

Respectfully,

A. I. SHAVER.

MR. A. I. SHAVER,
Alexandria, Minn.

Dear Sir: This office has heretofore held that the mere change in name does not affect the status of a newspaper; that it continues for all intents and purposes subsequent to the change of name, identically the same paper that it was prior to such change. This opinion was rendered by Judge Stark, one of the ablest incumbents who ever occupied the office, and may safely be relied upon as expressive of the law.

I am unable to say, however, from your statement of facts, that some reason may not exist affecting the validity of your paper. You seem to have consolidated two papers. If, as a matter of fact, the newspaper has by the arrangement entered into by the two old papers lost its identity as a newspaper, it would not be eligible until the lapse of a year from the date of such consolidation for the publication of legal notices. On the other hand, if the transaction amounted merely to the purchase by one paper of the other, and the adoption of a new name I see no reason why it would not then be within the rule as above expressed.

I would suggest that you place the facts before your county attorney, who is a very careful and competent lawyer, and obtain his views upon the question.

Yours truly,

H. W. CHILDS,

March 7, 1894. Attorney General.

TOWNSHIP TREASURER—Cannot Be Relieved by Vote of the Township of Personal Liability for Public Moneys Lost by Suspension of a Bank Wherein They Were Deposited.

E. B. WOOD, Esq.,
County Attorney,
Long Prairie, Minn.

Dear Sir: You state that several of the township treasurers of your county had public funds belonging to their respective townships deposited in a bank which subsequently became insolvent;

that it is now proposed to submit to a vote of the electors of such townships a proposition to relieve such treasurers from all liability on account of the loss of moneys so deposited by them.

You now inquire whether, in my opinion, there is any authority for such proposed action.

A township cannot any more relieve the township treasurer in the case stated by you than it can raise money by taxation for a private purpose. The principle is the same in both cases. The courts, without exception, deny the right of taxation for a private purpose. Moneys gathered into the township treasury by taxation have been contributed by the owners of all the property in the township, regardless of their wishes in the matter. It would be a most harsh and unwarranted procedure for a majority of the electors of a township to divert from their legitimate purposes the moneys so raised. The power cannot be implied, as it must rest upon provisions of positive law.

I therefore heartily concur with you in the view you have reached in the matter. Yours truly,

H. W. CHILDS,
March 10, 1894. Attorney General.

ELECTORS.—Students Temporarily Residing at the Seat of a College Do Not Thereby Become Electors of the City in Which Such College Is Situated.

H. L. BULLIS, Esq.,
Winnebago City, Minn.

Dear Sir: In your communication of the 16th inst. you inquire whether students coming to Winnebago City for the purpose of attending the college located therein, and who have no intention of remaining there after the expiration of their term of school, may lawfully vote at elections held in said city.

The statute has endeavored to determine what shall constitute residence for the purpose of voting at general elections.

It has expressly provided, "that a person shall not be considered to have gained a residence in any county into which he comes for temporary purposes merely, without the intention of making such county his home. * * * The place where a man's family resides shall be held to be his place of residence; but if it be a place of temporary establishment for his family, or for transient purposes, it shall be otherwise. * * * The residence of a single man is where he sleeps. * * * The mere intention to acquire a new residence without the fact of removal shall avail nothing; neither shall the fact of removal without the intention." It must "satisfactorily appear to all the judges of such election that the said party is an actual *bona fide* resident of said election district and not there for temporary purposes merely, and the mere affidavit of such person shall not be received as conclusive as to any fact necessary to entitle him to vote." Ch. 4, sec. 61, 1893.

The statute is in fact merely declaratory of what has been declared the law by the courts of this country. It has been held repeatedly that going to a public institution, and residing there for the purpose of education, will not, of itself, give the student his right to vote there, but such right must depend upon all the circumstances connected with the question of his residence. A student who has a father living, in whose family he remains a member, and to whose house he returns to pass his vacations, especially so if he is maintained and supported by his father, cannot properly claim such residence at the place where he is attending school as would entitle him to vote at elections held therein.

The statute has so clearly expressed the law that it is really impossible to say anything which would be helpful to the question. The judges of election must determine from all the facts and circumstances whether such residence has been acquired.

The mere fact that a young man is a

student at a college or other institution of learning does not determine the question one way or another. It must appear that he has severed his residence elsewhere and that he has no present intention of returning to his former residence, in order to enable him to vote in the place where he is attending school.

Yours truly,

H. W. CHILDS,

March 10, 1894. Attorney General.

PROBATE JUDGE—Not Entitled to Fees for Serving on a Jury to Examine as to the Sanity of an Alleged Insane Person, Pursuant to Chapter 14 of Probate Code.

Hon. JOHN PETERSON,
Judge of Probate,
St. Peter, Minn.

Dear Sir: In your communication of the 14th inst. you inquire, in substance, whether a judge of probate is entitled to receive fees as prescribed by sec. 277 of the Probate Code for services performed by him in the commitment of insane persons.

I am very clearly of the opinion that he is not entitled to such fees. He acts by virtue of his office as judge of probate in the commitment. He associates with himself, pursuant to sec. 267, the two other persons who, together with himself, are to constitute the examining jury. Then sec. 277, to which you call attention, provides that the fees shall be allowed by the probate judge to the physician or physicians and such other person, *not persons*, on the jury for examining the person, etc. It is clear, from the reading of the last named section, that it contemplates the payment of fees to only one person in addition to the physician or physicians. By no view of the law am I able to reach the conclusion that the judge of probate is entitled to any part of the fees prescribed by sec. 277. Yours truly,

H. W. CHILDS,

March 15, 1894. Attorney General.

LIQUOR LICENSE, VILLAGE—A Village Liquor License Expires One Year from Its Date, and May Be for Any Sum Not Less Than $500—A Village Attempted to Be Incorporated Under the Laws of 1883 Comes Within the Provisions of Chapter 145, Laws of 1885.

Mr. J. E. JOHNSON,
Village Recorder,
Hawley, Minn.

Dear Sir: You are advised, in reply to your several inquiries expressed in your letter of the 16th inst.:

1. A license for the sale of intoxicating liquors should be made to expire one year from the date thereof.

2. The village council may determine the amount of the license fee, provided it shall not be less than $500.

3. A license may issue at any time the village council may be disposed to issue it after the installment of the newly elected village officers.

4. Chapters 5 and 6, Gen. Laws 1887, are still in full force and effect with the exception that at the last session of the legislature ch. 5 was amended by the repeal of the proviso thereof and the enactment of another proviso to take its place. The effect of the amendment is to authorize the issuance of a license for the period of one year, regardless of the time when it was issued, and the refundment of the license money in cases where the electors of the village determine against the issuance of the license.

Assuming that your village undertook to incorporate under the general law of 1883, it is now clearly brought within the purview of the general law of 1885, ch. 145, as it is expressly provided in sec. 2 of the last named act "that every village which has been or shall be organized or incorporated under the general statutes shall be hereafter governed according to the provisions of this chapter, to the end that uniformity of village government and equal privileges to all may be secured."

Yours truly,

H. W. CHILDS,

March 17, 1894. Attorney General.

THE DISTRICT COURTS.

PERSONAL PROPERTY—Title to, Executed Gift.

This action was brought by the United Norwegian Lutheran Church of America, a corporation, against Augsburg Seminary, a corporation, et al., seeking to restrain and enjoin the defendants from interfering with or obstructing the plaintiff in the use of certain personal property consisting of types, presses, "printing-house outfit," etc.

It appeared that in 1869 there was an unincorporated school conducted at Marshall, Wisconsin, which was supported by contributions from churches of what was known as the "Norwegian-Danish Evangelical Lutheran Churches in the Northwest," the purpose of which was to educate young men for the ministry. This school was afterwards removed to the city of Minneapolis, and in 1872 was incorporated under the laws of Minnesota under the name of "The Augsburg Seminary," one of the defendants. Between the years 1869 and 1872 a large number of church organizations belonging to the said faith formed a "conference" which was styled the "Norwegian-Danish Evangelical Lutheran Conference," and which was composed of delegates elected by the churches or congregations, and of the pastors of such churches, and of the professors in their theological seminary. The said conference met annually and transacted business through such delegates. Its principal business was to provide for the education of ministers, to raise money for religious purposes, to provide for religious books and papers, and attend to other matters of interest to the churches composing the conference. This conference was not incorporated. It assumed the power to, and did, appoint, from time to time, the trustees who had the management of the defendant, Augsburg Seminary, and this action was ratified and confirmed by an act of the legislature, approved Feb. 25, 1877, by which act the said trustees were directed and authorized to be elected in the future by said conference, which was referred to in said act as the "Norwegian-Danish Evangelical Lutheran Church of America." Thereafter and in the year 1890 the said conference united with two certain other organizations of like character, under the name of the "United Norwegian Lutheran Church of America," and in 1891 this latter association, under the name last aforesaid, became a corporation under the laws of Minnesota, and was empowered to receive, purchase, hold and convey and manage property, both real and personal, for religious, charitable and educational purposes.

After the organization of the conference of the Norwegian-Danish Evangelical Lutheran Church of America, above mentioned, certain persons belonging to said conference organized themselves into what may be termed a joint stock association, for the purpose of the publication of a religious paper, which should be a church organ, and of the publication of such other matters as were necessary or desirable. These persons so associated adopted certain by-laws which declared the object of the association, established a board of directors and other officers, and provided for the repayment to the shareholders or subscribers of the association of the amount of their subscriptions out of the possible future earnings of the association; and further provided that when the shares were so redeemed the society should be dissolved and the property go to the conference of the Norwegian-Danish Evangelical Lutheran Church of America. At the annual meeting of the conference in 1882, all of the shareholders who were known or could be found having been reimbursed, the control of the publishing society was turned over by the directors thereof to the conference. Thereafter, until the year 1890, the said conference elected the officers

of the said publishing society; and thereafter, until the incorporation of the plaintiff, the United Norwegian Lutheran Church of America elected such officers and directors. The said officers annually made report to the said conferences electing them of the condition of the said publishing society, and from the election of the officers in 1882 until the incorporation of the plaintiff the management of the business of the said publishing society was entirely under the control of the officers designated by the conference, and after its incorporation by the plaintiff.

The publications of the joint stock association above mentioned, after the formation of the union which composed the United church, were merged with other publications, and the value of the entire property at the time of the commencement of this action was about $40,000. The entire business, since about the year 1874, had been carried on in buildings owned by and which were the property of the defendant, Augsburg Seminary. No bill of sale or other transfer of title to the property in litigation was executed or delivered by the original stockholders, or directors elected by them to the conference, or by the conference to the United church, or by the United church to the plaintiff, although it was found that the stockholders of the publishing society intended that the same should become the property of the conference and under its control, and that the conference at the time of said union intended the same to become the property of said United church.

It was urged on behalf of the defendant, Augsburg Seminary, that the gift of the property to the conference and to the United church failed by reason of the uncertainty and shifting character of the donees, but the court held that "notwithstanding the conference and the United church, prior to its incorporation, had no legal existence whereby it could purchase and dispose of property, each had the lawful possession and management of this property and business by its agents, who were called directors and managers; the conference from 1882 to the time of the union, and the United church until the time of its incorporation, and such possession was then turned over to this plaintiff. And that by such transfers of possession the title to the property passed to the plaintiff as a body legally authorized to acquire and hold property; and that the plaintiff is entitled to the possession of the property in dispute" and to a writ of injunction as prayed. SMITH, J.

United Norwegian Lutheran Church of America vs. Augsburg Seminary et al. Fourth district, Hennepin county. McNeir & Bacon, for plaintiff; Peterson & Kolliner and Jackson & Atwater, for defendants.

ASSIGNEE FOR BENEFIT OF CREDITORS—Right to Intervene to Attack Attachment on Merits—Where No Provision for Filing Releases Not an Assignment Under Insolvency Law of 1881.

Order to show cause why an attachment should not be vacated obtained by assignee for benefit of creditors who had been allowed to intervene for that purpose. The deed of assignment was in the ordinary form after attachment, but did not provide for the filing of releases, although expressly purporting to be made pursuant to ch. 148, Gen. Laws of 1881, and amendments thereto. The order for intervention did not state any grounds for dissolving the attachment. "No notice of motion accompanies the order to show cause in this case, as required by the rules of this court, and no grounds for vacating the attachment are specified in the moving papers. It may well be doubted if the court would have the power, by an *ex parte* order, as in this case, to permit the assignee to intervene for the purpose of having the attachment vacated upon any other than the general ground that the assignment to the intervenor *ipso facto* worked a dissolution of the attachment, and that this procedure is a suitable and orderly

method of determining that question, the plaintiff, in the attachment, refusing to recognize the result. I know of no rule permitting an assignee, or other party claiming an interest in the attached property to intervene, as in this case, for the purpose of testing the validity of the attachment on its merits; no such purpose is indicated in the moving papers of the assignee, Habighorst, and no such effect will be given to the order to show cause.

"If this assignment is to be construed as coming within the provisions of the insolvent law of 1881, as amended, and if it was made within ten days after the levy under the attachment in dispute, the intervenor must prevail, otherwise not.

"The assignment, in terms, is for the benefit generally of all creditors. The clause limiting it to such as shall file releases is stricken out. As the instrument reads, it is distinctly and only a common law assignment, such as the law of 1876 contemplated. It is true that at the end of the instrument there is a clause in which the assignor declares that the assignment is made under and pursuant to the law of 1881, and that he waives the filing of releases. But the question is whether an instrument otherwise lacking in the distinguishing features of an assignment under the insolvent law can be brought within its peculiar provisions by such a declaration on the part of the assignor. Or, to put it differently, whether the provision with respect to releases is essential to an assignment under the act of 1881. There is no decision of our supreme court determinative of the question. The subject is broached in the case, In Re Bird, 39 Minn. 520, and the question is to some extent involved in Makellar vs. Pillsbury, 48 Minn. 396; but it still remains an open question so far as the court of last resort is concerned. There is a decision, however, directly upon the point, by a court of great learning and high repute, which although not a court of last resort is still entitled to the highest respect. In the United States circuit court for the district of Massachusetts, in the case of Graves vs. Neal, 57 Fed. Rep. 816, our insolvent law of 1881 came up for construction with reference to the right of the assignee to avoid preferences. It was then held that it was only when the instrument contained a clause requiring releases that such right existed; that this is the one distinguishing feature of the law of 1881, as amended, and without it the assignment is simply such as the law of 1876 provides for, with no such right in the assignee. The learned judge of that court gives cogent reasons why such a right was made to depend upon such a provision, and I feel justified in adopting his view until the matter is definitely settled in our own state." KERR, J.

Benedict vs. Heidel, Second district. No. 53651. Ambrose Tighe, for plaintiff; T. R. Palmer, for assignee.

PLEADINGS—Amendment—Statutory Time to Answer—Notice of Motion—Right to, Waived by Not Objecting to the Matter Being Heard on an Order to Show Cause.

Action for the conversion of certain logs. Plaintiff to show ownership of the logs plead ownership of certain lands from which the defendant was alleged improperly to have cut the logs. In describing these lands by inadvertence they were placed in range 16, whereas the description should have been range 18. This error was not discovered by plaintiff until after the case had been noticed for trial. An order to show cause why the plaintiff should not be allowed to amend, correcting this description, was obtained and served on defendant. Defendant did not object to the matter being brought up on an order to show cause instead of on notice of motion, but insisted upon having the statutory time within which to answer the amended complaint.

"The case is not brought clearly within the rules of this court touching orders

to show cause, but inasmuch as the defendant does not resist the application to amend, but simply insists upon its right to the statutory period in which to answer the complaint as amended, I think the matter might as well be settled here. The plaintiff contends that the proposed amendment simply corrects a clerical error, and that the time for answering should, therefore, be abridged so as not to delay the trial. The case is trover for the value of certain sawlogs converted; the plaintiff instead of alleging ownership of the logs directly, saw fit to show title in a roundabout way by alleging ownership of certain land on which the timber grew from which the logs were cut by defendant; the error in the complaint was a misdescription of this land, calling it in range 16, instead of range 18. This was a most substantial error. It justified the defendant in answering as it did, practically a general denial; whereas, if the complaint is amended so as to describe the land correctly, the defendant says, and it is practically conceded, that it must put in an altogether different defense, somewhat in the nature of confession and avoidance. Under such circumstances I doubt if the court has the power, on such a hearing as this, to abridge the time for answering allowed by statute; but if it has, such power should be exercised only under exceptional circumstances."

Motion to amend granted; defendant to have the statutory period in which to answer the amended complaint after service thereof. KERR, J.

State of Minnesota vs. Shevelin Carpenter Co., Second district. H. W. Childs and Warner, Richardson & Lawrence, for plaintiff; J. B. Atwater, for defendant. No. 55487.

PRACTICE—Appeal—Bond for Costs and Supersedeas Bond.

Defendant duly took an appeal from the order denying his motion to vacate the attachment. He gave a bond for costs only. Plaintiff, after the expiration of the time to answer, duly entered judgment, and issued and levied execution. Thereupon, and after the time to appeal had expired the defendant executed and filed another bond containing the conditions specified in sec. 10, ch. 86, Gen. Stat. 1878, and now claims that further proceedings on the execution are stayed. It may be doubted whether this bond if given originally would have stayed judgment and execution. It was, however, given too late to have any effect. The statute evidently contemplates in case of an appeal from an order that there shall be but one bond. (See secs. 9, 10, 17.) The party appealing has an option to give a bond for costs only, or the supersedeas bond which includes costs. A copy of the bond must be served with the notice of appeal, and the appeal is not perfected until the bond is executed, served and filed, and this must be completed within thirty days. The respondent must except to the sureties "within ten days after notice of the appeal" (secs. 6, 17, 18). It was not intended by the statute that after the appellant had exercised his option to give a bond for costs only, and the time for appeal had expired, and the time within which the respondent could except to the sureties had expired, appellant could stay proceedings by giving the bond provided for in sec. 10. BRILL, J.

De Barnett vs. Tharaldsen. Second district. 53954.

SPECIAL ASSESSMENT.—Where Defendant City Failed to Complete Work, Plaintiff Is Entitled to Recover Assessment Paid, if He Has Received No Benefit.

In September, 1888, the city council of said city undertook to grade the street in front of plaintiff's lots. The council assessed the benefits and damages, and sent the benefit assessment to the county auditor for collection. Plaintiff subsequently paid the assessment. Notwithstanding such payment the city has failed to grade, or "do any act or thing for which such assessment was made." Plaintiff seeks to recover the assessment paid

and damages. Demurrer was interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. The defendant argued on the demurrer, that the action could not be maintained because the effect of recovery would be to cast the burden on the whole city when the law imposed it on those locally benefited; also, that money paid by plaintiff was her *pro rata* share of cost of grading the entire street, which was graded except in front of her lots; and, that the assessment was voluntarily paid; that if there has been unnecessary delay her remedy is mandamus.

Held, that the court payment was made to the court to grade the entire street, not to grade to her lots and stop. Upon the faith of this undertaking on the part of the city plaintiff voluntarily paid the money with the understanding and belief that the grading would be done. As to her the defendant has failed to perform its undertaking. Plaintiff has paid her money on a consideration that has wholly failed. That as she has waited a reasonable time for the defendant to do the grading "the city stands in position of holding in its treasury money collected from plaintiff which it has no right * * * to retain, because the purpose for which it was collected has been completely abandoned." 34 Minn. 446–448.

Demurrer overruled.

WILLISTON, J.

Bromley vs. Stillwater, First district, Washington county.

MUNICIPAL ASSESSMENTS—Direct Benefits.

Under the Duluth charter, city assessments for public improvements can be levied only upon property directly benefited thereby. The record disclosed the following facts: That the assessment against the property was made for the purpose of building a sewer and outlet on a certain avenue; that the improvement was located not less than ten blocks distant from the nearest property so assessed; that there were no sewer connections whatever between said sewer and outlet and any of the aforesaid property; that the benefit which was claimed to ensue to said property by reason of said improvement was based upon the future contingent use of the said sewer by the supposed extension of the sewer so as to connect with said property.

"We hold that such contingent future use of said improvement does not constitute a present benefit such as is contemplated by the charter. To constitute such a benefit, to enable the authorities to levy an assessment upon property for the construction of the sewer, we deem it necessary that said sewer shall be placed by the city in such position that the owner of the property may avail himself of the use of the same."

Assessment not confirmed as to objectors. LEWIS, J.

In Re Application for Order Confirming Final Assessment for Sewer in Second Street West. Eleventh district H. F. Greene, for city; W. E. Wright, for objectors.

COSTS—Witness Fees.

On appeal from taxation of costs by the clerk, *Held*, that where defendant, upon the trial and before witnesses are sworn, secures the dismissal of a suit on the ground that the complaint fails to state a cause of action, the defendant will not be allowed witness fees for a witness that was present and would have been a material one, had the motion to dismiss failed and the case proceeded to trial.

MOER, J.

Schulze vs. Fannie Brown, Eleventh district, St. Louis county. Titus & McPherrin, for plaintiff; I. Grettum, for defendant.

CORRECTING JUDGMENT—Nunc Pro Tunc.

The deputy clerk of court, in entering a judgment incorrectly, entered it for a much smaller amount than was actually awarded. The judgment debtor then sold his real estate to S. Judgment creditor, as soon as mistake was discovered, procured order, citing both judgment

debtor and S. to show cause why said error should not be corrected, and the true entry be made *nunc pro tunc*, so that the lien of the full amount of the judgment should attach to the real estate already conveyed. Order sustained.

Chas. A. Chase vs. Moses Stewart et al. Eleventh district, St. Louis county. J. A. Hanks, for plaintiff; S. T. & Wm. Harrison, for defendants.

DEFECTIVE CORPORATION — Partnership Liability of Incorporators.

Defendant, a manufacturing company, attempted to incorporate under secs. 109-119, ch. 34, Gen. Stat., and took all of the necessary preliminary steps thereunder, but failed to issue any stock. Immediately after signing the articles, and before the preliminary steps of incorporation had been completed, two of the incorporators ordered goods for the company in the corporate name. All the signers of the articles of incorporation were sued, as partners, for said goods. Upon trial, the articles were introduced in evidence by plaintiff to show partnership. *Held*, that the company, being a company organized for the purpose of manufacturing, could not incorporate under said law, but must incorporate under ch. 11 of the Laws of 1873, and being an imperfect and defective corporation, the incorporators were liable as partners. MOER, J.

Frost Manufacturing Co. vs. Barnes Vitrified Brick Co. et al. Eleventh district, St. Louis county. Schmidt & Reynolds, for plaintiff; Wilson & Wray, for defendants.

COSTS.

In action to foreclose a mechanic's lien where plaintiff and several defendant lien-holders prevailed, *Held*, that plaintiff could recover and would be allowed statutory costs and disbursements, but that the defendants prevailing would be allowed disbursements only, following the established practice in this court.

ENSIGN, J.

Frank L. Murray vs. Alex. Rhodes et al. Eleventh district, St. Louis county. Jacques & Hudson, for plaintiff; McGiffert & Wickwire, for defendants.

SERVICE — On Attorney.

Plaintiff's attorney being absent from the state, and leaving no place of residence where service could be made, having locked his office, and the complaint failing to show where the plaintiff resided, the defendant's attorneys served notice of motion on plaintiff's attorney by dropping a copy thereof through the letter-slot in the door of his office. *Held*, that no proper service of notice had been made. ENSIGN, J.

See *ante*, July, p. 64.

Eriesson, Brady & Co. vs. Donnelly & Schwartz. Eleventh district, St. Louis county. Geo. Wetherby, for plaintiffs; Crocker & Crandall, for defendants.

PLEADING.—Separate Causes of Action and One Allegation of Demand and Non-Payment.

Plaintiff in his complaint set up three causes of action, each for goods sold and delivered, and asked for judgment upon a *quantum meruit*. Following the separate allegations of his causes of action, he alleged that payment of the whole had been demanded, but that no part thereof had been paid except a certain sum. A general demurrer was interposed and sustained. LEWIS, J.

Jones & Laughlin, plaintiffs, vs. Clyde Iron Co., defendant. Eleventh district, St. Louis county. Smith, McMahon & Mitchell, for plaintiffs; Cash, Williams & Chester, for defendant.

FRANK P. DUFRESNE.

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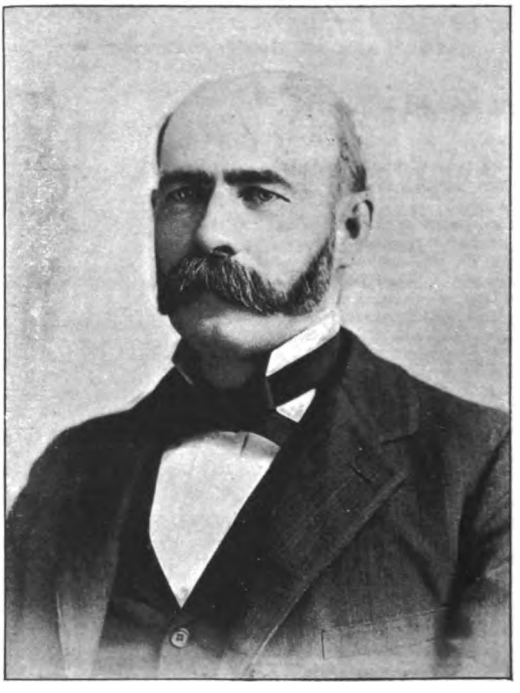

HON. H. W. CHILDS.

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THE RIGHT TO AMEND PLEADINGS.

The following article from the pen of Mr. John F. Kelly is, in our opinion, most timely. The rule which Mr. Kelly states is logically correct, and our courts in tending to hold otherwise are falling into an error which will work a great hardship in cases where the new rule may be applied.

The specific and exact question desired to be presented is, whether or not an answer not verified according to section 104, ch. 66, General Statutes, can be amended as a matter of right under sec. 123 of the same chapter, within twenty days after the service of the answer, and also, if the adverse party and the court proceed by disregarding the original answer and refusing to consider the amended answer whether or not such action and any order or decree made by the court is null and void.

Section 104 provides that the verification shall be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on his information and belief, and as to those matters that he believes it to be true; and section 123 provides that any pleading may be once amended by the party of course, without cost and without prejudice to the proceedings already had, at any time before the period for answering it expires, or if it does not delay the trial it may be so amended at any time within twenty days after service of the answer, demurrer or reply to such pleading.

To understand these two sections it is necessary to know the law and the principles from which they were taken and the history of the changes which placed the rule in the language it is now found.

At the time of the adoption of this code verification, the common law and chancery practice, as modified by the statutes, prevailed in New York. The pleadings at common law were not verified except in certain special pleas, but in chancery they were, and only so far that if the bill was verified the answer should, and if the answer was verified the reply must also be verified; and at that time the verification in chancery pleadings was substantially that provided in this statute. It was also a fundamental rule that the verification was no part of the pleading, because it was only for the purpose of probing the conscience of the adverse party, and when such party did not so verify his pleading the chancery court would require it to be done or grant the relief prayed. The New York Code commissioners adopted the chancery rule, that when any pleading is verified, all subsequent pleadings except demurrers shall be verified also, and framed this part of this section to read that every pleading (when verified) must be verified by the party, his agent or attorney, to the effect that he believes it to be true, but the verification could be omitted when the party would be privileged from testifying, and no

verification could be used in any criminal prosecution. In their report the commissioners state that the requirements should not go beyond that he believes the statements to be true, because the chancery rule, that the same is true of his own knowledge, was not honest or truthful, for the reason that no one could affirm that certain matters were true unless he knew the adverse contention, and then it depended on the mental capacity to receive a correct conception of the facts and to make a correct conclusion, which seldom existed, and therefore a person should only be required to affirm that which he believed to be true. In 1849 the New York legislature changed this to read that, in all cases of verification, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believe it to be true; thus adopting the verification in chancery, the principle of which, in that jurisdiction was, that a discovery should not be required unless the party knew the truth of the substantive facts. This language was adopted by the Revised Statutes of 1851, ch. 70, § 73, though changed in other respects in 1856 to follow the New York amendment of 1851, and the Revision of 1866, ch. 66, § 87, changed the phraseology to the present language.

Now, then, as the commissioners adopted the principle of the chancery verification, but changed knowledge to belief, and made it applicable to actions at law and suits in equity under one form of action denominated a civil action, and the amendment of 1849 changed the formula to the language as it stood before it was changed by the commissioners, so that formula would be in unison with the principle from which it was taken, and as the verification in chancery was no part of the pleading, it follows that a defective verification does not annul or abrogate the pleading. This was first asserted in George vs. McAvoy, 6 How. Pr. 200; 1 Code Rep. N. S. 318, and subsequently confirmed by the cases hereafter cited. In this jurisdiction the courts have for years held that a pleading not verified according to the section above cited is not a pleading and must be disregarded, and in a late case a litigant is now about to lose his property by this ruling.

Sec. 123, ch. 66, General Statutes, provides for an amendment as a matter of right and without regard to the preceding pleading, and no matter of what the preceding pleading consisted. At common law amendments became defined and settled by the statutes of joefails, which permitted amendments as of course—of right—when the same did not prejudice the adverse party. This was the rule in New York before the adoption of the code which was enforced by Rules 23 of 1845 and 22 of 1847 of the courts of that state providing that the parties could amend once of course, accompanied by affidavit that the same was made in good faith. From these rules the New York commissioners in 1848 framed the following: "Any pleading may be amended by the party of course without costs and without prejudice to the proceedings already had at any time before the period for answering it shall expire." This was amended in 1849 by limiting the amendment to one, and adding that amendment could be made before the time for answering expires, "or within twenty days after the answer to such pleading shall be served," which was further changed in 1851 to read, "or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed, and if it appear to the court that such amendment was made for such purpose

the same may be stricken out and such terms imposed as to the court may seem just." From this the makers of sec. 89, ch. 70, of Revised Statutes of 1851, added to the section as framed by the commissioners, after the word expire, the following, "Or if it do not delay the trial, it can be so amended at any time within twenty days after service of the answer to such pleading." This was amended in 1852—C. S. ch. 60, § 93—by inserting demurrer after the word answer, so as to read, "answer or demurrer to such pleading." The revision of 1866, ch. 66, § 103, inserted "reply," and increased the time to thirty days, and act of 1867, ch. 62, restored the provision as first above quoted.

Before the code the parties could make one amendment as a matter of right. Under the original draft of the code the number of amendments was not limited. The amendment of 1849 limited to one amendment, but allowed it to be made before the time for answering expired or within twenty days after the answer is served; and the amendment of 1851 provided that if the amendment is made within the twenty days after the answer is served for the purpose of delay, the court can strike it out. An amendment as a right could be made any time before the time for answering had expired, both before and under the code. The law of 1849 extended this right to twenty days after the answer is served.

By putting these two sections together—the principle that the verification is no part of a pleading and that a party can amend as a matter of right—we have the answer to the question propounded.

To prove this: In George vs. McAvoy, 6 How. 200, the court held that the verification was no part of the pleading, and a judgment taken for want of answer resulting from defective verification must be set aside. In Rider vs. Bates, 66 How. Pr. 129, the defendants, within twenty days after the service of the first answer, served an amended and properly verified answer. The motion for judgment on the ground that the answer was not properly verified, was denied, the court holding that the defendant had the right to serve such amended answer. The same principle was asserted in Burrall vs. Moore, 5 Duer, 655, and Griffin vs. Cohen, 8 How. 451, which also assert that the plaintiff cannot treat the amended answer as a nullity. The right to amend is absolute, subject to the power of the court to strike out if proved to have been made to delay the trial, in which case the court must pass upon the intent as well as the effect of the amendment. If the amendment is made in good faith and not for the purpose of delay, it cannot be stricken out, although the effect is to deprive the party of a term. A defective verification merely renders the verification a nullity. The pleading is good without it, and cannot be set aside or disregarded. If verification to complaint is defective the remedy is to answer without a verification. If the verification to the answer is defective, the remedy is to move to set it aside and for judgment, but such motion is defeated by an amended answer properly verified within twenty days after service of the original. Quinn vs. Tilton, 2 Duer, 649; Fitch vs. Bigelow, 5 How. 237; Lane vs. Morse, 6 How. 395; Hubbard vs. Cutler, 11 How. 149; Waggoner vs. Brown, 8 How. 212; Straus vs. Parker, 9 How. 342; Williams vs. Riel, 11 How. Pr. 374; Malony vs. Daws, 2 Hilt. 247.

In addition to this, section 127 of chapter 66 requires the court to disregard any error or defect in the pleadings whch does not affect the substantial rights of the adverse party; and as this section is from the statute of joefails, and that statute specifically provides for disregarding a defective verification, this is another reason in this argument.

JOHN F. KELLY.

St. Paul, Minn.

OPINIONS OF ATTORNEY GENERAL.

VILLAGES—Officers Authorized to Enter Upon Private Property for the Purpose of Killing Vicious Dogs.

MR. JACOB WALL,
Lanesboro, Minn.

Dear Sir: In your communication of the 10th inst. you call attention to the provisions of Ordinance No. 18 of your village pertaining to dogs, and inquire, in substance, whether an officer of the village has the right to enter upon the premises of a citizen for the purpose of killing a dog in a case where the owner thereof has not complied with the requirements of the ordinance.

It has been long held by the courts of this country that the keeping of dogs is a proper subject for regulation by public authority, and it is therefore now well established that license fees may be exacted, that the owners of dogs may be required to keep them muzzled, and that all such animals which have not been cared for by their owners as the law requires may be killed under public authority. There is no longer any doubt as to the right of a public officer to enter upon the premises of the owner of a dog and kill the animal when the owner has refused or neglected to muzzle him or to pay his dog license.

Your present ordinance is very lengthy and might and should be abridged. I would suggest that you frame a short, concise ordinance as a substitute for your present one and in line with the views above suggested.

Your authority to adopt an ordinance with reference to the subject of tramps will depend upon the provisions of your village charter. If your charter contains the usual authority to adopt appropriate ordinances for the preservation of the good order of the village, there is no reason why you may not adopt such an ordinance and enforce it. Under the general village law, chap. 145, Gen. Laws 1885, authority is conferred upon villages to ordain and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, etc., not inconsistent with the constitution and laws of the United States or of this state, as they shall deem expedient. If you have any similar provision in your charter the authority is ample for the purpose above indicated.

I assume that you are organized under a special act. If, however, your village was organized under a general law, its government would now fall within the purview of the above named act, as it is expressly provided by sec. 2 thereof.

Yours truly,
H. W. CHILDS.

April 12, 1894.

ROAD DISTRICTS—When and How to Be Designated by the Town Supervisors.

MR. S. ERICKSON,
Supervisor,
Hendricks, Minn

Dear Sir: The law provides that the supervisors of the township shall have the care and superintendence of roads and bridges in their respective townships, and they are expressly vested with authority to "divide the respective towns into so many road districts as they deem convenient, by writing under their hands to be lodged with the town clerk and by him entered in the town records; such division to be made annually if they deem it necessary, and in all cases to be made within at least twenty days before the annual town meeting."

This provision of statute has been considered by one of my predecessors in office, by whom it was held, and I think correctly, that the supervisors have authority to make the division of the township into districts during any portion of the year, save the twenty

days immediately preceding the annual town meeting.

This authority having been expressly conferred upon the supervisors of the township, no authority resides in the electors thereof to control their action. The road districts will be constituted as the board of supervisors determine, and not in accordance with the wishes of the electors expressed at the town meeting.

In establishing road districts, the supervisors are required to do nothing more than is expressly pointed out in the statute. When they have "lodged with the town clerk" their writing indicative of their action they have given all the notice the law requires.

Yours truly
H. W. CHILDS.

April 12, 1894.

TAXES—Procedure to Enforce Payment of When Levied Upon Shares of Bank Stock.

MR. JOHN MORAN,
Sheriff,
Park Rapids, Minn.

Dear Sir: In reply to your communication of the 9th inst., will say, that the law makes it obligatory upon the bank or managing officers to retain sufficient dividends belonging to stockholders as shall be necessary to discharge taxes levied upon shares of stock, until the taxes have been paid. The provision of law which is especially applicable to your case provides, that "any officer of any such bank who shall pay over or authorize the paying over of any such dividend or dividends, or any portion thereof, contrary to the provisions of this section, shall thereby become liable for such tax; and if the said tax shall not be paid, the county treasurer where such bank is located shall sell such share or shares, or interest, to pay the same like other personal property."

I would suggest that you exhaust your remedy first against the shares of stock. If any deficiency arises from their sale, there is no reason why you may not proceed against the derelict officers for the amount thereof. Doubtless you will have to recover as against such officer in a civil action, as the law makes only such officer liable who shall pay over or authorize the paying over of any such dividend, etc. Your remedy as against the shares of stock is clearly pointed out in the statute wherein their seizure and sale is expressly authorized.

Yours Truly,
H. W. CHILDS.

April 12, 1894.

BONDS—Vote Required to Authorize the Issue of, by Town in Aid of a Railroad—A Certain Agreement Construed.

HON. JOHN ZELCH,
Cottage Grove, Minn.

Dear Sir: You ask in substance, what vote is requisite in order to authorize the issuance of bonds in aid of railroads pursuant to the provisions of chap. 34, General Statutes 1878.

By the fourth subdivision of sec. 96 of the said chapter it is provided as follows: "If a majority of the legal voters who shall vote upon the question at any election to be held in any such county, town, city or village in pursuance of the provisions of this act, shall, as indicated by the special returns of any such election, vote for the railroad proposition, then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company, as provided in this act, shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and stock shall be issued and delivered by the proper officer."

It therefore appears that it requires only a majority of the legal voters who vote upon the question. It may be further noted that the law has remained unchanged in this respect, since the passage of the original act in 1877.

In reply to your inquiry as to whether or not the railroad company could require the delivery of bonds placed in

escrow before the bridge mentioned in the proposition of the South St. Paul Belt Railroad Company is completed and in readiness for teams and foot passengers, I quote the following from a letter this day written to Mr. Peter Thompson of Cottage Grove:

"One section of the proposition made by the railroad company reads in part as follows:

'Said South St. Paul Belt Railroad Company proposes and desires that said bonds shall be delivered to it when said railroad shall have been completed by it, including said bridge, with facilities for teams and foot passengers ready for the passage of cars from and to said point, as the said company has herein proposed to construct said railroad, and that said bonds shall be deposited in escrow as soon as convenient thereafter, but prior to said delivery to said South St. Paul Belt Railroad Company.'

"No court would hesitate for a moment, in view of the above quoted language, in holding that the railroad company has bound itself by its proposition to complete the bridge not only for the use of cars, but for the use of wagons and foot passengers, and that it will not be entitled to the delivery of the bonds until the bridge has been substantially completed and ready for the service of teams and foot passengers."

Yours Truly,
H. W. CHILDS.

April 13, 1894.

HON. F. P. BROWN,
Secretary of State.

Sir: I have the honor to herewith transmit to you a synopsis of a proposed amendment to sec. 1 of art. 9 of the constitution of this state as provided by chap. 1 of the General Laws of 1893.

Yours truly,
H. W. CHILDS.

April 16, 1894.

Synopsis of amendment to sec. 1 of art. 9 of the constitution of the State of Minnesota to be proposed to the people of said state for approval or rejection at the general election to be held therein in November, 1894.

Original Section.

The legislature of the State of Minnesota has provided by chap. 1 of the General Laws of 1893 for the submission to the people of the state for their approval or rejection at the general election to be held therein in November of the present year, an amendment to sec. 1 of art. 9 of the state constitution.

The section to be amended reads as follows:

"Sec. 1. Taxes to Be Equal. All taxes to be raised in this state shall be as nearly equal as may be; and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state; (provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements or upon the property to be benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe)."

Proposed Amendments.

It is proposed by the said act of 1893 to amend the above quoted section of the constitution by adding thereto the following proviso, viz.:

"And provided further, that there may be by law levied and collected a tax upon all inheritances, devises, bequests, legacies and gifts of every kind and description above a fixed and specified sum, of any and all natural persons and corporations. Such tax above such exempted sum may be uniform, or it may be graded or progressive, but shall not exceed a maximum tax of five per cent."

The purpose of the proposed amendment is to clothe the legislature with authority to tax the following subjects: 1.—Inheritances. 2.—Devises. 3—Bequests. 4.—Legacies. 5.—Gifts.

1. The said proposed amendment contemplates that all inheritances, devises, etc., in excess of a certain amount, to be determined by the legislature, shall be subject to taxation.

2. The tax "may be graded or progressive, but shall not exceed a maximum of five per cent." In other words, it is proposed to confer upon the legislature authority to tax the above named subjects by appropriate method to any extent not in excess of five per cent of the amount thereof.

3. The legislature may, if such authority is conferred, prescribe a fixed rate, not to exceed five per cent, applicable to all inheritances, devises, bequests, legacies and gifts regardless of the amount thereof. In other words, it may provide that an inheritance of five hundred dollars shall be taxed at the same rate prescribed for an inheritance of fifty thousand dollars.

4. It may provide rates of taxation varying with the amount of the inheritance, devise, etc. The rate of taxation may be made to vary as applied to any particular inheritance, bequest, etc. For illustration: An inheritance of one hundred thousand dollars may be taxed at a certain rate for the first ten thousand dollars, a different rate for the next ten thousand dollars and a still different rate for the next ten thousand dollars, and so on according to a rule which shall be prescribed by the legislature.

5. The tax contemplated by the proposed amendment is defined generally "to be a burden imposed by government upon all gifts, legacies, inheritances and successions, whether of real or personal property, or both, or any interest therein, passing to certain persons by will, or by intestate law, or by any deed or instrument made inter vivos, intended to take effect at or after the death of the grantor."

6. The justice of such a tax is claimed to rest upon the fact that the right to take property by devise or descent is the creature of the law and secured and protected by its authority; wherefore, it is urged that the state may justly attach to such subjects a reasonable tax.

7. Similar legislation has been in force for some years in Pennsylvania and other states.

8. The said amendment is proposed for the reason that doubt prevails as to the validity of such legislation in the absence of express constitutional authority. H. W. CHILDS.

March 24, 1894.

ORDINANCES Passed in Pursuance of a Special Law Are Repealed by a Repeal of Such Special Law by the Legislature.

LIQUOR LICENSES Issued by the Previous Municipality Likewise Are Annulled by the Repeal of the Law Which Authorized Their Issuance.

MR. R. M. GARDNER,
Hartland, Minn.

Dear Sir: Calling attention to the provisions of chap. 244, General Laws 1893, repealing chap. 238, Special Laws 1878, you inquire whether ordinances adopted by the township pursuant to the provisions of the last named act survive the repealing act of 1893.

The effect of chap. 244 was to completely destroy the force of chap. 233, and all ordinances adopted under the last named act fell therewith. The incorporation of a village under the general village law of 1885 constitutes a new and distinctive corporation unaffected by the previous legislation to which attention has been called. None of the ordinances adopted under the special township government will be in force or effect under your present village government. It will therefore be necessary for you to adopt such ordinances and by-laws as the law of 1885 authorizes and which your village council may deem advisable. I need not

add that it is unnecessary to assume to repeal the ordinances adopted by the township government.

What I have said as to ordinances applies with equal force to licenses issued by the special township government. Every license issued thereunder became inoperative when your village incorporated. The question of the issuance of licenses must be determined by your present village authorities. A license for the sale of intoxicating liquors cannot be issued for a fraction of a year. Or, to speak more properly, no license can be issued for any less fee than the minimum amount expressed in the law of 1887, to wit: $500. Every person taking out a license, whether for three months or a full year, must pay the full amount prescribed by the statute.

In answering your inquiries I have assumed that you are a village officer; otherwise I should have declined to advise you.

Yours truly,
H. W. CHILDS.

April 17, 1894.

POLICE OFFICERS—Not Authorized to Call Upon Citizens for Aid in Arresting an Offender Unless Such Arrest Is Made in the Execution of a Warrant.

MR. FRANK ROBBINS,
Deputy Game Warden,
Deer Creek, Minn.

Dear Sir: The statute provides that "every person must aid an officer in the execution of a warrant if the officer requires his aid and is present and acting in its execution."

Unless, therefore, you are in possession of a warrant issued by a magistrate for the arrest of one or more of the offending parties, you would have no authority to command the assistance of bystanders, nor have you authority to deputize other persons to accompany you to the place where the arrest is to be made for the purpose of aiding in such arrest.

The powers of the sheriff are broader in this respect, and if you are apprehensive of a formidable combination of offending parties to prevent the execution of the law, it might be well to have a warrant issued and placed in the hands of the sheriff for service. It is expressly made the duty of the sheriff under sec. 26 of the law to enforce its provisions. Undoubtedly the offending parties would make no serious resistance to the sheriff.

Yours truly,
H. W. CHILDS.

April 17, 1894.

TOWNSHIP TREASURER—When Authorized to Indorse Orders.

MR. FRANK CONRAD,
Douglas, Minn.

Dear Sir: A township treasurer is authorized to make indorsements upon orders drawn upon him only when there is a want of funds in his hands with which to pay them. The law does not authorize the indorsement of orders when funds are in the treasury with which to pay them, for the mere purpose of allowing the holders to draw interest upon them.

Yours truly,
H. W. CHILDS.

April 17, 1894.

A Perfect Jury—assuming perfection to exist in direct ratio to the ignorance of the jurymen—appears to have been obtained by Mr. F——, a St. Paul attorney in one of the counties of the Twelfth district. After the jury was impaneled, Mr. F— made a motion for dismission, and, according to his invariable custom on such occasions had the counsel's table well covered with a small library of sheep bound books, from which he read sufficient law to convince the court of the correctness of his motion. The motion being granted and the jury discharged, one of them, who had listened with the greatest gravity to the weighty arguments on the law, approached the judge and asked, in a mixture of Swedish and English, as interpreted, "Judge, who was that book agent talking for?"

WE call the attention of our readers to the decision of our Supreme Court, filed July 10, 1894, in Irwin vs. McKechnie, defendant, and Oakes et al., receivers, garnishees, in which it is held that a receiver of a railroad corporation appointed by a United States court is liable to garnishment in the state courts. (See post 154.)

This decision is one of great importance, and we are indebted to Robertson Howard, Esq., of the St. Paul bar, for a full and accurate report of the case. Mr. Howard has also added as a note at the end of the case a decision of Judge Woolson in United States Circuit Court for Southern District of Iowa, West Division, in which Circuit Judges Caldwell and Sanborn concurred, which had not been made public when the Irwin case was argued or decided.

The two decisions when read together will show the importance and delicacy of the questions of jurisdiction and comity involved.

THE following is the address of Hon. Chas. E. Flandrau, delivered at the last meeting of the State Bar Association. It is of interest at present, in view of the attempt now being made to awaken greater interest in the association among the legal fraternity:

Gentlemen of the State Bar Association:

You did me the honor at your last meeting to choose me as your president. I, of course, accepted the appointment, thinking without egotism on my part that in one respect I might be entitled to it. I do not, of course, refer to any qualifications of learning or ability that appertain to myself, but rather to that peculiar recommendation of age that is thrust upon us all whether or no. I think I can say that I am the oldest active practitioner, in duration of service, in the state at the present time. If I remember correctly, there were no members of the bar who are now alive when I came to the territory, except George L. Becker, Morton S. Wilkinson, Henry L. Moss, William P. Murray, Lafayette Emmett, Judge R. R. Nelson, Judge Isaac Atwater and my much esteemed partner and contemporary, Horace R. Bigelow. All of these gentlemen are, thank the good Lord, alive, and in the active pursuit of happiness, but they are out of legal practice, except perhaps my friends Wilkinson and Murray. If they or either of them will say they are in practice, I am the last man in the world to deny their assertion, and I cheerfully rate myself as subject to their prior claims—but all the rest of them have gone on the bench or into other lines of business—so I have pretty well established my claim to be the oldest practicing lawyer.

I have tried very hard to get some member of this association to deliver to us a paper on some subject of interest to the bar; but with the characteristic modesty of the lawyer they have all declined, and I am compelled to call you to order without an address, except such as I can offer you without much preparation.

Associations of the bar are all very well in their way, but I have not yet seen any very marked advantages flowing therefrom. We have county and city associations, but they don't seem to effect any special advantage to any one. Lawyers are very independent people, and are loth to be governed by the views or wishes of others as to the manner of carrying on their business, and it must be remembered always when considering the bar, that its members differ more widely than the members of any other association or assembly of men. You will find a man who, by his superior natural endowments, far surpasses his fellows, and you will also find a man who by his plodding industry and careful work establishes himself in the confidence of the business community, and you will also find the man who has gained the reputation of unbending honesty, all of whom upon their peculiar claims call upon the public for recognition and

support. No system can unite such men; each stands upon his own foundation in respect to his own clients, and each is entitled to charge fees commensurate with his professional standing. No rules of any society can regulate matters of this kind. An association may agree to maximum or minimum fees, but what lawyer will be controlled by its decrees? So in the general investigation of the advantages of association I am led to the conclusion that if they have any *raison d'etre* it consists of the ability of organized force to assert itself whenever it is called upon to express itself upon any given question.

There can be no doubt at all that the bar of the country is the most potent force in the government of the republic. No state legislature ever convened without a predominance of lawyers in its make-up, and no policy was ever promulgated and engrafted upon the accepted theory of a state that did not emanate from the pen or head of a lawyer. This condition of things does not stop with the state legislatures; it is found to penetrate into the federal department of the government. It is a rare thing to find a senator who is not a lawyer, and the same may be said generally of the member of the lower house, and when it can't be said it is generally accepted that the members who do not bear the stamp of the legal fraternity are not found to be especially prominent, or they are cranks of some kind or another. So it will be seen that the bar is a potential force in the governmental machine.

Our republic is young; it is a good deal of an experiment as yet, and this particular juncture of affairs proves how liable it is to become the victim of dangerous and crude theories of finance and many other alarming possibilities arising from the ill-digested conceptions of queer people who gain admission into our national and state governments. This is a condition of things that flows necessarily from our purely popular system of government Every man is the equal of every othe man before the law; and whenever a community entitled to a representativ in the state legislature or the congres of the United States, is dominated b illiteracy, or, what is worse, peopl who possess that dangerous elemen spoken of by the poet as "a little knowl edge," then it may be expected tha men who never should be admitted int the councils of the nation will appea and torture the body politic with ab surd, chimerical theories, which hav long ago been tested and found want ing, but are looked upon by these ad venturers as newly discovered panacea for all existing evils and wants.

This is inevitable in a republic s large and fresh as ours, where whol states are guided by fanatics wh probably never read the constitutio of their state or that of the Unite States, and if they had and found an obstruction therein to their ridiculou schemes would, in the words of a forme statesman of our country, dispose of th obstacle by saying "So much the wors for the constitution."

Lawyers are supposed to have rea these fundamental charters, and t know how essential to the prosperity o the nation is a strict adherence to thei teachings, and an ironclad constructio of their provisions. I was once a judge and frequently called upon to deter mine whether a law conflicted with th provisions of the constitution, and I al ways ran against the rule of construc tion adopted by the courts, that whe there was a doubt as to whether th law collided with the constitution th doubt was to be solved in favor of th validity of the law, and that a statut was not to be held unconstitutiona unless it was plainly in conflict wit the fundamental law, and I, of cours was always governed by that rule i my decisions. But, gentlemen, I no assure you that were I similarly place to-day with my accumulated experi ence of nearly half a century, I woul prove the oft said proverb, that "th

law is not an exact science" by deciding in diametric opposition to that rule, and holding that when there is any reasonable doubt about the constitutionality of the law, kill the law and save the integrity of the constitution. The administration of the law must keep pace with the growth and accumulated wisdom of the country.

I don't mean to say that lawyers are a better class of men than those of other branches of business and life, nor do I mean to suggest that they are not susceptible to the allurements that entice many a man from the narrow path of legal and political principle, into the untried fields of popular quackery, with the hope of preferment in worldly ways, and especially am I cognizant that young lawyers are likely to be so misled; but better things are to be looked for from the bar at large and as a body. I do not believe that the bar of any state, and especially of the sterling and conservative State of Minnesota can, as a whole, be seduced into any very great departure from the safe and sure path of constitutional government, and it is for these reasons that I have convinced myself that the association of this bar into a body that can be called upon to act as a unit in times of danger and emergency is a good thing, and ought to be sustained. In a purely popular government no one can predict what unheard of, untried and unknown measure may at any time be sprung upon the country, and it is well to have a resistant body which can meet the assault with force and intelligence.

While I advocate the maintenance of the association, I will take the liberty to suggest that a little more interest be manifested in its success by the members, so that the next president will meet with better success in procuring an orator than I have had.

There is very little to report for the past year in the way of legal movements in the country. I think of nothing of importance except a meeting of the bar of all the states at Milwaukee on the 31st of August last, at the call of the American Bar Association. Gentlemen were commissioned by the governors of the several states to attend and take part in the proceedings. The object of the convention was to promote uniformity in the laws of the states upon subjects of common interest to all American citizens. There are many subjects where such uniformity would be of great advantage, such as marriage and divorce laws, the execution and acknowledgment of conveyances, insolvency and many kindred topics which will occur to all engaged in the administration of the law.

Our state was ably represented, but it was my misfortune to be unable to attend, although the governor honored me with a commission. I learn that much of interest to the profession transpired, which will be published with proceedings.

A gentleman, dying, left all his estate to a monastery, on the condition that on the return of his only son, who was then abroad, the worthy fathers should give him "whatever they should choose." When the son came home he went to the monastery, and received but a small share, the monks choosing to keep a greater part for themselves. A barrister, to whom he applied, on hearing the case, advised him to sue the monastery, and promised to gain his case for him. In arguing before the court the ingenious lawyer said: "The testator has left his son that share of the estate which the monks should choose; these are the express words of his will. Now it is plain what part they have chosen by what they keep for themselves. My client, then, stands upon the words of the will. 'Let me have,' says he, 'that part they have chosen, and I am satisfied.'" This plea gained the suit.—The Law Student's Helper.

REVIEWS.

Index Digest to Minnesota Laws--By John F. Kelly, Compiler of General Statutes of Minnesota, Code Pleading and Practice, etc. F. P. Dufresne, St. Paul, Minn., 1894.

In preparing this Index Digest to Minnesota Laws, Mr. Kelly has rendered a service of great value to every practitioner in the state. Heretofore, with the imperfect indexes to the laws, and the imperfect and unreliable references to the laws in the General and Compiled Statutes, it has been a difficult task to trace a law through its possibly several enactments and amendments to its original enactment, or to ascertain just what the law was at any given time. And it was only after the most thorough investigation that the practitioner could assure himself that he had overlooked no amendment, and that no re-enactment with some change of verbiage was not hidden away in some of the always imperfectly indexed Special Session Laws. Both this labor and uncertainty Mr. Kelly has removed by this index. As he says in his Explanation, the index concentrates all the Minnesota law, general and special, enacted by the legislature, so that crude, inconsistent and disconnected laws may be apparent and future legislation and interpretation consistent and harmonious.

Mr. Kelly states seven reasons for the publication of this work, which, other than imperfect indexes, are, that many of the amendatory laws do not cite the prior or original law correctly, or do not cite the law which they amend; that many of the laws amend repealed laws, or amend an amendatory law, without reference to the original or repeal, or amend the original without reference to the amendment; that the repealing statute in the revision of 1866, i. e. chap. 122, does not in some instances correctly cite the law intended to be repealed, and does not repeal all prior laws nor contain all unrepealed prior laws; and that some General Laws have been classified and published with the Special Laws, and some laws classified as and purporting to be Special Laws have been found to be amendments of General Laws. By the use of the Index Digest these errors can be discovered at once, for on each matter which has been a subject of legislative action the law now in force is first cited, and then all prior, superseded or repealed law relating to the same subject. The work also contains tables showing all changes in the revisions and compilations of the General Laws, so that any general law can be traced to its origin.

Our author states that the work may be profitless and the interminable drudgery may be the cause of some errors which we must notice, which would have been discovered if the sheets had been carefully gone over and compared, purely clerical labor. Thus, under heading "Norway Lake," page 245, the chapter is omitted; it should be 251, but is easily found, notwithstanding the omission. Again, although in itself an unimportant matter, we find on page 181, under heading "Johnson," name changed to "Tabat," and on page 354 the latter name is written "Tabott." Nuncupative Wills, page 247, is cited as Penal Code (P. C.), when it should be Probate Code (Prob. C.); Northfield Bank Robbers, page 244, should refer to ch. 90, 1877, instead of ch. 89. Similar errors might be instanced which, although unimportant in themselves have a tendency to make one doubt the reliability of the work. They all can be and should be corrected in later editions.

All errors, however, are not to be laid at the door of our author. While examining this work our attention was called to an example of the persistence with which an error when once embodied in our written law will perpetuate itself, that if, unlike truth, error

will not rise when crushed to earth, unlike truth, further, it will not be crushed.

Chap. 7, Gen. Laws of 1855, being chap. 42, General Statutes of 1878, relating to towns located upon lands of the United States, and directing how the title to such lands shall be conveyed to the parties entitled thereto, recites an act of Congress "passed May 23rd, A. D. 1854." This date should have been May 23rd, A. D. 1844, and this error has been continually made in every compilation and revision of our statutes, appearing in chap. 42 of the revision of 1866, chap. 9 of Bissell's Statutes of 1873, chap. 42, Gen. Stats. of 1878, and sec. 4091 of Kelly's Statutes. This illustrates the great care with which statutes, and indexes to statutes also, should be prepared. When an error has once crept in it may perpetuate itself almost indefinitely, and as careful comparison and proofreading will discover them their existence is inexcusable. The errors which we have discovered in this work, however, are not serious, and we apprehend that it will be found to be an indispensable aid to the busy lawyer.

The following comedy was performed in New York city recently: Scene—The Tombs Police Court. Police Justice (to witness from country)—"What is your name?" Witness from the country—"I won't tell you, b'gosh! I know your game. You'll git my name, and as soon as I go out o' here some other blamed rascal 'll come up an' ask me how 'Mandy an' the children is, an' when I saw my son, the cashier in our bank down at the Corners. I know your game—green goods. I won't tell you my name, b'gosh!"—Albany Law Journal.

An instance of that legal courtesy which is a synonym of congressional courtesy, occurred in a Galesburg courtroom the other day. Attorney Jim McKenzie and a lawyer from East Galesburg became involved in a wordy discussion, in which each questioned the other's word. The East Galesburg legal light maintained his position, claiming that he could find his authority. He turned over the pages of the statute book, when quick as a flash Mac said:

"You'll find what you want on page —, section—."

The innocent attorney looked up the reference and found the law governing the running loose of jackasses.

And the court smiled.—Central Law Journal.

ATTORNEYS who may be participants in any case involving novel points of law will greatly assist us by furnishing a statement of facts, with a memorandum of the decision, to any of the following correspondents, who will forward them to us, with the names of the attorneys, for publication:

J. A. LARIMORE, St. Paul, Minn.
GEO. H. SELOVER, Wabasha, Minn.
A. E. DOE, Stillwater, Minn.
M. S. SAUNDERS, Rochester, Minn.
W. J. STEVENSON, Duluth, Minn.
F. B. ANDREWS, Waseca, Minn.
A. COFFMAN, St. James, Minn.

LEWIS IRWIN *vs.* A. MCKECHNIE *et al.*[1]

(*Supreme Court of Minnesota.* Decided July 10, 1894.)

1. COURTS—GARNISHMENT IN STATE COURT OF RECEIVER APPOINTED BY FEDERAL COURT.
The indebtedness incurred by the receivers of a railway company, appointed by the Federal Court, while operating the road under the authority of the court, may be garnisheed in a State Court.

2. SAME—JUDGMENT, HOW ENFORCED.
But no executory process can be issued against the receivers on the judgment rendered therein. It can only be satisfied, as other demands are satisfied, by an application to the court in which the receivership proceedings are pending for an order directing its payment.

Appeal by guarnishees from an order of the District Court of Ramsey county, J. J. Egan, J., made Sept. 30, 1893, denying the motion of the garnishees to be discharged in a garnishment proceeding wherein it was sought to garnishee funds in the hands of Thomas F. Oakes, Henry C. Payne and Henry C. Reuse, as receivers of the Northern Pacific Railroad Company, due the defendant, McKechnie, for services rendered said receivers while operating the road. Order affirmed.

The receivers appeared specially in the district court and moved to be discharged with making a disclosure, on the grounds:

First—That the court had no jurisdiction.

Second—That any indebtedness they might owe defendant was due to him as such receivers, and not otherwise.

Third—That they were not indebted personally to said defendant in any sums whatever.

J. H. MITCHELL, JR., and TILDEN R. SELMES for applicants. The statute of garnishment does not apply to cases of this character. Lord vs. Meacham, 32 Minn. 66.

The party owing the debt, to make it subject to garnishment must owe it absolutely. From the very nature of things it is impossible that a receiver, as such, could owe any money absolutely. He owes the money so far as the trust estate can pay it, and no farther; and if there is not sufficient funds with which to pay, then there is nothing due. In other words, it is the trust estate that owes the money, and not the receivers.

The Minnesota statute provides directly for service upon executors and administrators, under certain conditions, and upon corporations in all cases in which persons should be subject to garnishment. It shows clearly, therefore, that the intention was that it should be limited to persons and corporations, and to executors and administrators under certain circumstances, but not to persons holding property under the orders of the court.

The Supreme Court of Massachusetts, under a statute almost exactly like the Minnesota statute, holds that the statute does not apply to money in the hands of receivers. Columbia Book Co. vs. De Golyer, 115 Mass. 67; Comm. vs. Hide and Leather Ins. Co., 119 Mass. 157; Pub. Stat. Mass. 1882, ch. 183, sections 1, 22, 23, 24, 34.

See, also, in support of the proposition that property in the hands of the court is not subject to garnishment, Brooks vs. Cook, 8 Mass. 246; Thayer vs. Dudley, 3 Mass. 296; Barnes vs. Treat, 7 Mass. 271; Colby vs. Coates, 6 Cush. 558.

In most of the states there is no provision relative to garnishment or nongarnishment of property *in custodia legis;* but it is almost universally held that such money is not subject to garnishment; the rule being that whenever an official holds money merely as the agent of the law he cannot be charged on garnishment process in respect to such funds, but whenever his liability becomes changed from official to personal he is amenable to the process. Weaver vs. Davis, 47 Ill. 235; Oppenheimer vs. Marr (Neb.), 48 N. W. Rep. 818; Wade Attachments, sec 424; Curtis vs. Ford (Tex.), 14 S. W. Rep. 614; Pace vs. Smith, 57 Tex. 555; Daw-

[1] Reported by Robertson Howard Esq., of the St. Paul bar.

ERRATA.

On page 154, in sixteenth line of statement of case, for "*with*" read "*without.*"

On same page, in second line of argument, for "*applicants*" read "*appellants.*"

son vs. Holcomb, 1 Ohio 275; Willard vs. Decatur, 59 N. H. 137; Bowler vs. Ry. Co. 67 Me. 395.

In Michigan it is held that the statute specifically prohibits the garnishment of funds *in custodia legis.* Voorhees vs. Sessions, 34 Mich. 100; Cook vs. Rogers, 31 Mich. 391; Temper vs. Brooks, 40 Mich. 333.

Our courts have universally held that property *in custodia legis;* was not subject to garnishment, and that when a debt was due from an officer of the court as such officer, and not in his individual capacity, he was not liable to garnishment. McDougall vs. Hennepin Co., 4 Minn. 184. (Gil. 130); Marine Nat. Bank vs. Whitman Paper Mill Co. 49 Minn. 133; In re Mann, 32 Minn. 60.

It makes no difference whether the United States statutes provide that the receivers shall be subject to suit, or to garnishment even, or that the order appointing the receivers, as in this case, provides that they shall be subject to suit without leave of the court appointing them. The courts cannot extend or enlarge the statute of garnishments beyond its own terms.

In Phelin vs. Ganebine, 5 Colo. 14, it was held that the statute of Colorado made receivers, and other officers of the court, subject to garnishment by its terms, and that to invoke the rule that property *in custodia legis* was not subject to garnishment you must show that the service of process would disturb the rights of the receivers and interfere with their possession, and that where that did not formally appear, the property in the hands of the receiver was subject to garnishment.

But, in McDougall vs. Hennepin Co., 4 Minn. 184 (Gil. 130), it was held that public officials should not be embarrassed in the performance of their duties by being called into court on garnishment process; and it is upon this ground, as well as that the statute, in its terms, does not include receivers, that the Massachusetts decisions are based.

AMBROSE TIGHE for Respondent. The question is not, as stated by appellants, whether property in the hands of receivers, as such, is subject to garnishment, but whether the receivers of a railroad corporation who are operating the property, and in doing so making contracts and incurring liabilities—all under permission and direction of the court appointing them—are subject to garnishment on account of moneys due from them for liabilities they have incurred while so operating the property.

Our garnishment statute is very broad, and subjects to the process "any person," including in this term "any corporation." Gen. Stat. 1878, ch. 66, sec. 164, 169.

The courts have grafted two exceptions on the law.

(1) Public corporations, on the ground of convenience, and to prevent the interruption of public business. McDougall vs. Hennepin Co., 4 Minn. 184 (Gil. 130).

(2) Certain officers of the courts in respect to funds in their hands, the distribution of which is subject to the court's direction, such funds being considered *in custodia legis.*

If appellants are exempt from the process it must be because they come within the limits of the second class.

A receiver is not subject to garnishment on account of any debt contracted by the insolvent prior to the receiver's appointment. The original creditor could not sue the receiver on such a claim, and there is no reason why a creditor of the original creditor should be allowed to do so under the form of a garnishment action. The assets of the insolvent on the appointment of a receiver are sequestered, and all come into the court's hands. The claims of all creditors are there also, and the application of the one to the payment of the other is under the court's direction to be made at such time and in such shape as it may order. No original creditor could accomplish anything by instituting an action against the re-

ceiver on account of a claim due him from the insolvent, nor could a creditor of the original creditor by garnishment proceedings. This is the meaning of the cases cited by appellants.

But the moneys here sought to be held are not moneys due from the receiver on account of a debt of the insolvent, but moneys due from the receivers for a debt contracted by themselves in operating the property in their hands.

In as far as there are decisions in an action of this character, they favor the view that such moneys can be held by garnishment process. Adams vs. Barrett, 2 N. H. 374; Fitchett vs. Dolbee, 3 Harr. (Del.) 267; Harrington vs. La Rocque, 13 Or. 344; Oppenheimer vs. Marr (Neb.), 48 N. W. Rep. 818.

In Phelin vs. Ganebine 5 Colo. 14, cited by appellant, the syllabus is "A receiver is amenable to garnishee process in the absence of statutory provision, and when the process does not tend to disturb his right under the general orders of the appointing court."

The court says: "We have examined several cases cited in support of the doctrine that receivers are not amenable to garnishee process, but it will be found that the decisions in these cases rest either upon the statutory law of the state exempting the receivers from such process (Columbia Book Co. vs. DeGolyer, 115 Mass. 69), or upon the ground that the effect of the judgment would be to disturb the possession of the property or of some fund placed in the hands of the receiver by the appointing court, and where such property or fund was claimed by different sets of creditors and claimants awaiting final disposition of the property and fund by the court under whose order it was held by the receiver (Taylor et al. vs. Gillin et al., 23 Texas, 508; Field et al. vs. Jones et al., 11 Ga. 417), or where the receiver was appointed, not to continue the business, but merely to sell the property and apply the proceeds under order of the court (Hooper vs. Wurton, 24 Ill. 334). In the case before us the proofs taken by the referee show that the sum due the judgment debtor with which the receivers were charged as garnishees was due him as monthly payments or allowances under the operating department of the business of the railway, and hence the application of that sum upon the judgment against the creditors of the receiver to whom it would have been paid but for the garnishee process, in no way tends to disturb the rights of the receiver under the general orders of the appointing court, by which he is authorized to carry on the business of the railway and defray the current expenses thereof.

The receivers of a railroad in operation are not like the receivers of an ordinary insolvent. They are not appointed to wind up the insolvent estate and divide it among creditors, but to operate its road in lieu of its directors. Beach, Receivers, sec. 717.

They are nothing more than the road's operating custodians, charged with the tasks of managing the property while its debts are being subjected to adjustment and discharge, and they are amenable to all the liabilities which attach to a railroad company in the operation of its business. Meara's Admix. vs. Holbrook, 26 Ohio St. 137.

They may be sued, if appointed by a United States court, in any court having jurisdiction, without leave first obtained. Removal Act of March 3, 1887 (U. S. Stat. 1886-7, 552); Dillingham vs. Anthony, 37 Am. & Eng. R. Cas. 1.

So if appointed by any court of Minnesota, Gen. Laws Minn. 1893, ch. 54.

A garnishment proceeding is the institution of a suit against the garnishee as defendant. Wallace vs. Blanchard, 3 N. H. 395, 398; Ingraham vs. Oclock, 14 N. H. 243; Middleton Paper Co. vs. Rock River Paper Co., 19 Fed. Rep. 252; Whitman vs. Keith, 18 Ohio St. 134; 2 Wade Attach. 332; Drake Attach. 452; Malley vs. Altman, 14 Wis. 22;

Haines vs. O'Connor, 5, Bradw. (Ill.) 213. As such it may be brought against appellants without leave of court under the Removal Act.

Finally, garnishment statutes being remedial in their nature should be liberally construed. 8 Am. & Eng. Encyc. Law, 1104.

The receivers owed the debt to defendant absolutely, and it was subject to garnishment. Their "capacity to pay" the debt would be limited by the amount of the estate in their hands, but the extent or nature of their "liability" would not be. Dillingham vs. Anthony, 37 Am. & Eng. R. Cas. 1.

In answer to the point that a receiver is neither a "person" nor a "corporation," it is sufficient to say that a receiver of a railroad corporation while operating the property, is held "a person" in as far as he is in control in his individual capacity, and a "corporation" in as far as in his management he stands as a substitute for the insolvent company and its directors.

MITCHELL, J.—The garnishees were appointed by the U. S. Circuit Court for this district, receivers of the N. P. Ry Co., and while operating its road under the authority of that court became indebted to the defendant for labor and services. The plaintiff having a cause of action against the defendant for money due on contract brought an action for its recovery and sought therein to garnishee in the hands of the receivers the money due from them to the defendant. No question is made, nor could well be, but that, under the "Removal Act" of March 3, 1887, the receivers are subject to suit in respect to any transaction of theirs in operating the road, the only point made being that the money sought to be reached was *in custodia legis*, and hence not subject to garnishment.

No one will question the correctness of the proposition that property in the hands of receivers appointed by the court is *in custodia legis* and not subject to levy or garnishment. This doctrine receives additional force in this case from the rule of judicial comity between state and federal courts, by which each will refuse to interfere with property in the custody of the other, a rule which they are always solicitous to observe. But in this case it will be noticed that what is sought to be reached by garnishment is the property not of the railway company, but of the defendant, viz.: a debt due him from the receivers.

Moreover, while garnishment of a debt is often called a mode of attachment, yet it does not effect a specific lien on any property of the garnishees, such as is acquired by the actual seizure of property. The effect of the judgment is merely to determine the existence and the amount of the debt and to substitute the plaintiff for the defendant as the person to whom it is payable. The judgment against the receivers would not be against them personally, but against them officially. No executory process could be issued on it, for that would interfere with the control of the property in the custody of the federal court. The manner in which the judgment so rendered shall be paid must be under the exclusive control of that court. It can only be satisfied as other demands may be satisfied, viz.: by an application to the court in which the receivership proceedings are pending, for an order directing its payment in the due order of the settlement of the affairs of the insolvent company by that court.

Under the "Removal Act" the defendant himself could have sued the receivers and recovered judgment, and we are unable to see why the plaintiff may not, through garnishee proceedings, recover judgment against them for the same claim, or why a judgment in his favor interferes with property in the custody of the federal court any more than would a judgment in favor of the defendant for the same claim. We understand that the order of the court appointing these receivers is even

broader than the statute. The statute authorizes suit to be brought in any court of competent jurisdiction on claims against the company which accrued before the receivership, as well as those subsequently incurred by the receivers. We only refer to this as showing that the federal court does not consider such suits as at all interfering with its jurisdiction over the receivership, or with the property in its custody. In view of the fact that the receivers of railway companies, as ancillary to winding up the insolvent estate for the benefit of creditors, are authorized to operate the road in lieu of the directors—sometimes for years; any other rule would work great injury, and would often leave the creditors of the creditors of the receivers remediless.

There is nothing in the point that the indebtedness of the receivers is only contingent; the indebtedness is absolute; the only contingency is as to their ability to pay.

Buck, J., absent, sick, took no part.

Note.—In the case of U. S. Trust Co. vs. Omaha & St. L. Ry. Co., decided May 14, 1894, and reported in the number of the Federal Reporter dated July 10, 1894 (61 Fed. Rep. 531), the receiver of the railroad corporation appointed by the United States Circuit Court applied to the court for an order to compel parties claiming to be creditors of the employes of the road, who threatened to sue such employes and garnishee the receiver, to bring their actions by intervention in the pending proceedings in the federal court, and to enjoin the bringing of said actions in the state courts without leave therefor being first granted. The opinion of the court and the order granted, both of which were concurred in by Circuit Judges Caldwell and Sanborn, are printed in full below.

WOOLSON, District Judge. The following facts appear from the application of the receiver: The railway under his management extends from Council Bluffs, Iowa, into Davies county, Mo., thus lying partly in the State of Missouri and partly in the State of Iowa. Different persons, residing in the State of Missouri, and who claim to be creditors of employes engaged—in the State of Missouri—in operating and maintaining said line of railway, are about to institute, in the courts of the State of Iowa, actions for the collection of debts by said persons alleged to be due to them from said employes, and, as part of said actions, to attach, by garnishment proceedings against said receiver, the wages due to said employes for services by said employes performed in and about said railway and the maintenance and operation thereof; that said creditors of said Missouri employes will bring said actions in the State of Iowa, instead of in the State of Missouri, expecting thereby in said Iowa actions to secure judgments, effective against said receiver as garnishee, to an extent greater than such creditors could have secured, under the exemption statutes of Missouri, had such actions been brought in said State of Missouri, where said employes reside; that said employes are thus put to great hardship and loss in the matter, and the receiver to great trouble and expense if he be compelled to attend to the defense of said garnishment proceedings and to his relation thereto as garnishee defendant. Complaint is also made by the receiver as to similar actions about to be brought in the Iowa courts, by Iowa creditors, wherein said receiver is to be garnished. The receiver avers that said garnishment proceedings are "improperly brought, and such suits in the state courts are without jurisdiction, until leave to bring the same be first granted by this court;" wherefore the receiver asks for an order that all such actions as are above described be brought by intervention in the proceedings pending in this court, and for a writ of injunction enjoining the bringing of said actions in the state courts of Iowa, without leave therefor being first granted.

That the bringing of actions in the state courts by creditors of the employes engaged in connection with said railway, to be accompanied with garnishment of the receiver, must necessarily be attended with trouble and expense to said receiver, cannot be doubted. These actions, it is well known, are generally for comparatively small amounts and are brought mostly before justices of the peace, over widespread area, and in any county in which, under statutes of the state, service may be had. They thus become to the receiver a matter of serious inconvenience, if not of possible hazard, because of the judgments that may be therein rendered.

But to our mind there is a consideration of a much more serious nature. The railway company is in the hands of this court. Its employes are in the service of this court. It is the duty of the court, through its receiver and employes, to maintain and operate said road as efficiently as practicable. The court recognizes that these employes are generally dependent for their living upon the wages contracted to be paid them for their labor upon and in connection with said railway. These garnishment proceedings are instituted for the purpose of collecting debts due to outside creditors; and the intent is to seize and appropriate these wages—the livelihood—of these employes for the payment of such debts. In other words, the wages of the employes of this court, necessary for their present living, are, in these garnishment proceedings, to be diverted from such use. The effect must be to diminish the power of this court to operate the road. To take away the support of the employes is to cripple the efficiency of such operation, and this court is not powerless to prevent its employes from being starved out of its employ.

For the present purposes, it is not necessary to decide whether or not the actions above described may be brought without the leave of this court first granted therefor. If they may be brought without such leave, yet, by the provisions of the statute relating thereto (25 Stat. 433, sec. 3), payment by the receiver of the judgments therein rendered could only be made after this court had passed thereon. This statute expressly subjects such actions "to the (United States) court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice."

We hesitate to attempt a process of injunction which may in any event or to any degree affect actions pending or about to be brought in the courts of the state. The expressed will of congress and the uniform policy of the federal courts are opposed to the issuance of such injunctions, save in a very few exceptional cases, not necessary to be here described. In the present case we do not find such writ required. The effect desired can be otherwise attained. This court not only does not sanction, but it expressly disapproves of, the bringing of these garnisheeing actions. The power and practice of this court are ample for the consideration of such applications as may be necessary to decide with reference to the appropriation of the wages of the employes of this court to the payment of such debts; and such applications must be made to this court, before funds in the hands of the receiver will be permitted to be thus appropriated. From this court and its receiver is due, and cheerfully extended, to the courts of the State of Iowa, that considerate courtesy which such courts justly merit; but the receiver cannot be permitted to litigate therein matters relating to the wages in his hands belonging to the employes of this court. In this court is found the proper and accepted forum therefor.

The receiver is therefore directed, upon service of notice of garnishment upon him, as receiver, in said state courts, to file therein a certified copy of the order hereto appended, and thereafter to take no further part as such receiver in said action; and if, notwith-

standing the filing of such certified order, the claimant or plaintiff in such action shall prosecute said proceeding, such garnishing plaintiff or claimant will not be granted leave nor allowed to file herein the claim therein presented, or any judgment he may have obtained therein; nor will he be decreed or permitted to receive from said receiver or out of the funds in his hands, any costs therein incurred, or any wages or funds that may be due or that may belong to the alleged debtor in said garnishment proceeding.

CALDWELL and SANBORN, Circuit Judges, concur in the conclusion, and approve the order.

The clerk of this court will enter of record the following order, and furnish duly certified copies thereof to said receiver, upon his demand therefor:

Now, on this 21st day of April, A. D. 1894, there coming regularly on for hearing the application of J. F. Barnard, receiver of such railway company, heretofore duly appointed by this court, with reference to the action to be by him taken in garnishment proceedings against him, as hereinafter stated, and it being shown to this court that creditors of employes of this court, employed in the maintenance and operation of said railway company, are about to institute, in the courts of the State of Iowa, actions for the collection of debts alleged to be due from said employes to said creditors, and wherein it is intended that said receiver shall be garnished for wages alleged to be due, or that may hereafter fall due, to such employes for labor with reference to said railway, which said actions and said garnishment proceedings therein would cause said receiver great inconvenience, trouble and expense, which might be greatly lessened were said creditors to apply in such matters directly to this court, which is open and ready to attend thereto when application is made therefor; and it further appearing to this court that the efficency of said receiver in the maintenance and operation of said railway would be greatly impeded by the prosecution of said garnishment proceedings, and the appropriation therein of the wages of said employes,—it is therefore and hereby accordingly ordered that whenever said receiver is served with notice of garnishment, or any other notice, writ or process, issuing out of or pertaining to any of the courts of the State of Iowa, and whereby is sought to be attached, garnished, or appropriated any wages due, or that may become due, to any employe of this court, through said receiver, that, on or before the return day,—when by said notice, writ or other process said receiver is directed to appear or answer or make a showing with reference thereto, and whether under oath or otherwise,—said receiver do file with the officer serving said notice, writ or process, and with said court or the clerk thereof, as the case may be, a certified copy of this order, and do, as said receiver, respectfully decline to proceed further therein; and it is further ordered that, if any plaintiff or claimant in or under said garnishment action, notice, writ or process shall thereafter further proceed therewith in said state court, such plaintiff or claimant shall not be granted leave nor allowed to file in this court any application or claim for payment of or with reference to said claim so set up in said state court or judgment thereon (if any rendered thereon), nor shall he be decreed or permitted to receive therefor from said receiver or through this court, in any manner, any wages or funds that at any time may be in the hands of said receiver, which may be due or belong to any alleged debtor in such garnishment proceedings, nor the payment of any costs in such proceedings incurred.

THE DISTRICT COURTS.

WILLFUL NEGLIGENCE — Finding of. Proper Although Merely Simple Negligence is Alleged.

Action against Electric Street Railway company for damages caused by defendant's alleged negligence in so running its cars as to cause one of them to be propelled against a carriage in which plaintiff was riding, thereby injuring plaintiff. The jury returned a general verdict for plaintiff and two special verdicts as follows:

First question: Did the motoneer purposely, wantonly or recklessly run the car into or against the buggy in which plaintiff was riding? Yes.

Second question: Was the plaintiff guilty of any negligence which occasioned or contributed to the injury? No.

Defendant moved for judgment, notwithstanding the verdict, and upon the same being denied, for a new trial.

"By their verdict the jury find the defendant in fault with respect to the accident. By a special verdict they find plaintiff was not guilty of contributory negligence, in support of which there is sufficient testimony. It follows that plaintiff was entitled to recover unless defendant is right in its contention as to the court's instructions respecting willful negligence, and as to the effect of the further special verdict returned by the jury that 'the motorman purposely, wantonly or recklessly ran the car into or against the buggy in which plaintiff was riding.' The finding was not within the issues, unless a charge of negligence simply—without more—in the complaint was sufficient to make it so. Upon the trial, the court held against defendant's objection that it was within the issues, and in charging the jury they were instructed that plaintiff was entitled to recover provided the motorman was guilty of "willful negligence," if "apprehending the plaintiff's danger" he "recklessly and wantonly drove the car along and brought about the collision without regard to the situation," and similar language is elsewhere used in the instructions. So that whatever may be claimed as to the special verdict by reason of its being in the disjunctive form, it is very clear that the jury, under the instructions given, may have found that defendant's servant was guilty of willfully running into plaintiff's buggy. Defendant insists that since willful negligence was not specifically alleged, no recovery can be had therefor, and that the verdict negatives any other kind of negligence; that a finding of willful negligence on the part of the defendant will not sustain a verdict, when the complaint charges simple negligence only; that simple negligence and willful negligence are different, distinct and separate causes of action. This view would seem to have some support in authorities cited from other states, and the question has not apparently been passed upon in the supreme court of this state in any case where the point was decidedly made. In Evarts vs. St. P., M. & M. Ry. Co., 57 N. W. Rep. 459, the language used is suggestive of a rule contrary to defendant's contention, and would seem to support the charge of the court in the case at bar. See also Hoxsie vs. Empire Lumber Co., 41 Minn. 548, in an action for conversion, in which the court says that the question whether the act was willful or not was one of proof and not of pleading, and simply went to the measure of damages. A negligent act is a wrongful act, and it is the wrongful act which gives rise to the cause of action. Whether purposely, or carelessly and recklessly done, does not affect the right to recover for resulting injuries, and it is material only in respect to the question of damages. It is a very common, if not universal, practice of this court, in actions to recover damages for personal injuries,

grounded on negligence, to charge, when the evidence seems to justify it, that if the wrongful act was wanton, willful and in reckless disregard of plaintiff's rights, so that malice might be inferred, punitive damages might be imposed, but under defendant's contention, if so found and not pleaded, or if pleaded and not so found, there could be no recovery at all, for the reason that they constitute separate, distinct and different causes of action. Under our liberal rules of pleading I cannot concur in this view. It seems to me that the willful doing of a wrongful act is "the failure to exercise reasonable care," which is the ordinary definition of negligence, and that whether the failure to exercise reasonable care was by reason of an intention to do just what was done, or otherwise, does not affect the right to recover, though it might have some bearing upon the measure of damages." Motions denied.

OTIS, J.

Bone vs. The St. Paul City Ry. Co., Second district. No. 54412. Butts & Jacques for plaintiff; Munn, Boyeson & Thygeson, for defendant.

ASSIGNEE FOR BENEFIT OF CREDITORS —Examination of Third Parties—Upon Proper Cause Shown the Court Will Order Either Third Parties or the Assignor to Appear Before It or a Referee and Answer Proper Questions Touching Any Improper Disposition of the Assigned Estate by the Assignor Previous to the Assignment.

Motions were made on behalf of Frederick Stoppel et al. to restrain an assignee from examining them or compelling them to give evidence and submit to an examination before a referee appointed by the court touching an alleged improper disposition of a portion of the assigned estate by the assignor. Motion denied as to the third parties on the ground that the moving papers were insufficient.

1. While a decision of his motion might be placed upon the technical grounds that all of the alleged facts set forth in the moving papers are admitted by the assignee to be true, there being no counter affidavits, yet it is important that the practice as to the examination of insolvents and others under the provisions of our insolvent law of 1881 should be settled. This involves a consideration of the question: 1. Does the right to so examine exist? 2. If so, how shall the right be exercised?

Of these in their order:

2. If the right to examine the insolvent and third persons, either or both, generally as to the business affairs and dealings of the insolvent when no action or special proceeding is pending, exists, it must be given directly or by necessary implication by statute. There is no specific and particular provision of the law authorizing it. In this respect the insolvent act of 1881 differs, radically, from the Federal Bankrupt law of 1867, which expressly provided for the examination of the bankrupt, his wife and third persons on the order of the court, based upon a proper application showing good cause for ordering the examination.

The omission of a similar specific provision in the act of 1881 would be an important factor in construing the law if it was the only omission in the act, but the fragmentary provisions of the act upon important matters indicates that this omission was not intentional, and is therefore not significant. This act of 1881 created, in effect, a new tribunal whose proceedings are not at law, or according to the common law, but are analogous to proceedings in a court of equity. It is, in its essential features, a bankrupt act, and should be liberally construed with reference to its manifest purpose and spirit.

Wendell vs. Lebon, 30 Minn. 234.

The right of the court, in a proper case, to order the examination of the insolvent and third parties is essential to a full and practical administration of any bankrupt law. Without this

right, insolvency proceedings would, in very many cases, prove ineffectual, for it is of the first importance that the assignee or receiver should be fully advised of all the business dealings and transactions of the insolvent, of the condition and disposition of his property, of preferences and fraudulent transfers made by him, if any, and of his debts and credits. If the insolvent is hostile to the assignee, and he usually is where the assignee seeks to set aside preferences and transfers, this necessary information can only be obtained by an examination of the insolvent. In case the examination of the insolvent is alone insufficient to advise the assignee in the premises, the examination of third parties might be necessary and proper; for example, to enable him to pass intelligently upon the claim of an alleged creditor, or to determine the advisability of instituting actions to set aside preferences. In all such cases an order of the court directing a compulsory examination of the insolvent and directing third parties to appear and be examined, upon being properly subpoenaed, would be manifestly necessary and proper to carry into full effect the provisions of the law. Therefore the court is given by necessary implication the power to so order, for the statute provides that the court may make "all orders necessary or proper to carry into full effect the provisions of the law."

Laws 1889, ch. 30, sec. 2.

By the original act the court was limited to ordering the insolvent to do whatever was necessary and proper to carry the law into effect.

Laws 1881, ch. 148, sec. 2.

The change made by the amendment of 1889 is significant.

2. While this right exists the court can only exercise it when it is necessary and proper; this necessarily implies that an application or petition, making a prima facie case of necessity and propriety for the examination, must in all cases be presented to and acted upon by the court. The order should in no case be granted except upon good cause shown.

Bump, Bankruptcy, 9th Ed., p. 192.

In case of third parties a much stronger case should be made out than in the case of the insolvent, for they are not parties to the proceedings, no action is pending and the examination is inquisitorial in its nature. If the assignee has commenced an action against third parties to set aside a preference or fraudulent transfer, an order for the examination of the defendants should be denied in all cases where the manifest object and purpose of the examination is to cross-examine them as to their defense and elicit evidence to be used against them on the trial of their case. To permit the assignee to institute such an inquisition, with his attorney present to propound only such questions as would make against the defendants, while they are deprived of the benefit of counsel (a witness is not entitled to counsel) and compel them to answer the questions only in the form put, would be manifestly unfair, and the court would not lend itself to such iniquity.

If the assignee, in good faith, deems an examination of third parties necessary and proper to enable him to collect and marshal the assets of the estate and makes a showing to the court which justifies it, the court would grant an order for such examination whether the witnesses were defendants in a pending action or not; but in the latter case care would have to be taken to protect the rights of both the assignee and the defendants.

3. The application and order in this case for the examination of the insolvents were strictly in accordance with the practice here indicated. No order for the examination of third parties has ever been asked for. The application for the examination of the insolvents contains not the slightest hint of such a purpose.

The order in controversy was made upon this applicaton, and should be construed as granting only its prayer by an examination of the insolvents alone.

The modification of the order made is for this purpose. START, J.

In the matter of the assignment of Holden R. Smith et al., Insolvents, Third district, Olmstead county. Messrs. Thomas Spillane and Geo. W. Granger, attorneys for Frederick Stoppel et al.; Chas. C. Willson, attorney for assignee.

PLEADING MUST BE SIGNED BY ATTORNEY—General Statutes 1878, Chapter 66, Section 103—Judgment for Want of a Reply.

On March 6, 1894, defendant was served with a summons and complaint in an action in the District Court of Hennepin county. The summons and complaint were not subscribed by an attorney, but by plaintiff, who was not an attorney at law, as plaintiff.

On March 26, 1894, defendant duly served on plaintiff an answer setting up new matter requiring a reply. The same day defendant's attorney was served with a reply and a notice of trial, both of which were signed by plaintiff alone.

Within 48 hours defendant's attorney returned the reply and notice of trial to defendant personally, notifying him in writing that they were returned because "not signed or subscribed as required by statute."

On April 3d, when the calendar was called, defendant moved to strike the case from the calendar, on the ground that no reply or notice of trial had been served. On April 5th the motion was argued by counsel for both parties, and denied, as the court would not examine the pleadings to determine whether the case was at issue or not.

The time for serving a reply expired April 16, and on June 9, 1894, defendant moved for judgment for want of a reply.

HERCHMER JOHNSTON for defendant. Gen. St. 1878, ch. 66, § 103, is mandatory and requires every pleading in a court of record to "be subscribed by the attorney of the party." Our law is taken from the law of New York and not from Michigan or Wisconsin; (See Wait's Annot. N. Y. Code, p. 280, sec. 156; Rev. Stat. Minn. 1851, ch. 70, sec. 73; Comp. Stat. Minn. 1858, ch. 60, sec. 77) and until adoption of Rev. Stat. of 1866 allowed pleadings to be signed "by the party or his attorney." In 1866 the present law was adopted. (See page 555 of Commissioner's Report and page 461 of Gen. Stat. of 1866.) In New York, Michigan and Wisconsin the statutes authorize a party to prosecute or defend an action in his own name; (see Rev. St. N. Y. Ed. 1875, p 439, sec. 25; Rev. St. Wis. 1849, ch. 87, sec. 27; Howell's St. Mich. 1882, sec. 7252), and in Michigan and Wisconsin the right is conferred by the constitution expressly. (See Const. Mich., art. VI., sec. 24, How. St., p. 54; Const. Wis., art. VII., sec. 20, Rev. St. 1878, p 28.) No such privilege has ever been conferred by constitutional or legislative enactment in Minnesota. Under the present code in New York, which is the same as our section 103, the failure of an attorney of the party to sign a pleading is fatal. (See Johnson vs. Winter, 7 Albany Law Jr. 135; Schiller vs. Malthie, 11 N. Y. Civ. Proc. Rep. 304; Duvall vs. Busch, 13 N. Y. Civ. Proc. Rep. 366, 14 N. Y. Civ. Proc. Rep. 8.) A motion for judgment for want of reply is proper. (See Duvall vs. Busch, 14 N. Y. Civ. Proc. Rep. 8.)

G. S. GRIMES, for plaintiff, cited Gen. Laws 1891, ch. 36, sec. 7, 8; District Court Rule IV. Constitution, art. I., sec. 8.

On June 23, 1894, Ordered, that the motion for judgment be granted, with costs, unless plaintiff within ten days serve a reply to the answer.

POND, J.

Hainert vs. Howard, Fourth district. No. 6049S. Hennepin county.

BOND—Improper Execution by Principal—How to Be Taken Advantage of by Sureties.

Action by the city to recover on a bond given to it by a bank which had been duly designated as a depository of the city's moneys, and the bank having become insolvent while having in its possession a large amount of the city's funds. The defendant bank and four of the sureties on the bond jointly demurred to the complaint, and one surety severally demurred, all on the ground that the complaint did not state facts sufficient to constitute a cause of action. The complaint alleged that the bond was properly executed, but the copy thereof attached to the complaint was not properly executed by the bank.

"The principal objection to the complaint is that Exhibit 'A,' attached thereto, is not properly executed by the bank which is described therein as principal, the specifications to said objection being that the corporate seal of the bank is not attached to said instrument, and that it is signed by the cashier alone, and not by him and the president, as required by law.

"The demurrer is joint and must be good as to all the demurrants in order to be sustained.

"The case of Martin vs. Hornsby et al., 56 N. W. Rep. 751, is invoked to sustain the contention of the sureties, Marshall, Zimmerman and Carlson, that they cannot be held liable on such an instrument. The complaint here alleges that said instrument was duly made, executed and delivered by the defendants, that is, both by the bank and by said sureties. This is sufficient on demurrer to admit of proof upon the trial that the cashier was duly authorized by the bank to execute the instrument, or that the bank is estopped to assert the contrary, and that the instrument was executed and delivered by the sureties so as to estop them also from questioning their liability upon it.

"Very different questions were presented in Martin vs. Hornsby, supra, which was tried upon the merits, than are presented here upon demurrer. None of the cases examined by me in the trial below of Martin vs. Hornsby, or cited on appeal in the Supreme Court, go to the extent claimed here." Demurrer overruled. Separate demurrer of defendant Banholzer also overruled.

KERR, J.

City of St. Paul vs. The Seven Corners Bank et al. Second district. No. 53916. Leon T. Chamberlain, for plaintiff; E. J. Darragh and Bowe & Woodruff, for defendants.

SUPPLEMENTARY PROCEEDINGS—Checks on a Bank Signed and Delivered Constitute a Transfer of the Fund Drawn Against, Although Not Presented to or Paid by the Bank.

It appeared that on May 21, 1894, defendant had in a bank certain moneys, and that on said day he signed and delivered checks drawn on the said bank, and that also on said day an order in supplementary proceedings containing the usual clause forbidding defendant to transfer his property was served, but whether before or after the delivery of the checks was not made to appear.

"With respect to the moneys realized on account of the benefit given to defendant, the evidence in said proceedings supplemental discloses that certain money was received by defendant, or for his use, prior to May 21, 1894, the day when the order in supplementary proceedings was served on defendant; but that all the money so received was on May 21st applied to the payment of an indebtedness of defendant to one Jacob Litt by checks on the bank against said fund. Whether these checks were given before or after the service on defendant of the order in proceedings supplemental does not appear, and I think it was incumbent on plaintiffs to make it appear that the money was then in defendant's hands undisposed of in order to entitle them

to the order of this court that such money be paid over by defendant to the sheriff, with contempt of court as the alternative.

"That the checks so given by defendant were not paid by the bank until the 22d or 23d of May is of no moment. If the checks on that specific fund were signed and delivered before said order was served on defendant, that was tantamount to a transfer of the fund, to that extent, to the payees of the checks." KERR, J.

Griggs, Cooper & Co. vs. F. L. Bixby. Second district. No. 51176. Morphy Ewing, Gilbert & Ewing, for plaintiff

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PLEADING—No Right to Answer After Frivolous Demurrer Stricken Out.

Defendant demurred to plaintiff's amended complaint. On motion under General Statutes 1878, chapter 66, section 99, the demurrer was stricken out as frivolous, and judgment for failure to answer entered. Defendant moved that the judgment be vacated, and that she have leave to answer. Motion denied.

"The defendant demurred to plaintiff's amended complaint, and her demurrer was stricken out as frivolous. She asks leave to answer. Leave to answer is denied for the reason that the court has no power to grant the same. Wood's VanSanvoord Plead., 3d Ed., 77d. We have no statute authorizing it, and without one I am of opinion that the court has no discretion in the premises. Such was the rule in Wisconsin (Bank vs. Sawyer, 7 Wis. 383) until changed by statute, Lordell vs. Insurance Company, 8 N. W. Rep. 280 (bottom page)."

CALVIN L. BROWN, J.

Perry vs. Reynolds, Sixteenth district, Grant county. C. M. Stevens, for plaintiff; A. C. Brown, for defendant.

COSTS BY STATUTE—Not Allowed Where Judgment Is Rendered for Defect of Parties Defendant, and Case Continued to Allow Plaintiff to Join Necessary Parties.

Action upon an express contract for services performed and goods sold and delivered. One of the defenses alleged was a defect of parties defendant, which defense was sustained. Application was made for leave to amend the summons and complaint joining all the necessary partes defendant. The action was continued over the term that plantiff might be able so to amend, and serve the papers as amended. Defendant taxed as costs and disbursements among other items "Statute Costs, $10." From this taxation appeal was taken.

Ordered, that the clerk's taxation is modified by striking out the item "Statute Costs, $10," and in other respects affirmed. OTIS, J.

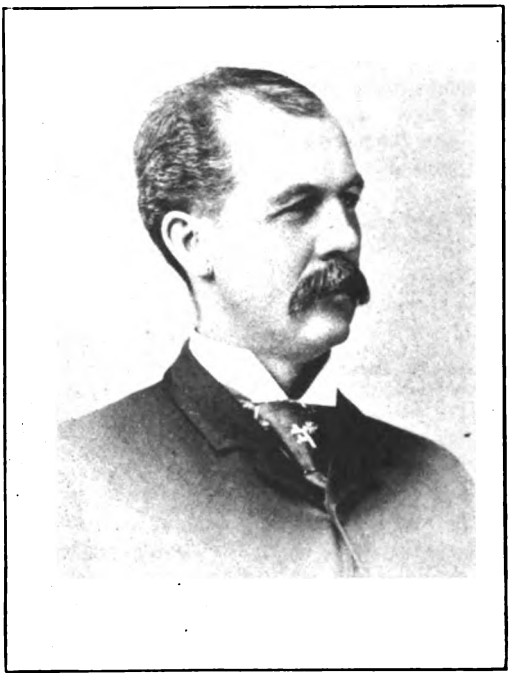
W. M. Pike et al. vs. J. S. Robertson. Second District. No. 54528. Frederick A. Pike, for plaintiff; Sanborns for defendant.

REPLEVIN—Failure of Plaintiff to Appear—Judgment for Defendant Therefor Erroneous.

Property was seized under a writ of replevin issued by a justice of the peace. On the return day plaintiff failed to appear. No pleadings were filed, witnesses sworn or evidence introduced, but on the ground of the non-appearance of defendant judgment was entered that the defendant was entitled to a return of the property or its value. On appeal on questions of law, Ordered, that the court below modify its judgment so as to dismiss the action without prejudice, ordering a return of the property to defendant, but with costs against plaintiff.

START, J

Karan vs. Mott, Olmstead county.



HON. GEORGE W. HOLLAND,

DISTRICT JUDGE, FIFTEENTH JUDICIAL DISTRICT.

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BOYCOTTS AS CONSPIRACIES.

SINCE the decisions of Judges Ricks and Taft, in the Circuit Court for Ohio, in the Ann Arbor cases last summer, the question of what acts of labor organizations are lawful and what are not, has not been much considered by the courts until brought to their attention by the late strike and boycott.

Several interesting decisions have lately been rendered, and the law has been laid down by eminent authorities in such a way as, we should apprehend, would make clear to labor organizations that the courts and people of the country will not permit such a condition of things as has recently been witnessed to exist.

One of the clearest statements of the law of boycotts and conspiracies ever delivered is found in the charge of Judge Grosscup to the Federal Grand Jury, recently called in Chicago to deal with these questions, and we quote liberally from it.

Judge Grosscup said in part:

"You have come in an atmosphere and amid occurrences that may well cause reasonable men to question whether the government and laws of the United States are yet supreme. Thanks to resolute manhood and to that enlightened intelligence which perceives the necessity of vindication of law before any other adjustments are possible, the government of the United States is supreme.

"You doubtless feel, as I do, that the opportunities of life, in the present conditions, are not perhaps entirely equal, and that changes are needed to forestall some of the tendencies of current industrial life; but neither the torch of the incendiary nor the weapon of the insurrectionist, nor the inflamed tongue of him who incites to fire and the sword is the instrument to bring about reforms. To the mind of the American people, to the calm, dispassionate, sympathetic judgment of a race that is not afraid to face deep changes and responsibilites there has as yet been no adequate appeal. Men who appear as the advocates of great changes must first submit them to discussion, discussion that reaches not simply the parties interested, but the wider circle of society, and must be patient as well as persevering, until the public intelligence has been reached and the public judgment made up. An appeal to force before that hour is a crime not only against the government of existing laws, but against the cause itself; for what man of any intelligence supposes that any settlement will abide which is induced under the light of the torch or the shadow of an over-powering threat?

"The law as it is must first be vindicated before we turn aside to inquire how the law or practice as it ought to be can be effectually brought about. Government of law is in peril and that issue is paramount.

"The government of the United States has enacted laws designed, first, to protect itself and its authority as a gov-

ernment; and second, to protect its authority over those agencies to which, under the constitution and laws, it extends governmental regulations. For the former purpose, namely, to protect itself and its authority as a government, it has enacted that every person who entices, sets on foot, assists or engages in any rebellion or insurrection against the authorities of the United States or the laws thereof, or who gives aid or comfort thereto, and any two or more persons in any state or territory who conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against it or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States, contrary to the authority thereof, shall be visited with certain severe penalties named therein.

"Insurrection is a rising against civil or political authority, the open and active opposition of a number of persons to the execution of law in a city or state. The laws of the United States forbid, under penalty, any person from obstructing or retarding the passage of the mail, and make it the duty of the officers to arrest such offenders and bring them before the court. If, therefore, it shall appear to you that any person or persons have willfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection within the meaning of the law has been established; and he who by speech, writing, promise, or other inducement, assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty also of a violation of law.

"It is not necessary that there should be blood shed. It is not necessary that its dimensions should be so portentous as to insure probable success to constitute an insurrection. It is necessary that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are indequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents, and every person who knowingly incites, aids, or abets them, no matter what his motive may be, is likewise an insurgent. This penalty is severe, and, as I have said, is designed to protect the government and its authority against direct attack.

"The mails are in the special keeping of the government and laws of the United States. To insure their unhindered transmission it is made an offense to knowingly and willfully obstruct or retard the passage of the mails, or any carriage, horse, driver, or carrier carrying the same. It is also provided that if any two or more persons conspire together to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, all the persons thereto shall be subject to a severe penalty.

"Any person knowingly and willfully doing any act which contributes or is calculated to contribute to obstruct or hinder the mails, or who knowingly and willfully takes a part in such acts, no matter how trivial, if intentional, is guilty of violation of the first of these provisions, and any person who conspires with one or more other persons, one of whom subsequently commits the offense, is likewise guilty of an offense against the United States.

"The constitution places the regulation of commerce between the several states and between the states and foreign nations, within the keeping of the United States government. Anything which is designed to be transported, for commercial purposes, from one state into another, and is actually in transit, and any passenger who is actually engaged in such interstate commercial transaction, and any car or carriage actually transporting or engaged to transport such passenger or thing, are the agencies and subject matter of interstate commerce; and any conspiracy in restraint of such trade or commerce, is an offense against the United States.

"To restrain is to prohibit, limit, confine or abridge a thing. The restraint may be permanent or temporary. It may be intended to prohibit, limit or abridge for all time or for a day only. The law draws no distinction in this respect. Commerce of this character is intended to be free except subject to regulation by law at all times and for all periods. Any physical interference, therefore, which has the effect of restraining any passenger car or thing constituting an element of interstate commerce, forms the foundation for this offense.

"But to complete this offense, as also that of conspiracy to obstruct the mails, there must exist, in addition to the resolve or purpose, the element of criminal conspiracy.

"What is criminal conspiracy? If it shall appear to you that any two or more persons corruptly or wrongfully agree with each other that the trains carrying the mails and interstate commerce should be forcibly arrested, obstructed and restrained, such would clearly constitute a conspiracy. If it shall appear to you that two or more persons wrongfully agreed with each other that the employes of the several railroads carrying the mails and interstate commerce should quit, and that successors to them should by threats, intimidation or violence be prevented from taking their places, such would constitute a criminal conspiracy.

"I recognize, however, the right of labor to organize. Each man in America is a freeman, and so long as he does not interfere with the rights of others has the right to do with that which is his as he pleases. In the highest sense a man's arm is his own, and aside from contract relations no one but himself can direct when it shall be raised to work or be dropped to rest. The individual option to work or to quit is the imperishable right of a freeman, but the raising or dropping of the arm is the result of a will that resides in the brain, and much as we may desire that such will should remain entirely independent there is no mandate of law which prevents their association with others or their responsibility to a higher will.

"His right to choose a leader, one who serves, thinks and wills for him, a brain skilled to observe his necessity, is no greater pretension than that which is recognized in every other department of industry. So far and within reasonable limits, associations of this character are not only not unlawful, but are in my judgment beneficial when they do not restrain individual liberty, and are under enlightened and conscientious leadership. But they are subject to the same laws as other associations.

"The railroads carrying the mails and interstate commerce have a right to the service of each of their employes and until each lawfully chooses to quit, and any concerted action upon the part of others to demand or insist under effective penalty or threat upon their quitting, to the injury of the mail service or the prompt transportation of interstate commerce, is a conspiracy unless such demand of insistence is in pursuance of a lawful authority conferred upon them by the men themselves, and is made in good faith in execution of such authority. The demand

and insistence under effective penalty or threat, injury to the transportation of the mails or interstate commerce being proven, the burden falls upon those making the demand or insistence to show lawful authority and good faith in its execution.

"I wish again, in conclusion, to impress upon you the fact that the present emergency is to vindicate law. If no one has violated the law under the rules I have laid down, it needs no vindication; but if there has been such violation there should be quick, prompt and adequate indictment."

Judge Grosscup's charge was delivered July 10, 1894, and a few days later, Judge W. A. Woods, of the same court, passed upon a phase of the same question in the proceedings aginst Debbs et al., for contempt in disobeying the general injunction previously issued. In the course of his remarks, in denying a motion to discharge, Judge Woods says:

"The substantial matter in this case is in respect to the motive of your action, I mean the averment that your purpose was to prevent the use of Pullman cars already in possession of railroad companies. Now, the Pullman cars, whether owned by the railroad companies or held by contract of lease, or by whatever arrangement, after they had passed into the use of the railroad companies became instruments of interstate commerce and, therefore, within the direct protection of this statute of July 2, 1890, and the information sufficiently shows that the motive of your movement and effort, not to use the word "strike," was to prevent the railroad companies using these cars.

"Now, if you had had difficulty with the Studebaker Wagon Works Company it would have been just as competent to start a movement by which every farmer throughout this land would be required to abandon the wagons that he had bought of Studebaker and perhaps had had in his possession for years. In other words, your effort is misdirected, it is unlawfully directed. Whatever may have been your rights with regard to sympathy with the Pullman employes, you had no right to extend your operations to an interference with Pullman cars that had already passed into the use of the agencies and instrumentalities of interstate commerce.

"Therefore, your effort to do that was necessarily unlawful,and anything done to accomplish that purpose in the way of combination or conspiracy, whether it was to advise the men to quit employment or to intimidate them to quit or to throw any other obstruction in the way of the use of those cars, was an illegal effort.

"Now, there is no question involved here of the right of railroad laborers, or any other class of laborers, or all laborers, to combine, to organize and to choose a head, and to have the benefit of that head,—entitled to take the advice and counsel of the men thus chosen, —but it must always be advice to do a legal thing. If it is advice to do an illegal thing it will come within the powers of a court of equity, exercising its function of issuing or refusing an injunction, according to the nature of the thing itself. It may or may not be cause for injunction. That would depend upon the equitable principles applicable to that subject. This statute of 1890 relieves the court of the necessity of looking to the general equitable doctrine, because it expressly confers upon the court the express power to restrain—it confers upon the United States the power to apply in equity and the power upon the court to exercise its authority in the way of issuing injunctions or restraining orders to prevent that kind of thing. Now, that is the foundation on which this matter starts and rests."

Another view of the question is that taken by District Judge Baker, in the United States District Court for Indiana (Lake Erie & W. Ry. Co. v. Bailey et al., 61 Fed. 494), in passing sentence upon strikers who had been found

guilty of contempt in disobeying a similar injunction. He says:

"It is laudable for men, whether they are day laborers or are engaged in other vocations of life, by organization to take any lawful course for the purpose of bettering their condition; but it must be done according to those principles that lie at the very foundation of the social compact. Man was created for organized society; and in order that society shall exist, whatever may be the form of government, it is absolutely indispensable that the great fundamental and God-given right of every human being, unrestrained and unintimidated, to labor and enjoy the fruits of his toil, should be protected. There is little excuse for labor to organize, and, by unlawful means, attempt to overthrow the law. Society is organized under our form of government on the recognition of man's rights as man. If society were overthrown, and men turned back into conditions of anarchy, as they were, in large measure, during the dark ages, when power and force made right, the condition of the laboring man would not be bettered. If such were the condition of society, the man or the men with great intellectual power and great wealth would become the masters of the laboring classes as in those dark ages, and the laborer would be little better than a slave. The effort of these defendants, as the evidence in this case shows, is an effort, not only to overthrow the law, but also an effort to overturn the just authority of the courts. To permit this would be an offense, not only against society, but against the laboring men themselves. In the convulsions of society, when law becomes silent and force reigns, it is the humble and the poor and the powerless that become the victims. The condition of things that is evidenced by these strikes is well calculated to impress thoughtful men with their danger. I do not know but that I am a little old-fashioned in my notions, but I confess that I cannot look with any degree of tolerance on the false and dangerous teachings of those who actively, or by their silent acquiescence, are leading labor organizations to think that, because they are organized in associations, they have the right to seize property, or, by intimidation, to prevent well-disposed people from laboring. In my judgment, it is no less criminal for an organized body of men to commit these wrongs than it would be for a single man, armed with bludgeons or revolvers, to commit the same wrongs on the persons or property of others. I confess that, so far as I can see, if my property or personal rights are invaded by a body of men who call themselves "organized laborers," there is no more distinction, either in the view of God's law or human law, than if the same things were done by a single individual. Indeed, it would be more tolerable if it were done by the midnight robber in the silent watches of the night than if it were done by an organized body of men.

"In this case the evidence shows that there are a number of men who belong to a secret labor organization whose ramifications reach, not only over the entire extent of the United States, but into Canada as well. It has kindred associations by other names in Europe. All these organizations have the same general aim, and that is by force, violence and terrorism to compel their employers to submit their business, their property and their means of livelihood to the arbitrary demands of these associations. In their secret, oath-bound assemblies they determine for themselves on what terms they will work for others. They refuse those who are not members of their association the right to labor when they desire to do so. Those who will not submit to their exactions have no more option about carrying on their business than has the belated traveler when a highwayman presents a revolver, and bids him submit. As I say, I do not see any difference,

either morally or legally, between this sort of business, where an organized body of men combine for the criminal and unlawful purpose of compelling somebody else, against his will, to submit to their demands, than if the same thing were done by a single individual. If they compel submission, it is robbery, because whoever compels me, by force or terrorism, to give up one dime of my money, or one dime's worth of my property, is equally guilty, whether it be the man who meets me on the street corner in the night-time, or an organized band of strikers who take possession of my property and deprive me of its use. But these combinations are infinitely worse than isolated violations of the law, in that they teach general disregard and contempt of law. They make people think that human rights are of no value. They teach the fantastic and monstrous doctrine that a man who is hired to labor, and is paid for his work, has some sort of equitable right in the property of his employer, together with a right of perpetual employment. It has been said on the floor of the United States Senate that the laborer has a sort of equitable lien on the property of the man for whom he works, whose money bought the property, together with the right of perpetual employment. It may do for men that are reckless of the welfare of human society—who care nothing for its peace and good order—to imperil life, property and liberty, and the perpetuity of our institutions, by teaching such doctrines, but the judge who tolerates it ought to be stripped of his gown, and be driven from the sacred temple of justice. I think these men have been misled; I think they have been deceived by false teachers; but still they ought to have known better than to violate the law of the land, and to trample under foot the solemn processes of the court. I want it to be understood, so far as this court is concerned, that such offenses will not be deemed trivial, and that the law cannot be violated with impunity by any combination of men, under whatever name they may clothe themselves. They will not be permitted to violate the law, and then set themselves above the court. I think that such organizations for lawful purposes are to be commended. But when these organizations, as I said on yesterday, combine and confederate for the purpose of seizing other men's property, or when they undertake, by force and intimidation, to drive other men away from employment, and thus deny them the right of earning a livelihood, they commit a crime,—they commit a crime that this court cannot suffer to go unpunished. There ought to be blazed on the minds of every one of these men that belongs to a labor organization, as with a hot iron, so that they shall know and understand it, that, while it is lawful and commendable to organize for legitimate and peaceful purposes, it is criminal to organize for the invasion of the rights of others to enjoy life, liberty and property."

We are also able to give in part the view of the Hon. Austin Abbott, Dean of the Law School of the University of New York. He reviews the legal aspect of the matter as follows:

"The origin of the present difficulty is that certain mechanics who have been in the service of the Pullman Company are unwilling to work for the wages offered by the company, and claim that the company can and should offer higher wages.

"The employers refuse, and the general sympathy for the unfortunate mechanics, whose share of the general hard times upon us all is conspicuous, has engendered in the minds of great numbers of working people in their neighborhood a desire to punish the employers, or compel them by some infliction to offer more wages.

"Now, it happens that these employers — the Pullman Company — own a large part of those traveling conveniences on the railroads throughout the country which have become an indispensable comfort for all, and a neces-

sity for women and children, upon long journeys; and these conveniences—the sleeping and dining cars, with the porters and attendants provided by these owners, the Pullman Company—are run by the railroad companies all over the country under continuing contracts made between the railroad companies and the Pullman people. The point at which the retaliation of the sympathizing workmen has been adroitly aimed is to induce the railroad companies to break their contracts with the Pullmans and thus render the Pullman car property unproductive. The trainmen, in great numbers, in effect, say to the Chicago railway managers, 'If you do not break your contracts with the Pullmans we will no longer run your trains.' In action they have gone beyond this, by violent obstruction of tracks and destruction of cars.

"This is what, in private life, is called malicious interference with contract. If it were done by a few men, on a small scale, actions for damages would soon convince the wrong-doers that they had misconceived their rights. But it is done on so vast a scale that an action for damages would be as ludicrous as it would be to whip the boy whose forbidden playing with matches burned up the city of Portland. The great number of wrong-doers, and the obvious inadequacy of actions for damages, has practically made them feel quite indifferent to the law; and the disorder has spread day by day.

"On July 3d, the president ordered certain United States regulars to proceed to Chicago to enforce the observance of the laws, the United States Judge, Marshal and District Attorney having certified to the president that, in their judgment, it was impracticable to otherwise execute the orders of the court. This step is authorized by the United States Revised Statutes, Section 5299.

"The president deserves the highest commendation, in these times of trimming and time-serving politics, in acting upon the line of his constitutional and sworn duty. It is not the place of an American executive, sworn to enforce the laws, to sit still in the face of even exaggerated accounts of public disorder, and plead that he is able to quell it, but no one has asked him to do so. He should be moved by his oath even if the crowd ask him not to interfere.

"So far as the misguided men who are combining in these lawless contests are concerned, it seems plain that they have much to learn. They have tried the power of combination, and have found it great. They are now about to try the power of the law, and they will find it far greater. The American people have not enjoyed liberty and self-regulated order these four generations for nothing. They will maintain their inheritance and will support the hands of their chief magistrate and commander-in-chief to the very last. The experiment that the strikers are trying is a very inconvenient one to the country. It cannot be other than a painful and disastrous one to themselves, their families, their industries and their city. But the lesson seems needed, and good citizens can only hope that it will be taught as effectively as the stoppage of violence requires."

To these views nothing can be added. But it is safe to predict that we have seen the last great railway strike, for the present century, at least, and moreover, the whole people have been given an excellent illustration of the power and dignity and of the law as administered by our federal courts.

GEO. H. SELOVER.

OPINIONS OF THE ATTORNEY GENERAL.

CITY OF ST. PAUL—Provisions of Charter of Directing That Assemblymen Live in Certain Districts Invalid.

ELECTIONS—Vote of Precinct to Be Canvassed if There Has Been a Substantial Compliance With the Law in Holding the Election.

LEON T. CHAMBERLAIN, ESQ.,
Corporation Attorney,
St. Paul, Minn.

Dear Sir: In your communication of the 7th inst. you call attention to a provision of the city charter of St. Paul prescribing the territory from which the respective assemblymen of the city shall be selected, and inquire, in effect, whether it shall be observed by the board of canvassers in determining the election of candidates for the assembly.

In replying to your inquiry, attention is called at the outset to sec. 7 of article 7 of the state constitution, which reads as follows:

"Sec. 7. Eligibility to office.—Every person who, by the provisions of this article, shall be entitled to vote at any election, shall be eligible to any office which now is, or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this constitution or the constitution or laws of the United States."

So far as material, your city charter provides that "the members of the assembly shall be elected at large from the body of the electors of said city, and four of the same shall reside east of Wabasha and Rice streets and north of the Mississippi river, and four shall reside west of Wabasha and Rice streets and north of the Mississippi river, and one shall reside in the Sixth ward of said city." (S. L. 1891, C. 6, S. 11.)

It is elementary that the legislature cannot impose upon an elector qualification for office not contemplat the constitution. The supreme of this state, in the case of Sta Clough, 23 Minn. 17, referring t provision of the constitution quoted, say that nothing can be to, or taken from, it. There is of decisions supporting legislatic quiring such conditions as tha cumbents be skilled incident to respective offices, or that they lected from political parties, or th their selection honorably disch soldiers shall be preferred. It w cently held by our own supreme that a statute requiring an inspec buildings to possess certain qua tions, is valid. (State vs. Starke Minn. 503.)

This view is not, however, unive supported (Atty. Gen. vs. Bd. of cilmen, 58 Mich. 213), and, wherev taining, it is enunciated, so far as m amination of authorities extend, t pointive officers. In this state, th islature undoubtedly enjoys unli freedom in determining the reaso qualifications of appointive office they do not fall within the purvi the constitution.

If the provision of your city ch is invalid, it is so because in attem to classify assemblymen accordi geographical lines, it adds a con to eligibility in violation to a pro of the constitution, to which atte has been called. It will be con everywhere that the city of St. P a "district" within the meaning o provision. It is therefore manifest every elector of the city is eligil any office which is "elective by th ple" therein; and whatever ab this right, whether it consist of e tional qualifications or otherwis fends against the constitution a void. (State vs. Clough, supra. long as an assemblyman is elect the people of the city at large,

choice cannot be trammeled by a legislative provision defining the territory from which he shall be elected. It is foreign to the purpose of the constitution that a voter shall be compelled to ascertain the street and number of a candidate before being prepared to vote intelligently. If the legislature may impose such condition in the election of an assemblyman, it is difficult to perceive why it may not, with equal authority, provide that the mayor shall be selected from a given ward.

The provision of your charter is, I believe, an anomaly in legislation. It is doubtful if an attempt has ever before been made to thus restrict an elector touching his eligibility for an office, or his right of choice of candidates for office in his district.

For the reasons above expressed, not to speak of others which have suggested themselves, the statute is, in my judgment, invalid. While entertaining such views, permit me to suggest that an occasion rarely arises where an administrative body is justified in questioning the constitutionality of a law prescribed for their guidance. As a general rule, and save only in cases where a statute is clearly and palpably unconstitutional, it should be observed until pronounced invalid by the courts. Whether an exceptional case is now presented, I leave it for you and the canvassing board to determine.

You further inquire whether the vote of an election precinct be counted or canvassed when the judges of election have failed to make a return of the number of votes cast in the precinct, but have transmitted only the tally sheets.

While it is the general rule that the statute must be substantially complied with in making an election return, in order to authorize a canvassing board to receive it, it has little, if any, force in this state in view of the provisions of our election law. Sec. 163 thereof is as follows:

"Sec. 163. No canvassing board of any county, town, city or village shall refuse to include any returns in its canvass of votes on account of any informality in holding any election or making any returns thereof; but all returns shall be received and the votes canvassed by such canvassing board and included in its statements, provided there is a substantial compliance with the provisions of this act."

This section, read in connection with several of the immediately preceding sections, affords no room for doubt that your second question should be answered in the affirmative, provided the facts indicate that there has been a substantial compliance with the requirements of the law. I am,

Very respectfully,
H. W. CHILDS.

May 10, 1894.

TAXES—Assignee for Benefit of Creditors—The Property of an Insolvent in the Hands of an Assignee for the Benefit of His Creditors Is Liable to Respond First to the State for the Payment of Taxes Thereon Levied Before or After the Assignment.

JULIUS A. COLLER, ESQ.,
County Attorney,
Shakopee, Minn.

Dear Sir: The law secures to each individual an exemption of personal property to the amount of one hundred dollars, provided he "shall list all of his personal property for taxation." No personal property in specie is exempt from taxation, save the classes mentioned in sec. 5, chap. 11, General Statutes 1878, and not even property belonging to those classes when there has been a failure to comply with the statute in the matter of listing as above indicated.

No property is exempt from seizure upon a tax judgment. (Sec. 61, Id.) The fact that the delinquent has made an assignment of his property for the benefit of his creditors does not impair the

remedy of the state in collecting its tax. The assignment is not a sale, and it has been held that personal property may be seized for a tax wherever found, whether in the hands of the assignee or the assignor. (Wright vs. Wright, 84 Pa. St. 166.)

The exemptions provided for in chap. 66 of the General Statutes have no application to proceedings for the collection of taxes. The provision to which you call attention in chap. 41 is not at variance with this view, but agrees therewith. It evinces a purpose to preserve intact the superior rights of a state. In other words, the property of the insolvent in the hands of the assignee must first respond to the state in the payment of taxes, before the rights of creditors are to be considered.

I therefore fully agree with you in the conclusion that the state is not required to await the action of the assignee in converting the trust estate into money before its taxes shall be paid.

Very truly yours,
H. W. CHILDS.

April 30, 1894.

MAYOR OF ST. PAUL—Power of to Call Out the State Militia to Suppress Riots or Enforce Law—Pay of Militia While in Service in Obedience to Such Call.

HIS EXCELLENCY,
KNUTE NELSON,
Governor.

Sir: You request my opinion as to the authority of the mayor of the city of St. Paul to call out the state militia to aid in suppressing riots or enforcing the laws of the state within the said city.

The question is one of great importance, as it involves the responsibility of the officers and members of militia companies so summoned for acts incident to a possible conflict between them and unlawful assemblies. It is a rule of almost universal application, as well in military as civil affairs, that one must rely on lawful orders for the justification of his acts. (Com. vs. Blodgett, 12 Met. 91; Little vs. Barrum, 1 Cranch, 179; Mitchell vs. Harmony, 13 How. 137.) As suggested in the last case cited, while a private may urge in palliation of his offense the unlawful orders of his commanding officer, it will not constitute a defense. It is therefore manifest that the members of our several militia companies may with reason insist that their orders emanate only from proper authority.

The authority of the mayor of St. Paul to call out the militia is derived from sec. 3 of chap. 9 of the charter of that city. (Comp. 1884.) He is thereby made a peace officer, with power to "command the peace, suppress in a summary manner all rioting and disorderly behavior within the limits of the city, and for such purpose to command the assistance of all by-standers, and, if necessary, of all citizens and military companies." In conferring such power upon the mayor of said city, the legislature adhered to what has long been the policy of this state. Indeed, the charter provision above quoted is almost a literal reproduction of a provision found in the General Statutes of the state. (Gen. Stat. 1878, chap. 10, sec. 161.) Nor is such legislation peculiar to this state. A similar statute was involved in a case decided by the supreme court of Massachusetts in 1855, and no question was raised as to the validity thereof, although the case was well considered. (Ela vs. Smith, 71 Mass. 136.) Indeed, authority so conferred is to be in accord with well-settled rules of common law. (Id.)

The authority of the mayor to call for such assistance is in my judgment incontrovertible. The view that the militia can be called into active service only by the commander-in-chief is untenable. It is true that our constitution provides that the governor may call out the military or naval forces "to

execute the laws, suppress insurrection and repel invasion." (Art. 5, sec. 4.) The constitution of Massachusetts contained similar provisions at the time of the enactment of the statute involved in the case of Ela vs. Smith, supra. Besides it may fairly be claimed that full power of legislation upon the subject is conferred by article 12 of the constitution.

While it has no legal bearing upon the question, I deem it proper to suggest that it is only when the militia is called into active service by the commander-in-chief that officers and men are entitled to pay.

You are advised that the question should, in my opinion, be answered in the affirmative.

Very respectfully,
H. W. CHILDS.

April 28, 1894.

TOWNSHIP—Organization of Not Dissolved by Failure to Elect Officers—Can Be Dissolved Only by Act of the Legislature.

C. C. TEAR, Esq.,
County Attorney,
Duluth, Minn.

Dear Sir: It appears from the communication of your county treasurer accompanying yours of the 3d inst., that all of the township of Oneota except three sections thereof, was, pursuant to chap. 56, Special Laws 1891, made part of the city of Duluth from and after Jan. 1, 1894; that prior to said change of territory, all of the township officers were residents of the territory thus affected; that subsequent to the passage of the said act of the legislature and prior to the above-mentioned date, the said officers caused expensive improvements to be made in the way of laying out and opening of highways within the said town, and to meet the expenses thereof issued township orders to a large amount, of which sum thirteen thousand dollars are still unpaid. By reason of the incorporation of so great a portion of the territory of the township into the city, the electors residing in the unaffected territory have, I am otherwise advised, failed to elect township officers and have assumed to abandon the township organization, and that there are now, in fact, no officers in the township or person in authority with whom public business can be conducted.

In view of the foregoing facts, the county treasurer inquires, in substance, whether the township is so far disorganized as to authorize him to pay such outstanding orders, pursuant to chap. 162, General Laws 1893. If so, may the orders be paid by him as fast as presented out of the county revenue fund, or should they be rendered only so fast as revenue derived from taxes is available therefor?

Inasmuch as no provision was made by the legislaure in the special law of 1891 referred to, relative to the disposition of the property and liabilities of the township, the rule laid down by the supreme court in the city of Winona vs. School District, 40 Minn. 13, must be deemed to govern; that is to say, the old corporation remains subject to all its liabilities and retains all its property.

The manifest purpose of chap. 162 of the Laws of 1893 is to provide for the adjustment of the unsettled affairs of townships which once organized have attempted to become disorganized and are without township officers.

It is very obvious that the township organization was not dissolved by the failure of the people thereof to elect officers. Such a contingency as the failure of a township to elect officers has been provided for in sec. 51, chap. 8, General Statutes 1878. A township organization cannot be dissolved either by the action or non-action of its electors. The dissolution must be effected by legislative action. (Dil. Mun. Corp., 166.) But the statutes of this state no-

where provide for such dissolution. In a few instances corporations have been dissolved by special acts of the legislature (S. L. 1873, c. 8; S. L. 1872, C. 85; S. L. 1871, C. 17). Chapter 162 of the Laws of 1893 evinces legislative oversight; and I am at a loss to perceive how that chapter can properly have application to the township of Oneota.

It may be, that had an attempt been made by the new fractional township to become attached to some other township under the general law, it would have presented a case within the contemplation of chap. 162. Even if it might be held that the annexation of so great a portion of the township to the city of Duluth was tantamount to its dissolution, it would not relieve the situation.

But I am advised that sufficient funds are either on hand or expected soon to be realized with which to pay the orders in question. It appears to me that the only solution of the difficulty is for the board of county commissioners to proceed pursuant to sec. 54, chap. 10, General Statutes 1878, to the appointment of a township officer, by whose authority the payment of the orders in question could be easily provided for.

The question is certainly one of great importance, not only to the county treasurer, but to the township and to the holders of the orders as well. The authority of the treasurer to pay the orders is so doubtful at best that he should, in my opinion, decline to pay them until directed so to do by the courts.

Very truly yours,
H. W. CHILDS.

May 7, 1894.

THE report of the first annual meeting of the Territorial Bar Association of Utah, held at Salt Lake June 4, 1894, has just reached us, and we apprehend that this first report will be the last. Not that the meeting appears to have been unprofitable, but for another reason which will be apparent to the Utah politician, if not to the Minnesota lawyer. Three principal addresses were delivered; the first by the president of the association, Mr. J. G. Sutherland, which was reminiscent and admonitory in its nature; the second by Mr. Ogden Hiles, on "The Codification of the Law," a valuable paper, and which should have a wider circulation than that which will probably be afforded it by the printed report of the meeting; the third by Mr. Walter Murphy, on "The Use of the Writ of Injunction to Prevent Strikes," an interesting and instructive paper, but one with which we cannot altogether agree, especially with the writer's apprehension that certain of the federal courts have gone to such an extent in issuing injunctions against strikers as to "contravene the inhibition of our national constitution against involuntary servitude."

IN a Washington county town, a little while ago, the local champion liar was brought up before the justice for stealing hens. It was a pretty plain case, and by the advice of his lawyer the prisoner said, "I plead guilty." This surprising answer in place of the string of lies expected, staggered the justice. He rubbed his head. "I guess—I'm afraid—well, Hiram," said he, after a thoughtful pause, "I guess I'll have to have more evidence before I sentence you."—Central Law Journal.

DURING a breach of promise case heard in Indiana recently, the counsel on both sides chattered considerably about the "fire of love," "Cupid's flames," "the burning passion," etc. The jury brought in a verdict that both plaintiff and defendant were guilty of arson, and recommended them both to the mercy of the court.—Green Bag.

THE LAWYER FROM A MORAL STANDPOINT.

IN hot weather, when the courts are doing little or nothing to fill our pages, it may be well to preach a little to the bar, with an occasional hint aside to the bench, perhaps. The following address, first appearing in the "American Journal of Politics," we take the liberty of reprinting from the "Albany Law Journal," a publication which never contains anything not good, and we heartily recommend its perusal to our readers.

"Since Aristotle's day the world has very largely fallen into the habit of jesting over the alleged dishonesty of lawyers, and of twisting the first syllable of the word until it has the vowel sound of long 'i.' Who has not heard the oft-quoted epitaph:

'Here lieth one, believe it if you can,
Who, though a lawyer, was an honest man:
The gates of heaven to him are opened wide,
But closed, alas! to all his tribe beside.'

Or the invitation of the janitor who was displaying to a number of lawyers the conveniences of a newly built court house soon to be occupied:

'Come, sinners, round and view the ground
Where you shall shortly lie.'

Or the really excellent story of the Irishman (these witty things in print are always said by Irishmen) who, seeing on a gravestone the legend, 'Here lies a lawyer and an honest man,' exclaimed in evident perplexity, 'What the divil made thim put two av thim in the wan grave?'

"From Prescott's 'Conquest of Peru' (vol. 1, p. 304), we learn that in the famous 'Capitulation' of July 26, 1529, between Pizarro and the Queen, 'It was expressly enjoined upon Pizarro * * * to carry out with him a specified number of ecclesiastics with whom he was to take counsel in the conquest of the country, and whose efforts were to be dedicated to the service and conversion of the Indians; while lawyers and attorneys, on the other hand, whose presence was considered as boding ill to the harmony of the settlements, were strictly prohibited from setting foot in them.'

"There is a French proverb, that 'a good lawyer is always a bad neighbor,' because, presumably, he is 'considered as boding ill to the harmony of the settlement.' This view is not, however, often taken seriously in the present day. A bad lawyer is still, no doubt, always a bad neighbor, but to be a great lawyer, one must be a great and good man. His moral standpoint cannot be too high, for his duty calls him into all the shifting scenes of life, where honor is most needed, and where dishonesty can most easily be concealed. The man of business, entangled in a net and harassed by his debts, must seek a lawyer's aid, and must sometimes give himself entirely into his counsel's keeping.

"It is said that a man will give something to save his soul, will give much to save his life, but will give anything to save his property; and by so much as this is true does the lawyer, more than the clergyman or the physician, keep the conscience of his client. The lawyer hears his secret and reads his inmost thought, and the law itself forbids him to betray the knowledge thus obtained. He is sought by the widow and the orphan; he stands between the helpless or the timid and those who would oppress them. When the culprit stands before the bar of earthly justice the lawyer steadies the hand that holds the scales. Bill Nye once referred to Hon. George R. Peck, the learned railroad attorney, as 'the man who stands between the Atchison, Topeka & Santa Fe Railroad and substantial justice,' thus turning a happy witticism into a very pretty compliment. The lawyer's duty is something very different from that. The man employed to defeat the ends of justice is known by another name; we call him pettifogger.

"Not only in the active scenes of life is the lawyer a participant, but when the sands run low he is called, with confidence, to commit to legal form the last mortal wish of the departing—to preserve his earthly possessions to the objects of his affection. And if the sojourner go beyond, leaving no written expression of his will, he leaves to law and lawyers the disposition of his estate. More solemn responsibilities than these are not, and truly the law 'employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart.'

"History is not devoid of noble instances of such faithfulness to duty. A father, in a moment of passion, disinherited his only daughter, and bequeathed his large property to his attorney and two other cherished friends. The lawyer summoned his co-legatees, and persuaded them to join with him in conveying to the needy and deserving daughter the entire property thus obtained. When his unselfish course was known, and made the subject of public comment and praise, he sought to minimize his claim to exceptional credit by showing that the legacy received was not quite so large as had been represented. Such examples are rare, no doubt; they are, may be, 'too bright and good for human nature's daily food,' but no standard of morality is too high to strive for, even though we often fail.

"In his capacity as counselor, the lawyer's moral obligation is very prominent. Litigation is an evil. To prevent litigation is often the lawyer's highest duty and most useful function. A client often seeks a lawyer with feelings roused to a pitch of indignation that blinds his eyes to justice, and precludes discriminating judgment. Trifling wrongs are magnified to mountains of oppression, until not justice, but revenge, must satisfy resentment. Let the lawyer then be calm, and temper undue zeal; both parties may be honest, and offensive operations must be delayed. To gratify hatred, malice or revenge is not within his province, and failing here to reach the proper plane, he brings the profession into disrepute and gives his fellows over to public reprobation as the instigators of quarrels, 'who never end, but always prime, a suit, to make it bear the greater store of fruit,' and gives color to the charge that

> 'As laboring men their hands, criers their lungs,
> Porters their backs, so lawyers hire their tongues.'

"It has been said that the administration of justice should be cheap, and some inveigh against the courts because of the expensiveness of litigation, but this seeming fault is not without its benefits. Lawyers' fees have never been so high as to reduce the number of lawsuits to those brought of absolute necessity. Much needless litigation has always been the rule. If the cost were reduced no doubt the grievances seeking public redress would indefinitely increase. Trivial matters, easily settled by the timely application of a little equine intelligence and discretion, would find their way into the courts to the disadvantage of both parties. And while lawyers' heavy fees act as a wholesome preventive of petty lawsuits, they are not less potent in securing for the profession the higher order of talent which its proper pursuit so urgently demands.

"The lawyer's domain is reason, not the passions; let him be 'a light to eyes blinded by hatred to their own interests.' The prospective client is entitled to a candid opinion as to the merits of his case and as to the best course to be pursued, and such opinion he should receive, even though it does not suit his fancy. Equity favors the compromise of doubtful claims. The law's sharp weapons should not be needlessly resorted to, and should seldom be directed against those who are more unfortunate than culpable. Others'

rights are dear to them, and as just perhaps as are your client's. Lord Macaulay has well said that 'scarcely any quarrel ever happens in which the right and wrong are so exquisitely balanced that all the right lies on one side and all the wrong on the other.' It would be most wholesome to keep this fact constantly before the mind, for, to quote Lord Bolingbroke, 'the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious.'

"In a state of barbarism every man's hand is against his neighbor, and personal advantage sets the only limit to his privileges and his duties. With the first gleam of civilization, these privileges are circumscribed by his duty toward others, from which no individual is entirely free. In such a society what then may a lawyer do in behalf of his client without infringing his duty to the public, and without regard to the inherent justice of his cause?

"This is a question oft mooted, both by the profession and the laity, and the extremes are wide apart. Memorable on the one hand are Lord Brougham's hot words uttered in the defense of Queen Caroline, the unhappy wife of George IV.:

> 'An advocate in the discharge of his duty knows but one person, and that person is his client. To save his client by all means and expedients and at all hazards and costs to other persons—and among them himself—is his first and only duty, and in performing that duty he must not regard the alarms, the torments, the destruction he may bring upon others. Separating the duty of the patriot from that of advocate, he must go on, reckless of consequences, though it should be his unhappy lot to involve his country in confusion.'

"These words show zeal, but not discretion; they are commanding, but not convincing. All society is founded on the theory, at least, of the greatest good to the greatest number, and such a code as this is utterly subversive of this fundamental principle. In criminal trials especially too often the prosecution seeks to secure a conviction by any means, and the defense we may assume usually stops at nothing to escape the penalty of wrong-doing. If the public be aroused to participation and clamor in favor of one or the other, the advocate may find himself unduly swerved, and may seek to gratify such public sentiment to the detriment of public justice. Cases involving the freedom or the life of the accused demand in the lawyer a far-seeing discrimination and an all-inclusive view. He may be required to face the indignation of a frowning but unthinking community, and to maintain his integrity at the sacrifice of popularity or ambitions. On the other hand, his recreance to duty may entail the most unfortunate results. A crime is committed which justly outrages public sentiment, and through sharp practice or corrupt methods the perpetrator goes unpunished; his freedom from restraint, even his existence, involves the peace-loving portion of the community in constant apprehension; then indignation bursts all bounds; the law's delays and loopholes are made the excuse for defiance of all law, and property and life pay the penalty of one man's overzeal in behalf of a worthless client.

"Opposite to Lord Brougham's position is that of Sir Matthew Hale, who in his early practice would never accept a seemingly unjust cause. But in after life he was convinced that in this he had in a measure erred, for he felt that no one can so thoroughly know a case as to be entitled to a final opinion on its merits until all the facts are thoroughly presented.

"In every life questions of moral duty arise for daily settlement; paths constantly diverge, and the safe one must hourly and anew be chosen. There is no universal standard; each conscience must settle some things for itself, unaided, but by an enlightened understanding.

"One thing, positively, however, a lawyer may never do for his client

what the common conscience of mankind would forbid that client to do for himself. He may not espouse the cause of one who seeks to perpetrate a wrong through some chance advantage the law may happen to afford him. But not often, if ever, need a lawyer decline to undertake the defense of the accused. To undertake his defense, however, is not to decide to make every conceivable effort to save him from conviction; that might include, at last resort, the purchase of perjured testimony in his behalf, which even the most hardened might resort to, but would hardly seek to justify.

"But to secure to him those advantages and safeguards which the law, in mercy, offers him, is permissible and just. If more than this be expected or required, but one honest course is open —to decline peremptorily the proffered employment and forego the longed-for fee. Honest men decline opportunities for dishonest gain in every walk in life. However, by declining to espouse a cause because there seems to be ground for believing the party guilty, the lawyer would usurp the function of both judge and jury. The courts appoint attorneys for accused persons in extremity, and where the issue is life or death, counsel thus appointed cannot refuse the trust, so jealous is the law of the security of its subjects, and so averse to judgment against any one unheard.

"Sydney Smith justifies the acceptance of any ordinary case that offers, on the ground that truth is best arrived at by the earnest efforts of opposing advocates, and this proposition is no doubt true enough if the contestants use only legitimate weapons.

"What better statement of the proper view of this much-debated question than that of Sir William Blackstone, the law-student's patron saint?

> 'To virtue and her friends a friend,
> Still may my voice the weak defend.
> Ne'er may my prostituted tongue
> Protect the oppressor in his wrong,
> Nor wrest the spirit of the laws
> To sanctify the villain's cause.'

"Sharp practice, then, is no part of the lawyer's duty, nor do a client's wishes or instructions afford an excuse for unnecessary or unjust delay, and this view is held by the courts themselves. Chief Justice Holt said that an attorney who falsely delays justice is guilty of breaking his official oath. Cunning and trickery, snappish advantage taken of the mistakes and slips of others, will breed distrust among his fellows of the bar, and inevitably reduce his influence and effectiveness, while at the same time he sullies the fair fame of the profession in the eyes of a watchful public.

"An advocate may not withdraw from a case on the appearance of damning testimony against his client. An intensely interesting illustration of the problem thus involved arose in England in 1840, in the defense of a murderer named Courvoissier, by Mr. Charles Phillips, a distinguished London lawyer. A wealthy and aged man had been murdered in his bed; three servants were the only other persons known to have been in the house at the time. One of these, Courvoissier, was indicted, and was represented by Mr. Phillips, who defended him with unwonted energy, inspired by a firm conviction that he was innocent. On a second trial Courvoissier was found guilty, and it afterward developed that during the progress of this second trial, in terror at the production of some new and damaging evidence, he had confessed his guilt to his attorney, and begged him frantically to save his life, and Mr. Phillips had carried the case to its conclusion, bearing this secret in his bosom. He was publicly and privately assailed for what was called his dishonorable course in the matter, and his conduct was condemned by many, some of whom were misled, however, by the false charge of his accusers, that he had used every effort to fasten suspicion upon his client's fellow-servants. Fortunately, for the good name of the profession, he was induced, after

many years, to unseal his lips, which he had closed in scorn, resulting in a complete vindication of his course. It was then made to appear that the confession was made to him in the presence of one other man; that after torturing doubts and sleepless nights Mr. Phillips had sought the counsel of a member of the bench not concerned in the case on trial, and on his advice had continued in the case, narrowly watched by these two men who had full knowledge of the facts, and who now averred that they had utterly failed to find one word uttered by him not consonant with strict integrity and truth. Added to this conclusive vindication, the verbatim reports in the daily press of his closing argument bore witness, in the light of these additional facts, to the rigid honesty and discriminating conscientiousness of this noble man who dared do his duty while all his world in ignorance condemned him.

"We sometimes dare to praise the warrior who rides against the cannon's mouth to meet a certain death, as did those at Balaklava, or the followers of Gonzales, whom he so cheerfully assured, 'I lead ye not to win a field; I lead ye forth to die.' Their horses sought the fray as eagerly and with about the same discretion; but it was something a little less than courage that animated them. Pride or recklessness, or hunger for posthumous fame, may prompt such deeds as these, but when a lofty soul, to shield a fellow man, with only conscience to approve, can face the world's disfavor and jeopard the affection and esteem of his most valued friends, he then, for once, reveals the image of his maker.

"T. FLETCHER DENNIS."

THE DISTRICT COURTS.

ACTIONS—Abatement Of—When Suit Not Prematurely Brought.

One New brought an action against one Johnson in a justice court, and an attachment issued. Under it the sheriff seized a traction engine, and, in moving the same, through the negligence of his employes, permitted it to be burned and injured. The original action was tried before the justice, and an appeal was taken to the district court. While that appeal was pending, and before the next general term, Johnson brought this action against the sheriff for damages, because of the injury to the engine. Upon the trial motion was made by defendant for nonsuit, also for instructed verdict on the ground that the action was prematurely brought; that Johnson should have waited until the appeal case, in which the attachment issued was decided. Same objection urged on motion for new trial, which was denied, the court being of opinion that the injury was immediate, and that Johnson had a cause of action independent of the dependency of the attachment case on appeal.

START, J.

Johnson vs. Wennerskirsch. Third District. Allen J. Greer and Wesley Kinney for plaintiff, and Steel & Selover for defendant.

PUBLIC POLICY—Contract to Procure Act of Congress Giving Trespassers on Public Lands Exclusive Right to Purchase Such Lands Void.

Motion by defendant for judgment in his favor upon the pleadings, on the ground that the complaint did not state facts sufficient to constitute a cause of action. Motion granted. The complaint was as follows:

"The above named plaintiff for complaint and cause of action against the said defendant, shows to the court and alleges, that he, this plaintiff, for more than twenty years last past has been engaged in or familiar with the lumbering business, and acquainted with the value of pine timber standing upon the stump, and with the value of pine lands, and an expert as a cruiser and explorer of lands for the purpose of ascertaining the value and quality of pine upon the same, and in tracing the government section and quarter section lines.

"That in 1887 this plaintiff foresaw that considerable pine lands in Bayfield county, Wisconsin, between Ashland and Superior, belonging to the government of the United States, which had been withdrawn from the market for over thirty years for railroad purposes, should be declared restored to the public domain so as to be acquired by individuals under the homestead or pre-emption laws of the United States. Thereupon this plaintiff proceeded to the general land office at Washington, for the purpose of obtaining information as to the particular tracts of land that should be restored to the public domain under the general land laws of the United States, and the plaintiff immediately thereafter explored and examined many of such lands for the purpose of obtaining information as to the quantity and value of the pine timber upon such lands, and made extensive minutes in relation thereto. That the said defendant was wholly unacquainted with said business, but desired to settle upon a valuable quarter section of said lands and acquire a title thereto under the homestead or pre-emption laws of the United States, when said lands should be restored to the market, and desired the plaintiff to locate him, the defendant, upon some such quarter section, and instruct him as to what he should do as such settler, and to take charge of him and do all that was necessary or could be done to bring the land into the market and enable the said defendant to acquire the title thereto, and promised and agreed that he would do what was right with the plaintiff for such information and service in the way of compensation therefor when he, the defendant, should acquire the right to make final proof for such land. That this plaintiff assented thereto and furnished the said defendant with the minutes which he, this plaintiff, had made in respect to said lands, and furnished the necessary provisions and provided a competent person to go with the defendant and point out to him the section and quarter section lines and the pine timber contained on each tract, so as to enable said defendant to judge for himself what particular tract he should select and settle upon. That thereupon and upon the information thus derived by the defendant he selected and settled upon the north half of the northwest quarter and the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter of section 17, township 49, range 9, west, in Bayfield county, State of Wisconsin, about the month of May, 1888, and thereupon awaited the time when he should be permitted to make filing upon said tract.

"And the plaintiff further shows to the court that during the sessions of congress of 1887-8 and 1888-9 and 1889-90 and 1890-91 he attended at Washington from three to six months each year, and appeared before the secretary of the interior and appropriate committees of the senate and house of representatives and employed counsel for the purpose to urge the passage of a bill declaring said lands forfeited to the government, and also that parties who had in good faith settled upon said lands should have the preference rights to enter the same from the government under the homestead laws when the same should be restored to the market.

That by an act of congress approved Sept. 29, 1890, entitled "An act

to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," the lands hereinbefore described, together with other lands, became forfeited to the United States, and by section two (2) of the act the defendant had the prior right over any one else to prove up and acquire title to the lands hereinbefore described, by reason of his being a settler thereon.

"That thereupon the said defendant from and after the 23d day of February, 1891, had the right to make final proof and payment and acquire the said land hereinbefore described, and did, in point of fact, make such proof and payment and acquire the right of the patent thereof about October, 1892.

"That said lands hereinbefore described at the time that the said defendant settled upon the same, and at the time he acquired the right to make final proof therefor, were worth and of the value of from twelve to fifteen thousand dollars, and that the said defendant has since sold the pine timber upon the same for twelve thousand dollars.

"That the said defendant did nothing towards acquiring the right to said land, except to make settlement upon the same, and depended upon this plaintiff to secure said land for him, and that the plaintiff did at the proper time prepare for him his declaratory statement and cause the same to be duly offered for filing and labored as aforesaid to bring said land into the market and enable the defendant to acquire title thereto.

"And this plaintiff alleges that his services to the defendant in said matter were of the value and reasonably worth the sum of thiry-five hundred dollars or more, but he alleges that the defendant neglects and refuses to pay him therefor or any part thereof."

BAXTER J. The facts set forth in the complaint in this action amount simply to this: that the plaintiff and defendant entered into an agreement, by the terms of which the defendant was to enter into possession of a certain tract of land belonging to the United States, not then in market, or subject to entry, and to hold the same until it could be purchased from the government; and the plaintiff for a consideration, to be paid by the defendant, agreed to procure such legislation from congress as would enable the defendant to secure such land in preference to any other party.

The plaintiff performed his part of said agreement and procured the promised legislation; and this action is brought by him upon said agreement to recover from the defendant the amount claimed by the plaintiff to be due him for his said services, as well as for certain moneys expended by him in pursuance thereof.

The agreement referred to is, it seems to me, void as against public policy. By its terms the plaintiff undertook to and did procure the passage of a law by congress giving the defendant, a mere trespasser upon government land, the exclusive right to purchase the said land then occupied by him. The means employed to secure such legislation is not particularly stated, but the plaintiff did, no doubt, as he promised, use all the means in his power to secure the same. And the result secured, although the law upon its face may appear just and fair, is sufficient to show the improper purposes that prompted the action of the parties in the matter.

An agreement, the express purpose of which is to secure land from the government unjustly and unfairly, through legislation or otherwise, ought not to be enforced.

Houlton vs. Dunn, District Court of Sherburne County. J. M. Gilman and C. D. O'Brien for plaintiff, Robb & Slack for defendant.

LANDLORD AND TENANT—Duty of Landlord to Notify His Tenant of His Intention to Hold the Latter Liable if He Remove From the Demised Premises Before the Expiration of His Lease.

Plaintiff had demised to defendant certain premises from month to month

by parol lease. On the 1st day of November, 1893, the defendant removed from the premises, having previously given plaintiff notice of her intention so to do. On the 30th day of October, 1893, the plaintiff relet the said premises for a smaller rental than that stipulated for in the lease to defendant, but did not notify defendant of any intention on her (plaintiff's) part that she intended to take possession of said premises and rent the same for and on account of the defendant during the term of her lease, but, on the 15th day of October, 1893, did notify defendant that as soon as she (plaintiff) could find a new tenant defendant would be relieved from further liability on said lease.

"When a tenant abandons the premises during the period of the lease, and the landlord does not intend to accept a surrender, it is his duty to notify the tenant that he intends to take possession of the property and find a tenant for the same, if possible, and allow the tenant a credit upon the rent which would become due under the tenant's lease. It is the duty of the landlord to make an attempt to obtain a new tenant; but if he simply takes possession of the premises on his own account, and makes a new lease to a new tenant without any reference to the former tenant, it is an acceptance of the surrender.

"In this case it appears that Mrs. Neil took possession of these premises on or about the 1st of November, and through her agents found a new tenant for the same; it does not appear that she notified Mrs. Eustis of her intention to do so, or of the fact that a new lease had been made. On the other hand, it appears that on the 15th day of October notice was given Mrs. Eustis that as soon as a tenant could be found for this house she would be released from further liability. Nothing is said in this lease about holding her for any difference in rent, and if Mrs. Neil chose to accept a tenant for a lesser rental, I do not see how she can hold Mrs. Eustis for any balance. Taking possession of the premises and making this new lease, under the particular circumstances of this case, is an acceptance of the surrender."

ELLIOTT, J.

Lillie Neil vs. Christine Eustis, Fourth District, Hennepin County. Bartlett, Robinson and Higgins, for plaintiff, E. J. McMahon, for defendant.

PRACTICE—Evidence as to Material, Controverted—Allegations of Complaint Required on Motion to Strike Out Answer as Sham.

Action to recover upon two promissory notes, alleged to have been executed in the State of North Dakota, each bearing interest at twelve per cent per annum. The complaint alleged that the taking of such interest was lawful in the State of North Dakota. The defendant in his answer denied that he had executed the notes alleged, and alleged that he had not sufficient knowledge or information to form a belief as to the allegations in the complaint in regard to the rate of interest allowable in the State of North Dakota.

Motion was made by plaintiff to strike out the answer and for judgment as prayed for in the complaint, on the ground that the said answer was sham and frivolous, false and untrue.

Plaintiff produced affidavits to the effect that the defendant had admitted the making of the notes and his indebtedness thereon to the person who served the summons on him, and that the defendant intended leaving the state before the next term of the district court in Ramsey county, and that plaintiff was, therefore, in danger of losing his said claim unless he could obtain judgment without delay.

"Without the allegation in the complaint as to the laws of North Dakota permitting the taking of interest at 12 per cent, the complaint would be demurrable. Upon the hearing of this motion the facts with respect to said laws were not attempted to be shown, as provided in Gen. Stat. 1878, ch. 73,

sec. 59, or otherwise. It will not be claimed that the allegations of the complaint in that regard are not sufficiently denied in the answer to require proof upon the trial as to the existence of the law alleged; and if required there it certainly will be upon a motion to strike out as sham." Motion denied.

Second District, Walter A. Wood Mowing and Reaping Machine Co. vs. A. H. Parker. John L. Townley for plaintiff, C. F. Baxter for defendant.

KERR, J.

PARTNERS—Duties to Each Other—One Partner Cannot Charge Another for Unnecessary Expenses Incurred by Reason of His Failure to Consult or Notify His Partner of Matters Concerning the Partnership Business.

Plaintiff and defendant entered into a parol agreement to purchase certain land. Defendant was to advance the money ($450) for purchase, and the taxes were to be paid by him until the land was sold; the plaintiff was to examine the title, make the purchase, and take charge of land and sell same; upon sale, after first deducting money advanced by defendant for purchase and taxes, the balance was to be divided equally. The land was purchased under such agreement, and deed taken in name of defendant. The defendant some years later attempted to sell the land. He procured an abstract from register of deeds, which did not show record title in him. Thereupon, without consulting plaintiff, nor notifying him of the apparent defect in title, he expended $526 in procuring a quitclaim deed to cure the apparent defect.

The plaintiff, at time of purchase, had examined the title and knew that it was perfect; knew that defendant had good title, and could have so informed defendant had defendant consulted him when the apparent defect was discovered; the plaintiff could have informed defendant that his abstract omitted a transfer.

Defendant sought to charge plaintiff one-half the $526.

"In this transaction parties bear to each other the relation of partners as to the enterprise. The utmost good faith was due each to the other. It was the duty of defendant to have consulted plaintiff concerning matters and conditions not naturally arising or contemplated by the parties. Since the defendant incurred an expense unnecessarily he should not be allowed to charge plaintiff with any part of it." Judgment for plaintiff.

WILLISTON, J.

First District, Washington county. Thos. J. Yorks vs. David Tozer. H. N. Setzer for plaintiff, Clapp & McCartney for defendant.

WARRANTY—Character, Location, Size and Value of Real Property in Distant City—Reliance on Warranty—Breach of Warranty—Measure of Damages.

This was an action to recover damages for breach of a written warranty in respect to certain real estate transferred by the defendant to the plaintiff.

The defendant owned certain real estate situated in the city of New York, which he wished to sell, or exchange, for property in St. Paul, and for that purpose placed his said New York property in the hands of Canby & Cathcart, real estate agents in the city of St. Paul.

The plaintiff owned certain property in St. Paul, which he wished to sell, and which he had placed in the hands of Canby & Cathcart to find a purchaser for.

Negotiations were opened up between the plaintiff and the said Canby & Cathcart, acting as agents for the defendant, for an exchange by the plaintiff of his St. Paul property for the defendant's New York property, and as the complaint alleged, "for the purpose of influencing and inducing the above-named plaintiff to make and conclude a negotiation for such exchange of properties," and as a part of the agreement therefor, the above named defendant wrote and delivered to said Canby & Cathcart a letter to be shown and delivered to the above-named plaintiff, in the words and figures following, to-wit:

ST. PAUL, Minn., Feb. 13, 1889.
Messrs. Canby & Cathcart, City.

Gentlemen:—I hereby put into your hands for sale, property Nos. 2148 and 2150 Fifth avenue, New York City. This property I purchased from E. I. Frost of St. Paul. At the time of purchase, it was represented to me that this property was worth about $27,500 each; that the houses were four-story, with basement and brownstone front. The lots twenty feet front on Fifth avenue, by seventy-five feet deep; the sidewalks hard stone; brownstone steps; handsome colored glass in the door; entry ways with double doors and were of hardwood finish; the houses finished throughout with hardwood. A personal visit to New York City last month resulted in my finding the representations made to be correct.

When I bought the property, I bought it subject to the following mortgages: $16,000 on premises No. 2148 and $15,000 on 2150, five per cent interest; mortgage dated Nov. 26, 1888, running one year. These mortgages are held by the Washington Life Insurance Company, who I am informed are willing to renew them from time to time.

The property next to mine (No. 2146) I was informed sold for $27,500. The house is now occupied by the original purchaser or by tenants, I do not know which, as I did not have an opportunity of finding out. Other property in the same block I am informed is mortgaged as high as $18,000.

I think the fact that the property is mortgaged for this amount would in itself show pretty conclusively what the property is valued at in New York City.

Before buying the property I wrote a prominent real estate dealer in New York City, Adrian H. Muhler, who informed me by letter—copy of which I can show if desired—that the valuation of the property at forced sale would be $22,500. Mr. Burnett, a real estate dealer whose office is near the property and who has for sale a house exactly similar to mine in the same block, told me he valued the property at not less than $26,000, though he believed he would take $25,000 cash. He advised me to hold the property and assured me that by spring it would bring $26,000 or $27,000. I visited several real estate dealers and no valuation was placed at less than $23,000, except by Mr. Muhler, who put it at $22,500, and this was for forced cash sale. It is in a part of the city that is improved; is in sight of Mount Morris Park; only a few blocks from the elevated railroad, and is in a portion of the city that is rapidly improving. The houses on Fifth avenue in this portion of the city are all fine residences.

The houses are new, never been occupied. I have not endeavored to rent them for the reason that I believe it would interfere with the sale of them. I do not desire to rent them. I am anxious to dispose of them and invest my money in St. Paul, my home, where I can look after it. I will take for the property $25,000 cash, or will take part cash and part in second mortgage payment; or I will trade the property at $30,000 for good productive real estate.

To give a better description of the house, I would state that the basements are finished throughout and are sufficiently lighted to be used for dining rooms; there is also an entrance both front and back to the basement; the front entrance being under the front door steps. The first story, or story above the basement, consists of two large handsome parlors; handsome mantels, hardwood finish. The second stories are finished up for bedrooms with bathrooms attached, closets, etc., ornamental wood-work. The same is the case with the third and fourth stories; the fourth being as well finished, I believe, as the second. I do not remember whether there are bathrooms on the other floors or not.

I do not believe that these houses could have been built for less than $16,000 apiece, and certainly real estate in that portion of New York can-

not be worth less than $500 a front foot. The houses are lighted by gas and are furnished throughout with electric bells. Complete with all modern improvements and first class in every respect.

The pictures which you have are an exact reproduction of the property.

In case you make a trade or sale, I personally guarantee the property is as herein represented, and if, upon investigation it is found not to be as herein represented, I personally agree to cancel the trade and to pay the purchaser all expenses to which he has been subjected, as well as to remunerate you for your services.

Yours very truly,
E. R. GILMAN.

The said Canby & Cathcart, as the agents of the above named defendant, to induce the above-named plaintiff to make said trade with the above-named defendant, showed and delivered to him said letter and also the photographs referred to in said letter."

These allegations of the complaint were not denied by the answer.

The complaint further alleged that the plaintiff relied entirely upon the statements and representations contained in said letter and the guaranty therein contained, in making the trade for the exchange of property, and also alleged the breach of the warranty, and demanded damages.

The answer, as amended at the trial, denied that the plaintiff relied at all upon the letter, but sought, and obtained, and relied upon information derived from others in respect to the New York property. The answer also denied a breach of the warranty.

(For decisions of the supreme court, see 47 Minn. 131 and 52 Minn. 88.)

EMERSON HADLEY, for defendant.

The letter contains no warranty as to the value of the New York property. This is evident from the language used. Defendant never intended to warrant this property as being worth "about" $27,500 each piece. This is too uncertain to be covered by the warranty. There are several different estimates and opinions of value stated in the letter, but no positive statement or warranty as to any definite value whatever. Nor was the letter so understood by plaintiff.

The warranty extended only to the character of the property as described in the letter, and in all substantial particulars the property was in fact as represented.

Plaintiff did not rely on the letter in making the trade, but on information received by him from his nephew in New York before closing the deal. His own testimony shows that he never believed the New York property was worth "about $27,500 each piece," but that in fact it was worth much less than that sum. This appears from the value he put upon his own property given in exchange for the New York houses.

ROBERTSON HOWARD for plaintiff.

The supreme court in its recent decision awarding the plaintiff a new trial thus defines the issues of fact involved in the case: (See 52 Minn. 95.)

"It is to be taken as admitted by the pleadings that the representations (in the letter) were held out to the plaintiff as inducements to him to make the exchange, which was subsequently effected by mutual conveyances by deed. The question whether the plaintiff can recover in this action depends upon the facts as to whether, in making this exchange, he relied, either solely or in part, upon the representations set forth in the letter; and if so, whether the representations relied upon were, or were not, in accordance with the facts."

The plaintiff did rely upon the warranty in making the exchange.

The rule of law governing this issue has also been clearly expressed by the supreme court (see 52 Minn. 95) in this case, where the court says: "As to the law bearing upon this feature of the case, it is to be said that if the plaintiff relied upon the representations as be-

ing true, if they constituted a substantial inducement to the making of the exchange, even though he may have also been influenced to some extent by information derived from other sources, the representations and express warranty thus relied upon, and acted upon, became obligatory on the defendant as a contract. It may be added that if the plaintiff actually knew that any one or more of the several representations were not true, he could not have been influenced by such representations, and they cannot be regarded as entering into the contract."

The evidence in the case shows conclusively not only that plaintiff relied entirely upon the letter in making the exchange, but that in fact he had no knowledge whatever as to the falsity of any one of the representations respecting the property contained in the letter, until long after the consummation of the trade by delivery of the deeds. But, as decided by the supreme court, it was only necessary that plaintiff should have *relied in part* upon the letter to entitle him to recover.

Many of the material representations relied upon were not in accordance with the facts.

The letter of defendant contained a great many representations in respect to the property. Some of these were in fact correct, but there were certain other representations, *which materially affected the value of the property*, which were not in fact true, as shown by the depositions taken in the case.

The material representations which were not true were as follows:

1. That the property was in a part of the city that was improved; was in sight of Mount Morris Park; only a few blocks from the elevated railroad; and was in a portion of the city that was rapidly improving; that the houses on Fifth avenue in that portion of the city were all fine residences.

2. That said houses were new; were complete with all modern improvements, and first class in every respect.

3. That each of said lots was twenty feet front on Fifth avenue by seventy-five feet deep.

4. That said land on Fifth avenue was worth at least $500 per front foot.

5. That said houses could not have been built for less than $16,000 each.

6. That each piece of property would sell at forced cash sale for $22,500 or $23,000.

7. That each piece of property in New York City, with the improvements thereon, was worth about $27,500.

The general rule is that upon a breach of a warranty the measure of damages is the difference between the value of the property as it is represented and warranted, and its actual value, with interest.

Douglass vs. Moses (Ia.), 56 N. W. Rep. 271; Love vs. Ross (Ia.), 56 N. W. Rep. 528; Maxted vs. Fowler (Mich.), 53 N. W. Rep. 921; Froreick vs. Gammon, 28 Minn. 480, 483; Merrick vs. Wiltsie, 37 Minn. 41.

After argument by respective counsel, the court said:

The Court: I am inclined to think this is the fair way to decide this case. Take this last part of the contract, where he says "houses must have cost $16,000 apiece." I wouldn't find that to be true; "and real estate cannot be worth less than $500 a front foot." There is a positive statement. "I personally guarantee the property as represented." If it was as represented, then it would have been worth $51,500. Now, you take the figures of brother Hadley as to all these witnesses. There are nine of them. The footings on the value of the twenty-foot house are $201,850; he divides that by nine; I add to that the $15,000 for which the property sold at the foreclosure sale, and that makes $216,850, and divide that by ten instead of dividing it by nine; that leaves the average valuation of that house $21,685; then he adds up the estimates of the other witnesses as to the other house as $192,816, and divides that by nine, which leaves the average valuation $21,424. That house sold for

$14,000 at actual foreclosure sale. Now, take the footings of the nine witnesses, $119,450, and add $14,000 to it, that makes $207,450; divide that by ten, because you have added an additional sum, and you get $20,745 as the value of that house, actual value; you add those together and you have $42,430 as the actual value of those two houses and lots on the 15th day of February. You substract that from the amount which the defendant assured the plaintiff the property was worth and you have a difference of $9,070, and my present impression is that that is the amount which the plaintiff should recover, with interest from the date of the deed, on the two houses.

Mr. Gilman: That does not take into consideration what the defendant's witness Schoonmaker says, that would make $10,000—

The Court: I am taking all the testimony as to value, every bit of testimony, and I think that averaging it right through and then taking the amount realized at the sale as the evidence of one witness, I am inclined to think that that is giving that testimony as little force as could possibly be given to it, because, although the erection of the flats had depreciated the value of the property, still I can't see that it depreciated it to the value of twenty-five per cent. It seems to me that testimony is not credible.

Mr. Gilman: That amount, with interest at seven per cent, would be the judgment of the court?

The Court: Yes.

Mr. Hadley: I should like to have findings made in this case to show the value of this property outside of the representations of value; that is, what I mean by that is to show what the difference between the property as represented and the property as it actually was sold, outside of the representations of value, is.

Mr. Gilman: I don't think you have any right to ask that.

The Court: I think it is no more than fair to do this, that either party who chooses may, within a week, submit to me a complete decision, findings of facts and conclusions of law. You may both do so if you wish, and then I shall prepare my findings of facts and conclusions of law from that.

On April 4, 1894, the following decision was filed:

The cause above entitled duly came on for trial before the court at a general term thereof, commencing on the first Monday of the month of March, A. D. 1894, and was duly tried on the 6th day of that month.

A jury trial was duly waived by stipulation of both parties.

Now, after reading the pleadings of the respective parties, and a careful consideration of the evidence adduced by the parties, respectively, and after hearing the arguments of counsel, the court finds as the facts herein:

First—That all the allegations admitted in the pleadings are true as therein stated and admitted.

Second—That the firm of real estate agents acting for and on behalf of the above named defendant in connection with the exchange of property described in the pleadings, after entering into negotiations for such exchange, and for the purpose of influencing and inducing the above-named plaintiff to make and conclude a negotiation for such exchange of properties, and as a part of the agreement therefor, obtained from said defendant, and delivered to the above-named plaintiff a certain writing in letters and figures as hereinafter set forth, that is to say. (Letter in full is set out above.)

That the said writing was prepared and signed by said defendant, and delivered to his agents for the purpose of inducing the above-named plaintiff to make the exchange of landed property described in the pleadings. At or about the date of the execution and delivery of said letter, the agents of the said defendant, for the purpose of inducing the above-named plaintiff to make said exchange, showed and delivered to the

said plaintiff, also the photographs described in said writing.

Third—That the above-named plaintiff was, at the date of the delivery of said writing, a resident of the city of St. Paul, in the county of Ramsey and State of Minnesota, and had no personal knowledge as to the character, condition, location, surroundings or value of the real estate described in said writing, and relied in part upon the statements and representations set forth in said writing in relation to the real estate therein described.

Fourth—That the above-named plaintiff consummated the exchange of property described in the pleadings in reliance upon the personal guaranty of the defendant set forth in said writing.

Fifth—That certain of the representations in said writing respecting the property transferred by the defendant to the plaintiff, and which materially affected the value of such property, were not, in point of fact, true, as stated in said letter. The representations hereby found to be untrue are hereinafter set forth, that is to say:

(A) The houses described in said writing as "property number 2148 and 2150 Fifth avenue, New York City" "are complete with all modern improvements and first class in every respect."

(B) "The houses on Fifth avenue in this portion of the city are all fine residences."

(C) "These houses could not have been built for less than $16,000 apiece."

(D) "The valuation of the property at forced cash sale would be $22,500."

(E) "Real estate in that portion of New York City cannot be worth less than $500 a front foot."

In reference to said representations the court finds that the facts really were that the houses described in said writing were not first class, as therein represented; but, on the contrary, were, to a great extent, of inferior quality by reason of poor material used in the construction thereof, and unworkmanlike methods used in the construction of said houses.

The houses on Fifth avenue in that portion of the city, described in said writing as the location of said houses transferred to the plaintiff, were not all fine residences as represented in said writing; but, on the contrary, the said houses were located upon the extreme northern limit of the region occupied for residences of a high character, and all the portion of the city of New York immediately north of the street running east and west, and situated immediately north of the property transferred to the plaintiff by the defendant, was sparsely settled, and the buildings used for both residence and commercial purposes in said region north of said street were of a poor character and quality.

The houses described in said writing did not cost $16,000 each to build, nor any sum to exceed about $13,000, for the house standing upon the lot nineteen feet in width, and about $13,500 for the house standing on the lot twenty feet in width.

The said lots without improvements were not worth $500 per front foot, but only about $400 per front foot.

Neither of said tracts of land, with the improvements thereon, would sell at forced cash sale for the sum of $22,500.

The property described in said writing and transferred by the defendant to the plaintiff, as set forth in the pleadings, was actually worth and of the value of $42,430, to-wit: The lot 19 feet in width with the improvements thereon, was worth and of the value of not more than $20,745; and the tract of land 20 feet in width, with the improvements thereon, was reasonably worth and of the value of a sum not exceeding $21,685. That the value of said property as represented and warranted by the said defendant, in connection with the aforesaid exchange of properties, was $51,500.

As Conclusions of Law from the facts aforesaid, the court finds:

That the plaintiff is entitled to judgment against the defendant for the sum of nine thousand and seventy dollars ($9,070), with interest thereon at the rate of seven per cent per annum from and since the 21st day of February, A. D. 1889, together with the costs and disbursements of this action.

Let judgment be entered accordingly.

WILLIS, J.

On June 16, 1894, defendant's motion for a new trial was denied. On Aug. 2, 1894, plaintiff entered judgment for $12,530.21

Marshall vs. Gilman. District Court of Ramsey County, No. 44,871. J. M. Gilman and Robertson Howard for plaintiff; Lusk, Bunn and Hadley for defendant.

SOME good stories are going the rounds concerning Sir Matthew Begbie, chief justice of British Columbia, who died the other day. Here is one of them: In 1883 a man was charged in Victoria with having killed another man with a sandbag, and in the face of the judge's summing up the jury brought in a verdict of not guilty. This annoyed the chief justice, who at once said: "Gentlemen of the jury, mind, that is your verdict, not mine. On your conscience will rest the stigma of returning such a disgraceful verdict. Many repetitions of such conduct as yours will make trial by jury a horrible farce and the city of Victoria a nest of immorality and crime. Go, I have nothing more to say to you." And then turning to the prisoner, the chief justice added: "You are discharged. Go and sandbag some of those jurymen; they deserve it."—Westminster Gazette.

WARNING to Trespassers.—In Massachusetts the following legal notice was posted: "Any person ketched on these grounds, or cows, or wimin, will be liabul two fine itself in a scrape."

And in Texas was the following: "Notis.—If eny man's or woman's cows or oxun gits on to this here lot his or her tale will be cut off as the case may be.—Gen. Digest.

A GOOD story, but one rather hard upon the profession, is told of a certain dean of Ely. At a dinner, just as the cloth was being removed, the subject of discourse happened to be that of extraordinary mortality among lawyers.

"We have lost," said a gentleman, "not less than seven eminent barristers in as many months."

The dean, who was very deaf, rose just at the conclusion of these remarks, and gave the company grace: "For this and every other mercy, make us devoutly thankful."—Green Bag.

ATTORNEYS who may be participants in any case involving novel points of law will greatly assist us by furnishing a statement of facts, with a memorandum of the decision, to any of the following correspondents, who will forward them to us, with the names of the attorneys, for publication:

J. A. LARIMORE, St. Paul, Minn.
GEO. H. SELOVER, Wabasha, Minn.
A. E. DOE, Stillwater, Minn.
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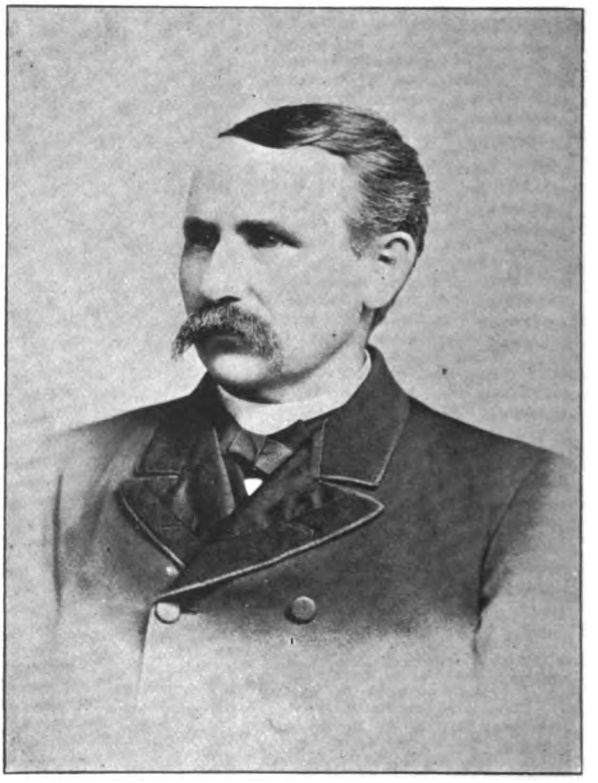


HON. CHARLES M. START.

DISTRICT JUDGE, THIRD JUDICIAL DISTRICT.

THE MINNESOTA LAW JOURNAL.

VOL. II. AUGUST, 1894. No. 8.

THE MINNESOTA HOMESTEAD LAW.

THE JOURNAL can be made to subserve an important purpose, if the members of the bar will make it the vehicle for noting conspicuous defects in our state legislation to which their experience in practice has called their especial attention. Year after year legislatures meet and adjourn, but old errors and omissions in our statutes persist to the confusion of lawyers and the prejudice of clients because no organized body makes it its business to secure a remedy, and because individuals have heretofore had no organ through the medium of which to make suggestions with any hope of commanding a hearing.

Take the Minnesota homestead law as an example. In one case the Supreme Court calls it "a vexatious statute."[1] In another it adopts a construction which it admits is full of difficulty only because any other would lead to still greater difficulty.[2] In another it speaks of it as a law which permits great moral fraud.[3] In Baldwin vs. Robinson, 39 Minn., 244, Judge Collins begins his opinion by saying:

"To determine this case we must construe a section of our statutes relating to the homestead exemption which is certainly beyond any construction which will prove satisfactory or not subject to doubt and stricture."

And again in *In re* Smith's estate, 51 Minn., 316, Judge Mitchell uses these words:

"This case illustrates the embarrassments that are liable to arise in construing the very crude provisions of our homestead exemption law."

And yet in spite of its admitted unintelligibility, and in spite of the repeated cries of despair which have gone up from our trial and appellate courts when called on to interpret its impossible provisions, this statute stood with its phraseology practically unaltered from the admission of the state into the union down to the year 1891. During this interval some changes were made but none calculated to diminish its difficulties. But in 1891, the legislature, with the playfulness of a pugilist on a drunk, hit the poor thing a blow in the shape of an amendment which has stripped it of what little symmetry it had won from years of careful judicial doctoring and left it an object of despair to all who have to look on its face.

For the purposes of this article, it will be accurate enough to say that

[1] Mintzer vs. The St. Paul Trust Co., 45 Minn., 323.

[2] Lundberg vs. Sharvy, 46 Minn., 350.

[3] Jacoby vs. Distilling Co., 41 Minn., 227.

prior to this final legislative exploit, the act exempted from attachment, levy or sale upon execution or any other process, a homestead of an ill defined size and character. If not included in the laid out or platted portion of any incorporated town, city or village, the exemption extended to a quantity of land not exceeding eighty acres. If within the laid out or platted portion of any incorporated town, city or village having over five thousand inhabitants, it was limited to a quantity of land not exceeding one lot; and if within the similar portion of such a town, city or village having less than five thousand inhabitants, to one half acre. In each case the dwelling house and its appurtenances on the exempted tract were included. The further requirement was added that the property must be owned and occupied by the party seeking to take advantage of the privileges the law conferred and there the legislature rested.[4]

There is a couplet addressed to the gentlemen who 'write with ease to show their breeding,' which ends with the line,

"But easy writing's curst hard reading."

And it is the same way with legislation. When the legislatures loaf, the courts have to work and our judges have been kept busy adding to the homestead act what its authors and their successors have failed to insert in it, but which is necessary to make its application possible. Very early in its history,[5] by a curious misunderstanding of the precedents it quoted, our Supreme Court announced the peculiar doctrine that a homestead statute "is in derogation of the common law and must be strictly construed." It does not appear that it has ever reversed itself on this point in so many words. But some of its decisions justify the opinion that its facile amplifications of our law on the subject have accomplished the same end and brought it in harmony with the general drift of judicial holding which favors a liberal construction. Thus, for example, it is difficult to reconcile the doctrine of Kelly vs. Baker, 10 Minn., 154, with the strict interpretation theory. There the court held that even though part of a city lot is used for other purposes than the homestead and only a small portion is actually occupied by the owner's dwelling house, the mere presence of the latter is none the less sufficient to secure the exemption of the whole and to save from levy even valuable rented tenements, provided they are included within the prescribed limits. It is true, that the wording of the law perhaps admits this view. But it is opposed to the position taken under similar statutes by the appellate courts of Michigan, Iowa and Wisconsin[6] and is hardly what might be expected of a tribunal jealously intent on guarding the "common law from derogation." The same comment is pertinent also to the case of Jacoby vs. Parkland Distilling Co., 41 Minn., 227, where Kelly vs. Baker was affirmed and applied in justification of a man, who on the eve of a failure in business having moved into a room in a valuable brick block which he had previously listed among his assets as a basis for credit, claimed the whole of it to be exempt as a homestead. The

[4] Gen. Statutes, Minn., 1878. Chap. LXVIII.
[5] Olson vs. Nelson, 3 Minn., 53.
[6] Dyson vs. Sheley, 11 Mich., 527. Kurz vs. Brusch, 13 Iowa, 371. Casselman vs. Packard, 16 Wis., 114.

District Court of the United States, in two well considered opinions[7] based on similar facts has distinctly stated that to use the homestead law as a cloak for such moral dishonesty is a prostitution of its beneficent purpose which a court will defeat, if possible, even though it requires some elasticity of construction to do so. Nothing here said is intended as a criticism on the wisdom or correctness of the conclusions of our own judges in the cases in question. The character and ability of the men who wrote them would be a sufficient reply to any suggestion of this sort. But they are quoted and referred to in support of the contention that our courts, in spite of their initial error to the contrary, now recognize the fact that the common law provided protection for the home, and that our current statutes to the same purport are not at variance with the common law, but simply applications of its spirit and principles.

But whether the liberal or the strict construction doctrine holds in Minnesota on this subject, it has in any event afforded the most prolific field, especially in recent years, for judicial legislation and promises the happiest opportunities in this direction for the future. Up to the present writing this sort of activity has been chiefly exercised over two points. One has been in defining the expression "the laid out or platted portion" of a city. The other has been in explaining what the statute means by a "lot." It is rather curious that the first of these unhappy expressions did not thrust itself forward for consideration until 1888, although it had been part of the law since 1875. Then the growth of Minneapolis developed the following problem.[8] One Baldwin for more than thirty years had lived on a piece of property 165x198 feet in dimensions. When he first went on it, it was outside of the city limits, but at the date of the controversy before the court had been brought within the urban confines and was surrounded by a platted and thickly settled district. The court concluded that since the piece in dispute had never been actually platted either by its owner's or legislative action, it was not within the "laid out or platted portion" of a city as meant by the statute, and that it was all exempt, notwithstanding the platting of the contiguous territory.

This seems clear enough and the decision has the added merit of contemplating the consequences which its holding might entail. The court admits that under it a man might secure the exemption of as much as eighty acres in the heart of a great city if he should obstinately refuse to plat it, but adds that such a contingency is too unlikely to be permitted to militate against its reasoning. Queerly enough the very next case[9] which came before it involving this question, was one which required the court to hold thirty acres in the city limits of St. Paul exempt as a homestead or else back down from its previous decision, and still more queerly, both appellant and respondent quoted this former decision in support of their respective positions. The court, however, was not bluffed, either by the confusion

[7] *In re* Lammer, U. S. Dis. Ct., Western Dis. of Wis., 1876, reported in 3 Cen. L. J., 574. *In re* Wright. 3 Bissell, 359.

[8] Baldwin vs. Robinson, 39 Minn., 244.

[9] Mintzer vs. St. Paul Trust Co., 45 Minn., 323

into which the Baldwin case had thrown eminent counsel or by the size of the tract before it. It decided that the entire thirty acres were exempt, and for the guidance of future generations laid down a rule for such cases which, with commendable modesty, it said had at least the merit of certainty. And this is the rule in its own words:

"A tract of land to be within the laid out or platted portion of a city must be itself laid out or platted. It must be a part and parcel of that portion of the municipality which is either laid out or platted, and not merely a tract of ground not subdivided in any manner but which may be surrounded in whole or in part by tracts which have been laid out or platted by other parties."

No generous man will claim that it is a necessary part of a court's duty to give definitions of this sort designed to set doubts at rest and to save legislatures from the trouble of exercising their constitutional functions. But, when an attorney comes across such a one, he thanks Heaven and the Supreme Court and takes courage. With its help the timid client can be encouraged to embark on litigation and brief writing is made easy. But there are two obvious difficulties with judicial legislation as distinguished from legislative legislation. One difficulty is that the court which enacts a statute can repeal it in the very same decision and frequently does so, either by attempting some explanation or qualification or else out of pure recklessness or wantonness of spirit. Of this danger the case now under consideration affords an interesting illustration. Any old fool reading the definition just quoted would say that a piece of land in order to be in the "laid out or platted portion" of a city must itself be laid out or platted. But right there he would be mistaken. It is true that the definition which has at least "the merit of certainty" puts it thus. But immediately afterward the court adds these terrible words:

"But from what has been said it must not be understood that a formal laying out of land or its regular platting into lots, blocks, streets and alleys according to statute is absolutely essential in order to reduce the area of the homestead from the larger to the smaller tract, for there might be acts of the owner which would amount to the laying out of his property and [be] equivalent to its platting."

What these mysterious other "acts of the owner" may be, which are not platting and which at the same time are platting, we are not told, but as to them we are left in suspense like the reader of the penny dreadful story paper until some future installment may enlighten us.

The weary seeker after truth, however, whatever other sensations he might experience from a perusal of the Mintzer case, would at least feel sure as to the accuracy of one inference. He might have to admit that while for the sake of "certainty" the court had held that a piece of property in order to be within the platted portion of a city must itself be platted, it had also perhaps to save the law from the reproach of being an exact science, held in the same case that it need not be. But there could apparently be no question from what both the court and the statute said that if a piece of urban property were itself platted, it would be within the platted portion of the city in the meaning of the statute. And to this comfortable identical proposition the bar clung with feelings of considerable self satisfaction as though it knew something about the homestead law until *In re* Smith's estate, 51 Minn., 316 was

decided in the fall of 1892. The opinion in that case affords an illustration of the second difficulty attendant on judicial legislation. A legislature when it enacts a law can either by implication or express provision, repeal all previous statutes inconsistent with it. Courts cannot wipe the tablet clean in this way and start afresh. They may be ever so brave in a constructive sense but it is seldom long before they find themselves brought to grief by the demands for reconcilement asserted by some obscure phrase in the printed laws which they had overlooked. So our own court, which had decided the Baldwin case with full recognition of the fact that under it 80 acres in the heart of a great city might be held exempt as a homestead because such a contingency was not likely to arise, and when it did arise to the extent of 30 acres in the Mintzer case went right on and for the sake of "certainty" laid down the general rule which has already been noted, found itself confronted in the Smith case with a problem of a most upsetting character. The possible limits of this article do not permit a detailed examination of this decision. But in general it permitted the exemption as a homestead, of a four acre tract within the corporate limits of New Ulm and added to the rule of the Baldwin and the Mintzer cases the further qualification that to be within the platted portion of a city a piece of property must not only be itself platted, if the Mintzer case so holds, but must be platted for urban, in distinction from rural or suburban purposes.

With the word "lot" the courts have had less trouble in their legislative capacity, and had the legislature itself kept its hands off the subject, an intelligent guess as to its meaning might be within the reach of a well-trained lawyer. The employment of such a term as a measure of exemption was certain to cause confusion because a lot is, of necessity, of undetermined dimensions. At first many respectable authorities construed the word as synonymous with "tract" or "parcel," but in Wilson vs. Proctor, 28 Minn., 13, the Supreme Court defined it as a lot "in the sense of a city, town or village lot according to the survey and plat of the city, town or village in which the property is situated." This was a good enough definition for the purposes of that case, but it left many difficult questions entirely unsettled. The most obvious one was this: Suppose the lots in a city vary in size according to the recorded plats, what will be the limit of the exemption? It was ten years after the decision in the Wilson case before the court was called on to answer this inquiry and then[10] it ruled: (1.) That the quantity of land exempt is to be determined by the size of the lots as marked out on the plat of the addition of which the land in question forms part, and (2) that if lots in an addition are of variable sizes on the plat, the ordinary or prevailing size in the addition is to be taken as the measure. Passing over the conspicuous injustice of such a law for which the court was not responsible, this decision was very helpful. It was based on a theory, which with characteristic courtesy, the court conceived the legislature had in mind when it passed the law. This notion

[10] Lundberg vs. Sharvy. 46 Minn., 350.

of the legislature's having a theory in the enactment of statutes is one of most delicious and persistent of legal fictions. The court's idea seemed to be that the legislature thought people of the same financial standing would naturally live in the same quarter of the city and intended to exempt for each such class the same quantity of land. But the legislature, by a noteworthy coincidence, gave the lie to this flattery, and put to rest forever the suggestion that it meant *anything* by the word "lot." The opinion in Lundberg vs. Sharvy was handed down June 20, 1891. Three months previously, (March 16, 1891,) the legislature took upon itself to solve the same problem which the court had before it in that case, and this is what it did. It amended the homestead law by declaring that in cities of more than five thousand people there may be exempt as a homestead a quantity of land not exceeding one lot

"of the original plat or any rearrangment or subdivision of such plat or any part thereof as the same shall exist at the date of the commencement of the action or proceeding in which the execution or other process hereinafter mentioned shall issue, or of the death under which the homestead is claimed or in case the buildings occupy parts of two (2) or more lots as legally platted at the time the exemption is claimed a quantity of land not exceeding in area one of the original lots in the same block."[11]

Presumably the Supreme Court was not aware of the existence of this legislative abortion when its opinion in the Lundberg case was written. But its attention will sooner or later be called to it. If thereafter it brashly speaks of the legislature as having a theory in mind, or having a mind at all, for that matter, in the enactment of the homestead law or its amendments, it will forfeit forever its reputation for sincerity and figure before the public in the guise of a courtier who obsequiously attributes intelligence to a paretic sovereign. The author of the amendment of 1891 is probably a good fellow, but as to him the constitution ought to be suspended, and as a penalty for his achievement, he should be subjected to the "cruel and unusual" punishment of explaining what it means.

To summarise, the Minnesota homestead law is in sad need of revision. In as far as its significance is settled, it is a monument of bad logic and injustice. It protects from one man's creditors property of only a thousand dollars in value, while his neighbor enjoys an exemption of a million. And notwithstanding the conscientious efforts of our courts to the contrary, it defies in its every provision the inquirer's demand for information. It may be that some of the strictures of this article may seem to reflect on the court's position in some of its opinions on this subject. Nothing is further from the writer's mind. He has recently watched one of our judges, capable, industrious, learned and unbiasedly ambitious to do justice without wavering, trying to solve a homestead problem presented to him for which the law itself and the printed decisions afford no guidance or assistance. The difficulties of the task are insuperable and what our appellate court has accomplished under similar circumstances is a wonderful example of the judiciary's ability to do both its own and the legislature's work when driven to it. As such it is deserving of admiration rather than of criticism. But the same cannot be said of legislatures which waste their time over buncombe bills and then go home to prate about judicial usurpation which their own negligence and incompetency have compelled.

AMBROSE TIGHE.

St. Paul, Sept. 1, 1894.

[11] Gen. Laws Minn., 1891, Chapt. 81.

OUR PORTRAIT.

HON. CHARLES M. START was born on a farm in Franklin County, Vermont, in 1839, and received his early education at Bakersfield and Barre Academies. He was admitted to the bar of Franklin County in 1860. In July, 1862, he enlisted in Co. I, 10th Vermont Volunteer Infantry. On account of ill-health, however, he was discharged in December of the same year. In October, 1863, he came to Rochester, Minnesota. In 1865 he was elected city attorney, in which capacity he served until the fall of 1869, when he was chosen county attorney of Olmstead County, which position he held for eight years.

In the fall of 1879 he was elected attorney-general of the state, serving until March 11th, 1881, when he resigned to accept the office of Judge of the Third Judicial District in place of Judge Mitchell, promoted to the Supreme Court Bench.

In the fall of 1881 he was elected and has twice been re-elected Judge. His third term commenced January, 1894. He was elected each time unanimously without the formality of any party nomination.

He was nominated July 11th, 1894, by the Republican State Convention for Chief Justice of the Supreme Court of Minnesota.

Judge Start is in the very prime of judicial life, and his vast experience as practicing lawyer, county attorney, attorney general and district judge will make his services on the supreme bench of inestimable benefit.

Though never courting popularity, he is beloved by the people. He enjoys the popularity which Lord Mansfield desired, "that which follows; not that which is run after." There is progress in law as in everything else, and Judge Start has always been under its conservative, yet forward, impetus. He is a student, not only of books, but of the events in the midst of which he lives. He belongs to that class of jurists who recognize that the law is not a fixed science, ossified in the reports, but that it is expansive, in the hands of enlightened magistrates, to accommodate itself to every exigency of a social system which is continually increasing in complexity and in necessity for the administration of adequate justice.

IN a certain town in Nevada there was at one time a justice of the peace, who had been born in the Emerald Isle, and whose blunders occasioned many a smile to the better educated members of the community.

A subpœna had been issued from his court to another Irishman to attend as witness in a case where James Smith was the plaintiff, and Isaac Williams *et al.* were the defendants.

Michael Fennessey, the desired witness appeared in court before the trial commenced, and during an informal preliminary conversation he asked bluntly, "Judge, who in the wurld is *'et al.'*? That's fwhat Oi'm wantin' t'be towld."

"Well, well, Moichael," exclaimed his honor in utter amazement, "Oi must say Oi'm a bit surprised that an American citizen, an' a man av orthinary intilligince, should not know the manin' of *et al.!* But for the binifit av the witness an' any other gintlemin prisint that moight be ignorant as well as Moichael Fennessey, Oi will explain. It is dirivated from two Latin wurrds conthracted, an' manes in its litheral an' Amirican sense, "*at all, at all!*"—*Greenbag.*

OPINIONS OF THE ATTORNEY GENERAL.

SCHOOL—A District in which for three years there has been no school, although a District Organization has been maintained, held entitled to apportionment as a new District.

EXAMINATION OF TEACHERS—County liable only for expense of advertising such as are held in the county seat.

HON. W. W. PENDERGAST,
Supt. of Public Instruction.

Dear Sir: I beg to acknowledge receipt of your communication of the 19th inst., in which you raise the following questions.

1. A school district having had no school for three years or more, has kept up its organization, elected its proper officers at annual meetings and made regular annual reports. The county commissioners have never taken cognizance of the fact that there was no school maintained in such district. This spring a new school house was built in said district and a school taught therein for two months. Is the district entitled to apportionment as a new district?

2. The commissioners of Faribault county claim that the notice provided for in section 112 of the compiled School Laws has reference only to one meeting to be held at the county seat and therefore refuse to pay the expense of publication of notices of other meetings. Have they properly construed the law?

It may be fairly held that the district falls within the spirit of the proviso contained in Sec. 132 of the Compiled laws, and is therefore entitled to share any apportionment as a new district. The fact is that there was a discontinuance for all practical purposes of the school kept in the district for a period of upward of three years. The case is very exceptional in character, and in view of all the facts presented, I deem it advisable to regard the district in the light above suggested.

The statute provides that the superintendent shall hold each spring and fall in the county at least three meetings for the examination and licensing of teachers, one of which shall be held at the county seat and of which meeting at least ten days notice shall be given by publication in the newspapers of the county. The evident purpose of the statute is to provide for the holding of one meeting in a central place in the county, which shall have been noticed by ample publication in the papers of the county. It is therefore appropriately provided that one of the three meetings shall be held at the county seat, and that notice thereof shall be given by publication in the newspapers printed in the county. The commissioners are therefore correct in assuming that the county is not required to pay the expenses incident to publication of notices of any other than the meeting advertised to be held at the county seat.

The statute is somewhat directory in the matter of publication of the notices of the meeting to be held at the county seat. It is left largely in the discretion of the superintendent of schools as to the number of papers in which such notice shall be published. He ought to employ a suitable number of papers in order to give as wide publicity as possible to the meeting to be held at the county seat, and the board of county com-

missioners should allow the claims of all papers thus designated by the superintendant for such publication.

It is very manifest that the validity of the meeting cannot be in anywise affected by the question as to whether few or many papers have been thus designated.

Very respectfully,

June 21, 1894. H. W. CHILDS.

SAVINGS BANKS—Law of 1879, relating to, repealed by Chap. 119, Gen. Laws of 1889.

HON. M. D. KENYON,

Public Examiner.

Sir: I beg to acknowledge receipt of your communication of the 19th inst., in which you call attention to the earlier one of Mr. Goldsmith in which he submits the following question:

"Is Chap. 22 of the General Laws 1885, amending Sec. 28 of Chap. 109 of General Laws of 1875, relating to savings banks, still in force, or has the same been repealed by the enactment of Sec. 3, of Chap. 119 of Gen. Laws, 1889, amending Sec. 28 of Chap. 109 of Gen. Laws, 1879 relating to saving banks?"

You request my views upon the question thus submitted.

By Chap. 22, Gen. Laws 1885, the law of 1879 was amended by adding thereto a certain clause. The law of 1889 above cited amended Sec. 28 of the law of 1879, so as to read as set forth in Sec. 3 thereof. The provision added to the law of 1879 by the amendment of the law of 1885 does not, however, reappear in the law of 1889. It is a familiar rule in the construction of statutes that where a statute is amended by the use of the words "so as to read as follows," all provisions of the old law, reappearing in the amendatory law, are deemed to survive or continue in force; while all those not thus re-appearing are to be regarded as repealed. (Suth. Stat. Const., Sec. 133.)

It therefore follows that the question submitted must be answered in the affirmative. In other words, that Sec. 3, of Chap. 119 of the laws of 1889, has fully superseded the law of 1879 and the prior enactment thereof. Very respectfully,

June 27, 1894. H. W. CHILDS.

HIGHWAYS.—The fee in the soil of, unless otherwise expressly provided by the legislature, remains vested in the owners of fees of the abutting property.

P. A. COSGROVE,

Arlington, Minn.

Dear Sir:—As you are, of course, aware, the public acquired by condemnation proceedings only as easement in the land embraced within a highway; in other words, the right to use such land for the purpose of public travel. The fee of the land, except when the legislature has made other express provisions, continues undisturbed in the owner. In the charter of some of our cities, like St. Paul for instance, it is provided that the absolute fee shall pass by condemnation to the municipality, and in such a case the right is upheld to remove the soil and rocks, lying in one portion of the street to another portion, and in fact to dispose of them for a purpose entirely foreign to that of highways. (See Fairchild vs. City of St. Paul, 46 Minn. 540.) This is not, in my judgment, true of ordinary country highways where the right of easement is acquired by virtue of the provisions of our general statutes. While I have little doubt of the right of the board of supervisors to remove soil from the highway

abutting on the lands of A to a portion thereof abutting upon the lands of another, there is, of course, a limitation upon their authority in this regard. They certainly could not lawfully remove the soil to an unlimited extent and regardless of the rights of A.

Speaking, therefore, as generally as you have been pleased to express your question, it is my opinion that your question should be answered in the affirmative. Whether A may recover damages against the town for the appropriation of soil taken from the highway running across his land, is a question which he must submit to his private counsel.

Very truly yours,
H. W. CHILDS.

June 22, 1894.

TAXATION—Tax Certificate—Taxable as Personal Property until the time to redeem expires.

MR. S. W. FURBER,
Northfield, Minn.

Dear Sir:—In your communication of the 14th inst. you inquire, in substance, whether a tax certificate issued by a county auditor for the sale of lands delinquent is taxable, and cite an opinion rendered by Hon. Gordon E. Cole, while attorney general, to the effect that such certificates are not taxable.

When the opinion above cited was rendered, the statutes expressly provided that "every county auditor hereafter delivering any certificate of purchase of forfeited lands or other lands sold for taxes, shall immediately of his duplicate transfer the same to the name of the purchaser." This statute was cited in that opinion as authority for the view therein expressed. The statute has, however, undergone a material change in such regard, and it is now provided that title shall not pass by the certificate until after the time of redemption has expired.

The supreme court of this state has held in the case of McLelland vs. Omodt, 37 Minn. 157, that the certificate of sale at tax-judgment sale neither passes the title to the holder, nor gives him the right to possession until the time for redemption has expired. He cannot, therefor, during the redemption period, be properly regarded as the owner of the land described in his certificate, and I deem it fair to hold that until such time his certificate is to be regarded as a credit within the meaning of that term as employed in our tax laws. This view is supported by an opinion rendered by Ex-Attorney General Start, in which he held that a foreclosure certificate after foreclosure and before redemption is taxable; that until the time of redemption expires the purchaser at the sale has only a chattel or equitable interest. I fail to perceive any difference in principle between the case of a tax certificate and a foreclosure certificate in this respect.

I am therefore of the opinion that a tax certificate is taxable as personal property.

Very truly yours,
H. W. CHILDS.

June 27, 1894.

The National Guard.—When called into actual service by the Commander-in-Chief is to be furnished sustenance by, and at the expense of the State, without any deduction being made therefor from the per diem of the men.

HON. HERMAN MUEHLBERG,
Adjutant General.

Sir:—In your communication of the 6th inst. you call attention to a bill

rendered by the La Vaque Paint and Wall Paper Company, of Duluth, for board of soldiers during the strike at Virginia, in the county of St. Louis, and request to be advised whether the state is properly chargeable with said bill, and if so, from what fund may the same be paid.

Section 3 of Article 6 of the Military Code provides, in substance, that whenever the National Guard of the state is called into active service by the Commander-in-Chief, the enlisted men who respond to such call shall be entitled to receive a per diem of two dollars for the time actually engaged in service, which compensation is to be paid from the treasury of the state upon the requisition of the Commander-in-Chief.

The guard was ordered out, in the case in hand, by the Commander-in-Chief, at the request of the sheriff of said county, and no provision was made by the state for their subsistance during their term of actual service. The sheriff procured subsistance for them at a hotel at Virginia, during their stay at that place, and the bill rendered is on account of accomodations thus supplied.

A careful reading of the several provisions of article 6 of the said code leads me to the view that the statute implies that the guard, when called into actual service, is to be furnished subsistance by and at the expense of the state, without any deduction being made in the per diem of enlisted men on account thereof. This is in contradistinction to the rule obtaining when the National Guard is ordered into camp by the Commander-in-Chief; as in the latter event it is expressly provided that a deduction of fifty cents per day from the pay of enlisted men shall be made for subsistence furnished by the state. While neither the Commander-in-Chief nor the officers in command of the Guard expressly authorized the furnishing of supplies by the proprietor of said hotel, it may be fairly claimed that the sherriff was acting as agent of the state, or at least that his action in such regard was ratified by it. This being so, it naturally follows that an obligation was thereby incurred by the state, and the bill in question should, in my opinion, be paid by it.

The only appropriation available for the purpose of meeting such expenses is the appropriation made by sec. 3 of art. 10 of the Military Code, as that fund is expressly declared to have been appropriated "for the purpose of carrying out the provisions" of the act providing for the creation of the National Guard. There can be no question that the furnishing of subsistance to the men during such actual service, falls within the contemplation of the said appropriation.

Very respectfully,

H. W. CHILDS.

June 15, 1894.

ATTORNEYS who may be participants in in any case involving novel points of law will greatly assist us by furnishing a statement of facts, with a memorandum of the decision, to any of the following correspondents, who will forward them to us, with the names of the attorneys, for publication.

J. A. LARIMORE, St. Paul, Minn.
GEO. H. SELOVER, Wabasha, Minn.
A. E. DOE, Stillwater, Minn.
M. S. SAUNDERS, Rochester, Minn.
W. J. STEVENSON, Duluth, Minn.
A. COFFMAN, St. James, Minn.

REVIEWS.

THE Historical Developments of the Jury System. Maximus A. Lesser, A. M., L.L. B. Lawyers' Co-Operative Publishing Co. N. Y., 1894.

In his preface our author states that this work is a labor of love, originally read by him as an essay before the Academy of Political Science of Columbia College, and subsequently revised and expanded from interest in the subject,—and that, as such, he prefers that it be judged.

The work is not one of value to the mere practitioner, but one which will not uselessly cumber the shelves of the lawyer, and one which will be of interest to the general reader and valuable to the student of law.

The chapters on "The Dikasts of Greece," "The Judices of Rome," "The Tribunals of the Ancient Germans" and "The Institutions of the Britons," although interesting in themselves, and bearing the evidences of thorough study, do not throw light upon the historical development of the English jury system. As well might we seek for traces of similar institutions among the Hindoos or ancient Persians, or other Aryan people, and they doubtless could be found; or, better still, exclaim with M. Bourgoignon that the origin of the system is lost in the night of time. (P. 7.)

With chapter 6, "The System of the Anglo-Saxons," our author really begins his inquiry into the origin of the English jury, and at once (P. 67) comes upon the mooted question of whether the institution is Saxon or Norman.

On page 68 is given a table or list of the authorities holding either way, and it is at once observed that all the older authorities concur in holding the institution to be of Saxon paternity, and that the more modern almost as unanimously claim that it was introduced or derived from the Normans, and was not of Anglo-Saxon origin. Although our author modestly does not attempt to make his own opinion prominent, it is apparent that he belongs to the more modern school. (P. 93.) And in this we must agree with him. That some Saxon institutions or customs in a measure affected the development of the jury is doubtles true. Thus the number of the traverse jury became fixed at twelve, probably because that was ordinarily the number of Saxon compurgators. (P. 79.) But the institution or custom whence immediately sprang our jury is as undoubtedly the *inquisitio*, or iniquisition, (a French or Frankish institution which had been adopted by the Normans), "A proceeding unknown to the old Germanic law," which "crossed the channel with the Normans," and which "while dying slowly out in France began its peculiar and astonishing developement in England." (P. 95.)

From the inquisition our author traces the assize of Henry II, which he rightly calls "the immediate progenitor of the modern jury." In fact the assize was the same as the jury latter became in all material particulars, differing only in the character of the evidence upon which the recognitors based their verdict. The trial by jury is said to have been a trial by

witnesses to all intents and purposes until about the reign of Henry VI, (p. 104), but as our author states, (p. 112,) "the circumstances which tended to disqualify a man from serving as a juror corresponded closely with the disqualifications of witnesses at a later day, being perjury, serfdom, near relationship, enmity and intimacy (citing Bracton, *de Laud*, Bk IV., c. 19.) Therefore, the character of the evidence upon which the verdict was rendered was much the same where the jurors themselves were witnesses, as where they rendered their verdict upon the testimony of witnesses produced before them.

By the middle of the 15th century the jury was essentially the same as it is at present with the exception of this requirement of personal knowledge of the disputed facts on the part of the jurors; and this requirement was so gradually lost that no date can be assigned when the jurors ceased to be witnesses, and rendered their verdict upon the testimony of witnesses produced before them, thus becoming the modern jury, although the change had been effected at least as early as the beginning of the 16th century.

OF all the periodicals which reach our table, other than those of a purely legal nature, the "Atlantic Monthly" is unquestionably the most interesting, and the one to which our "jealous mistress" should take the least dislike. Nor are its contents always of a character entirely foreign to that line of reading for which lawyers are supposed to have an exclusive fondness. Thus the article of J. Laurence Laughlin in the July number on Monetary Reform in Santo Domingo, although not of a strictly legal character, is an account of the making of certain laws for that little island republic which will undoubtedly prove of the greatest benefit to her and to her people. Also the article, The Mayor and the City, might have some interest to a lawyer, even if he have, as we are assuming, no literary taste whatever.

In the August number also some things of "value" will be found. Thus it may be well for the lawyer about to try his first "horse case" to have learned that the horse trader is a very "superior person," but, "unfortunately, not always absolutely honest," and this he can learn, if nothing more, from Mr. Merwin's "Professional Horseman."

But levity aside, none of our periodicals maintain a higher literary standard than the Atlantic, and there are none which surpass it in interest, or which contain more timely articles on matters of present concern.

WINKERS—How did Van Brief make such a failure of politics?

Blinkers—His head was so full of legal phraseology that when he started to make a speech, he used the same style of language.

Well?

Well, the campaign was over before he could say anything.

AN old judge of the New York Supreme Court, meeting a friend in a neighboring village, exclaimed, "Why, what are you doing here?" "I'm at work trying to make an honest living," was the reply. "Then you'll succeed," said the judge, "for you have no competition."

PIERCE BUTLER, ESQ.

PIERCE BUTLER, the present county attorney of Ramsey County, is one of the youngest members of the bar. Born on a farm, March 17th, 1866, in Waterford Township, Dakota County, Minn., After attending the common schools he began a course at Carleton College, Northfield, Minn., and graduated June 16th, 1887, with a degree of B. S. In July of the same year Mr. Butler came to St. Paul and studied law, was admitted to practice in October, 1888, and began practicing for himself in 1889. He was appointed assistant county attorney on January 1st, 1891, by Thos. D. O'Brien, the county attorney and was elected to the office of county attorney in November, 1892. He appointed as his assistant, S. J. Donnelly, his former law partner. His record as a prosecutor is one of the best in the history of Ramsey County, and he has no equal for his age as a criminal lawyer in the state. Personally he has a charming and agreeable manner, is an eloquent speaker, and his integrity, ability and fearlessness has made him what he is to-day, viz.: one of the most popular young lawyers of the Ramsey County Bar.

FRANK M. NYE is a native of Maine and is forty-two years of age. His parents removed to Northwestern Wisconsin when he was an infant. He grew up on a farm in the St. Croix valley near River Falls. After receiving a common school education and a course in the academy at River Falls, he taught school several terms, after which he commenced the study of law. He was admitted to the bar at Hudson, Wisconsin, in the spring of 1878. Shortly after he located at Clear Lake, Polk County, Wisconsin, and commenced the practice of his profession. He was soon elected district attorney, which office he held two terms, after which he was elected to the lower

FRANK M. NYE, ESQ

house of the Wisconsin legislature. He was a warm personal friend of Hon. John C. Spooner, and had the honor of presenting his name to the

legislative caucus for the United States Senate.

In the spring of 1886 he removed to Minneapolis, and soon after was appointed assistant county attorney of Hennepin County by Robert Jameson. In the fall of 1892 he was elected county attorney, which office he now holds. He has lately been unanimously re-nominated by the Republican party.

His term of office now nearly complete, has been one of unusual labor and responsibility. He has tried a large number of important criminal cases, among which were the cases of Dugan and White charged with the murder of James R. Harris; Richard Kennedy, charged with the murder of Joseph Hoy; Philip Schieg, Louis and Frank Floyd, charged with robbing the Bank of Minneapolis, all of whom were convicted and are now under sentence. Numerous other cases of less note have been successfully prosecuted.

He has proven himself a fearless and impartial officer, a vigorous prosecutor and an eloquent advocate.

EXPENSES VS. PROFITS.

A NEW YORK firm of wholesalers that sends out commercial travelers recently wrote as follows to one of its representatvies:

We received your letter dated Urbana, O., of the 26th ult., with route list and expense account. What we want is orders. We want no weather report nor map of Ohio, and we have big families of our own to make expenses. We find in your expense account an item of $2.50 for billiards; please buy no more billiards for us. And also $7.50 for horse and buggy. Where is the horse, and what did you do with the buggy? Cigars seem to be dear out west, so we send you to-day by express two boxes of New York cigars. The one costs $1.40 per box, and the other 90 cents per box. The one at $1.40 you can smoke yourself, one cigar after each meal; the one at 90 cents you can use to treat your customers. We also send you samples of an article that costs us $5 a gross. Sell it for $5 a dozen. If you can't get $5 take $2.25. You might offer it as a novelty, as we've had it but two years in stock.

Do not date any more bills ahead, as the days are getting longer.

Yours truly,

—*Law Student's Helper.*

NOBLY DOING HER PART.

"YOUR husband is the editor of the *Bugle*, I believe?" said the neighbor who had dropped in to make a friendly call.

"Yes."

"And, as you have no family and have considerable leisure on your hands, you assist him now and then in his editorial work, I dare say?"

"Oh, yes," answered the brisk little wife of the young newspaper man, hiding her strawberry-stained fingers under her apron, "I edit nearly all his inside matter."—*Chicago Tribune.*

VISITOR—Is your son taking a very thorough course in college

Fond Mother—Indeed he is. The poor fellow is really too conscienctious. This is his fourth year in the freshman class, and they tell me there is a great deal there that he can learn yet.—*The Detroit Free Press.*

THE DISTRICT COURTS.

IN searching through the files of the various courts, matters of curious interest, as well as matters of value to the profession, are oftentimes discovered.

Thus the opinion of Hon. A. H. Young, formerly judge of the Fourth District, rendered almost twenty years ago, in the matter of the application of Martha Angle Dorsett to be admitted to practice as an attorney and counselor at law, will be of great interest to certain applicants for the same permission to-day, who possess the same disqualification, and also, we trust, the same qualifications. The court said:

"The applicant has furnished to the examining committee and court satisfactory proof that she possesses the requisite qualifications as to age, moral character, learning and ability, to entitle her to admission; but she is a female, and does not, therefore, come within the scope of the statute above quoted. It is true that the statute does not, in express terms, declare that females shall not be admitted to practice; still, by affirmatively providing who may be so admitted, limiting the class to males, there is an implied inhibition against the admission of females, quite as plain and binding as though the section contained an actual prohibition. The statute referred to is exactly like the territorial statute of 1857, and which has therefore been in operation for twenty-five years.

"A quarter of a century ago it was an unheard of thing for a woman to apply to be admitted to practice in the courts of any of the states, and it is scarcely to be inferred that the limiting clause referred to was at that time intended by the legislature to possess any significance as a negative act. During the period referred to, very many important alterations have been made in the laws of this, as also many other of the states. Enlarging and defining the powers and liabilities of married women, and in a measure approaching to the recognition of the rights and qualifications of females to exercise the functions of citizenship in the broadest sense. A limited right of franchise has been accorded in this state. In Iowa, Illinois, and possibly some other states, women have, by express statute or by an implied right, where the law is silent upon the subject, been admitted to practice in the courts. In Wisconsin, the supreme court, under a statute containing no positive, and a very doubtful, if at least any implied, prohibition, rejected an application of a woman to be admitted to that court on general principles. The arguments of Chief Justice Ryan, in deciding the case referred to, are not without merit and sound reason, and yet it will be claimed that there is a smattering of a conservatism which assumes to exercise a guardianship of advisory protection over females, which is not in accordance with the advanced ideas of unlimited rights of citizenship on the part of such persons.

"The law is noted for its conservatism; and especially so is that class of lawyers and judges who have made

their profession a life study, and believe that a lawyer can only attain to a standing worthy of his calling by a life-long application thereto. The part assigned to women by nature, is, as a rule, inconsistent with this idea.

"The work which the wives and mothers of our land are called upon to perform, and the part they are to take in training and educating the young, and which none other can do so well, forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice, when such opposition has been manifest, is to any extent the outgrowth of that conservatism, or as it is some times styled, 'old fogyism,' which is opposed to the enfranchisement of women; it arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession, and encourage only those to adopt the same, as from their attainments, natural and acquired, are qualified for, and from their adaptability and earnestness, it may reasonably be expected will honor the calling. Sex is by no means the only criterion by which to determine this question, as is evidenced by the many male persons applying for admission, whose characters, learning and ability entitle them to take but a low seat in the practice; such is the proportion of this class of applicants received, that the 'lower seats' are all full, and for the honor of the profession, it is desirable that every means should be adopted which will tend to raise the standard of legal ability, not forgetting moral worth.

"And in this it is not attempted to underrate or belittle the natural qualifications of females for the profession, as many are unquestionably in such respects fitted to take a high place in any calling or profession, and when such an one possesses such a love for the law as that she is thereby impelled to adopt the profession as a life calling and is willing to give her best years to the prosecution of the same, preferring such a life to that of wifehood and motherhood, in all which those words imply, I do not think the profession would suffer from any such accession.

"But the courts have not made, nor will they ever assume to dictate, the law in the premises, and when the people of the state, in a legislative capacity, shall remove the disability, I doubt not the profession as now constituted will heartily welcome to its ranks this applicant and others of like merit, and seek to adapt the practice in all respects so far as possible to the new element thus introduced. For the reason first stated, however, this application must be refused."

So ordered.

A. H. YOUNG, J.

In the matter of the application of Martha Angle Dorsett to be admitted to practice as an attorney and counselor, Court of Common Pleas, Hennepin County, September, 1876.

Charles Stoppel vs. John Marton, et al.
(District Court, Olmstead County.)

NEGOTIABLE INSTRUMENTS: — PARTNERSHIP. — Liability of retiring partners on notes of the firm, where the indebtedness is assumed and agreed to be paid by the continuing partners.

M., B., C., S., F. S. & F. J. S., were partners as a Separator Butter Co.

M., as president and B. as secretary, were authorized to execute notes for the firm. F. S., as agent for his father, F. J. S., in the latter's dealings with the firm. delivered $230 of his own money to B. as a loan to the firm. B. (nothing being said as to whom the money in fact belonged), delivered a receipt that the firm had received the money of F. J. S. Afterwards, F. S. and F. J. S., being both present, M. & B., on behalf of the firm executed a note for that amount, payable to F. J. S. or order, dated back to the day it was received. F. S. read it and made no objections. Next day M., by agreement, sold all his interest in and retired from the firm. The remaining co-partners agreed to assume and pay all debts, including this note. F. S. was present and knew the terms of this agreement but made no claim of mistake in the payee of the note. Afterwards the second partnership was dissolved, and B. retired there from. The remaining members formed a new firm and made a similar agreement with B. But B. prior thereto was informed by F. S. of the mistake made in the payee of the note. Thereafter C. retired from the firm on the same terms as M. & B., and a new firm was formed by the remaining partners. F. S. presented the note to the last formed firm, which paid interest thereon for one year and continued to do so until Sept. 16, 1893. No principal was paid and F. J. S. never agreed to extend the time of payment. After maturity and before suit, the note was sold to C. S., the plaintiff. HELD, that all the defendands except M. were liable upon the note, and that M. recover costs taxed against plaintiff. Start, J.

Pond vs. Anderson.

(District Court, Kandiyohi County.)

JUSTICE COURT—Notice of Appeal from, cannot be made by Mail, but must be Personal or by Leaving it at such Person's Place of Abode.

PROOF OF SERVICE OF, where Attempted to be made by Mail, should State Residence of Party Attempted to be Served.

Appeal by defendant from justice's judgment. The notice of appeal was served by mail, addressed to plaintiff's attorneys in North Dakota. The proof of service filed with the justice showed this, but did not show and there was nothing in the record to show, where the attorney for either party resided.

POWERS, J. 1st. If notice of appeal can be served by mail in any case, the proof of such service was insufficient to confer upon the justice jurisdiction to allow the appeal.

2nd. That notice of appeal cannot be served by mail, but only in the manner provided by sec. 114 chap. 68, Gen. Statutes 1878; "by delivering a copy thereof to the person upon whom service is made, or by leaving a copy at the residence of such person." Appeal dismissed.

Herman vs. Nieman.

(District Court, Chippewa County.)

JUSTICE COURT, NOTICE OF APPEAL FROM, Signed by an Attorney who did not Appear at the Trial, with an Admission of "Service" by Attorney and of "Due Service" by Party. Sufficient.

Appeal by plaintiff from justice's judgment. Defendant moved to dismiss the appeal on the grounds of the insufficiency of the notice of the appeal, and the proof of its service. The defendant appeared at the trial in person, and without an attorney; his notice of appeal was signed by an attorney at law. The proof of service was on the back of the original

notice: 1st. An admission of "service" signed by defendant's attorney; 2nd. An admission of "due service" signed by defendant. Motion to dismiss appeal denied.

POWERS, J.

Geo. S. Maxon vs. Samuel Glover.

(District Court, Hennepin County No. 60372.)

ATTORNEY'S LIEN AFTER DUE NOTICE Thereof Given is Superior to the Right of a Defendent to Set Off the Judgment Against Him Against a Judgment Held by Defendant Against Plaintiff.

SET OFF, right of in this State Exists only by Order of Court and not as of Course.

This action came on for hearing at a special term held Saturday, the 28th day of July, 1894. On the defendant's motion to have allowed to him, the said defendant, as a set off *pro tanto* against the judgment recovered in this action, a judgment assigned to him, the said defendant, by Michael Roeller.

O. Mossness and W. E. Hewitt for plaintiff and Rea Hubachek & Healy for defendants.

RUSSELL, J. On the 6th day of June, 1894, the plaintiff in this action secured a verdict against the defendant for the sum of one hundred and twenty-five dollars. On the 7th day of June, 1894, the attorneys for plaintiff claim to have taken from the plaintiff an assignment of the verdict, the consideration for which was the service rendered in this action. The fees which they were to receive were set out in a written agreement made by them with the plaintiff by which it was provided that they were to receive $175.00, if the judgment did not exceed that sum and the costs, they agreeing to advance the costs.

After the return of the verdict the defendant for a valuable consideration had assigned to him a judgment against the plaintiff which had been rendered in the municipal court of the city of Minneapolis in favor of one Michael Roeller on the 16th day of January, 1891. A transcript of the judgment was filed and docketed in this court on the 17th day of January, 1891. On the 10th day of July, 1894, an execution was issued on the judgment, out of the court which on the 12th day of July, 1894, was returned wholly unsatisfied.

On the 19th day of June, 1894, the defendant gave notice to the plaintiff of the assignment of the Roeller judgment which at that time amounted to the sum of $105.85. On the same day, but after the notice of the assignment, the attorneys in this action gave notice to the defendant of their lien as attorneys. On the 21st day of July, 1894, judgment was entered in this action for the sum of $180.19, being the amount of the verdict, costs and disbursements. On the same day, July 21st, the defendant procured from one of the judges of this court an order on the plaintiff to show cause why the amount of the Roeller judgment should not be set off against the judgment in this action.

The question presented is, did the defendant acquire, by the assignment of the Roeller judgment and the notice of the same given by him to plaintiff, the right to set off the amount of that judgment against the judgment of plaintiff in the action to the exclusion of the attorneys lien? It is provided by subdivision 4 of sec. 16, chap. 88, General Statutes of 1878, that an attorney has a lien, for his compensation, upon a judgment, to the extent of the compensation

specifically agreed on, from the time of giving notice to the party against whom the judgment is recovered. The attorneys, then, under this provision, had their lien by giving notice on the 19th of June. This is not disputed; but it is claimed that it is subordinate to the amount due on the judgment now held by the defendant. The defendant has the right to assert his claim by way of set off; but he does not, by mere ownership of the judgment and notice of the assignment to him create a lien on the judgment against him superior to the attorney's lien. There does not exist in this state the right to set off one judgment against another without the order of court.

The right to set off, and the right to attorney's lien, to be made effective, require the action of the parties; in the one case an application to the court, and in the other notice to the judgment debtor of the claim of lien.

Peri et. al. vs. Harkness 52 N. W. 581.
Hroch vs. Aultman & Taylor Co. 54 N. W. 269.
Williams et. al. vs. Ingersoll et. al., 89 N. Y. 509.
Henry vs. Traynor, 52 Minn., 234.
Bradt vs. Koon, 4 Cowan 416.

In this case the notice of the attorney's lien was given before the right to set off was asserted and the lien was, therefore, superior. It is also urged by defendant that the lien for attorneys fees was merged in the assignment of the verdict to the attorneys. This might be true in some cases, but not under the circumstances shown here. The assignment was made on the consideration of the services, and merely as a recognition by plaintiff of the lien. It did not prevent the attorneys from asserting the lien against the defendant who was no party to the assignment and who does not recognize it, but, on the other hand, seeks to have his set off allowed, notwithstanding the assignment.

For these reasons the motion is denied.

G. A. Tuft vs. The Cudahy Packing Company.
(District Court, St. Louis County.)

LIBEL—Report to Persons Interested. Where persons engaged in a certain trade agree to report to each other, for their mutual protection, the failure of purchaser to meet his payments as they become due, and one does make such a report in pursuance of such an agreement, he is not liable to such delinquent purchaser therefor if his action is without malice.

Defendant, a wholesale dealer in meats at Duluth, Minn., made an arrangement with all other wholesale dealers in meats in Duluth, that each should make to the others weekly reports of all retail dealers in meat, their customers in that vicinity, who should be a certain length of time in default in the payment of their bills for meat. All the members of the association were to deny credit to persons so reported until the bills were paid, of which payment each member was to receive immediate notice.

Plaintiff was a retail dealer in meat at Carlton, Minn., whose business, to be successfully prosecuted, required credit with the members of the association, with some of them he had had such dealings, and from any of whom he might at any time call for credit.

Defendant reported him in default for the sum of five dollars and eleven cents,($5.11), and not being able to obtain credit he was compelled to close his business, which had been yielding him a profit of fifteen hundred dollars, ($1,500.00) per year.

Plaintiff had bought of defendant, and received and used without

objection at the time, meats of the value of forty-three dollars and forty-four cents, ($43.44), at contract prices, but paid only thirty-eight dollars and thirty-three cents, ($38.33), claiming a deduction for defects in quality: The reports made by the members of the credit association were strictly confined to other members.

ENSIGN, J. In this case the first question which arises is,—Was the plaintiff indebted to defendant on the first day of November, 1893, the date of defendant's report of his delinquency.

The bill of goods furnished amounted at contract rates to forty-three dollars and forty-four cents ($43.44). The plaintiff received and used the goods, and on the same day sent the defendant thirty-eight dollars and thirty-three cents, ($38.33), with a statement that that was the amount of the bill as he understood it, and that if it was not correct he would make it right. This gave to the defendant no notice that plaintiff claimed the goods to be deficient, either in quality or quantity, and no notice of such claim appears to have been given to the defendant up to the time when he made its report of delinquency.

It is well settled in this state that, by receiving and using the goods, as plaintiff did, he precluded himself from claiming that they were not such as the contract called for.

Haase vs. Nonnemacher, 21 Minn., 486.

This has been followed by a line of decisions to the same effect.

Plaintiff therefore owed the defendfive dollars and eleven cents, ($5.11), and defendant might lawfully state the fact.

Nor would the result be different if the subject matter of the report made by defendant was in fact false. The good faith with which defendant made the report being conceded, the only question presented is whether, under the circumstances, the report so made can be considered as privileged.

It appears that all who received the report of the plaintiff's delinquency from the defendant were directly interested in the information which it gave.

The law applicable to such a case is well settled by a series of adjudications both in this country and England, among others the following:

An action will not lie for a combination to do a lawful act, as for instance, against officers of insurance companies for agreeing to refuse insurance on a boat, however malicious their motives may be. Any one alone might refuse for any reason satisfactory to itself, or without a reason, and what one might do all might agree to do.

Hunt vs. Simonds, 19 Mo., 582.

A like case is Bohn Mfg. Co. vs. Hollis, 55 N. W. Rep., 1119.

But while men may agree to refuse to deal with a person, they have no right to induce others not to deal with him.

Delz vs. Winfree, 80 Texas, 400.

Merchants have an interest in knowing, and have a right to know, the character of those with whom they deal or of those who propose to deal with them, and of those upon whose standing and responsibility they, in the course of their business, have occasion to rely. They may

make inquiries of other merchants, and if such merchants in good faith communicate information which they have or think they have, the communications are privileged. In such a case, proof that the communication is false is not sufficient to raise the presumption of malice.

Ormsby vs. Douglass, 37 N. Y. 477.

Communications as to a man's business character and standing, made to one having an interest in knowing, and by one who is so situated towards him as to make it a duty or proper that he should give the information contained in such communication, are privileged, and hence not actionable unless express malice is shown. Between parties so situated such communications are protected, even though volunteered.

Erber vs. Dunn, 12 Fed. Rep. 626.

Such cases is Trussell vs. Scarlett, 18 Fed. Rep., 214, and Mitchell et al. vs. Bradstreet Co., 20 L. R. A. 138, where the alleged libelous matter was sent to all the subscribers of a mercantile agency, are not applicable to the case at bar, where only those directly interested in the matter communicated received the communication.

Lord Campbell, in Harrison vs. Bush, 32 Eng., Law and Equity Reports, 173,

lays down the following canon of the law of libel to-wit:

"A communication made bona fide upon any subject matter in which the party communicating has an interest or with reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter, which, without this privilege, would be slanderous and actionable. Duty in this connection means not only legal duty, but moral or social duties of imperfect obligation."

This canon is cited and approved in Van Wyck vs. Aspinwall, 17 N. Y., 190.

The foregoing rule as to privileged communications is approved and applied to the case of an association of wholesale butchers for mutual protection against dishonest and insolvent customers, who agree not to sell goods to any person indebted to a member of the association.

Delz vs. Winfree, 25 S. W. Rep. 50.

In the case at bar, there was a mutual interest among the members of the credit association in the information which they aggreed to communicate to each other, and a communication made pursuant to the agreement, in good faith, is a privileged communication.

The communication set out in the complaint was of that character, and there being no proof of express malice, any falsity of the communication itself gives no right of action.

The plaintiff cannot recover.

Fransen, Assignee, vs. Mabon.

(District Court, Ramsey County. No. 58741.)

C. D. and Thos. D. O'Brien for plaintiff, Owen Morris for defendant.

SURETY.—Accomodation maker of renewal note released by exchange of collaterals put up as security for payment of original note.

Action on promissory note by assignee in insolvency against accomodation maker.

This action having been tried and submitted to the court without a jury, the court finds as facts:—

1. All and singular the allegations in the complaint contained are true, save as hereinafter stated.

2. Said note was given for the consideration and under the circumstances following, viz.: About April 1, 1891, one Hendrickson, being then president of a bank known as the Redwood County Bank was desirous of obtaining therefrom by way of loan, the sum of $2,000, and to this end, at his instance, defendant made his promissory note to said bank for said sum, of the same date and of like tenor and effect, save as to payee, as said note described in the complaint, and thereupon said note was duly delivered to said bank, which in consideration thereof paid over to said Hendrickson said sum of $2,000, no part of which was received by the defendant. As part and parcel of the same transaction, pursuant to the mutual understanding and agreement between said Hendrickson and said defendant, said Hendrickson duly assigned, transferred and set over to said bank as collateral security for the payment of said note, twenty shares of the capital stock of the St. Paul German Accident Insurance Company, which were then and there reasonably worth and of the value of $2,500, and furthermore agreed with defendant to pay said note and interest and save defendant harmless therefrom. Said defendant executed said note for the sole benefit and accomodation of said Hendrickson and upon said Hendrickson's agreement to put up said stock as collateral and to pay said note and interest and save him, said defendant, harmless therefrom, and derived no benefit whatever from said transaction. Afterwards, by sundry mesne transfers, plaintiff's assignor became the owner and holder of said note and said stock as collateral therefor. Plaintiff's assignor, said St. Paul German Insurance Company, while so the owner of said note so executed to said bank and said stock as collateral thereto, on or about the month of November, 1891, then having full knowledge of all the facts aforesaid, released and surrendered said shares of stock to said Hendrickson and took in exchange therefor from said Hendrickson 137 shares of the capital stock of a corporation known as The Capital City Real Estate and Improvement Company, of the par or face value of Fifty Dollars per share, and at or about the same time procured the defendant to execute and deliver to it the note in said suit in place and stead of said note to said bank and which last mentioned note to said bank was then and there surrendered and delivered up to said defendant by said Insurance Company upon the mutual understanding and agreement that the note in suit should take the place of said note to said bank. Whether said exchange of stocks so held as collateral was made before or after said substitution of notes does not appear, but said defendant had no notice, nor knowledge of said exchange of stocks and the release and surrender of said original pledge until some time during the following year, and long after said substitution of notes and exchange of stocks, and never consented thereto. Said Accident Insurance Company stock when so surrendered and exchanged for said Capital City stock exceeded in value the amount then due on said note. What, if anything, said Capital City stock was then and thereafter worth does not appear.

3. Save as hereinbefore found, the allegations of the pleading are not true.

As conclusions of law, the court found:

1. That by the surrender of said German Insurance Company stock to said Hendrickson without defendant's knowledge and consent, said defendant became and was released from all liability on said note.

2. That plaintiff is not entitled to any relief in this action, and that defendant is entitled to judgment that plaintiff take nothing by this action and for his costs and disbursements.

OTIS, J.

M. W. Halstead vs. St. Paul German Ins. Co.

(District Court, Ramsey county. No. 56019.)

Humphrey Barton for plaintiff. C. D. & Thos D. O'Brien for defendant.

INSURANCE — Assignee for Benefit of Creditors.— An assignmene by an insurance comdany under the law of 1881, held not to abrogate a clause in the policy providing that action on the policy must be brought wiihin one year from date of loss. — Screven vs. Franzen, Minn., L. J. Vol. II. No. 3, and 59 N. W. Rep. 996, distinguished.

Action against the assignee of an insolvent insurance company. It appeared from the complaint that the policy contained a clause requiring any action brought thereon to be brought within one year from the time of loss and that this action was commenced more than two years after the loss sued for. It was urged by the plaintiff that the case was within the rule of Screven v. Franzen and that the insolvency and assignment of defendent's assignor prevented the running of the limiting clause.—On demurrer sustained.

KERR, J. The property of plaintiff's assignor was insured by defendant against loss by fire. The policy contained a provision in effect limiting the time in which suit could be brought on the policy, to one year from the date of the fire.

The property was destroyed by fire March 17th, 1892. On April 14th, 1892, defendant being insolvent, made a general assignment for the benefit of its creditors, under the insolvent law of 1881. Proofs of loss were duly made, and plaintiff's claim, long prior to the expiration of said year of limitations, was duly filed with defendant's assignee, and still remains so filed as a claim against said insolvent estate, on which claim, however, nothing has yet been realized by plaintiff.

Now more than two years after the date of said fire, plaintiff brings this suit at law against the defendant insurance company to recover for said loss, and claims that, by virtue of said assignment, and the proceedings thereunder, set up in the complaint, the defendant has waived or estopped itself to claim the benefit of said limitations clause.

The authority relied upon to support this claim is the case of Screven vs. Franzen, assignee of the St. Paul German Ins. Co. recently decided in our supreme court, (59 N. W. Rep. 996). It was there held that the assignment by the insurance company operated as a waiver of the limitation clause, *as to the trust fund in the hands of the asignee*, the claim being a valid one at the time of the assignment.

There is abundant authority to sustain that decission, some of the cases being put upon the ground that the assignment created a trust, and that the statute of limitations which ran against the debt ceased to

run against the trust, upon well-established equitable principles; and others upon the ground that the assignment and the specific scheduling of the debt in question were in the nature of a new promise so far as the proceedings under the assignment are concerned.

But there has been no authority cited, nor have I been able to find any, to sustain the claim of the plaintiff, that such an assignment abrogates the limitation clause in the contract, so as to bar any advantage from it in a suit at law, entirely distinct from and disconnected with the assignment or the trust fund created thereby. On the contrary, the case from 32 Md., cited by our supreme court, indicates the opposite view, and the more recent cases of Roscoe vs. Hale, 73 Mass., 275, and Stoddard vs. Doane, 73 Mass., 387, and Richardson vs. Thomas, 79 Mass., 381, the last two from the pen of Chief Justice Shaw, are closely in point and altogether antagonistic to the contention of the plaintiff here.

My own judgement being fortified by such eminent authority, I feel free to follow it in this case, although it may be true, as claimed by plaintiff, that the phraseology used by the learned judge who wrote in the Minnesota case referred to, would indicate some doubt in his mind whether the principle might not be extended to cover such a case as that at bar. As to the further claim of plaintiff, that defendant is estopped to claim advantage from the limitation clause in the policy by conduct of assignee with respect to the claim filed with him, I am unable to draw any such conclusion from the facts set up in the complaint, conceding for the purposes of the argument that the defendant is bound by the conduct of the assignee in that regard.

James C. Harper vs. Walter N. Carroll, Assignee, et al.

(District Court, Hennepin county, No. 60793.)

STOCKHOLDERS — Banks and banking — Assignment for benefit of creditors — The holder of bank stock, who transfers the same within one year prior to the assignment of the bank, is liable under the statute to the creditors of the bank thereon in an action brought more than one year after transfer.—On demurrer to complaint; overruled.

Wilkinson & Traxler for plaintiff; W. S. Dwinnell and F. F. Davis for defendants.

The facts sufficiently appear in the memorandum.

ELLIOT, J. On July 8th, 1893, the Citizens Bank, a corporation being insolvent and unable to meet its obligations, suspended payment and made a general assignment for the benefit of creditors. This action is brought for the purpose of enforcing the statutory liability of shareholders under Art. 9, of the Constitution of Minn., and Sec. 21, Chap. 33, Gen. St., 1878. The defendants, Hill, Sons & Co., were the holders of $5,000 of the stock of the corporation and transferred the same to other parties subsequent to July 8th, 1892, and prior to July 8th, 1893, but more than one year before the commencement of this action. The defendants contend that liability attaches only to those who are stockholders at the time and within one year prior to the commencement of the action to enforce the liability. I do not think that this is the true construction of the statute. The double liability attaches to all who are stockholders at the time the assignment is made, and who have transferred stock within one year prior to such assignment.

Mary M. How vs. The American Masonic Accident Association.

(District Court, Ramsey county. No. 56397.)

CHANGE OF VENUE — When demand for may be made.

APPEARANCE — Any act which calls into action the power of the court, save to determine the question of its own jurisdiction, is an appearance and a submission to the jurisdiction of the court.

After service of summons, and before answering or making other formal appearance, defendant made demand for change of venue. The application was resisted on the ground that the same was improperly made before appearance.

OTIS, J. Defendants residence and place of business and where only it maintains an office is in Hennepin county, and there was the place where this action should properly have been brought.

After personal service of the summons, and without service of formal notice of appearance, its attorney, duly retained by it for all the purposes of the action, served in its behalf a written demand for change of venue in due form subscribed by him styling himself "attorney for defendant." Upon motion for such change, supported by proper affidavits, made after answer, plaintiff claims that the demand for a change of venue was a nullity because made and served without formal appearance of defendant in the action; and to this end cases from the practice report of New York are cited, as also from the Supreme Court of California, construing provisions of statutes similar to our own.

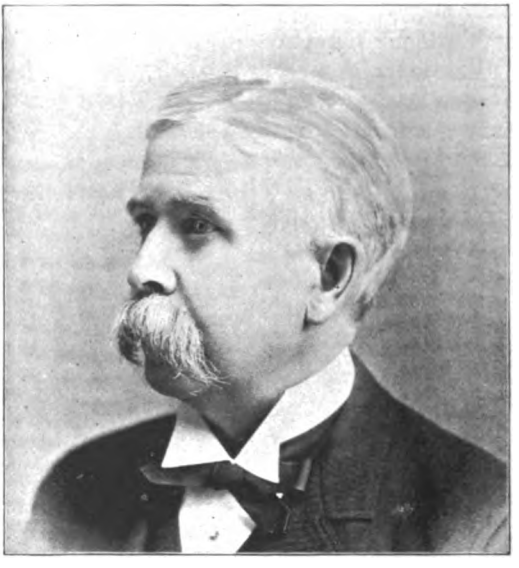
In view of the decisions of our own court of last resort as to what constitutes appearance, I do not think the objection valid. It has here been repeatedly held that any act of the defendant recognizing or submitting himself to the jurisdiction of the court was equivalent to an appearance; such for instance, as moving to set aside a judgment for want of jurisdiction, coupled with other grounds, or with a motion for leave to answer.

Curtis vs. Jackson, 23 Minn., 268.
Frear vs. Hichert, 34 Minn., 96.
Godfrey vs. Valentine, 39 Minn., 336.

In the former case the following language of the Supreme Court of Iowa is cited with approval: "If a party so far appears as to call into action the power of the court for any purpose, except to decide upon its own jurisdiction, it is a full appearance." Within this rule the service of a demand in the case at bar was as well a full appearance in the action.

But whether it operated as a full appearance, so as to entitle the defendant to notice of further proceedings, it was in my opinion a sufficient demand. There is no question but the attorney was by the defendant authorized to make and serve the demand, and plaintiff's attorney in his rebutting affidavit expressely states that "at all times prior to the service of the answer herein affiant has regarded and treated Mr. Lane as the attorney for defendant, specially appearing in this cause for the purpose of said demand and not otherwise."

The statute requires only that the demand be made before answer, not that it shall be made after formal appearance, and the authorized making and serving of demand was at least an appearance for that purpose and sufficient to preserve its right to a change of venue.



HON. LOREN W. COLLINS.

ASSOCIATE JUSTICE, SUPREME COURT OF MINNESOTA.

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THE LAW OF POSITIVE AND NEGATIVE TESTIMONY IN ACCIDENT CASES.

WAS the bell rung or the whistle sounded is the important question in a great number of personal injury cases. In nearly every action against a railroad company for injuries received by reason of a collision at a railroad crossing, and in a great many actions against street railways, the only negligence charged is a failure to ring a bell or sound a whistle. In these cases it becomes important to know what is sufficient and proper proof to establish the negative propositions *that the bell did not ring, or the whistle was not sounded.* A collection of the authorities on positive and negative testimony may, therefore, be not wholly without interest to some of the readers of the Journal.

GENERAL RULE AS TO RELATIVE WEIGHT OF POSITIVE AND NEGATIVE TESTIMONY.

It is a general rule, supported by a long line of decisions, that positive evidence as to any fact, not in itself improbable, is entitled to more weight than negative evidence relative thereto.[1]

By the Supreme Court of the United States the rule is stated thus: "It is a rule of evidence that ordinarily a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, while it is impossible to remember what never existed."[2] Some authorities make the rule still stronger in favor of positive, as against negative, testimony, and hold that positive testimony on a given point always preponderates over negative testimony on the same point.[3] It should, however, be remembered that courts are not uniform or consistent in their holdings as to what constitutes positive and what negative testimony.[4]

DEFINITION.—WHAT IS POSITIVE AND WHAT NEGATIVE TESTIMONY.

Uniform and consistent meaning has not been applied by our courts to the terms "positive and negative testimony." In order to understand a decision it is often necessary to know the meaning in which the particular court rendering the decision uses those terms.

[1] Chicago & Alton R. R. Co. vs. Gretzner—46 Ill.—74. Parvis vs. R. R. Co. 17 Atl. (Del.) 702. Chicago, Burlington & Quincy R. R. Co. vs. Stumps—65 Ill.—367.
[2] Still vs. Haidekopers—17 Wallace—384.
[3] Socola vs. Chess Carley Co.—1 So. (La.) 824.
[4] Frizzell vs. Cole—42 Ill.—362.

Some courts, and probably the greater number of them, call all testimony, negative in form, "*negative*," while other courts disregard the form in which testimony is given and look only to the foundation (the opportunity of the witness for knowing) upon which the witness bases his testimony. To avoid confusion it is endeavored from the decisions herein referred to, to give, as far as possible, the testimony in the language of the witnesses, upon which the court's opinion is based. In Frizell vs. Cole—42 Ill.—362, an action for slander, several of defendant's witnesses testified that they were present at the time when the slanderous words were claimed to have been spoken, and heard all that was said, and state the language differently from plaintiff's witnesses. Some of them gave the language spoken, and said that the words sworn to by plaintiff's witnesses were not spoken by defendant. The trial court instructed the jury that this affirmative testimony was entitled to the greater weight. This instruction was held erroneous and the court, through Judge Walker, thus defines negative and positive testimony: "Where a witness swears that a particular act occurred at a specified time and place; or that particular language was spoken by a person to whom he refers, this is affirmative evidence. But if another witness were at the same place at the same time, and were to swear that he did not observe the act, or hear the language of which the other speaks, this would be called negative evidence. But, suppose the latter witness were to state that his attention was fully excited to what occurred, and what was said, and that the act of which the other spoke did not occur, or that the language was not used by the person to whom it was attributed, this would be as fully affirmative evidence as the other; if his opportunities were the same, and his attention was equally engaged in reference to the circumstances as that of another, his testimony is affirmative equally with that of the other. It may be illustrated by a witness who swears that he saw a person at a specified place at a particular time—another witness, or the person himself, swears that he was not there at the time, but was then at another place. One of these statements is as much affirmative as the other. The mere fact that he makes the affirmative in a negative form does not change its character. On the other hand, if a witness says he was at a particular place at a specified time, and did not hear certain declarations, but was giving but slight attention—this would be slight and negative evidence that the declaration was not made. But, if another person was to state that he was present and heard all that was said, and that no such declarations were made, his evidence would be affirmative."

So in an action[1] for injuries received in a collision at a railroad crossing the testimony that "*no bell was rung or whistle sounded*," by witnesses, near by a passing train and having their attention directed to the fact, and in another action[2] where the negligence charged was a failure to ring the bell at the eighty rod whistling post as provided by the statutes of Illinois,

[1]Chicago, Burlington & Quincy R. R. Co. vs. Lee 87 Ill—454.
[2]Illinois Central R. R. Co. vs. Gillis 68 Ill—317.

testimony of a witness *that he heard when the bell was first rung and how far the engine was then from the crossing*, was held to be positive and not negative. But if a witness simply testifies *that he did not hear or did not recollect hearing*, this is mere negative testimony.[1] In R. R. Co. vs. Lane,[2] a witness who was near and saw a collision, testified that when he observed the approach of the train and the cattle in danger, he determined to notice whether any signals were given. He called his wife's attention to it, stating, "*I'll bet a hundred and fifty dollars they don't whistle or ring.*" He also testified that the *whistle was not sounded nor the bell rung until after the cattle had been killed.* The court was requested to instruct the jury that the affirmative testimony of the trainmen to the ringing of the bell and the sounding of the whistle overcame the testimony of this witness. This request the court refused. The Supreme Court of the state of Kansas held that this refusal was not error, and as to the above testimony said: "The testimony of one who was in a position to hear, and who was giving special attention to the sounding of the whistle, that it was not sounded, while negative in form, is a positive statement of fact; and where the witnesses had equal opportunity to hear the whistle, and are equally credible, it is generally of as much value as the testimony of one who states that it was sounding." In Michigan a similar rule apparently prevails. So in an action for injuries received at a crossing plaintiff's witnesses testified "that they were giving attention to the approach of the engine, and some of them say '*listening for the whistle*' yet *no whistle was sounded or bell rung.*" This was held to be positive and not negative testimony.[3] The decisions we have given thus far under this heading, it will be noticed, entirely disregard the form in which the testimony is uttered by the witnesses, and consider only the means which the witness had for knowing the facts in relation to which he testified. The majority of the courts however, seem to speak of all testimony which is negative in form as "negative testimony." In support of this statement it is hardly necessary to offer any authority.[4]

RULE—THAT MERE NEGATIVE TESTIMONY IS NOT SUFFICIENT TO SUPPORT A VERDICT FINDING THAT A BELL WAS NOT RUNG OR A WHISTLE NOT SOUNDED.

A mere "*I did not hear it*" is not evidence that a certain sound was not given. Such testimony is not, standing alone, sufficient to prove that a bell was not rung or a whistle not sounded. In order to have any probative force this testimony must be coupled with other testimony that the witness listened, or had his attention directed to the fact of the ringing or not ringing of the bell, or the sounding or not sounding of the whistle. The witness must testify that he listened for the warning, or he must testify to facts indicating that he was giving heed to the presence or absence of signals. This rule

[1] Rockford, Rock Island & St. Louis R. R. Co. vs. Byam 80 Ill. 528-530.
[2] 23 A. & E. R. R. Cases 237.
[3] McDuffie vs. R. R. Co., 57 N. W. Rep. (Mich.), 248.
[4] Voak vs. R. R. Co., 75 N. Y. 320. Renwick vs. R. R. Co., 36 N. Y., 132.

is supported by a strong array of authorities in New York, Wisconsin and Illinois, and by several cases in Minnesota, New Jersey and other States. Among the most important and leading cases adopting this rule is Culhane vs. R. R. Co., 60 N. Y., 133. The plaintiff therein who was injured in a collision at a railroad crossing, and a person riding with him, testified that "*they heard no bell.*" Defendant proved by two persons on the engine that the bell was rung, and by two others that they heard it. Defendant moved for a nonsuit which the trial court denied. This was held error. The Court of Appeals, speaking through Judge Allen, said: "It (that the bell rung) is proved by the positive oath of the two individuals on the engine, one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say "*they did not hear the bell,*" but they do not say *that they listened or gave heed to the presence or absence of that signal.* As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere "*I did not hear*" is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

This is one of the most important decisions upon this subject. It is in consonance with nearly every man's experience. We become so familiar with oft-repeated sounds that they make no impression upon our mind. We never notice the ticking or striking of a clock, the ringing of the bells or gongs upon street cars, nor the noises of moving trains after a certain degree of familiarity with them. Our testimony that we "*did not hear them,*" (and that is all that we could, ordinarily, honestly say) would tend in no degree to prove that the clock did not strike or that the gong did not ring. To permit a verdict or judgment to be based upon and to be supported solely by such testimony would be to give it probative force, something which universal human experience denies it. The second trial of Culhane vs. the R. R. Co. is reported in 67 Barbour, 562. The testimony upon the second trial was the same as upon the first, with the exception that plaintiff's servant testified that he "*listened for the bell.*" The court, however, held that this evidence was overcome and outweighed by the positive testimony of the trainmen that "*the bell was rung.*" In Hoffman vs. R. R. Co., 22 N. Y. S., 463, on the part of defendant three witnesses, all in its service, testified affirmatively that defendant's engineer rang the bell on approaching the crossing. The only evidence opposed to this was the testimony of several witnesses that they did not hear the bell, and it was not shown that their attention was

directed to the matter at the time. Held that the evidence did not justify a finding that the bell was not rung, the court saying: "It will be observed that the evidence on the part of the plaintiff to show that no bell was rung is; that the witnesses did not hear it. *None of them pretend to say that they listened or gave heed to the presence or absence of that signal. They were not looking, watching or listening. Their attention was not directed to the fact.*

In the absence of any affirmative evidence of the fact, it would be going a great ways to hold that such evidence was sufficient to prove that no signal was given. But here we have the affirmative testimony of three witnesses swearing positively to the ringing of the bell. There is nothing against their credibility, except that one was the engineer in charge, and that the others were in the employ of the defendant, facts that are not of themselves sufficient to discredit their testimony, but nevertheless facts for the jury to take into consideration where there is any real conflict in the testimony. But here I cannot see that there is any real conflict worthy of the name. It seems to me to be squarely within the principle that as against affirmative evidence of credible witnesses as to the ringing of a bell, there must be something more than the testimony of those who did not hear, and it must appear that their attention was directed to the fact at the time. It will be noticed in examining the testimony reported in this opinion that the witnesses who testified that they did not hear the bell were near enough to hear the signal. In Ranney vs. R. R. Co., 23 N. Y. S., 80, an action against a railroad company for the killing of plaintiff's intestate, one of plaintiff's witnesses testified that the accident occurred between eight and nine o'clock in the evening, that he stood within three or four feet of the track; that he did not hear the bell rung. Defendant proved that only three trains passed over the crossing during the hours stated, and the trainmen testified that they had run over no one to their knowledge, and that the bells of their respective trains were rung. Held, that the plaintiff did not establish the failure to ring the bell, since positive testimony that the bell was rung could not be overcome by mere negative testimony of failure to hear it without showing that the witness had his attention directed to the fact at the time. In Seibert vs. R. R. Co., 49 Barbour, 593, plaintiff himself testified that he heard no bell or whistle before he was struck by the engine, and another witness at a short distance testified to the same. The trainmen testified positively that the whistle was blown and the bell rung. Held, that a verdict finding that the bell was not rung was not supported by the evidence. In R. R. Co. vs. Greany, 101 N. Y., 419, an action to recover damages for injury sustained at a railroad crossing by reason of failure to ring a bell or sound a whistle, two passengers upon the train were permitted to testify "*that they did not hear any bell or whistle*," although they did not testify that they paid attention. There was, however, evidence of other persons whose attention was directed to the fact sufficient to justify a jury in finding that the statutory signals were not given. The syllabus of the decision is misleading. It says that the verdict could have been sustained solely upon the tes-

timony of the two passengers. If this were true then the decision would be in conflict with Culhane vs. R. R. Co., above. Such was the view taken by the court in Scott vs. R. R. Co., 9 N. Y., 189. Upon a careful examination it would seem to be clear that Greany vs. R. R. Co. was intended to have no such effect All that is there decided is that it was not error sufficient to reverse the judgment for the trial court to admit the testimony of the two passengers upon the train, even though they had not testified that they were listening to hear the bell or whistle. In view of the decisions in Hoffman vs. R. R. Co. and Ranney vs. R. R. Co., above cited, reaffirming the ruling of Culhane vs. R. R. Co., we think there is no doubt but that New York stands committed to the above doctrine. But see Griffin vs. R. R., 40 N. Y. 34.

A similar rule has been adopted by the supreme court of the state of Wisconsin. In Bohan vs. R. R. Co., 21 N. W. 241, the plaintiff and several eral witnesses testified that they saw no light on the engine or train, and that they did not remember to have heard an engine bell ring before the plaintiff was injured. Four witnesses on behalf on the defendant testified affirmatively to the ringing of the bell and to the presence of the lighted lantern on the end of the train. A verdict for the plaintiff was set aside, the Court saying: "The testimony of the plaintiff's witnesses that they did not hear the bell ring, or did not see the lighted lantern at the head of the gravel car, is purely negative, and its negative character is intensified by the fact, which is made perfectly obvious by their testimony, that they did not look attentively, but only casually, at the approaching train, and the attention of none of them was directed to the presence or absence of such warnings. Upon this record the credibility of the defendant's witnesses, who testified positively to the ringing of the bell and the presence of the brakeman on the gravel car with a lighted lantern, stands unimpeached. The jury would not be at liberty to disregard their testimony, but it was their duty to reconcile the testimony of all the witnesses, if that could reasonably be done. There is no difficulty in doing so in this case. The testimony of defendant's witnesses is positive that the bell was seasonably rung, and that the brakeman stood on the forward end of the leading gravel car holding a lighted lantern; and that of the plaintiff's witnesses is that, although they had the opportunity to hear and see such warnings. they failed to do so. The testimony does not tend to show a single fact or circumstance which gives a positive character to the testimony of the plaintiff and his witnesses. Such being the nature of the testimony, the fact that the warnings were given was established, if not by the undisputed evidence, certainly by an overwhelming preponderance of testimony, and the jury were not justified in finding that they were not given. Indeed, the negative testimony of plaintiff and his witnesses, while it has some bearing upon the question of the warnings, amounts to little more than, so to speak, a mere scintilla of evidence, and did not justify the jury in their disregard of all the positive and otherwise unimpeached testimony that the warnings were given."

In Ralph vs. R. R. Co., cited hereafter, will be found another illustra-

tion of the rule as applied by the Supreme Court of Wisconsin. A like rule has been adopted in Illinois, New Jersey and probably Minnesota. In Telfer vs. R. R. Co., 30 N. J. L., 188–194, the Supreme Court of New Jersey held that the negative testimony of the occupants of a bar room near the place of the accident, that they did not hear it (signal), is not entitled to much weight, accustomed as they were to the sound, it would be strange if they recollected hearing. The testimony of one credible witness that he did hear it is far more reliable and should outweigh theirs. In R. R. Co. vs. Gretzner, 46 Ill., 74, plaintiff examined five witnesses who testified that they saw the collision and saw no flagman; one of them said he was excited at the time and paid no attention to the flagman, and didn't know whether there was one or not; he didn't recollect. Another said: "The flagman generally stands in the center of the street, *and he wasn't there then.*" On his cross examination, however, he said that a good many persons and teams were passing; that all he knew about the flagman was that "he did not see any." Another witness testified that "he did not see any flagman, and would probably have seen the flagman if he was there." On the part of the defendant it was proved positively by the engineer and by the switchman that the flagman was at his post giving signals. The court set aside the verdict for plaintiff, saying: "That the attention of none of plaintiff's witnesses was directed to the flagman, and only one of them swears *that he was not at his post.* This evidence was overcome by the positive testimony offered by defendant." In R. R. Co. vs. Stumps, 55 Ill., 367, the court held that the testimony of a witness some ten feet from a collision who testified that a bell was not rung was overcome by positive testimony of the trainmen that the bell was ringing. This decision would seem to be in conflict with Klanowski vs. R. R. Co. (Mich.) 21 R. R. Cases, 648, and those decisions which hold that if a witness swears "that the bell did not ring or the whistle did not sound" that is sufficient to sustain the verdict of said warnings. In Still vs. R. R. Co., may be found another instance of the holdings of the Supreme Court of Illinois upon this subject. It is an extreme case and can hardly be said to be in conformity with the weight of authority. In Minnesota this rule has been considered by the Supreme Court in Harris vs. R. R. Co., 33 Minn, 459. A witness who was within fifty feet of the crossing testified: "I did not hear any bell, but I heard a whistle after the train passed the crossing. I had not heard any whistle before that." On cross examination he testified: "I was looking towards the crossing, but not before the train got there. I do not know where I was when the train was north of the depot (that was from 160 to 200 feet north of the crossing). I was in the house, I suppose. I do not know where I was when the train was at the whistling post north of the depot. I will not swear it did not blow before that." The court held that this evidence did not establish that the whistle was not sounded. In Moran vs. R. R. Co., 48 Minn., *infra.*, the rule we have formulated is recognized, but it was held in that case not to be applicable to track-repairers who were bound for their own protection to be constantly on the look-

out for warnings of approaching trains. The rule that mere negative testimony will not support a verdict is illustrated by numerous decisions in other courts.[1] In all the cases we have referred to under this heading the verdict of the jury finding that signals were not given was held not to be supported by the testimony.

RULE—THAT NEGATIVE TESTIMONY OF A WITNESS WHOSE ATTENTION IS DIRECTED TO THE PRESENCE OR ABSENCE OF SIGNALS IS SUFFICIENT TO SUPPORT A VERDICT.

This is the converse of the preceding rule, and is of course supported by abundant authority. We give a few cases illustrating its application to particular facts. In Voak vs. R. R. Co. 75 N. Y. 320, an action to recover damages for injuries sustained by plaintiff at a railroad crossing, because of negligence in failing to give signals, several witnesses testified that they were in position to hear signals if given, and that they paid attention and did not hear them. Defendant's witnesses testified directly and positively that the signals were given. The court held that there was a conflict of testimony, and that the evidence offered by plaintiff was sufficient to show that the signals were not given. In Renwick vs. R. R. Co., 36 N. Y. 132, upon the question of negligence in failing to ring the bell, plaintiff and his daughter swore that they listened for the train as they approached the crossing, and did not hear it. Several witnesses upon the train testified that they heard no bell or whistle before the whistle for the brakes at the crossing. Another witness, whose house the train passed about fourteen rods before it reached the crossing, testified that there was no signal either from the bell or whistle. Another, who was observing the train from the same house, heard none. Another, who was three-quarters of a mile east of the crossing, and 100 rods from the track, heard the train, but heard no bell or whistle until the whistle for the brakes. The trainmen testified positively that the bell was rung. The court sustained a verdict in the plaintiff's favor, and as to the sufficiency of plaintiff's testimony, said: "Now, though most of this (plaintiff's evidence) is negative evidence, and the defendant has, on its side, the positive testimony of five witnesses that the bell was rung, still, as some of the plaintiff's witnesses were in a condition to hear it if it had been rung, and were giving their attention to the train, the fact that they did not hear it is evidence conclusive to prove that is was not rung. Two of defendant's witnesses, who swore that it was rung, are the engineer and fireman, who were in fault if it was not rung. The character of one other was impeached. The conflict raises a question of fact, which the plaintiff had the right to have determined by the jury.

There are a few decisions upon this subject by the Supreme Court of our state, but the line of demarkation between testimony which will sustain a finding by a jury that a bell was not rung or a whistle not sounded and testimony that will not, as yet, does not seem to be clearly drawn.

[1] Henze vs. R. R. Co. (Mo.) 2 A. & E. Ry. Cases, 212 Hubbard vs. R. R. Co. (Mass.), 34 N. E. 459. Tully vs. R. R. Co. 134 Mass. 499. Horn vs. R. R. Co., 54 Fed. Rep. 301. Missour. Pac. R. R. Co. vs. Johnson, 24 Pac. Rep. 1116. Mo. Pac. R. R. Co. vs. Pierce, 18 Pac. Rep. 305. Hinton vs. Queen City R. R. Co., Wis., 27 N. W. 147

In Moran vs. R. R. Co., 48 Minn., 46, as already said, the general rule stated is recognized, but the court held that a mere "*I did not hear*," by trackmen who for self protection are bound to be listening for the whistle of trains is alone sufficient to prove that the whistle was not sounded. The court says however that such a case is different from "mere strangers" in the vicinity.

N. M. THYGESON.

(The conclusion of this interesting article will be published in our next number.)

OPINIONS OF THE ATTORNEY GENERAL.

VILLAGE RECORDER—Compensation of.—A Village Recorder is entitled only to such fees and compensation as provided by Sec. 46, Ch. 145, Gen. Laws of 1885, and the village council cannot properly increase the same.

MR. L. M. LIEF,
Village Recorder,
White Bear, Minn.

Dear Sir: Upon a careful examination of the provisions of the general village law touching the question of compensation of a village recorder, I have arrived at the view that he is entitled to no other compensation than the fees prescribed in Sec. 46. By the 4th subdivision of section 21 authority is conferred upon the village council "to limit and define the duties and powers of officers and agents of the village, fix their compensation and fill vacancies when no other provision is made by law." By the first named section the recorder is authorized to charge and receive fees for the official duties contemplated by the 5th and 7th subdivisions thereof. He is an officer, therefore, whose compensation has been provided for within the meaning of subdivision 4 of Sec. 21. If this view is correct, it necessarily follows that the village council cannot properly allow him compensation for other services to be performed on behalf of the village. It is a general principle of law that a public officer is entitled to only such compensation as has been expressly authorized by statute. In view of this principle, a statute should not be so construed as to authorize compensation in a doubtful case.

Yours truly,
April 12, 1894. H. W. CHILDS.

COUNTY ATTORNEYS—Duties of in Criminal Proceedings.—In a proper case, of which he is the sole judge, a county attorney may draw the complaint and appear before a justice of the peace and conduct the prosecution in a criminal proceeding without being requested so to do by the justice.

C. A. NYE, ESQ.,
County Attorney,
Moorhead, Minn.

Dear Sir: The statute makes it the duty of the county attorney to "attend on all terms of the district court for such county and all other courts having criminal jurisdiction, and attend all preliminary examinations of criminals when the magistrate before whom such examination is held shall request his attendance and furnish him with a copy of the complaint."

Strictly speaking, such officer is not required to take part in a criminal process before a justice of the peace until required so to do by the justice and he is furnished with a copy of the complaint.

You inquire, however, whether he could "insist upon taking no part in a criminal prosecution until the case had been actually commenced before a justice and the presence of the attorney required by such justice."

I answer your question unqualifidely in the negative. I do not believe that he can, with a due regard to the administration of justice in his county, decline in a proper case either to prepare the complaint of the complainant, or to appear in the action or proceeding prior to a request upon him from the justice of the peace. I think it is the practice throughout the state for the county attorneys to draw criminal complaints and appear before the justice without awaiting his request.

Very truly yours,

Aug. 24, 1894. H. W. CHILDS.

TAXATION.—Exemption of minors from.—A guardian of several minors who have personal property subject to taxation may claim the full exemption allowed by law for each of his words.

GEORGE W. GRANGER, Esq.,
County Attorney,
Rochester, Minn.

Dear Sir: You state that a person residing in your county has listed money as the guardian of three minor children, and that he claims an exemption of one hundred dollars for each of said children.

The law provides that the personal property of each individual liable to assessment and taxation shall be exempt to an extent not amounting to more than one hundred dollars in full, provided, that the person lists his personal property for taxation as the law requires. In my judgment each of the minors in question is entitled to an exemption of one hundred dollars. The rights of the children in this regard are not affected by the fact that one guardian is appointed for all. The estate of each and the rights of each must be determined by themselves.

The auditor would be justified, from your statement of facts, in assessing the property as ommited property pursuant to G. L. 1881, Chap. 5, Sec. 1, amending Sec. 113, Chap. 11, G. S. 1878.

Some doubt may attend this construction of the law of 1881, but I think the view above expressed is in harmony with the purpose of the statute.

Very truly yours,

Sept. 4, 1894. H. W. CHILDS.

COUNTY SUPERINTENDENT OF SCHOOLS—Compensation of in a Joint District. A joint district, partly in two counties may be considered for the purpose of determining the salary of the County Superintendent as in either or both counties, regardless of the situation of the school house.

HON. W. W. PRENDERGAST,
Supt. of Public Instruction,

Dear Sir: I have considered the question raised by the superintendent of schools of Bue Earth county recently submitted by you to this office.

Mr. Sherer inquires whether joint districts are to be regarded in determining the amount of his salary in cases where the school house or school houses therein are situated beyond the boundaries of his county.

The statute provides that the compensation of county superintendents shall not be less than at the rate of ten dollars for each organized district in the county, to be reckoned pro rata for the year from the time of the commencement of the first school in the district. The question is not affected, in my view, by the situs of the school house in any joint district. There is no intimation in the statute itself that the superintendent shall not be entitled to compensation for a

district in which the school house is situated in an adjoining county. In determining his salary, there is no reason why he may not regard a joint district as an organized district in the county within the meaning of those terms as employed in the statute regardless of the situation of the school house. Very respectfully,

June 8, 1894. H. W. CHILDS.

STREET COMMISSIONER—New Inhabitant. A street commissioner cannot place upon the poll list the name of a person arriving at majority after the poll list has been made up.

F. E. LATHAM, ESQ.,
Howard Lake, Minn.

Dear Sir: In your communication of the 30th ult. you raise the following questions:

1. Under Sec. 9, Ch. 13, G.S. 1878, has the street commissioner authority to place upon the poll list the name of a person arriving at majority subsequent to the time when the board of supervisors or village council assesses the road tax and makes out the poll list?

2. Under Ch. 29, G. L. 1883, is a magistrate authorized to commit a delinquent to jail who refuses to pay the penalty imposed as prescribed by the statute?

The liability of a person to work upon the highway or to pay a poll tax is determined by his status at the time of the action of the board of supervisors in assessing the road tax and making out the poll tax list. A person, who at such time falls within any of the classes enumerated in Sec. 9, Ch. 13, G.S. 1878, is not subject to highway labor during the ensuing year. The overseer is invested with authority to correct ommissions and to place upon the list the names of "new inhabitants." These words contemplate only persons moving into the district and have no reference to minors subsequently becoming of age. A minor is as much an inhabitant as one who has passed his majority, and cannot, in any view, be deemed a "new inhabitant" upon arriving at majority.

Ch. 39, G. L. 1893, is unquestionably a penal statute. A magistrate has the authority of enforcing the payment of penalties by committment to the county jail. Such authority is inherent in and auxiliary to the right to impose a penalty. Nor is the committment in any sense a punishment. Ex Parte Crittendon, 62 Cal., 534; Wilkinson vs. Minneapolis Stock Yards, 57 N. W. Rep. 940.

But the question is placed beyond all doubt by the express language of Sec. 525., Penal Code.

Very truly yours,
H. W. CHILDS.

Sept. 1, 1894.

THE LAW OF NON-SUIT.

THE confusion in this rule of administrative justice illustrates the want of principle in the administration and practice of the law in this jurisdiction, where three rules are laid down, two followed by the courts, and the other, the statutory rule, ignored. The rule followed by the *nisi prius* courts, is that when the court would set aside a verdict, it can grant a non-suit—that is, dismiss the action. The rule laid down by the Supreme Court in Abbett vs. R. R. Co., 30 Minn. 482, that when the material evidence is conflicting, or when different conclusions might be

drawn from the undisputed facts, a non-suit cannot be granted; but if the material evidence is not conflicting, or different conclusions cannot be drawn therefrom, and when there is no evidence, or the verdict is against the evidence, the court can grant a non-suit. The statutory rule is that the court may dismiss the action when the plaintiff "fails to substantiate or establish his claim or cause of action or right of recovery," G. S. ch. 66, § 262, subd. 3. "Fails to substantiate or establish" is defined by the statute to mean that "when the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, it is a failure of proof," Gen. Stat., ch. 66, § 122; that is, he "fails to substatiate or establish his claim or cause of action"—fails or failure to establish or substanstiate, is a failure of proof."

This statutory rule is the common rule of failure of proof, and has not been followed by the courts since its enactment in 1851, and has been ignored by the Supreme Court in all its decisions upon this subject.

This statutory rule was taken from the New York Code Commissioners' report, which was framed by them, as they state, from the common law practice then existing in New York, which was the rule established by the English statutes of jeofails, 32 Hen. VIII, ch. 30; 18 Eliz. ch. 14; 21 Jac. I, ch. 13; 16 and 17 Car. II, ch. 8; 4 and 5 Anne, ch. 16; 5 Geo. I, ch. 13.

Before these statutes, especially the first, the rule was that any difference between the allegation and the proof was fatal before and after verdict, but under these statutes all defects and mistakes which did not go to the substance were cured by the verdict; hence the rule, that if no cause of action was alleged, or if alleged, not proved, the verdict did not cure; but if substantially but imperfectly alleged, or substantially but imperfectly proved, the verdict cured the defect, Doug. 658, 683; 1 Saund. 228; Tuck. Com. 316.

The purpose of the statutes were to try the right and just of the case, and not impinge upon the jurisdiction of the jury. Before the statutes of jeofails, any difference between the allegations and the proof was fatal, because it was then held that a case not proved in its entire scope was not proved at all, and therefore not a case for the jury. Any difference between the allegations and the proof meant a failure to prove the allegations of the declaration in some particulars—that is, if one or more links in the chain were not proved, and one or more were proved, the verdict did not cure the defect, and therefore there was no case. The contentions which produced the statutes of jeofails, urged that this rule invaded the jurisdiction of the jury, because the institution and growth of the trial by jury and as preserved by the Magna Charta gave to the jury the sole right to determine the weight of the evidence. If there was no proof, it was not for the jury. If there was some proof, it was wholly for the jury. And whether there was or was not proof, depended upon the question whether or not there was any proof of the right to recover; the pivot, the gist, the material averment of the right. The issue thus presented, was not the defect in omitting to prove some particulars of the right,

but proving the entire scope, a failure of proof or a defect in the weight of of the evidence. The statute of jeofails settled the question in favor of the jury (because it could not be done otherwise and retain that institution) by giving to the jury the sole jurisdiction of the weight of the evidence, which always belonged to it, and curing all defects in variance. This enactment provided that all differences between the allegations and the proof which did not effect the substantial right should be disregarded after verdict. This established the rule that *the right* was the pivot. If the right was not proved, it was not for the jury, hence the court could take it away from the jury before verdict by nonsuit, directing a verdict or demurrer to the evidence, and after verdict by setting the verdict aside and granting a new trial. If the right was proved in its entire scope, although some particulars were not proved, it was for the jury and the court could not interfere unless the jury violated some rule of law or something intervened to prevent the impartial trial of that right which could not have been used on the trial, such as irregularity, misconduct, accident, surprise, excessive damages, new evidence, or rulings of the court which may have influenced the jury.

This, therefore, produced the rule that the weight of evidence was for the jury and the failure of proof for the court—that is to say; If the right to recover depended upon two facts, to-wit, selling after notice not to sell, both must be proved, but if the testimony tended to show sale and notice, the case must go to the jury, because if there was no evidence of sale and notice, it is a failure of proof, but if there was some evidence, it is a question of weight.

At the time the New York commissioners framed the procedure code these rules prevailed in New York and were provided for in the New York statutes, and the commissioners merely transferred them to their code, clothed in general language, where, as in the former, the language is precise and particularized. That language and principle was carried into Minnesota, which is that the court can nonsuit when the plaintiff fails to prove his case and that failure means a failure of proof in its entire scope and not in some particulars only.

The same principles produced the rule for setting aside the verdict and granting a new trial, namely, that if there was a failure of proof the verdict should be set aside. If merely against the weight of the evidence it could not be set aside. To convey this principle various forms of expression were used, namely, against the evidence, insufficient evidence, not justified by the evidence or contrary to law, because if the jury had the exclusive right to determine the weight then the court could not disturb the verdict, and if the court was limited to the failure of proof then it could not enter into the weight of the evidence, and hence the language, insufficient evidence, against the evidence, not justified by the evidence or contrary to law, meant whether or not the jury acted within its jurisdiction. The New York code commissioners did not provide in their code the grounds for a new trial but left it as it stood in the New York Revised statute being the same as at common law, but the amendments of 1851 provided for a motion on the minutes to set aside the verdict and

grant a new trial when the verdict is against the evidence, or for insufficient evidence.

The statutory rule that a nonsuit shall not be granted but when there is a failure of proof is very plain, and the history and precedents showing the principles and causes which produced that rule are part of the elementary studies of the law, and yet, plain and simple as it is, the Minnesota courts have never followed the statute, nor the principles upon which the statute is based, nor have they established settled rules of their own, unless it be the autocratic rule that a nonsuit should be granted when the court would set aside the verdict, which is something like what Lord Coke called equity, a rule depending upon the measurement of the chancellor's big toe. The fallacy of such a rule and the analysis of the Minnesota decisions will appear in the next issue.

JOHN F. KELLY.

DAVID F. SIMPSON.

DAVID F. SIMPSON, Corporation Attorney of the City of Minneapolis, was born June 13, 1860, in Dodge County, Wisconsin. After some years in the common schools, he attended college for a short time at Ripon, and then entered the State University at Madison, graduating in 1882. He taught in the University during a portion of the next school year and attended the Law Department. The next year he entered the Columbia Law School, of New York City, and there in 1884, received the degree of L. L. B. He also received this degree from the law school of the University of Wisconsin, and became a member of the Wisconsin bar in the fall of 1884. He then removed to Minneapolis where he has since remained, engaged in the practice of law. In 1890 he was appointed first assistant city attorney, by the Honorable Robert D. Russell, now district judge of Hennepin county, then city attorney of Minneapolis, and in 1892 was appointed city attorney of Minneapolis, which position he has held since that time.

In addition to the usual litigation and legal work falling to this department of a city like Minneapolis, he has been engaged in several important suits involving the powers of a municipality to contract with corporations, and their rights to regulate *quasi* public corporations. The principal cases in this line have been the mandamus case against the Minneapolis Street Railway Co. to compel the company to give transfers at all intersections, the case against the Brush Electric Co. to cancel a five year contract for street lighting, and the proceedings against the Minneapolis Gas Light Co. to obtain a reduction in the price of gas in the city. In each of the above cases the contention of the city was sustained. Personally, Mr Simpson is an

affable gentleman, who makes friends of all with whom he comes in contact in either a business or social way.

LEON T. CHAMBERLAIN.

LEON T. CHAMBERLAIN, corporation attorney of the city of St. Paul, was born in Wayne county, New York, April 3, 1862, coming with his parents in 1864 to Dakota county, Minnesota, where he resided until his removal to St. Paul. His father was a farmer near Hastings, and the subject of this sketch was employed during the summer vacations in the usual work on a farm, and in the winter attended the Hastings high school and maintained his position with the regular classes until his graduation. He then entered the freshman class in the State University and commenced his college course. Following his attendance at the university he was engaged with his brother for nearly a year in editing and publishing "The Hastings News," and in the fall of 1883 commenced his law studies in the St. Louis Law School, from which he graduated in June, 1885. Soon after, being admitted to the bar in Minnesota, he opened a law office in Hastings, meeting the usual luck of young lawyers in finding more experience than fees. He removed to St. Paul in May, 1887, where he has since practiced his profession. In the spring of 1892 he was chairman of the convention that nominated the successful republican city ticket of that year. He took an active part in the following campaign, and the republican council chosen at that time elected him corporation attorney, succeeding to that office the Hon. D. W. Lawler, whose term expired March 14, 1893. His duties as such an officer have been arduous, especially in the line of advisory assistance to other corporation officers. In the administration of his office he has won many friends and has obtained for himself the respect and admiration of the bench and bar as well as the general public.

PROBABLY the most important case to be found on the subject of the admissibility of declaration as to intention, when not made as part of the *res gestæ*, is the Massachusetts case of Commonwealth v. Trefethen, which has just been reported in 24 L. R. A. 235, although the case was decided some time since, and had been already reported in 157 Mass. 180. The cases directly in point on this question are very few, and the leading prior case on the subject is that of the Mutual Life Insurance Co. v. Hillman, 145 U. S. 285, 36 L. ed. 706. These two cases probably contain about all the authority to be found on the question.

A city which has made a contract to supply water for a steam boiler in a greenhouse, is held, in Watson v. Needham, 24 L. R. A. 287, liable for the freezing of plants, which results from a failure to supply the water.

OUR PORTRAIT.

HON. LOREN W. COLLINS, Associate Justice of the Supreme Court, with whose portrait we present our readers this month, is a native of Massachusetts. His father was one of the early settlers of Eden Prairie, Hennepin County, removing his family there in 1854. Young Collins studied law in the office of Smith & Crosby at Hastings, and during the war, enlisted in the Seventh Minnesota Infantry, where he rose to the rank of first lieutenant. He was discharged with his regiment in 1865, and located in St. Cloud, where he commenced the practice of law. He was sent to the legislature for the sessions of 1881–83, and during the latter year he was appointed District Judge to fill a vacancy caused by the resignation of Hon. James McKelvy. In 1884 he was elected for a full term. He resigned this office in 1887 to accept the appointment as Associate Justice of the Supreme Court to fill the vacancy caused by the decease of Hon. John M. Berry. In the fall of 1888 he was elected to the position, which he now holds, by the largest majority of any candidate on the ticket.

Judge Collins is in the prime of life and in the full possession of all his powers, both mental and physical. While thoroughly judicial in his temperment and devotedly industrious in the performance of his official work, yet he is interested in all the living questions of the day and has never permitted himself to get out of touch with the world around him. Acute and learned as a lawyer, his practical knowledge of men and affairs greatly aids him in the correct application of legal principles. Strictly fair and impartial, his natural sympathies are with the great body of the people, but without any element of either the demagogue or partisan. In short, he has all the qualities of a safe, able and useful judge.

A GEORGIA magistrate was perplexed by the conflicting claims of two women for a baby, each contending that she was the mother of it. The judge remembered Solomon, and drawing a bowie knife from his boot, declared he would give half to each. The women were shocked, but had no doubt of the authority and purpose of the judge to make the proposed compromise.

"Don't do that," they both screamed in unison, "you can keep it yourself."—*Green Bag.*

IN a recent written examination of applicants for admission to the Bar of Ohio, the following question was put to one of the can lidates: What is bigamy? *Answer* (which is given verbatim et literatim): "A pretend marag by man or women to one of the opposite sect having at the time a living companion."—*Green Bag.*

EPHRAIM FLINT, the veteran lawyer of Dover, Me., who died recently, was once fined by a country justice of the peace for contempt of court in telling the magistrate too bluntly what he thought of one of his decisions. Mr. Flint was not taken back by the justice's order to his clerk. "All right," he said, "I have got a note in my pocket against you which I have been trying to collect for the past ten years, and I'll endorse the fine on it. I never expeted to get that much," and suiting the action to the words, he pulled out the note and made the endorsement.—*Green Bag.*

THE DISTRICT COURTS.

In re Assignment of St. Paul German Insurance Company, Screven vs. Franzen, Assignee.

(District Court, Ramsey County.)

Ambrose Tighe, for P. W. Screven, C. D. & Thos. D. O'Brien, for Franzen, Assignee.

COSTS AND DISBURSEMENTS AGAINST ASSIGNEE — WHEN AND HOW PAYABLE.

One Screven, having brought suit against Franzen, as assignee of the St. Paul German Insurance Company, interposed a demurrer to Franzen's answer. The demurrer was overruled and Screven appealed to the Supreme Court. There the order of the lower court was reversed and judgment for $78.25 entered against Franzen as assignee, being the amount of appellant's costs and disbursements. Franzen refused to pay this judgment except in the regular course of the administration of the assigned estate, claiming that it was entitled only to its dividend like any debt of the insolvent. Screven then applied to the District Court having jurisdiction of the assignment, for an order requiring the payment of the judgement for costs and disbursements in full and at once,—citing High on Receivers, Sec. 810; Camp vs. Receivers Niagara Bank, 2 Paige, 283; Columbus Insurance Co. vs. Stevens, 37 N. Y., 536; Locke vs. Covert, 42 Hun, 484; Gluck & Beeker on Receivers, p. 325; Dow vs. R. R. Co., 20 Fed. Rep. 260, and Central Trust Co. vs. Ry. Co., 41 Fed. Rep. 551.

The assignee argued in opposition that the practice under our insolvent law had always been to treat judgments for costs obtained in litigation with assignees like ordinary debts of the insolvent estate.

Held, that such judgments are not debts of the insolvent estate, but, like expenses of the assigneeship, to be discharged in full before any dividends should be paid creditors, and in the absence of any showing by the assignee that he had no funds with which to meet the judgment at bar or that it would embarass him to have to pay it, its payment in full at once is ordered. BRILL, J.

Michael J. Farrell vs. The City of St. Paul.

(District Court, Ramsey County, No. 55100.)

S. L. and W. L. Pierce for plaintiff, Leon T. Chamberlain for defendant.

MUNICIPAL CORPORATIONS — ASSESSMENTS — RES ADJUTICA — The owner of a lot, who does not appear or contest an application for judgment against the same on an assessment, cannot afterwards maintain an action against the city for damages alleged to have resulted from the acts for which said assessment was levied.

Action against a municipal corporation to recover damages alleged by plaintiff to have been sustained by reason of the alleged unlawful acts of defendant. It was found, among other things, that plaintiff was the owner of a lot fronting on Wells street in said city; that said street had an established grade; that said city changed the grade of said street, and duly entered into a contract with one Charles Stone, whereby said Stone agreed to erect a retaining wall in the center of said street, and so to grade the same that plaintiff was thereby deprived of his right of easement on one-half of the width of said street, and his, said plaintiff's, lot was deprived of its lateral support, to the damage of plaintiff as found by special verdicts of a jury; that before the commencement of this action the defendant had levied an assess-

ment against the said plaintiff's lot, which assessment had passed into judgment and was still in force and effect. Held that plaintiff was not entitled to any relief, and that defendant recover its costs.

OTIS, J. The foregoing decision is grounded upon the facts as found that plaintiff suffered a judgment to be rendered against the lot, claimed to have been damaged, for an assessment levied thereon to pay for the work constituting the alleged tresspass and unlawful acts complained of. The city was not entitled to judgment if the work was illegal, and its rendition is a conclusive adjudication, so far as this lot and the owner thereof is concerned, that the city had a right to make a contract for the doing of which damages are sought, and plaintiff cannot, after suffering such judgment, be heard to claim that the same was tortious. Plaintiff vigorously assails the validity of the judgment, but while the proceedings are affected by gross irregularities, I am of the opinion that they are not open to collateral attack and are binding on plaintiff and his lot.

Jerome Titlow, plaintiff, vs. Jos. Holman, defendant, and Chicago & Northern Railway Co., garnishee.

(District Court, Ramsey County, No. 55499.)

J. T. George for plaintiff, Brown & Abbott for garnishee.

GARNISHMENT—EXEMPTION—NON-RESIDENT—A non-resident is not entitled to the benefit of the exemption laws of this state.

The defendant was a non-resident of the state and made no appearance either in the main action or the garnishee proceedings. The garnishee disclosed an indebtedness to defendant, but alleged that the same was for services performed by defendant, and that he was a married man, and, on behalf of the defendant, claimed that $25.00 was exempt under the laws of this state.

KELLY, J. The garnishee in its disclosure claims as exempt the sum of twenty-five dollars as the wages of a person earned within thirty days next preceding the date of garnishment. The defendant makes no appearance, but from the files it is made to appear that he is a non-resident of Minnesota. Without deciding whether the garnishee may plead an exemption for the defendant which he does not himself assert, it is sufficient in this case to say that the exemptions sought to be pleaded is expressly limited to debtors having an actual residence in this state.

William S. Moore et al. vs. City of St. Paul.

(District Court, Ramsey County.)

Steel & Rees for plaintiffs, Leon T. Chamberlain for defendant.

DURESS—LICENSES—A license fee paid under threats of arrest, and that one's business will be stopped and thereby ruined, is paid under such duress and coercion that the same may be recovered back if said license was not property collectible or due.

Action against a municipal corporation to recover license fees, alleged to have been paid under threats of arrest and of stopping plaintiffs' business, amounting to duress. Plaintiffs were the proprietors of an "employment agency" in the City of St. Paul, and engaged in procuring employment for male persons and procuring such persons for employment. The defendant in 1887 duly passed an ordinance requiring, among other things, that all persons engaged in conducting such employment agencies should pay an annual license fee of $150.00. Plaintiffs, upon demand

being made on them by the license inspector of said city, and upon being threatened with arrest if they attempted to conduct their said business in violation of the terms of said ordinance, and upon being threatened with having their office and place of business closed up, paid said fee in the years 1887, 1888, 1889, 1891 and brought this action to recover the same. On the trial the court found against plaintiffs. On motion being made for a new trial on the ground of errors of law occurring at the trial, the court granted the same.

KERR, J. Under a recent decision of our supreme court, not called to my attention on the trial of this case, I think that one of the payments, at least, here sought to be recovered, was made under circumstances which bring it within the rule, as to coercion or duress, now established in this state.

There is nothing in the delay of plaintiffs in bringing suit which should operate as an estoppel.

In re confirmation of assessment for sanitary sewer in second alley west. Application of S. L. Merchant, John A. Willard et al.

(District Court, St. Louis County.)

Page Morris, Esq. attorney for City of Duluth, Eckman & Stevenson, attorneys for objecting property owners.

MUNICIPAL ASSESSMENTS—Defective notice of assessment and of application for order of confirmation not jurisdictional under Duluth charter, after judgment.

The charter of the City of Duluth provides for the levying of street and sewer assessments briefly, as follows: The board of public works shall give ten days notice by publication in the official paper that they will on a certain day assess all property directly benefited by the public improvement then completed, unless cause is shown why any of the property should not be so assessed. After such assessment, the said board shall give ten days notice by publication in the official paper that they will apply to the District Court on a certain day for an order confirming said assessment roll for the assessment levied as aforesaid. After such confirmation the assessment becomes due and payable and if not paid within a specified time the city comptroller applies again to the District Court for judgment on delinquent assessments, giving notice by publication, as before. The board of public works under the above provisions in proceeding to assess for a sanitary sewer, failed to give the required ten days notice of intention to assess, giving instead only nine days, and further failed to give the required ten days notice of application for order of confirmation, giving instead only nine days notice. The court, however, issued an order confirming the assessment roll on such defective notice, and the city officials proceeded to collect the assessment, and finally had the assessment placed in judgment, giving this time the required notice by publication.

About twenty-five property owners joined in a motion to vacate said order of confirmation and the judgment entered thereon, on the ground that the court never obtained jurisdiction of the property because of the said defective notices given, and that all proceedings prior to the judgment being illegal, the judgment itself must fall; that the order of confirmation was necessary to give the court jurisdiction to enter judgment, citing 2 Dill. Mu. Cor. 769. Flint v. Webb, 25 25 Minn. 93; Sewall v. City of St. Paul, 20 Minn. 459.

MOER, J. Notwithstanding the failure to comply with the charter in levying and confirming the assessment, the judgment itself was conclusive, and such objections could not be taken to the judgment after the entry thereof, but could have been successfully presented only at the time of the application for judgment on the illegal assessment.

State vs. Hamilton.

(District Court, Watonawan County.)

W. S. Hammond and Ashley Coffman for the State. J. W. Seager for the defendant.

CRIMINAL LAW—SALE OF MORTGAGED PROPERTY—AGENCY—CONSENT.—In a prosecution under section 454 of the Penal Code the defendant will be allowed to show that in selling mortgaged property, he acted as the agent of the mortgagee, but evidence which amounts only to an oral consent to the sale of such mortgaged property, will not be received

This was a criminal prosecution for the sale of mortgaged property without the consent of the mortgagee, under section 454 of the Penal Code, tried before SEVERANCE, J. and a jury.

The defendant on the 28th day of August, 1892, was owing the complaining witness, A. Welden, $330.00, due one year after date, and to secure the payment of said debt, made and delivered to Welden, a chattel mortgage upon a number of articles of personal property, and also upon a crop of grain, to be sown in the farming season of 1893, upon the farm of the complaining witness, which the defendant held under an ordinary farm lease.

On the 28th day of August, 1893, all of said debt being still unpaid, the defendant sold a portion of the crop raised under the mortgage, and appropriated the proceeds of the sale.

The defendant's counsel offered to show, that while the defendant had no written consent of the complaining witness, he had his oral consent to the sale of the property.

This was objected to by the attorneys for the state, and the objection sustained.

Then the defendant's counsel offered to show the relationship of principal and agent, and that in disposing of this particular property, the defendant was acting as the regularly authorized agent of the complaining witness.

Over the objection of the state's counsel, the court allowed the defendant to offer evidence, tending to show the relation of principal and agent existing between the defendant and complaining witness under oral authority, but at the close of the trial, the court held that no agency had been proven, and that not having proved the defense of agency, evidence of oral consent to the sale would not be received. He therefore instructed the jury, that if they found that the defendant sold the mortgaged property while the debt was still unpaid, and without the consent in writing of the complaining witness, they must find the defendant guilty.

Anton Korman, Admr, vs. Peoples' Ice Co.

(District Court, Ramsey County. No. 55124.)

Kueffner, Fauntleroy & Searles, for Plaintiff; McLaughlin & Morrison, for Defendant.

CONSTITUTIONAL LAW. CLASS LEGISLATION—Sec. 346 of the Penal Code which provides for guarding openings made upon the waters in this state "for the purpose of removing ice for sale" is class legislation and, therefore, unconstitutional and void

Action to recover for death of plaintiff's intestate, a boy of eleven years, alleged to have been drowned by reason of the negligence of defendant in not guarding the openings made by it in removing ice from a lake in the city of St. Paul, as by statute and an ordi-

nance of the city of St. Paul provided. The facts sufficiently appear in the memorandum.

KELLY, J. The plaintiff's intestate, his son, then a boy about eleven years old, was, on December 21, 1891, drowned in Lake Phalen. He had been skating on the ice, and the complaint charges that the accident happened by reason of the defendant having removed the ice from a part of the lake, and failing to properly guard the opening thus made. The complaint alleges that defendant was then and still is engaged "in dealing in, and handling and cutting and storing ice in the city of St. Paul." That on about the 21st day of December, 1891, and prior thereto, the defendant ice company negligently, wrongfully and unlawfully was and had been cutting ice on Lake Phalen for the purpose of removing the same for sale, contrary to the statute and the ordinances of the city of St. Paul in such case made and provided, and had removed ice from said lake * * * and did not * * * at any time surround said cuttings or openings with fences or bushes or other guards sufficient to warn all persons of such cuttings or openings." And that in consequence of such failure to observe the law the deceased fell into the water and was drowned.

This is clearly an action brought under Sec. 346 of the Penal Code, which provides in substance, that any person cutting ice in or upon any waters in the state, "for the purpose of removing the ice for sale must surround the cuttings and openings made with fences or bushes, or other guards sufficient to warn all persons of such cuttings or openings." Failure to do so is a misdemeanor.

The objection to this penal statute is that it is "class legislation—unequal in its operation and therefore void. The legislature undoubtedly may, if it will, require persons removing ice from waters within the state's jurisdiction, to properly guard the openings just made, and in view of the general custom in this climate to use frozen lakes and rivers as highways, such legislation seems not only proper but imperative. But can it make penal the act of one man failing to guard an opening where ice is removed for sale and leave unpunished precisely the same act done by another, because the ice removed was for private consumption? In the case of the ice merchants there is no "apparent, natural reason—some reason suggested by necessity, by such difference in the situation and circumstances of the subjects placed in different classes,—as suggests the necessity or propriety of different legislation with respect to them" that cannot be suggested as to all other persons engaged in cutting ice. The object of the law is to minimize the danger from these openings made in the ice. It may be said that because ice is removed for sale the openings made would be larger, according to common experience. But being larger and therefore more easily seen, they become less dangerous. This consideration, which is obvious, would thus defeat the only argument for discriminating against the ice merchants. But even if the larger the opening the more dangerous it becomes is true, still the reason fails. Suppose this case, a cold storage or a brewery needing large quantities of ice for its private use cut side by side and in an equal quantity with a company removing the ice for sale. By

what legal logic can the last be held liable under this penal statute and the first go free? The statute is clearly obnoxious to the constitution forbidding class legislation, and is void.

Nichols vs. Walter, 37 Minn., 264.
Allen vs. Pioneer Press Co., 40 Minn, 117.
State Ex Rel vs. Sheriff Ramsey Co., 48 Minn., 236.
Lavallee vs. St. P.. M. & M. Ry. Co., 40 Minn., 249.
Johnson vs. St. P. & D. Ry. Co., 43 Minn., 222.

The last case cited is in its facts and reasonings almost on all fours with the case at bar. In any event the case was properly dismissed because the evidence left it to mere conjecture whether plaintiff's intestate lost his life by falling into an opening made by the defendant company. To put the evidence strongest for the plaintiff, he was last seen alive skating in the direction where defendant's servants were then cutting ice. His body was found the next day in the water which defendant had uncovered. Whether it floated there, or how it got there is surmise. There was no case for the jury either on the law or the facts.

Brainard vs. Myers, et al.

(District Court, Ramsey County, No. 55270.)

Frank Ford for plaintiff. Briggs & Countryman for Defendants.

PARTNERSHIP.—Assignment for Benefit of Creditors—A common law assignment of a partnership executed by one co-partner is valid.

A foreign attachment of partnership real estate, levied after the assignment and before the deed of assignment is filed or recorded in the county where such real estate is situated, but after the attaching creditors have actual notice of the assignment, is invalid as against the assignee.

Action by the assignee of an insolvent co-partnership, and of the co-partners, against certain creditors of the partnership who had levied an attachment upon certain real estate situated in Ramsey County, Minnesota, which belonged to the insolvent co-partnership, praying that plaintiff's title, as assignee thereto be quited, and that defendants be adjudged to have no lien thereon.

It appeared that the said attachment had been levied after the execution of the assignment to plaintiff, and actual notice thereof had been received by defendants, although the deed of assignment, which specifically described said lands in Ramsey County, had not been recorded or filed in said county, but that the same had been duly filed in Audubon County, Iowa, of which county the co-partners were residents, and in which county the insolvent co-partnership had carried on its business.

The deed of assignment was not executed according to the statute, but the assignment was one at common law.

BRILL, J. It is conceded that the assignment conveys partnership property and for the benefit of partnership creditors. An assignment by a partnership of the partnership property for the benefit of the partnership creditors was undoubtedly good at common law, and it is not claimed that the common law in this respect has been changed in Iowa, nor has it been changed in Minnesota.

The assignments of partnership property held void in this state were attempted to be made under the insolvency law, which does not permit them, and they were invalid at common law because they exacted releases. An assignment of partner-

ship property may be made by one partner where the firm is insolvent and the other partner has absconded or is dead.

Stein vs. La Dow, 13 Minn. 412.
Williams vs. Frost, 27 Minn. 255.
Hanson vs. Metcalf, 46 Minn. 25.
Barton vs. Lovejoy, 57 N. W. Rep. 935.

Real estate belonging to the firm is considered personal property for the purpose of paying debts. An assignment by one partner when he is authorized to make it will convey the real estate of the partnership—the legal title of the partner executing, if in due form—and the title in equity of such as stands in the name of the other partner.

Hanson vs. Metcalf, *supra*.
Barton vs. Lovejoy, *supra*.
Sullivan vs. Smith, 19 N. W. Rep. 620.
Rumery vs. McCullough, 54 Wis. 565.
Shanks vs. Klein, 104 U. S. 118.

The assignment in question in this case was valid where made, is sufficient in form and execution to convey real estate situate in this state, does not operate to prejudice the citizens of this state, and is not in conflict with the policy of this state. See Re-Paige and Sexmith Co., 31 Minn. 136. Our laws permit non-residents to own and hold real estate situate here, and to convey it upon the same terms as residents. A conveyance of real estate by a non-resident owner to a creditor in payment of his debt, or as security, is undoubtedly valid as against a subsequent attaching creditor with notice, whoever he may be. Assignments for the benefit of creditors are recognized as a legal and proper method of conveyance of real estate (if sufficient in form) if made in this state by residents, and there is no valid reason under the law why they are not equally effectual if made by non-residents out of the state.

In many states the policy is declared to be to protect their own citizens against a foreign assignment of real estate, but in those states such an assignment is held good as against non-resident creditors subsequently attaching. In this state it has been said in Jenks vs. Luddon, 34 Minn. 482, that citizens ought not to stand on any better footing than non-residents in such a case. Whether this will be finally determined to be the law or not, it does not seem to weaken the plaintiff's position.

If the conveyance was sufficient to pass the title legal or equitable, as I think it was, the attaching creditors have no rights.

Sortwell vs. Jewett, 9 Ohio, 181.
King vs. Glass, 73 Iowa 205.
May vs. First Nat'l Bank, 122 Ill. 51.
Thursten vs. Rosenfeld, 42 Mo. 474.
Benley vs. Whittemore, 19 N. J. Eq. 462.
Thompson vs. Ellenz, 59 N. W. Rep. 1023.

Louis B. Jacobson v. Thomas B. Johnson.

(District Court, Hennepin County.)

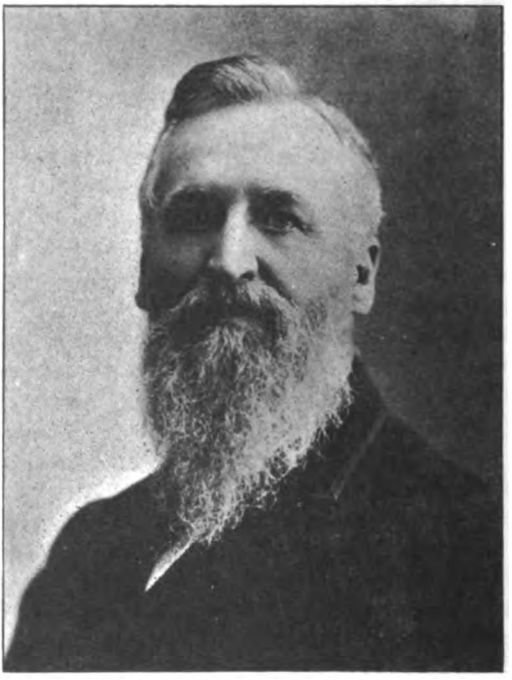
W. R. McDowell for defendant. W. A. Adams for plaintiff.

JUDGMENTS—SET OFF—ATTORNEY'S LIEN—The statutory lien of an attorney is subordinary to the rights and equities existing between the parties, and where judgments should be set off against each other, and one judgment debtor is insolvent, the attorney of the party who obtained judgment against the solvent party cannot by giving notice of lien for fees deprive such party of his right to set off.

The facts sufficiently appear in the opinion.

JAMISON, J. The motion in the foregoing matter was for an order requiring a certain judgment in favor of Jacobson against Johnson to be set off against a certain judgment in favor of Johnson against Jacobson. The judgment in favor of Johnson had been duly entered and docketed in the office of the clerk of this court prior

to the commencement of the action of Jacobson against Johnson, in which the said judgment in favor of Jacobson was obtained. Upon the hearing of this motion the attorney who acted for Jacobson in the suit of Jacobson against Johnson appeared and showed to the court that he had taken the statutory steps to acquire a lien for his fee upon the judgment which was rendered in favor of Jacobson against Johnson. Said attorney urged that said judgment against Johnson should not be set off against said judgment against Jacobson, but that he should be paid by Johnson the full amount of the judgment against him for the reason that he had acquired a lien on the same for the entire amount thereof. It is undisputed that Johnson is solvent, but Jacobson is insolvent and he has been since the entry of the said judgment against him. If the right of the attorney to enforce his alleged lien is paramount to the right of Johnson to have the judgment off-set, then these judgments should not be off-set against each other. But does this right exist to this attorney? In view of our statute on this subject we think not. Section 16, of Chapter 88, of the General Statutes of the State read as follows: "An attorney has a lien for his compensation, whether specially agreed upon or implied, as attorney*** upon the judgment to the extent of the costs included therein; or, if there is a special agreement, to the extent of the compensation specially agreed upon from the time of giving notice to the party against whom the judgment is recovered. The lien is, however, subordinate to the rights existing between the parties to the action or proceeding." What rights existed between the parties, Jacobson on the one hand and Johnson on the other? Johnson had acquired a judgment against Jacobson; thereafter Jacobson commenced suit against Johnson to recover damages. The action was one in tort and resulted in a judgment against Johnson for a sum less than the said judgment which he then held against Jacobson. Jacobson during all this time was insolvent. Before the judgment in this action had been entered and docketed against Johnson, the attorney of Jacobson sought to acquire a lien on the same for his fees by giving the statutory notice. I think Johnson had a right to have the judgment obtained against him set off against the judgment which he held. "Judgments should always be set off against each other when they are final between the parties and their rights are fived under them." 6 Minn. 398. If Johnson had the right to have the judgments so off-set against each other, than the lien of the attorney is subordinate to the right because the statute provides, as above set out, "this lien is, however, subordinate to the rights existing between the parties to the action or proceeding." The rights or equities which existed in favor of Johnson attached because Jacobson was and is insolvent. The right of attorneys to liens for fees upon judgments obtained should be favored by the court, but violence should not be done to the statute. It would be unjust and inequitable to require Johnson to pay the full amount of the judgment against him to Jacobson's attorney in view of the fact that Johnson cannot collect a dollar from Jacobson because of Jacobson's insolvent condition.



HON. J. D. ENSIGN,

DISTRICT JUDGE, ELEVENTH JUDICIAL DISTRICT.

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THE LAW OF POSITIVE AND NEGATIVE TESTIMONY IN ACCIDENT CASES.

PART II.

IN Kelly vs. R.R. Co., 29 Minn., 1-4, plaintiff's witnesses testified to having "*listened to hear the bell and heard none.*" One witness testified *he was crossing track listening for train and heard none and that he always listened for trains while crossing tracks.*" In Iltis vs. R. R. Co., 40 Minn., 273, two witnesses testified "*that bell was not rung.*" In each case the evidence was held sufficient. In R. R. Co. vs. Cauffman, 38 Ill., 425 (323), three witnesses who were near and expecting to see collision said they did not hear bell or whistle until train was within some ten rods of the place where some colts were killed. The engineer and fireman swore that the bell was rung. A passenger testified that while standing on the platform before the accident, he heard the bell, but after going into the car he heard it no longer. The Court held that therewas a conflict of testimony for the jury to decide. In regard to R. R. Co. vs. Still, supra, the Court said: "By reference to that case it will be seen that the witnesses who testified that they did not hear the sound of the bell or whistle were most of them in a position that they could not see what was transpiring, and the others simply said that they heard neither sound, whilst in this case the witnesses were near at hand and saw, and were in position to hear either the bell or the whistle if they had been sounded." This statement is hardly correct. The two cases can hardly be explained except upon the theory that in the Kauffman case the rule as to negative testimony was greatly relaxed. In R. R. Co. vs. Triplett, 38 Ill., 367 (483), the Railroad Company did not claim that the bell was rung, and it admitted that whistle was not sounded continuously from the whistling post to the crossing. For what space of time the engineer failed to give the necessary signal was the point about which the witnesses differed. The trainmen made the period of omission very brief, while four witnesses for the plaintiff testified that there was but a single blast of the whistle while the train was passing the whistling post, and no further signal was given until the engineer whistled down brakes a moment before the collision occured. A verdict for the plaintiff on this testimony was upheld on appeal. In Rhodes vs. R. R. Co., 58 Mich., 263, sev-

eral persons testified that they did not hear the signal; one witness testified that he saw "the bell and it was moving." The Court held the evidence sufficient to establish defendant's failure to ring the bell or sound the whistle, although opposed by positive testimony of sudden and loud whistles which frightened a team in the vicinity. In Byrne vs. R. R. Co., 14 Hun., 322, a witness testified that the bell was not rung before the accident. On cross-examination he said he knew that it was not rung because he did not hear it; that after the accident, whenever the cord was pulled he heard the bell distinctly. Two other witnesses, (track repairers) testified that they heard no bell. The evidence was held sufficient to show that the bell was not rung, although the trainmen testified positively that it was rung. In Iowa, a mere "I did not hear" seems sufficient to support a finding that a bell was not rung or whistle not sounded. The rule in that state is illustrated by quite a number of cases.[1] Massachusetts and Missouri, seem inclined in some cases to a like liberal rule.[2]

RULE. — THAT POSITIVE TESTIMONY "THAT THE SIGNAL WAS NOT GIVEN" IS SUFFICIENT TO SUSTAIN A VERDICT FINDING A FAILURE TO RING BELL OR SOUND WHISTLE.

It is held that the testimony of a witness who was in position to hear, and who swears not merely that he did not hear certain sounds, but "that they were not given," is sufficient evidence to show that there were no such sounds.[3] This rule for all practical purposes is the same as the preceding. If a witness says his attention was directed to the ringing or not ringing of a bell and was where he ought to have heard it, his testimony "that he did no hear it" impells the conclusion that the bell did not ring. Under this rule the witness draws the conclusion himself, while under the preceding rule that conclusion is left for the jury to draw.

RULE. THAT POSITIVE TESTIMONY OUTWEIGHS NEGATIVE TESTIMONY ILLUSTRATED.

In R. R. Co. v. Still, 19 Ill., 499, an action to recover damages for injures sustained in a collision at a railroad crossing, one of plaintifl's witnesses testified, "*that I had no difficulty in seeing the train. If there had been a whistle blown, I think I should have heard it. I did not hear the whistle blown or bell rung. I thought that if they did not, Still would get caught. I do not think it was possible that I could be mistaken under the circumstances. If the bell had rung, or whistle sounded, I certainly should have noticed it. I was afraid there would be a collision if they did not give the signal, and I was watching to see if any was given. The headlight was not lit. I am as sure of this as I am that a whistle did not sound or the bell ring.*" Other witnesses testified that they did not hear the signals. One of defendant's witnesses testified: "*I was in the express car next to the tender; I took my money from safe and stepped to the car door with it in my hand while the train was still on the bridge, The bell was then ringing.*" Another witness testified: "*I heard the bell ringing while we were*

[1] Pence vs R. R. Co., 42 R. R. Cas., 126; Lee vs. R. R. Co., 45 R. R. Cas., 157; but see Annacker vs. R. R. Co. (Ia.) 47 N. W., 68.
[2] Davie vs. R. R. Co., 34 N. E., 1070; Murray vs. R. R., 13 S. W., 817.
[3] Klanowski vs. Grand Trunk R. R. Co. (Mich.,) 21. R. R. Cas., 648; Rhodes vs. R. R. Co., 58 Mich., 263-265; Kelly vs. R. R. Co., 29 Minn., 1-4; Byrne vs. R. R. Co., 14 Hun., 322. R. R. Co. vs. Lane, 33 Kas., 702; But See Chi. Alton R. R. vs. Robinson, 106 Ill., 142.

on the bridge." The engineer testified: "*I know that the fireman commenced ringing the bell near the east end of the bridge. After passing the bridge he jumped over to my side of the engine and told me there was a team on the track. He was pulling the bell-cord and let go to come over to me. I lit the headlight myself at Marseilles that night. I can swear positively that the bell was ringing when the team was hit. It commenced ringing at or near the east end of the bridge.*" The fireman testified: "*I commenced ringing the bell before we got onto the bridge. I recollect ringing it on the bridge. I let go the rope to tell the engineer that a team was on the bridge.*" The jury found for the plaintiff. The Court set aside the verdict on the ground that the positive evidence that the signals were given and that the headlight was burning, overcame the testimony offered by the plaintiff. In Cauffman vs. R. R. Co., above, this case is distinguished. This evidence would seem to present an issue for the jury. A verdict upon that testimony, it would seem, would ordinarily be sustained. The case may, therefore, be justly called an extreme one. In Ralph vs. R. R. Co., 32 Wis., 177, an action to recover the value of a quantity of rope, which plaintiff alleged was delivered to defendant for shipment to Chicago, he testified that he took the rope to the depot, and not finding the Station Agent, he applied to the operator, and she directed him to place it in the freight room, which he accordingly did. The operator testified: "*Plaintiff did not in November bring to the office and call my attention to a coil of rope; never had any coversation with him about a coil of rope to be shipped to Chicago; do not remember to have ever seen him there in the office; I am very sure that I never received the rope from any one to ship to Chicago.*" The Court held that a verdict for defendant was not supported by the testimony; Judge Lyons speaking for the Court, said: "The testimony of the plaintiff is affirmative. He swears positively to the affirmative fact that he delivered the rope in the freight room of the depot by direction of Miss Brown. There is but little room in this testimony for failure of memory. He either did so, or he has probably committed perjury. The testimony of Miss Brown, although somewhat positive in form, is negative in effect. It means but little more than that she had no recollection of the transaction to which Todd testified; in her case there is much more room for failure of recollection. A single question put to her by Todd when she was otherwise and perhaps intently engaged about something else, and the brief reply was the whole of the transaction so far as she was concerned. It is not strange if it made no impression upon her mind, but passed at once from her recollection. The rule of law is that positive testimony of one credible witness to a fact is entitled to more weight than that of several others who testify negatively, or at most to collateral circumstances merely persuasive in their character. Applying this rule in the present case, we are impelled to the conclusion that the testimony of Todd outweighs that of Miss Brown, and hence that it was proved on the trial that the rope was delivered to the defendant for shipment to Chicago, as alleged in the complaint." In Culhane vs. R. R. Co., 67 Barb., 562, an action to recover damages for killing

a horse in a collision at a crossing, plaintiff's servant who was driving the horse and a person riding with him at the time testified, that as they approached the crossing they "*listened for the bell, and heard none.*" On the part of the defendant, the fireman who had control of the engine, testified, when he crossed Hudson Street, Peer got on the engine and rang the bell until the accident. Peer testified that he rang the bell. Another witness testified that the bell was rung, that he heard it, and saw the man pulling the bell-cord. Another testified that he heard the bell and saw it swinging. Another witness testified also to the ringing of the bell. On cross-examination he testified that he noticed that the bell was ringing because he looked up and saw it ring. The Court set aside the verdict in plaintiff's favor and granted a new trial for the reason that the weight of the testimony was against the verdict, the Court saying: "Each and every of these witnesses (for defendant) were guilty of wilful and corrupt perjury if the bell was not in fact, rung at the time as stated by them to their respective knowledge. This is not so in respect to the plaintiff's two witnesses. They simply testified that they listened and did not hear the bell. That may have been so without any impeachment of their integrity as witnesses. Here are five witnesses against two; they were in no way impeached, and there is nothing in the case to show that they are unworthy of belief. It is doubtless the province of the jury to weigh evidence and to pass upon the credit of the witnesses sworn and testifying before them, but they have no right arbitrarily or capriciously to disbelieve the testimony of any witness not impeached or contradicted. The testimony of plaintiff's witnesses was not positive; it was merely that they listened and did not hear any bell ring. This evidence was doubtless sufficient *prima facie* to take the case to the jury on the question whether the bell was in fact ringing or not. But it was not capable of contradiction; nor could these witnesses be convicted of perjury if their testimony were false. It was merely that they did not hear any bell; and who could say that they did in fact hear, however loud it might in fact have rung. This consideration does not apply to the five witnesses who testified for the defendant that the bell did in fact ring at the time. While it is true that the number of witnesses on each side of the question should not necessarily control in the consideration of the jury, they should nevertheless consider, as in this case, that it was far more unlikely that five witnesses would commit wilful and corrupt perjury than that two would or might do so, when they testify to the same fact with equal means of knowledge. And besides, in this case the jury should have remembered and considered that the burden of proof was upon the plaintiff, and that he was bound to make out his case by a preponderence of testimony upon the whole issue. Most clearly the plaintiff on the trial failed to do so." The verdict of the jury in plaintiff's favor was accordingly set aside and a new trial granted. The report of the first trial of this case may be found in 60 N. Y., 133, and above referred to.

In Seibert vs. R. R. Co., 49 Barb., 583, an action to recover damages sustained while crossing a railroad track

by reason of a collision it appeared from the evidence of the plaintiff himself that he heard no bell or whistle before he was struck by the engine, and another witness a short distance away testified that he heard no bell. As to this testimony the Court said that it was the slightest possible evidence, scarcely sufficient uncontradicted, to take the case to the jury. The engineer testified positively that bell was rung and whistle sounded. Several other witnesses testified "they heard the bell." A verdict in plaintiff's favor was set aside as not supported by the evidence. This rule is further illustrated by Bohen vs. R. R. Co., 21 Wis., 241; Harris vs. R. R. Co., 32 Minn., 459; Telford vs. R. R. Co., 30 N. J. L. 188; Supra, and Floyd vs. R. R., 29 Atl., 396. The last case is a splendid illustration of this rule.

MISCELLANEOUS CASES IN CONFLICT WITH, OR NOT EASILY CLASSIFIED, UNDER THE PREVIOUS HEADS.

The statment of a witness at a great distance "*that he did not hear*" is inadmissible.[1] But it is not error to admit this testimony by a passenger on a train with which the collision occurred.[2] The testimony of some credible witnesses that they heard the whistle and bell of the engine is not in conflict with the testimony of others who heard nothing; for the observation of the fact by some is entirely consistent with the failure of others to observe, or their forgetfulness of its occurance.[3] It is error for the Court to instruct the jury that it may be justified in giving greater weight to the testimony of witnesses who state negatively that the whistle was not sounded or the bell not rung than to that of witnesses stating affirmatively that such was done.[4] A different rule formerly prevailed in Illinois.[5] A witness having testified to a conversation in a family it is not competent in rebuttal thereof to call a neighbor to testify merely to never having heard such a coversation in the family.[6]

In another case defendant's witnesses testified that the bell was rung and that a switchman guarded the crossing, but several witnesses for the plaintiff testified that they saw the train, but did not see the switchman's lantern, although they could have seen it, if it was there. Other witnesses, who were several hundred feet away, testified that they did not hear the bell ring. As the testimony of the train men was lacking in precision and was confused and contradictory, it was held error to direct a verdict for the defendant.[7] Where nine witnesses who were on train causing collision swore that the bell was not rung, although opposed to the positive testimony of five witnesses, a verdict that the bell was not rung was affirmed.[8] Positive testimony as to the giving of a signal near a crossing cannot, as matter of law, control negative testimony on the same subject.[9] It will be observed the negative testimony in this case was not simply that the witness did not hear, but the witness testified that "the bell was not rung."

[1] Chapman vs. R. R. Co., 14 Hun., 484; Harris vs. R. R. Co., 33 Minn., 459; Hughes vs. R. R. Co., 67 Tex., 66.
[2] Greany vs. R. R. Co., 101 N. Y., 419.
[3] Horn vs. R. R. Co., 54 Fed. Rep., 301; Stett vs. Huidekopers, 17 Wall., 393.
[4] Chi. & Alton R. R. Co. vs. Robinson, 106 Ill., 142.
[5] Chicago, Burlington & Quincy R. R. Co. vs. Kauffman, 38 Ill., 425; Chicago, Burlington & Quincy R. R. Co. vs. Triplett, 38 Ill., 483.
[6] Chambers vs. Hill, 34 Mich., 523.
[7] Hoye vs. Chicago & Northwestern R. R. Co., 29 N. W. (Wis.), 646.
[8] Parvis vs. R. R. Co., 17 At. (Del.), 702.
[9] Rhoades vs. Chicago & Grand Trunk Ry., Mich.

Where witnesses have testified that they did not hear any signal from an approaching train, their opinion that they could have heard the signal if it had been given, has been held to be inadmissible.[1] But this seems contrary to the general rule.[2]

Where a witness testifies that a certain agreement was made and another testifies that it was not made, the rule that positive evidence prevails does not apply.[3] In a case in Massachusetts there were six witnesses who testified that they heard no bell or whistle until the danger whistle was sounded close by the crossing. All of these were in a position where they might easily have heard, and three of them riding at great risk to their lives if they failed to notice such signals. This evidence was held sufficient.[4] In another case from the same court, one witness testified that he heard no noise made by an engine before the accident, and another witness testified that he heard three sharp whistles just as plaintiff's intestate was struck, but heard no whistle before, the question whether defendant had performed its duty in giving warning, was held to be for the jury.[5] Testimony that witness did not hear a bell rung or a whistle sounded is weak, but positive testimony that the bell was not rung and that the whistle was not sounded stands upon a different footing.[6]

It has been held that the testimony of defendant's witnesses having charge of the bell or whistle, and therefore interested in proving that the proper signals were given, is not necessarily conclusive as against the testimony of plaintiff's witnesses that they did not hear the signals.[7] It would seems that this decision may be explained on the supposition that it was based upon the misunderstanding of Greanie vs. R. R. Co., 101 N. Y., already cited. The foreman of a section gang, whose duty it was to give warning, testified that he gave the warning. Plaintiff testified that he heard none, "and I am not hard of hearing either." This was held sufficient to justify a finding that no warnings were given.[8] The Court called attention to the latter part of this testimony, saying that it ment a great deal more than that the witness's memory was a mere blank.

Conclusion.—A mere "I did not hear" is not evidence. In order to raise an issue witnesses must testify not only that they did not hear, but also that their attention was directed at the time to the presence or absence of the signals relative to which they assume to testify. This idea may be expressed by saying, that the witnesses must qualify in order to make their testimony "that they did not hear" of any value. They may qualify in three ways:

First.—By showing that they listened for the signal.[9]

Second.—By showing facts and circumstances indicating that they were giving heed to the presence or absence of signals.[10]

[1] Eskridge vs. Cincinnati & New Orleans R. R. Co., (Ky.), 42 R. R. Cas., 176.
[2] Illinois Central R. R. Co. vs. Slater, 49 R. R. Cas., 480; Chicago & Alton R. R. Co. vs. Dillion, 32 R. R. Cas., 1.
[3] Sheckey vs. Eldridge, (Wis.), 37 N. W. Rep., 820.
[4] Manard vs. R. R. Co., (Mass.), 23 N. E., 214.
[5] Johanson vs. Boston R. R. Co., (Mass.), 26 N. E., 426.
[6] Klanowski vs. R. R. Co., (Mich.), 21 R. R. Cas., 648.
[7] Scott vs. Penn. R. R. Co., 9 N. Y. S., 189.
[8] Davis vs. N. Y. & N. H. R. R. Co., 34 N. E., 1070.
[9] Culhane vs. R. R. Co., 60 N. Y., 133; 67 Barb. 562.
[10] Moran vs. R. R. Co., 48 Minn., 46.

Third.—By testifying positively that no signal was given.[1]

The mere fact that a witness was in the vicinity where he might have heard the signals, is not sufficient to qualify him so that his "I did not hear" becomes evidence that signals were not given. As suggested by Judge Gilfillan in the *Moran* case, in this state, such testimony from a mere stranger in the vicinity of an accident is not enough to raise an issue. To give "I did not hear" any probative force, is to give it something which universal experience denies that it has. Did the gong of the street car sound at the crossing at which you boarded the car this morning? Can you testify as to the sounding of the gong yesterday morning or on any morning, a week or a month ago? You may have watched or waited on the corner for a car and necessarily watched its movements sufficiently to enable you to board it when it stopped, yet that attention in all probability was not such as to enable you to say whether there was a signal given or not. You were not interested in signals. It was none of your concern whether they were given or not. They made no impression on your mind. They are so constant, so customary and so frequently recurring that no notice is taken of them. There are hundreds of men in this city who are within hearing distance of the court-house clock. Suppose they are asked if they heard it strike a particular hour on a particular day, in a particular week. What answer, in all probability, would you receive? In all probability the answer would be: "I did not hear it," or "I don't remember of hearing it." Would this answer prove that the clock did not strike? Yet every day verdicts for large sums of money are rendered, supported by no better or more convincing testimony than this. Verdicts are rendered every day, finding large sums of money to be due by one party to the other upon testimony which is no more convincing than the testimony we have here alluded to.

For a very clear exposition of the unreliability and worthlessness of negative testimony as to the ringing or not ringing of the bell or the sounding or not sounding of a whistle, we know of no better authorities to which the reader can be referred than Bailey's "*Master and Servant*," pp. 509, and Patterson's "*Accident Railway Law*," Sec. 370. These two authorities very clearly show the absurdity of basing a verdict upon a mere "I did not hear."

N. M. THYGESON.

[1] Klanowski vs. R. R. Co., 21 A. & E. R. R. Cas., 648.

OPINIONS OF THE ATTORNEY GENERAL.

REGISTER OF DEEDS—Fees of—Indexes—What required by statute.

MR. A. MAHLUM,
Register of Deeds,
Brainerd, Minn.

Dear Sir: Referring to the several inquiries raised in your communication of the 10th instant, you are advised as follows:

1. The indexing required to be done upon the reception books kept by the register of deeds does not constitute matter for which that officer is entitled to charge folio fees. His fees must be

restricted to folios contained in the instrument left for record.

2. The statute requires that the entries made in the reception books shall be sufficiently explicit to locate the property. This would be best complied with where the property has not been platted, by indicating the appropriate government subdivisions.

3. When the name of more than one grantor or grantee appears in the instrument, the instrument should be indexed as to each name. No other course would comply with the terms of the statute.

Yours truly,

April 16th, 1894. H. W. CHILDS.

COUNTY COMMISSIONERS — Redistricting — Where the boundaries of a city and its wards have been so changed and extended that the commissioner districts no longer conform thereto, as required, it is the duty of the county commissioners so to redistrict the county that the districts and wards do so conform. In such case the action of the commissioners is prospective and does not terminate the term of a commissioner whose district may be altered or abolished.

MR. GEORGE W. BUCK,

Duluth, Minn.

Dear Sir: You state, in substance, that the commissioner districts of your county were established under the former city ward lines; that since they were thus established the corporate limits of the city have been extended, and that the wards of the said city have also been re-arranged, so that the territory of each is materially different from what it was when the commissioner districts were established. In view of such changes in the boundaries of your city wards, you raise the following questions:

1. Is it not necessary for the county commissioners to redistrict the county so as to conform to the ward boundaries as now established?

2. In an event of the redistricting, will it not be necessary to elect a commissioner for each district thus established?

The statute provides that "commissioner districts shall be bounded by township or ward lines, be composed of contiguous territory, and contain, as nearly as practicable, an equal population. The board of commissioners may redistrict their counties respectively after each United States or State census, taking the population as shown by their said census as the basis." (G. S. 1878, c. 8, s. 93.)

It is clearly the duty of your board of county commissioners to rearrange or redistrict the county with reference to the boundaries of the ward lines of the city.

A redistricting of a county does not have the effect of shortening the tenure of office of a county commissioner. The Supreme Court of this state has held in the case of Norwood v. Holden, 45 Minn. 316, that "an order redistricting a county is merely prospective in its operation as to the election and qualification of members of the board of county commissioners, and in no way affects a right to the office of those previously elected. The division of a county into districts is merely for election purposes. The duties of commissioners are not local or to be performed in only a particular part of the county. On the contrary, they are merely members of an entire board, which acts as such for the entire county."

This view, it is proper to state, expressed by the Supreme Court, is at variance with views which long obtained with this office, but is now the controlling law, and must, of course,

be observed. It is therefore manifest that whatever action your board of county commissioners may be disposed to take with reference to the redistricting of your county, it will have no effect upon the tenure of office of any of your county commissioners.

Very respectfully,

June 7, 1894. H. W. CHILDS.

GLANDERS—Killing Animals Infected with —The owner of horses killed by order of the board of health for being infected with glanders is not entitled to compensation for his loss by chapter 200 Gen. Laws of 1885.

HON. CHARLES M. HEWITT, M.D.,
Secy. and Executive Officer,
Red Wing, Minn.

Dear Sir: I have considered the bill of R. G. La Grange, of Worthington, against the State for the keep of certain horses ordered isolated by the local board of health of the Village of Worthington. It appears that the horses in question became infected with glanders and were, by the order of the local board of health, isolated for a period of time. The animals were not, however, taken from the actual possession of the owner, nor am I fully advised as to the precise arrangement made by the local board of health with him, respecting the care and custody of such animals. Upon being advised as to the law of the case you will have no difficulty, I apprehend, in applying it to the facts as actually existing.

The law does not contemplate relief to the owner of horses which are infected with glanders. In no view of the law can it be successfully maintained that because the owner of the animals thus infected has suffered loss by reason thereof, he is thereby entitled to relief under chap. 200, G. L. 1885. He stands upon no better footing than does any man who has lost his barns and stock by fire, or who has in any one of many ways suffered great financial misfortune; nor does the law of 1885 assume to make an exception in his behalf. Occasions will necessarily arise where a local board of health will deem it advisable to isolate animals supected of being infected by some contagious disease like glanders or farcy. It is left wholly to their discretion to determine what course shall be pursued in the isolation of such animals. The animals may be left in the care and under the control of the owner, to be employed, perhaps, by him in his business, so long as they are not allowed to come in contact with other animals; or they may be taken from his possession and placed within such environments and under such control as the public welfare may be deemed to require. There is no inhibition upon the board, however, to employ the owner of the horses to act as their agent in caring for them during the period of their isolation. The mere fact that he has been thus employed would not be at all incompatible with the view that they had been taken from the possession of the owner within the meaning of the statute in question. If it be a fact that by action of the board of health, the owner was deprived of all custody and control over his animals, and was merely acting as their agent during the period of isolation, he would be entitled, in my judgment, to reasonable compensation therefor; but this would be so, not because he is the owner of the animals, but for the reason that he is the agent of the board of health, employed by them to perform a particular service with reference to the isola-

tion of animals. The expenses of isolation will necessarilly consist of several items. It may necessitate the procurement of a proper pound, building or enclosure, suitable food, medical treatment, and the services of some suitable person to watch over the animals during their isolation. Mr. La Grange's bill, it may be said in this connection, is not expressed with sufficient fullness to be entitled to payment, even if it appear that his case is a meritorious one. He presents a bill of some $373.00 for "feed and attendance upon horses quarantined for glanders." Before the bill can be allowed under the said chapter 200, the items must be expressly stated, and it must further appear that the person presenting the bill was employed by the board of health in connection with the isolation of the animals, and that the feed or medicine, as the case may be, was further authorized by it.

The statute in question is based upon the fact that the public welfare is of paramount importance, and vests health officers with authority to condemn and kill animals infected with either farcy or glanders. When the killing of the animals is ordered, the board "may pay to the owner an equitable sum for the killing and burial thereof." It will be perceived that this does not contemplate payment to the owner for the loss he has suffered, but rather for the value of his services performed in the killing and burial of his animals pursuant to the order of the board.

Whether or not Mr. La Grange is entitled to the payment of any amount out of the appropriation provided by the law of 1885 will depend, as above suggested, upon the fact that the animals were in fact isolated, and that he performed services on behalf of the board in connection of the isolation, and provided food for the maintenance of the animals during the term thereof. This is a question I am unable to determine from the facts presented, and indeed, it is a question which the board of health and not the attorney general should determine.

Very respectfully,

June 9th, 1894. H. W. CHILDS.

INCOMPATIBILITY IN OFFICE—Superintendent of schools and district treasurer not incompatible.

MR. L. R MACINTOSH,

Morris, Minn.

Dear Sir: Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper for the consideration of public policy for one incumbent to retain both. The statute has nowhere declared the offices of superintendent of schools and that of district treasurer incompatible. The treasurer is one of the board of trustees of the district, and is also made the custodian of the moneys belonging thereto. The superintendent has, of course general supervision over all the schools of his county, and has more or less to do with the affairs of each of the districts in his county. Strictly speaking, these duties are somewhat in conflict, as he, as superintendent, is called upon to consider matters brought to his attention by the school board or its officers. This, therefore, presents a case of technical incompatibility between the two offices. It is not my opinion, however, that it is that degree of incompatibility which offends against the rule above expressed.

Very truly yours,

July 13, 1894. H. W. CHILDS.

INDIAN RESERVATION—Election districts—An election district cannot be formed within an Indian reservation, as the reserved territory is not subject to the laws of the state.

HIS EXCELLENCY,

KNUTE NELSON, Governor.

Sir: I beg to acknowledge receipt of your communication, in which you submit for my inspection petitions for the establishment of election districts in Norman County. In view of the fact that the territory in each petition lies wholly within White Earth Indian Reservation, you ask my views as to your authority in the matter establishing election districts as prayed for in said petitions. From a careful examination of the law upon the subject, it is my opinion that no valid election district can be established upon such territory, as such reservations are not deemed part of the state in which they lie for election purposes. The authorities go so far as to hold that the grounds ceded to the United States for navy yards or for the purpose of a soldiers' home are not part of the territory of the state, so far as the jurisdiction of its laws extends. It therefore follows that you are not authorized to establish the election districts in question.

Very respectfully,

Aug. 13, 1894. H. W. CHILDS.

JUSTICES OF THE PEACE—Appointment of in case of vacancy under Sec. 48, Ch. 10, Gen. Stat. 1878, held valid.

In the matter of the application of A. G. Wedge and M. F. Propping, for the institution of quo warranto proceedings to test the title of Eric Olson to the office of justice of the peace in the town of New Canada and County of Ramsey.

Mr. Eric Olson claims to hold the office of justice of the peace in the Town of New Canada, in Ramsey County, by virtue of an appointment under sec. 48, Chap. 10, G. S. 1878. It is insisted on the part of the applicants that an appointment of a justice of the peace in case of vacancy can be made only as provided in Sec. 122, Chap. 8, G. S., 1878. I am unable to agree with such contention and entertain the view that the appointment of such officer by the board of county commissioners has reference only to vacancies arising in counties not divided into towns. Reading together sections 119 to 122, inclusive, of said chapter 8, it is obvious to my mind that such is the proper construction to be placed upon section 122. Whether or not the law was complied with in the appointment under section 48, does not clearly appear. That section has been passed upon by our Supreme Court in State v. Guiney, 26 Minn. 313.

From the nature of the showing made I do not feel that a proper case is presented in which I would be justified in instituting the proceedings asked for. But Mr. Olson's tenure of office is not assailed upon the ground of want of compliance with the provisions of said section 48, but for the reason that his appointment was not made pursuant to section 122.

The application is, therefore, denied.

H. W. CHILDS.

Aug. 14, 1894.

A WITNESS, in describing an event, said: "The person I saw at the head of the stairs was a man with one eye named Wilkins." "What was the name of the other eye?" spitefully asked the opposing counsel. The witness was disgusted with the levity of the audience.—*Ohio Legal News.*

THE NATIONAL BANKRUPTCY LAW.

THE condition of affairs all over the United States at the present time is painful. Whether these unfortunate conditions exist as a result of over-speculation, the tremendous advance in the price of gold; the result of tariff tinkering, from a reason unknown, or from a combination of reasons, the cold fact remains that out of every one hundred persons who were worth from $10,000 upwards in the United States eight years ago, about seventy-five per cent are in financial difficulties. The per centage may seem high, but after consulting with men well able to judge, all the way from New York to the Pacific Coast, I am of the opinion that the estimate is not too high. On the contrary, it is rather below than above the per centage. Real estate has dropped 80 per cent in many of the far Western towns from the value it had eight years ago, and in the suburban district of every city in the West a very large decrease in value has taken place, ranging all the way from 25 to 75 per cent. Property is being foreclosed right and left, deficiency judgments are being piled up in the courts, men are discharging their servants, giving away their horses and carriages, if they cannot sell them, and letting their lands be sold for taxes. Many of our factories are closed; our benevolent and educational institutions are suffering; the number of the unemployed is very great; the harvest has been but a moderate one, owing to the dry weather, and everything indicates financial distress. Very many of our most aggressive and enterprising men have their ardor and their ambition killed by being constantly dunned for money, and being now and then placed on the gridiron of supplemental proceedings to disclose concerning their property. If they act at all in a business way they are forced to do so under another name, and are almost obliged to be dishonest if they would earn enough to keep their families from starvation. Now these people, and among them many of our best citizens, like the Egyptians of old, are crying, not to Pharaoh for bread, but to Congress to relieve them from the cyclone of bad times and give them a chance to start anew. They say "Give us the law contemplated by the framers of the republic, whereby, on turning over what we have to our creditors we may be relieved from any further legal obligation to them, and may again be permitted to use our energies, not only for ourselves and our families, but to benefit the community in which we live and thereby also benefit our creditors."

Among the powers delegated to Congress by the Constitution, adopted September, 1787, was the following: (Sec. 8, Art. 1) "To establish uniform laws on the subject of bankruptcies." It is also interesting to note that Sec. 10 of the same article, prohibited the States from passing any law imparing the obligation of a contract. Now, the courts have held that if a state passes a bankruptcy law it does not impair the obligation of a contract if there is no existing congressional legislation on the subject. But no such state law could have any effect on a contract made before its enactment, or made outside

of its own territory, nor to contracts made between citizens of different states, and the discharge granted in one state usually has no effect over debts contracted in another state, unless they volunteer to accept of the benefits of the state law. So, at best, state enactments are very unsatisfactory, and have caused, as experience shows, much unnecessary litigation.

MINNESOTA INSOLVENT LAW UNSATISFACTORY.

It may be surprising to many people outside of the legal profession, or to those who have not passed through insolvency in this state, to say that if a person makes an assignment his creditors are not bound thereby unless they come in and file a release. The Minnesota state law works about this way: Smith owes Hall $1,000, Jones $1,000 and Olson $1,000. Smith makes an assignment and pays 30 cents on the dollar. Hall and Jones accept of the 30 cents and formally release him from any further liability. But Olson says, "No, I will take a judgment against him and ultimately collect my full amount." Olson has a perfect right to do this, and can harass Smith to his dying day for the payment of the $1,000. Thus, the Minnesota insolvent law is of no special benefit to the unfortunate debtor aside from the fact that it would keep Olson from getting a preference and put what Smith has in the hands of the court, so that it can divide up the property fairly and equitably. We need for the benefit of both debtor and creditor, and must have, a national bankruptcy law. Such laws have existed in all civilized countries since the days of Moses, when we had the first record of such an enactment. It was there provided that a debtor might be discharged from all obligations once in every fifty years, which was commonly called, "the year of jubilee." (See Lev. Chap. 25.) This humane curb on human greed and selfishness was enacted about 1490 years before Christ. Bankruptcy laws first appears in Roman jurisprudence 326 B. C. and was known as the "Lex Poetelia." Such laws were first enacted in England in the reign of Henry VIII, and again under Elizabeth and later sovereigns. Several acts have been passed during the reign of Victoria; the latest being the act of 1880 (42 and 43 Vic.), which amends the act of 1869. Bankruptcy laws exist in almost all European countries, being largely framed after the French Code of 1807. In the United States we have had three federal bankruptcy laws. The first one was passed April 1, 1800. It was limited to five years. It was practically a compilation of the English statutes then in force, but as it recognized the old and now obsolete distinction between a trader who could become bankrupt and another person who could become insolvent, it did not give general satisfaction, was distasteful to the South, being considered a special boon to the mercantile classes, and was repealed in 1803. The second law was passed by Congress August 19, 1842, and went into effect February 1, 1842, but it was repealed March 8, 1843, and was only in operation thirteen months, but during that time in Massachusetts alone some 3250 cases are reported. Another bankruptcy act was passed in 1867, commonly called the "Jenk's Act," but it was repealed

in 1879. We are now without a national bankruptcy law.

During the present session of Congress a bill was introduced by a member from Texas and passed the House July 17, 1894, and was reported in the Senate by Mr. George, with amendments, but it did not pass.

With all due regard to the gentleman who drew it, the bill, it seems, is a very incomplete piece of legislation and it may, on the whole, be well that it did not become a law at this time, but no effort should be spared to pass a proper bill at the coming session of Congress.

The wisest thing to do, it seems to me, would be to re-enact the law of 1842, with such amendments in the law and practice as experience and the act of 1867 would suggest. Much also of the present excellent English law and practice might be incorporated in it. By substantially re-enacting these laws, with the objectionable features omitted, we would have the benefit of many thousands of adjudications, both in this country and in England, which would assist the courts and the profession very largely in determing questions of law and practice.

EFFECT ON CREDITORS.

Among some short-sighted bankers and business men the suggestion of a bankruptcy law at once arouses opposition, but a more careful study of the law and its effects will demonstrate to them that it will be for their benefit, as well as to the benefit of the debtor class, for the following, among other reasons:

1st. The great cost, unsatisfactory results and large amount of litigation arising out of conflicting state laws on the subject would be obviated and a great expense thereby afforded to the unfortunate creditor.

2nd. The knowledge that a national bankruptcy law existed would greatly curtail the credit system and prevent the indiscriminate sale of goods or loan of money to every irresponsible person, and in this way the bubble commonly called a boom would be prevented from again intruding itself with all its ultimately disastrous results upon the community, would emancipate at least a million of energetic men (now in a sort of slavery), and afford them a chance to act again, and thus benefit, not only themselves, but the community in which they live, including their creditors.

4th. It would tend to satisfy the masses that the law favored the poor as well as protected the rich, and thus would prevent anarchy and other phases of discontent, which are rising like a vast tide and which threaten to overwhelm the creditor class.

Lastly. The experience of the most conservative nations of ancient and modern times demonstrates that such laws, while eminently humane, are a blessing to both debtor and creditor.

J. M. HAWTHORNE.

THE LAWYER'S LULLABY.

By F. H. Coggswell.

Be still, my child! remain in statu quo,
While I propel thy cradle to and fro.
Let no involved res inter alios
Prevail while we're consulting inter nos.

Was that a little pain in medias res?
Too bad! too bad! we'll have no more of these.
I'll send a capias for some wise expert
Who knows to eject the pain and stay the hurt.

No trespasser shall come to trouble thee,
For thou dost own this house in simple fee—
And thy administrators, heirs, assigns,
To have, to hold, convey at thy designs.

Correct thy pleadings, my own baby boy;
Let there be an abatement of thy joy;
Quash every tendency to keep awake,
And verdict, costs and judgment thou shall take.

—*Boston Transcript.*

John Rogers, Jr., et al., Plaintiffs v. Annie O'Brien, Defendant, and The Phoenix Insurance Co., Garnishee.

(Municipal Court, City of St. Paul.)

Pinch & Whaley for Plaintiffs. Westfall & Darragh for Defendant.

HOMESTEAD EXEMPTION—Held that the insurance money in the hands of the insurance company, arising from a partial destruction of a homestead is exempt from sale and levy on execution.

This action was brought against defendant, and the Phœnix Insurance Company was garnisheed. It appeared that the insurance money due from the garnishee to the defendant was for a loss on the homestead of defendant. Garnishee discharged.

ORR, J. Paragraph 6, Sec. 310, Chap. 66, General Statutes, exempts "All moneys arising from insurance of any property exempted from sale on execution when such property has been destroyed by fire." It may be contended that this exemption extends only to personal property and does not apply to homestead property, but whether it does or not, I am of the opinion that the garnishee cannot be held, as the Supreme Court strongly intimates in Quehl v. Peterson, 47 Minn. 13, that the proceeds of a policy of insurance on a homestead owned and occupied as a homestead are exempt.

LITERARY NOTES.

THE October and November numbers of the Atlantic Monthly have duly come to our table. As has before been remarked in these columns, the Atlantic Monthly is unquestionably the best, if not the only, purely literary monthly published on this side the Atlantic Ocean. Space and the nature of the contents of the Magazine forbid any lengthly mention of them here. And they are so varied, and all of such interest, that if one mentions but a portion he is in danger of harming his reputation for having good taste by not mentioning others.

One might, however, venture to call special attention of the readers of the LAW JOURNAL to "The Medieval Towns of England," "Recollections of Stanton Under Johnson," "Sewards' Attitude Toward Compromise and Secession," "Tammany Points the Way," and "The Growth of American Influence over England," as having for them an interest, not apart from, but in addition to their literary interest.

"The Railway War" by Mr. Henry J. Fletcher, an article written on the railway strike in July, while it was at its height, has rather a foreign or distant sound in October, and, to some extent, it illustrates recent criticisms which have appeared on various monthly periodicals which have attempted to produce timely articles, but which, when the monthly appears, read in the light of after events, seems not so wise as they might if read when written.

LET us offer a suggestion to the brewers for the better advertisement of their products. Hang on all the town drunkards a placard which says, "Loaded with our goods." This method is used by many manufacturers on their wagons and railroad cars, and is considered good advertising.—*Reflector.*

THE case of Roberts Manufacturing Co. vs. Wright, reported in this number decides that the members of an inchoate corporation may be held liable as partners on contracts made in the corporate name, and is in accordance with the decision of Judge Moer, of Duluth, in Frost Manufacturing Co. vs. Barnes Vitrified Brick Co., reported ante page 139.

THE DISTRICT COURTS.

W. W. Stenson v. J. C. Hendee.

(District Court, Winona County.)

JUSTICE PRACTICE — PLEADING — Where pleadings are not had on the return day of the summons in justice court, and defendant on the adjourned day objects to pleadings being made and moves for a dismissal, and on the objection being over-ruled, proceeds to trial, he does not thereby waive his rights to urge this objection on appeal.

A summons was issued out of a justice court returnable June 21st, 1894. Both parties appeared, no pleadings were made on that day, and no consent of parties was given or order made by the justice as to when they should be made, but the cause was, by consent of the parties, adjourned to June 28th, 1894.

On the return day defendant appeared specially and moved that the action be dismissed on the ground that no pleadings were made on the return day of the summons. The motion was overruled and defendant duly excepted to the ruling. Thereupon plaintiff plead orally on an account, and filed a statement thereof with the justice. The defendant answered, the cause was tried, judgment was rendered for plaintiff, and defendant appealed therefrom on questions of law alone.

START, J. 1. G. S. Chap. 65, Sec. 23, is imperative. If the cause is adjourned without appointing a time, with consent of the parties, when the pleadings shall be made, the justice loses jurisdiction. (8 Minn., 243; 14 Minn., 142; 48 Minn., 222.) It is too late to question this rule.

2. If, however, defendant appears on the adjourned day without objection, answers and goes to trial, he waives by voluntary appearance the right to object to the jurisdiction, and confers such jurisdiction, and the error in law of adjourning the cause without pleadings is thereby cured. (21 Minn., 402; 48 Minn., 221.)

The case at bar is distinguishable from these cases in that defendant did not voluntarily submit to the jurisdiction of the justice.

He appeared specially, moved for a dismissal of the action, and excepted to the ruling denying his motion. He was not bound to abandon his defense, or repeat his objection and exception. He answered under coercion. This is not an open question in this state, whatever may be the rule elsewhere, and needs no discussion. (3 Minn., 29; 98 U. S. 476.)

Wilson v. Mills.

(District Court, Lac qui Parle County.)

C. D. Bensel, for Plaintiff. C. A. Fosnes, for Defendant.

JUSTICE PRACTICE—JURISDICTION—REPLEVIN—Where the plaintiff in an action of replevin in justice court testifies that the value of the goods replevied is more than $100 the justice thereby loses jurisdiction of the action.

This was an action in replevin commenced in justice court of Lac Qui Parle County. The affidavit of replevin alleged the value of the property to be $94. Upon the trial of the cause in justice court, the plaintiff himself, who was the only witness sworn, in giving the value of each article replevied, gave the value of all the property as $113.

The defendant then moved to dismiss the action on the ground that the court had no jurisdiction, for the reason that the value of the property in controversy, was more than $100.

This motion was granted, whereupon, the plaintiff appealed to the district court, POWERS, J., presiding.

In the district court the plaintiff testified to the value of the property as $91, claiming that he had not examined as to its condition fully, when he testified to its value in justice court, and that the value as he then gave it was too much. He admitted, however, that he testified in justice court that the value was more than $100.

The plaintiff rested. Two witnesses were examined by the defendant who testified to the value fixed by the plaintiff in the court below.

The defendant then moved to dismiss the action on the same ground on which it was dismissed in justice court, claiming that as the justice court was ousted of jurisdiction the district court did not acquire any by appeal. This motion was granted.

In Re-Assignment of M. H. Crittenden & Son.

(District Court, Hennepin County, No. 62,870.)

Wadsworth & Wadsworth for Petitioners. Henry J. Fletcher for Assignee.

ASSIGNMENT FOR BENEFIT OF CREDITORS—An assignment purporting to be under the law of 1881, executed by one co-partner conveying all the assets of the co-partnership and his own individual property, but which is not executed by and which does not convey the property of the other co-partner is void.

The facts sufficiently appear in the memorandum.

HICKS, J. It appearing to the court that on the 15th day of August, 1894, that said Mason H. Crittenden on his own behalf, and on behalf of the co-partnership of M. H. Crittenden & Son, made what purported to be an assignment in writing, dated and filed in the above entitled court on that day, purporting to assign to the Metropolitan Trust Company of Minneapolis, all the property and estate of said Mason H. Crittenden as an individual, and all the property and estate of M. H. Crittenden & Son not exempt by law, for the equal benefit of the creditors of said firm and said M. H. Crittenden; that at the time of said assignment, and long prior thereto, said Archie M. Crittenden had held himself out as, and was in fact, as to the creditors of said M. H. Crittenden & Son, a general partner in said firm of M. H. Crittenden & Son, and should have joined in the said instrument of assignment as a member thereof; that by reason of this failure to join in the execution of said instrument of assignment the said assignment does not bring into court all the joint and several property of said debtors, and the same is therefore invalid and ineffectual as an assignment under the Insolvency Act of Minnesota, and of no force and effect; and that by reason of the invalidity of the assignment it appears to the court that certain creditors are about to obtain a preference over other petitioners and creditors of the firm of M. H. Crittenden & Son.

Therefore, the firm of M. H. Crittenden & Son, is declared to be insolvent.

Wherefore the said instrument of assignment, dated August 15, 1894, and executed by Mason H. Crittenden on his own behalf, and on behalf of M. H. Crittenden, and on said day filed in the above entitled court, is hereby adjuged and declared to be void and of no force and effect as an assignment under the Insolvency Act, Gen. Laws of 1881, Chap. 148, of Minnesota and amendments thereof.

Borg v. Peterson.

(District Court, Ramsey County, No. 56,185.)

Harold Haris for Plaintiff. Geo. W. Walsh for Defendant.

SLANDER—PLEADING—In a complaint for slander it is unnecessary to give the names of the persons in whose presence the alleged slanderous words were spoken.

This cause came before the court on the motion of the defendant com-

pelling the plaintiff to make his complaint more definite and certain in this—by inserting the name or names of the person or persons in whose presence and hearing it is alleged the slanderous words pleaded were uttered. Having heard counsel for the respective parties, ordered that said motion be and the same is hereby denied. By consent, the defendant's time to answer is extended to and including November 10th, 1894.

KELLY, J. The gist of plaintiff's cause of action is: (1) That the words were uttered by defendant and were slanderous, and (2) That they were so uttered in the presence and hearing of some person or persons who understood them. It is not necessary to plead the names of the persons who so heard. It might be convenient for the defense to know these names, but the plaintiff is not obliged to disclose them in his pleading.

Wm. H. Young v. Wm. Donaldson, et al.

(District Court, Hennepin County, No. 69035.)

F. F. Davis and W. S. Dwinnell for Plaintiff. Keith, Evans, Thompson & Fairchild for Defendant.

STATUTE OF FRAUDS—A contract to perform labor and services for a period of more than one year must be in writing.

Plaintiff contracted to work for defendants in their store at Minneapolis for a term of two years, commencing on the seventh day of June, 1892, and was to receive a compensation of $18.00 per week until the first day of October, 1893, $20.00 per week from October 1st, 1893, until the first day of March, 1894, and $22.00 per week thereafter until the expiration of said two years; the contract was oral, no part of which has ever been reduced to writing,

Plaintiff commenced work on June 7, 1892, and continued in said employment, receiving the sum of $18.00 per week, until about October 1, 1893, when the defendant discharged the plaintiff, without any cause, and refused to employ him for the remainder of the said two years.

Plaintiff brought this action to recover the balance due on the contract, from October 1, 1893, to June 1, 1894.

ELLIOTT, J. A contract, which, by its terms, is not to be performed within one year, must be in writing; an oral contract may be set up as evidence to show the amount due on an action for *quantum meruit*.

No action can be maintained on this contract.

Hedvig A. Colby v. Christian M. Colby.

(District Court, Hennepin County, No. 60641.)

Arctander & Arctander, for plaintiff. W. H. Adams for defendant.

ALIMONY—Action to set aside Decree of Divorce.

Plaintiff brought this action to set aside a decree of divorce theretofore obtained by the defendant herein in this court, alleging that the same had been obtained by fraud upon her and upon the court, and asked that the defendant be ordered to pay her alimony during the pending of this action and counsel fees therein

The court, having "heard the arguments of counsel and duly considered the matter, being of the opinion that in an action to vacate a voidable decree of divorce the wife is not entitled to alimony or counsel fees," denied plaintiff's motion therefore.

HICKS,
SMITH,
RUSSELL, JJ.

M. M. Dye, et al, v. N. F. Johnson, et al.

(District Court, St. Louis County, No. 9888.)

Towne & Davis for Plaintiffs. J. L. Washburn for Defendants.

PLEADING—Allegation that plaintiff became the owner and holder of a note for value before maturity, is not a conclusion of law.

Plaintiffs, as indorsees, sued the maker and indorsers on a promissory note, and after setting up the note and the indorsements, alleged that "thereafter and before maturity defendant 'B' (the second indorser) indorsed said note for value, and delivered it so indorsed, and that thereafter and before its maturity, these plaintiffs became and now are the owners and holders thereof for value."

Defendants demurred to the complaint, contending that the allegation that plaintiffs became the owners and holders was a conclusion of law, and not a sufficient allegation of transfer and indorsement to these plaintiffs. In support of the demurrer counsel cited Weatherspoon v. Rodgers, 32 Cal.; Poorman v. Mills, 35 Cal. 121; Frazer v. Williams, 15 Minn., 288, (Gil. 219) 22 Minn. 272, 13 Minn. 165, (Gil. 154), 17 Minn. 493, (Gil. 270).

Plaintiffs contended that in the cases cited in support of the demurrer there was a particular allegation of endorsement and transfer to the plaintiff besides the allegation "plaintiff is now the owner and holder thereof," and that therefore the latter allegation was under the familiar rule of pleading, a conclusion of law. Plaintiff cited in opposition to the demurrer, 4 Abb. Pr. 463, 36 How. Pr. 190, 15 How. Pr. 1, 32 Wis. 243, 8 How. Pr. 385, Bliss on Code Pl. 232.

Demurrer of defendants overruled.

ENSIGN, J.

National Investment Co. v. Robert Igel.

(District Court, Ramsey County, No. 55486.)

Briggs & Countryman for Plaintiff. H. Barton for Defendant.

PLEADING—PARTIES TO ACTIONS—In an action to recover for unpaid installments due on a contract for sale of real estate by an assignee thereof it is unnecessary to allege that the assignor and vendor has not declared the contract void for default, or that he had demanded possession of the premises. Nor in such an action is the assignor a necessary party. Where money is paid upon the express request of another, it is unnecessary to allege that he was obligated to make such payment, or was benefited thereby.

One Schickler sold to the defendant certain real estate for the sum of $3,200.00, to be paid as follows: $30.00 per month on the 15th day of each month, and $100.00 on or before two years from the date of the sale. Schickler agreed to convey to the defendant the said premises when the amount of the payments should have reduced the amount due to $2,000.00. By the contract of sale the defendant also agreed to pay the taxes on said premises, and also to keep the buildings thereon insured. Schickler afterwards, and before the commencement of the action, assigned to plaintiff all money due or to grow due on said contract.

The defendant having failed to make certain of the monthly payments aforesaid, the first cause of action was to recover the same. But it appeared from the complaint that the payments made and the amount sued for would not reduce the total amount due to $2,000.00. For second and third causes of action, respectively, it was alleged that the plaintiff, at defendant's request, had paid certain taxes on said premises and certain insurance premiums on the buildings thereon.

The plaintiff's assignor was not made a party to the action.

The defendant interposed a demurrer on the grounds of a defect of

parties, plaintiff and defendant, and that in none of the causes of action set up in the complaint were facts stated sufficient to constitute a cause of action. Demurrer overruled.

KERR, J. One Henrietta Schickler agreed in writing to sell and convey to defendant certain real property for the price of $3,200, the defendant to have possession of the premises. In consideration whereof, defendant agreed to pay said purchase price (except $100.00) in monthly installments of $30.00 on the 15th of each month, commencing with July 15th, 1892. The warranty deed was to be executed by Schickler to defendant when payments were made as aforesaid, sufficient to reduce the amount remaining unpaid to the sum of $2,000.00. Monthly payments were made by defendant as agreed, down to and including Nov. 15th, 1893, and no more. Upon default in payment of any installment, or in performance of any of the terms of agreement by defendant the contract might be declared void at the election of said Schickler, and upon any such default defendant agreed to surrender possession to said Schickler upon demand. All moneys due and to grow due on said contract were, for value received, sold and assigned by said Schickler to plaintiff.

Plaintiff sues in first cause of action to recover the unpaid installments after Nov. 15th, 1893, down to April 15th, 1894. The amount sought to be recovered herein, together with the amount heretofore paid by defendant on the contract, would not reduce the purchase price remaining unpaid to $2,000, so as to entitle defendant to a deed. There are therefore no conditions precedent to be performed by Schickler. In such case it is not necessary that said Schickler should be made a party, plaintiff or defendant, to the action. Nor is it neeessary, in, the complaint, to allege that said Schickler was the owner of the property or had not elected to declare the contract void, or had not demanded or recovered possession of the premises. These are the matters of defense, and are equally available to the defendant against the plaintiff as they would be against Schickler had the suit been brought by her.

As to the second and third causes of action, they are in the approved form for money paid at the express request of another, except that they do not state specifically to whom the money was paid. It is not necessary, in such action, that the money should have been paid for the beneficial use of defendant. It is entirely immaterial whether he was benefitted by the payment or not, if it was made at his express request with an implied, or as in this case, an express promise to pay. Nor is it necessary in such case to allege or show that the payment was made in discharge of a liability binding on defendant. It might be that these causes of action are faulty as being indefinite or uncertain with respect to the person to whom the payments were made, but objections of that character are not reached by general demurer.

Charles J. Gellatly v. William H. Gellatly, et al.
(District Court, Ramsey County, No. 56057.)
ATTORNEYS—DISMISSAL OF ACTION.

On order to show cause why an administrator should not be substituted for its decedent in an action for partition of real estate. Order vacated without prejudice.

KELLY, J. This action was begun by Humphrey Barton as attorney for the plaintiff, and is for the partition of real property. Subsequently Mr. Barton, as attorney for defendant Hart, answered the complaint and demanded in the answer affirmative relief. Other defendants have appeared by other attorneys, and in some cases asked affirmative relief. The order to show cause as above was obtained on Oct. 31st, by Mr. Barton, appearing as attorney for the plaintiff. On Nov. 1st. the plaintiff, in person, executed and filed a formal dismissal of his action. This paper appears to have been signed and acknowledged before a notary public in Hennepin County. Conceding that the plaintiff cannot, as against such defendants who have demanded affirmative relief, dismiss this action, the question here is, can Mr. Barton, being attorney of record to the plaintiff be heard to object to its dismissal. As attorney for one of the defendants his position is anomalous. We think he cannot, and the result is that while the action will not be dismissed, this motion fails because there is nobody in court to prosecute it.

Charles Joy, Plaintiff, v. The Burlington Insurance Co., Defendant, and Gardner and Warner, Garnishees.

(District Court, Ramsey County. No. 50495.)

Bion A. Dodge, for Plaintiff, James E. Trask, for Defendant and Garnishees.

GARNISHMENT—Contingent indebtedness of garnishee—Where the agent of an insurance company is garnisheed in an action against his company and discloses that he has collected and holds certain sums as premiums for said company, but further states that the policies on which these premiums were collected are subject to cancellation by the insured, and that the unearned premiums will, upon such cancellation, have to be returned to the insured: HELD, that the indebtedness of the garnishee to the defendant is not of such a contingent nature as not to render it subject to garnishment.

This action was commenced to recover on a policy of insurance, and resulted in a verdict in favor of the plaintiff. At about the time of the service of the summons in the original action garnishee summons was served on several parties, including agents of the company in St. Paul and Minneapolis. The disclosure of the first garnishee was, in substance, that at the time of the service of the garnishee summons he was owing certain sums of money to the company. But on cross-examination by counsel for the garnishees this disclosure was modified by stating that the moneys were not absolutely and unconditionally due, because a portion of the premiums of the said policies issued by said agents on behalf of the defendant company were in the form of accounts, and that those accounts were subject to change at any time by cancellation of the policies, and that the amount due and owing from the agent to the company depended upon whether or not the policies should be subsequently cancelled.

The second garnishee disclosed that there was no sum whatever in his hands belonging to the defendant at the time of the service of the garnishee summons, and refused to produce his books of account before the referee, claiming that in so much as the policies provided that the same could be cancelled at any time, and were likely to be cancelled, and the premium required to be returned, that whatever amount he had in his hands was not unconditionally due and owing. But afterwards, in response to the question, "What was the amount of the premiums received in cash previous to the service of the summons," he admitted, "We had received nothing that was due the company, but had received $158.81;" and he refused

to testify as to the amounts charged for premiums.

Upon this disclosure the plaintiff moved for leave to file a supplemental complaint, impleading the garnishees therein, which motion was denied.

KELLY, J. Without considering the effect of the disclosure, the supplemental complaint tendered is insufficient. It does not state a cause of action against the garnishees—certainly not in view of the statutory provisions. The statute, sec. 175, chap. 66, G. S., in cases where the garnishee on disclosure denies any indebtedness to the defendant, and the plaintiff believes the garnishee does not answer truly, says the plaintiff may thereupon apply to the court "for permission to file a supplemental complaint in the action, making the garnishee a party thereto, and setting forth the facts upon which he claims to charge the garnishee." This has not been observed.

Thereupon the plaintiff moved for a further disclosure of the garnishees.

KELLY, J. The referee's disclosure report was filed May 7, 1894. On June 15, a motion to file supplemental complaint against these garnishees and another was denied, but with leave to move for judgment on the disclosure. On June 22d, plaintiff's attorney moved for judgment against the other garnishees, but as to these, asked for the order herein denied. I take this as an indication of abandonment of any claim that on the disclosure he can hold these garnishees. While the answers of the garnishee do not commend themselves to the court for frankness, yet I think counsel had it in his power by proper steps to have brought him, in May last, before the court and compelled his answer to all proper questions. On the face of the return I am not sure that something is not due defendant from the garnishees.

Thereupon the plaintiff moved for judgment upon said disclosure against said garnishees.

KELLY, J. The garnishees were agents for defendant insurance company, and as such, on the day garnishment was served, had either collected in cash for, or become obligated to pay said insurance company for premiums on policies written by the company the sum of money for which I have ordered judgment. Their books showed $531.30 as the indebtedness when the garnishee summons was served, but the disclosure shows that prior to that time certain policies had been cancelled and premiums amounting to $67.50 returned, so that the apparent indebtedness is reduced by this sum. When the garnishee summons was served July 1st, 1893, it stopped in the hands of the agents any sum of money then owing defendant insurance company. This amount could not be reduced, so far as plaintiff is concerned, by cancelling policies and returning premiums, either with or without the company's consent. Therefore if the garnishees undertook, as agents of the company, to return the premiums after they were garnisheed in their hands, they did it at their own risk. The contract for cancellation and return was not between the garnishees and the assured, but between the insurance company and the assured.

The garnishee denies indebtedness to the defendant but discloses facts that establish a legal indebt-

edness at the time the garnishee summons was served. The denial is therefore futile. That the debt was not then presently due is of no moment; it has long since become due. Nor is it of any consequence that the policies were liable to be cancelled. That was a matter solely between the defendant and the assured, and did not in any way affect the indebtedness of the garnishees to the defendant. It certainly could not with reference to the cancellations made after the sixty or ninety days credit had expired. It does not appear when these policies were cancelled, if at all, except as below stated. The garnishees admit that they, as defendants' agents, received for premiums on policies issued by defendant the sum of $158.81. From this should be deducted premiums returned on cancelled policies prior to the garnishment of $14.70, and garnishees' commissions of $41.44 leaving a net indebtedness of garnishees to defendant of $102.67.

Roberts Manufacturing Co. vs. Frederick P. Wright.

(District Court, Ramsey County.)

PARTNERSHIP—FAILURE TO INCORPORATE—Parties who undertake to form a business corporation, and abandon the project without completing their incorporation are individually liable as partners to those, with whom they make contracts in the name of the proposed corporation.

Robertson Howard for plaintiff.

When parties associate themselves together with a view to becoming properly incorporated, and fail to perfect their incorporation, they are liable individually as partners, to persons with whom they make contracts within the scope of the proposed enterprise, *if such corporation is to carry on a commercial business for the mutual gain and profit of its members.* Hess vs. Weitz, 4 Serg. & Rawle 356; Pettis vs. Atkins, 60 Ill. 454; Bigelow vs. Gregory, 73 Ill. 197; Garnett vs. Richardson, 35 Ark. 144; Kaiser vs. Lawrence Savings Bank, 56 Iowa 104; Abbott vs. Omaha Smelting Co. 4 Neb. 416; Field vs. Cooks, 16 La. Ann. 153; Jessup vs. Carnegie, 44 N. Y. Super. Ct. 260, 283, 285, 286; Wells vs. Gates, 18 Barb. 554; Williams vs. Bank of Michigan, 7 Wend. 542; Martin vs. Fewell, 79 Mo. 401, 409, 410; Frost vs. Walker, 60 Maine 468; Coleman vs. Coleman, 78 Ind. 344; Eaton vs. Walker, 76 Mich. 579; Guckert vs. Hackett, 159 Pa. St. 303. See also Johnson vs. Corser, 34 Minn. 357 and Sheran vs. Mendenhall, 23 Minn. 92.

Where the object of the association is not for pecuniary gain or profit, but merely for the promotion of some moral, benevolent, social, political, or other purpose not strictly commercial, although some pecuniary advantage may result to the members, such members will not be considered partners, and will not be liable on association contracts individually unless they have authorized or ratified such contracts. Johnson vs. Corser, 34 Minn. 355; Ehrmantrout vs. Robinson, (Minn.) 54 N. W. Rep. 188; McCabe vs. Goodfellow, 133 N. Y. 89.

The defendant will be held liable as a partner although sued alone, as no objection has been interposed by demurrer or answer. 1 Bates Partnership, Sec. 454, p. 476; Barry vs. Fayles, 1 Peters, 311, 317; Gay vs. Corry, 9 Cowan, 44; Collins vs. Smith, 78 Pa. St. 423; Gen. St. 1878, Ch. 66, Sec. 92, 94, 95; Davis vs. Choteau, 32 Minn. 548; Sandwich Manufacturing Co. vs. Herriott, 37 Minn. 214.

Under Gen. Stat. 1878, Ch. 66, Sec. 37-40, this action can be maintained

against defendant although other parties liable have been released by plaintiff.

John D. O'Brien for defendant. The National Metropolitan Bank was a corporation *de facto* and the members were not *individually* liable. The members of a proposed corporation that failes to become duly incorporated cannot be held liable by one who has contracted with it *as a corporation*. Finnegan vs. Neuronberg, 52 Minn. 239; 4 Eng. & Am. Encyc. of Law, 200; 17 Eng. & Am. Encyc. of Law, 866; 2 Morawetz on Corporations 748 and cases cited.

EGAN, J. The cause above entitled duly came on for trial before the court, without a jury, at a general term thereof, commencing on the first Monday of the month of May, 1894, and was duly tried on the 28th day of that month.

Now, after reading the pleadings of the respective parties, and a careful consideration of the evidence adduced by the parties, respectively, and after hearing the arguments of counsel, the court finds as facts herein:

First. That the plaintiff is a corporation as alleged in the complaint.

Second. That on or about the 28th day of February, 1893, W. J. Dyer, C. W. Hackett, J. W. Cooper, D. H. Moon, Thomas Cochran, G. W. Bohn, J. C. Norton, H. D. Brown, G. W. Griggs and Frederick P. Wright, associated themselves together for the purpose of organizing a corporation under the National Banking Act of the United States to conduct a general banking business in the city of St. Paul, in the state of Minnesota, under the name of the Metropolitan National Bank of St. Paul, Minnesota. That in pursuance of said purpose to organize and conduct a national bank the above named persons signed articles of association as required by said national bank act, and at a meeting held for that purpose, said aforenamed persons and one Cyrus H. Kellogg were duly elected as the first board of directors of said proposed national bank, and the capital stock of said bank was fixed at $200,000, and surplus fund at $20,000. That said board of directors from time to time held meetings thereafter, elected officers and appointed committees with authority to select and rent a room for the use of said bank, to advertise in the newspapers, and to purchase furniture and fixtures for said bank.

Third. That on or about the 15th day of April, 1893, the defendant was duly elected as, and became a member of said board of directors to fill a vacancy caused by the resignation of said Cyrus K. Kellogg, and thereafter acted as a member of said board.

Fourth. That books of subscription to the capital stock of said proposed national bank were opened and shares of stock subscribed for by various persons.

Fifth. That none of the subscriptions to stock as aforesaid was ever actually paid in by the persons so subscribing therefor.

Sixth. That on or about the 18th day of April, 1893, the plaintiff submitted to the committee theretofore duly appointed by said board of directors to negotiate and conclude a contract for the manufacture and purchase of fixtures and furniture for the use of said proposed bank, a proposition to manufacture for and sell to

them for said proposed bank the fixtures and furniture referred to in the complaint for the sum of $2,000. That on or about the 19th day of April, 1893, said committee for said proposed bank duly accepted said proposition made to them by the plaintiff.

Seventh. That thereafter the plaintiff manufactured the said fixtures and furniture for said bank as required by the terms of said contract made by it and the said committee in behalf of said proposed bank, and duly notified said committee that said fixtures and furniture were ready for delivery. That said fixtures and furniture were manufactured in accordance with the terms and conditions of said contract and were approved by said committee and acceepted by them. That as directed by said committee some of said fixtures were delivered by plaintiff at the room designated by said committee as the place where the same should be delivered, and the balance of said fixtures and furniture, at the request of said committee, were stored by plaintiff at their risk and subject to their order for future delivery.

Eighth. That said fixtures and furniture were reasonably worth and of the value of $2,000.

Ninth. That the plaintiff made a reduction of $30.00 from the price of said furniture and fixtures, which would have been the cost of setting up and putting the same in place in said bank.

Tenth. That the plaintiff knew at the time it entered into the contract for the manufacture and sale of said furniture and fixtures that the persons aforenamed had not at that time become duly incorporated but intended to organize and carry on business as a corporation.

Eleventh. That the persons aforenamed failed to complete the organization of said bank as a corporation under the national bank act and never did, in fact, become a corporation and have abandoned their purpose of completing their organization and becoming a duly incorporated body under said law or otherwise.

Twelfth. That on or about the 30th day of December, 1893, William J. Dyer, C. W. Hackett, J. W. Cooper, D. H. Moon, Thomas Cochran, G. H. Bohn, J. C. Norton, H. D. Brown and G. W. Griggs, each paid to plaintiff on account of and as part payment for said furniture and fixtures the sum of one hundred and seventy-nine $\frac{9}{100}$ dollars ($179.09), and that the plaintiff in consideration of said payments by them, and each of them, has released them, and each of them, from any further liability to it on account of said contract for the manufacture and sale of said furniture and fixtures as herein heretofore stated.

Thirteenth: That the said Frank Schlick, Jr., paid on account of and as part payment for said furniture and fixtures the sum of fifty dollars.

Fourteenth. That the defendant, after signing said articles of association and being elected a member of said board of directors, attended meetings of said board and took part in the proceedings thereof on the 18th day of April, 1893, and the 6th day of May, 1893; that during April and May, 1893, advertisements were inserted in the daily newspapers published in St. Paul, stating that said bank was being organized, giving the

names of the officers of said bank and of the directors thereof, including the name of the defendant, stating the amount of the capital stock and of the surplus, and that said bank would occupy rooms on the ground floor of the Pioneer Press building on the corner of Fourth and Robert Streets in said city, on or about the 1st day of June, 1893; that on the 12th day of May, 1893, the defendant, by letter, tendered his resignation as a member of said board of directors; that on the 29th day of June, 1893, at a meeting of said board said resignation was by vote of the board, laid on the table and that no further action was taken in regard thereto.

Fifteenth. That defendant has refused to make any payment on account of said contract although demand therefor has been made.

As Conclusions of Law from the facts aforesaid the court finds:

That the plaintiff is entitled to jugement against the defendant for the sum of one hundred and sevent-nine [illegible] dollars, together with the costs and disbursements of this action.

Let judgment be entered accordingly.

RULES OF PRACTICE—ELEVENTH JUDICIAL DISTRICT.

The following rules of practice were adopted by the District Court of the Eleventh Judical District at Duluth, Minnesota, November 3d, 1894, relating to proceedings under Chapter 76 of the General Statutes of 1878.

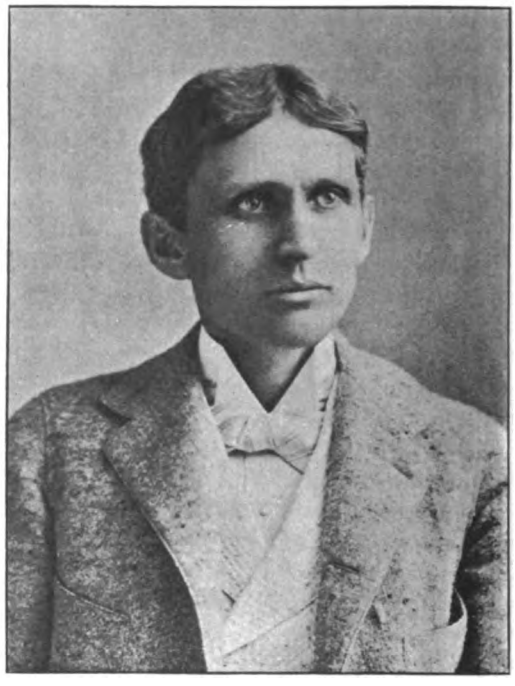
1. Any creditor of such corporation who desires to become a party to such action so brought, and to participate in the benefit of the judgment which shall be rendered in said action, shall file his verified complaint with the clerk of the court, stating his cause, or causes of action, and attach thereto a verified statement of his account, or copy of the note or notes, bill of exchange, contract or contracts, or other evidence of indebtedness upon which his cause or causes of action are based.

II. After the filing of such complaint he shall serve a notice upon the defendant corporation, or the receiver, if any has been appointed, as the case may be, and the plaintiff, or his, their or its attorneys, stating that he will at a time and place, not less than ten days from the date of the service thereof, move said court for an order making him a party to such action.

III. That upon the hearing of said application, the court shall make such applicant a party plaintiff to such action, provided he is entitled upon the face of his complaint to be made such party.

IV. If there is a defense to such claim or any part thereof, the receiver or corporation, shall within twenty days after notice of the filing of such order, serve an answer to said complaint upon said creditor, and all the allegations in the complaint so filed by such creditor shall stand and be deemed controverted or denied by each and all of the other defendants, the plaintiff and all other creditors who shall be made parties to the action."

THE closing of a public alley to permit its use for private purposes is held in Van Witzen v. Gutman, 24 L. R. A. 403, to be an unlawful destruction of the easement of an abutting owner.



FRANK B. KELLOGG, ESQ.

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NOTICES OF MORTGAGE FORECLOSURE.

WHAT should a notice of mortgage foreclosure under a power of sale contain? In considering this question it should be borne in mind that in the absence of statutory provision a power of sale may be exercised without making any public advertisment whatever. Unless otherwise commanded by statute or the terms of the power itself, the donee of the power may, upon the happening of the prescribed condition, proceed to sell the mortgaged property either at auction or private sale, and upon such notice as he deems proper, or without any previous notice. In Minnesota, however, the legislature has prohibited private sales under such powers, and required all foreclosure sales to be made at public auction, under supervision of the sheriff, after public advertisement for six weeks. The statute prescribes the contents of the advertisements. These are:

1st. The names of the mortgagor and mortgagee, and the assignee, if any.

2d. The date of the mortgage, and when and where recorded.

3d. The amount claimed to be due on the mortgage, and taxes, if any, paid by the mortgagee.

4th. A description of the mortgaged premises.

5th. The time and place of sale.

Definite and simple as are these statutory requirements, it appears to be nearly impossible for the Minnesota lawyer, in preparing his notice, to content himself with a full compliance with them. He must needs incorporate in the advertisement a miscellaneous and utterly unnecessary assortment of preambles, whereases and recitals, the only result of which, either in law or in fact, is to greatly increase the cost of the publication and thereby render redemption from the sale unnecessarily expensive. In case there is no redemption, his client, the mortgagee, bears the burden of paying for an unconscionably long winded notice. This prevalent practice constitutes an evil which ought no longer to be tolerated. The aid of our statute imposing a penalty for excessive charges in mortgage foreclosures will some day be invoked to teach the profession the lesson which it is the object of this article to suggest.

In the preparation of a notice of foreclosure it is, of course, the primary duty of the attorney to his client to

exercise the utmost care in stating every requisite fact with accuracy and clearness. It should not be forgotten, however, that in equity and good conscience he owes it also to the mortgagor or owner of the mortgaged property to avoid making an unreasonable expense by the publication of a uselessly long advertisement. It would appear that the large number of attorneys whose foreclosure notices occupy from a half column to a column each of closely printed matter have neglected to keep in mind the last mentioned part of their professional duty.

Looking to the statute as a guide for the preparation of the notice, the first matters required to be set forth are the names of the parties to the mortgage. This seems a tolerably simple thing to do, but an examination of the legal colums of almost any newspaper in the state will show that it is generally treated as a very solemn and weighty declaration, to be surrounded with as much legal verbiage as possible. Here is an example, taken from a recent publication, with a slight change of names.

"Whereas, default has been made in the conditions of that certain indenture of mortgage duly made, executed and delivered by Mary A. Reed, widow, of the city of Minneapolis, Minnesota, mortgagor to the Twin City Real Estate and Investment Company, a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, mortgagee," etc.

The attorney who wrote that complied with the statute, but he also compelled his client or the mortgagor to pay for three times as much space as if he had used a little more good sense and said this:

Whereas, default exists in the conditions of a mortgage made by Mary A. Reed to the Twin City Real Estate and Investment Company.

The latter form is as full a compliance with the statute as the former, and possesses the practical merit of economy. It is not necessary to refer to the instrument as "that certain" one. Those words certainly add no certainty to the mortgage. Neither is it necessary to call the mortgage an "indenture." The word "mortgage" is good enough for anybody. It may be interesting to the public, and comforting to an examiner of the title, to be informed that the mortgage was "duly made, executed and delivered," but the information adds nothing to the legal force of the notice. Why not leave it to be taken for granted, or ascertained by the usual methods of inquiry, that the acts and formalities necessary to give the mortgage a legal inception were duly attended to? Again, why should the sad fact be proclaimed to an unfeeling world that Mrs. Reed is a widow? The allegation of her *status* in the notice does not affect the actual fact, nor excuse the examiner of the title from satisfying himself by other inquiry as to whether she had a husband living or not. The additional fact that Mrs. Reed resides "in the city of Minneapolis, Minnesota" is from any point of view quite immaterial and irrelevant. Next, by way of abundant caution, the notice declares that this same Mrs. Reed who duly made, executed and delivered that certain mortgage, was the "mortgagor," Possibly without this

assurance some one might have supposed that she was the mortgagee, but it is not very probable. It might be safe, on the whole, to leave that to be inferred. The name of the mortgagee is followed by an allegation of corporate existence as in a pleading. This takes up valuable space, and accomplishes nothing. It does not induce anyone to buy, nor does it furnish any evidence of corporate extence, should that question ever become material.

The statute also requires the name of the assignee of the mortgage, if any, to be given. In this connection most attorneys give not only the name of the assignee, but also various other matters, as shown by the following specimen.

"Which said mortgage was for a valuable consideration duly assigned by the said (mortgagee) to John Doe by an instrument in writing bearing date the——day of——1889, duly recorded," etc.

That is twice as long as need be. It is necessary to say merely that the mortgage was "assigned to John Doe, as per Book——assignments, page ——" etc. There is not a word in the statute requiring the notice to state that the assignment was for a valuable consideration, or that it was made on such a date, or that it was an instrument in writing. All these things are the merest padding, beneficial to nobody but the printer. It might be added that even the book and page of the assignment record are not required to be given, but there is some excuse for inserting that, as it furnishes a convenient reference. The other matters furnish nothing but extra folios.

The next requirement of the statute is the date of the mortgage and when and where recorded. A bad habit of prolixity prevails in respect to these items. Instead of saying "bearing date the twenty-first (21) day of September, A. D. 1893" why not sum it up in terse plain business language and say "dated September 21, 1893." The public generally will not think any the less of a lawyer because he talks plain English in his notice. And instead of saying "which said mortgage was duly recorded in the office of the register of deeds in and for the county of Ramsey in the state of Minnesota, on the fifth day of October, 1893, at eleven o'clock and 20 minutes in the forenoon in Book 652 of mortgages on page 800 thereof," why not be content with saying "recorded in the register of deeds' office in Ramsey county, Minnesota, October 5, 1893, at 11:20 a. m. in Book 652 of mortgages, page 800." The word "duly" is one that some lawyers love to roll under their tongues (and into their legal documents) like a sweet morsel, but it was never known to accomplish anything.

The laborious particularity with which is set forth the precise time of the day on which the record was made is as unnecessary as it is awkward. The day of record alone is undoubtedly sufficient, but if the hour also is to be given, as is now the practice, let it be given in simple common phrase and have done with it.

The provision that the notice shall state the amount claimed to be due etc., seems to have given the profession more pain and trouble than were endured when the mountain labored and brought forth a mouse. If the principal debt has matured without

the aid of an acceleration clause, the attorney's task unusally takes shape in the framing of a declaration something like this: "And whereas, there is claimed to be due and there is actually due on said mortgage, at the date of this notice, the sum of seven hundred thirty-seven and ³⁵/₁₀₀ ($737.35) dollars, principal and interest, and fifty ($50) dollars attorney's fees, stipulated in said mortgage to be paid in case of foreclosure, amounting in all to seven hundred eighty-seven and ³⁵/₁₀₀ ($787.35) dollars" etc. Many published statements can easily be found more prolix than the above, which was taken at random from a page of legal notices. The gist of it is this: "There is due on said mortgage $737.35." Who will contend that anything else is necessary? It is ridiculous to say "there is claimed to be due and there is actually due." The statement that "there is due" constitutes the "claim," and if the attorney is wrong as to the amount he does not help matters by vehement asseveration. Putting the amount in words as well as figures does not make it plainer to a reader of the notice. And of what earthly consequence to the public is it that the amount is made up of "principal and interest?." As to including in the amount due the stipulated attorney's fee, it is doubtful whether that item properly belongs there, even under the usual mortgage covenant. But if it does, the necessity for separately stating it is not apparent any more than for separately stating the interest or principal. Finally, while it is gratifying to note that the attorney's mathematics are sound, and that $737.35 plus $50 in very truth equals $787.35, the poor mortgagor ought not to be compelled to pay for the printed elucidation of the problem.

A much more complicated and difficult task confronts the attorney when he is preparing a notice of foreclosure under a mortgage, the debt whereof has not yet matured save by virtue of an agreement giving the mortgagee power to declare it due on default in payment of interest or for some breach of covenant. Here indeed do his whereases and his recitals present themselves as to tower of strength. He first proceeds with a flourishing whereas, to recite the particular covenant giving the mortgagee this power, and gravely (but with comical inconsistency) adds that notice of the mortgagee's election to declare the debt due is by the terms of the mortgage expressly waived. (He is apparently not quite sure that the mortgagor was in earnest when he waived it.) The recital takes ten or fifteen lines of space at $3,00 per folio. He then takes breath, seizes another whereas, and recites the fact of default, the lapse of the stipulated 30 days, and that the mortgagee has, in view of all these rights, events and contingencies, elected and does hereby elect to declare the entire debt, principal and interest, immediately due and payable." All of which, when stripped of its unnecessary wearing apparel, amounts merely to a claim that a certain amount is due, and may be stated in a dozen words. The statute does not require any reference to be made to the matters or reasons by virtue of which the debt has become due, and no attorney has yet been found to give a satisfactory explanation of his object in setting out such recitals.

The right to exercise a power of sale at a particular time or at all can never be proven by such *ex parte* statements. Therefore let the notice follow the statute and declare the amount due, without whereas or preamble. In this connection, it may be added that if the mortgagee has paid taxes, he need not recite the provisions of the mortgage by virtue of which he claims reimbursement. After giving the amount of debt due, the notice should add, "also $40 taxes paid by mortgagee." If ever called upon to prove such payment he must do it by legal evidence, and not by showing that in his notice he recited all the circumstances, beginning with the mortgage covenant and the tax levy.

Before leaving this branch of the subject, a word should be said about notices under "building society" mortgages. A few weeks ago a notice appeared in one of the city papers which occupied a whole column. It was truly an imposing object to behold. Upon inspection, it was found to consist chiefly of recitals of facts which in the opinion of the attorney justified a certain building society mortgagee in exercising the power of sale, and of arguments to support the final conclusion that a stated amount of debt was due. The statements required by law were all there, but they did not occupy one-fourth of the entire space. The other three-forths represented a very expensive piece of professional fooling. There is one, and only one, thing peculiar about a building society mortgage, so far as preparing the notice is concerned, it may require some little figuring to ascertain the exact amount due. But when ascertained, the amount can be stated in just as few words as are necessary in any other notice. The attorney who drew the notice referred to seemed to be of opinion that the proper thing to do was to prepare and print substantially a bill in equity to foreclose the mortgage.

The description of the mortgaged premises must conform substantially to the description given in the mortgage, but even here the notion seems to prevail that the language of the notice must be as verbose as possible. An excellent lawyer of the writer's acquaintance says in his notice: "Whereby the said mortgagor did grant, bargain, sell and convey unto the said mortgagee, his heirs and assigns forever, all that tract, piece or parcel of land, lying and being in the county of Ramsey and state of Minnesota, and described as follows: (Describing it) according to the recorded plat thereof on file and of record in the office of the register of deeds in and for said Ramsey county."

He can give no excuse for all that waste of printer's ink, except that the mortgage was before him and he followed its language. But he might as well have gone further and quoted the covenants of seisin and warranty. If the plat is a "recorded" plat, why insist in the next breath that it is "on file and of record?"

It is hardly necessary to pause to criticise the attorney whose notice after describing the property adds: "Together with the hereditaments and appurtenances thereunto belonging," but it might be interesting to know whether he makes the sheriff offer the hereditaments and appurtenances in separate parcels, or whether he lets them go, without special men-

tion, along with the corpus of the land.

Lastly, the time and place of sale must be given. Even here, a full compliance with the statute is not enough to satisfy the Minnesota lawyer. The superfluous statement is invariably made that the sale will be conducted by the sheriff or his deputy. In view of the fact that those officials are the only persons who can lawfully conduct a mortgage sale, what occasion is there for publicly designating the auctioneer? So long as the sheriff keeps his present cold cinch on that lucrative job, no one will be misled or deceived as to who will make the sale, though the notice be silent on the point. After giving the time and place of sale, what should follow? Nothing, except the date and signatures. But custom, which, like conscience, doth make cowards of us all, has prescribed a number of things to follow. One of these is an announcement that the sale will be made to pay the mortgage debt and interest etc. and the costs and expenses of sale, including the said sum of $——, attorney's fees stipulated in said mortgage to be paid, in case of foreclosure. Also that the sale will be for cash, to the highest bidder. As a final flourish (this however appears to be treated as optional) the declaration is made that the sale will be "subject to redemption at any time within one year from date of sale, as by statute provided." All these things, my learned masters, are worse than useless. They would be merely useless if they did not cost money. Why not, in the interest of hard times, leave them out.

There are one or two points to be mentioned which do not seem to have any connection with the statutory requirements already considered. The first is the clause (always found) that "by virtue of the power of sale in said mortgage contained, (some attorneys triumphantly add "and therewith duly recorded,") and pursuant to the statute in such case made and provided, the said mortgage will be foreclosed" etc. Is this clause necessary? It is true the sale is made by virtue of the power, and is regulated by the statute. But the notice and subsequent proceedings show even without the recital, that the power of sale was resorted to. If the mortgage has a power of sale, the sale by the sheriff is good, without reciting the power in the notice. If the mortgage has not a valid power, then no such sale would be good no matter how many recitals of that kind were in the notice. But if we grant the propriety of referring to the power, it can be done in four words at the outset by adding after the words "notice is hereby given that a mortgage," the words "with power of sale." The "statute in such cases made and provided" may with entire safety be left to take care of itself.

One more suggestion timidly made, and this long article will be brought to a close. The statement that no action or proceeding at law or otherwise has been instituted etc. is now regarded as an indispensable part of every foreclosure notice. But can anyone tell why it should be so regarded? The statute does not require it. The statute does require as a condition of foreclosure, that no action shall be pending, but that has nothing to do with the terms of the notice. In some cases very likely the attorney who draws the notice does not stop

to ascertain whether his client has begun a suit or not. He takes it for granted. And so must the attorney who afterwards examines the title, unless he deems it his duty to investigate. The recital, to repeat what has been said so many times already, is no proof of the fact. It does not make even a *prima facie* case. An attorney who would deliberately foreclose while an action was pending would not hesitate to say in his notice that there was none pending. Until it can be shown that such a recital excuses all other investigation, the writer will maintain that it is an unnecessary recital and should be omitted.

As embodying the reforms here contended for, the following form of notice is submitted for the criticism of the profession.

NOTICE OF FORECLOSURE SALE.

A mortgage with power of sale, made by John Doe and Mary Doe, his wife, to Richard Roe, dated June 1, 1893, recorded June 2, 1893 in the Register of Deed's office, in Ramsey county, Minnesota, in Book 250 of mortgages, page 74, assigned to Richard Fen, as per Book 36 of assignments, page 63, upon which there is due $326.00, also $12.00 taxes paid by assignee, will be foreclosed by public sale of the mortgaged premises, situate in said county, to-wit: Lot 8, in block 45, of Remington's addition to St. Paul, according to the recorded plat thereof, which sale will be made at the Cedar street main entrance to the court house in St. Paul, in said county, on Monday, November 12, 1893, at 10 o'clock a. m.

Dated Sept. 29, 1894.

RICHARD FEN,
Assignee of Mortgage.

MARCELLUS L. COUNTRYMAN,
Assignee's Attorney,
St. Paul, Minn.

M. L. COUNTRYMAN,
St. Paul.

OPINIONS OF THE ATTORNEY GENERAL.

ELECTIONS—CONVENTIONS—But one name is entitled to a position upon the official ballot as the candidate of a party for one office—A political convention or assembly defined.

MR. LEWIS B. KROOK,
County Auditor,
New Ulm, Minn.

Dear Sir: In your communication of the 21st inst, you make the following statement of facts:

1. A certificate of nomination of a certain person nominated by a convention of delegates representing a party that polled at least one per cent. of votes cast in the district was filed in my office September 20th, 1894, at 4.40 o'clock p. m., and the nomination fee as prescribed by law was paid, and receipts for such certificate and the fee paid were duly issued.

2. On September 21st, 1894, at 10.25 a. m. a certificate of nomination of another person, nominated by a convention of delegates representing the same party and nominated for the same office as number one, was filed in my office, but was received under protest by me and no receipt was issued.

You now inquire whether you are authorized to place the names of the two persons upon the same ballot, designating them respectively number one and number two; or whether

more than one name is entitled to be placed upon the ticket. The law implies that only one name shall be printed upon a ballot indicative of the nomination of a political party. You would not, therefore, in my judgment, be authorized in placing upon the ballot the two names appearing upon the respective certificates of nomination and designating them in the manner indicated by you, or otherwise. As to which of the two names is entitled to be placed upon the ballot, must be determined, not by the question as to which of them was first filed in your office, but rather as to which of them emanates from the duly called and organized convention representing the political party involved. It is obvious that only one of the said conventions can properly be deemed such a convention; but as to which of them such character attaches is a question to be determined by existing facts and circumstances. The only statute bearing upon the question, so far as my attention has been called, is sec. 34 of the General Election Law, which is as follows: "An assembly or convention of delegates within the meaning of this act is an organized assemblage of delegates representing a political party which at the last general election before the holding of such convention or assemblage polled at least one per cent. of the entire vote cast in the state or county or other division or district for which the nomination was made." A convention within the meaning of the above provisions of statute must be "an organized assemblage of delegates." This implies that its delegates shall have been selected in accordance with the rules and customs adopted and observed by the party in whose interest the convention is held. As you are aware it is a custom of nearly every political party to create committees, whose autority obtains within the boundaries of specified political divisions of the state. Conventions of the several kinds recognized by a party are called into being pursuant to the action of such committee, and without exception, I believe, are formally called to order by the chairman or some other member of such committee. In determining your action, therefore, with reference to the question presented, you will be justified in ascertaining which of these conventions, if either, complied with the custom or rules and regulations of its party, and the convention which you shall ascertain, upon such inquiry, to have been thus regularly organized will be entitled to have its certificate of nomination filed by you. If for any reason you deem the question of so much doubt as to preclude you from arriving at a reasonably certain conclusion, you may require the respective interests to adjudicate their rights by an appropriate action in the courts. I would, however, suggest in this connection that before determining to act upon this suggestion you endeavor, if possible, to inform yourself as to which of the said conventions is entitled to recognition.

Very truly yours,

Sept. 24, 1894. H. W. CHILDS.

PUBLIC OFFICERS—A public officer is entitled to the salary attached to the office so long as he retains the position, whether he properly performs his duties as such officer or not.

MR. C. U. WEBSTER,
County Auditor,
Crookston, Minn.

Dear Sir: A deputy county auditor

is a public officer whose term of office may be terminated at any time by a revocation of the appointment by the county auditor. Up to the time of such revocation, however, he is entitled to perform all the functions of the said office and to receive the salary thereof. It appears from your presentation of the facts that your deputy absented himself from the office on the evening of the 4th of August, of the present year, and that he remained away from the office for a period of about three weeks. A letter received from your deputy by the same mail which brought yours to hand, enclosed a copy of your written revocation of his appointment which bears date the 21st day of August, 1894. It is therefore very obvious that he continued deputy county auditor of your county until the 21st day of August, the date of said revocation. He is, therefore, unquestionably entitled to draw his salary up to that time.

Very truly yours,

Sept. 25, 1894. H. W. CHILDS.

VILLAGES—Licenses—Where the question of the separation of a village from the township has been voted upon, and a majority of the electors of the village vote for the separation, the vote upon the question is a valid one even though no formal notice thereof was given.

A village has no power to grant a rebate on a liquor license, except where local option is adopted, the prohibition to go into effect during the term of the license.

MR. CYRUS C. ALDRICH,
Village Recorder,
Morristown, Minn.

Dear Sir: It is made the duty of the village recorder to give notice of such elections as are required by law. The meeting authorized by chap. 199, G. L. 1893, is not, of course, strictly required to be held. The proper course to pursue when a vote is to be taken upon such a question is by a formal submission of the proposition to the voters by the village recorder. Some doubt attends this question, however, as to whether this formality is requisite. In sec. 3, of the act, it is expressly provided that if by a majority vote the proposition carries, the village recorder shall notify the county auditor thereof. It appears that at your election no formal notice was given, but that the whole vote cast was in favor of separation. I assume that the vote cast was clearly a majority of the electors residing within the village, and I therefore advise that the election be deemed a valid one.

You further inquire whether the village council has a right to give a rebate on a village license to sell intoxicating liquors. A village council has no authority to issue a license for any less sum than the minimum fee expressed in the law, to-wit: $500; nor has it authority to refund to the licensee at any period within the term of the license any portion of such fee in consideration of a revocation of the license. The law has made provision, however, that where a village during the life of a license votes in favor of no license, then the licensee will be entitled to a rebate of a proportionate share of the fee. In no other case, however, is the refundment authorized.

Very truly yours,
H. W. CHILDS,

Sept. 25, 1894.

ELECTORS—Judges of election.—A qualified elector is eligible to appointment as a judge of election.

F. W. HALL, ESQ.,
County Attorney.
Aitkin, Minn.

Dear Sir: Persons cannot be appointed judges of election who are not *bona fide* residents of the election precinct. If the men in question are

there merely for temporary purposes, they are certainly not authorized to vote in such precinct, and, by the same force of reasoning, are ineligible to the positions of judges of election. It is sometimes quite difficult to determine whether or not a man is a resident of an election district within the meaning of our statute. A single man dependent upon his daily labor, going from place to place wherever employment may be found, and who has no permanent place of abode, should be regarded, I think, as a resident of the precinct in which he has resided the requisite length of time. This is in accord with a decision rendered some years since by Judge Wilkin, then a member of the District Court of Ramsey County.

Very truly yours,

Oct. 17, 1894. H. W. CHILDS.

PUBLIC SCHOOLS—Current School Fund.—The money received from the apportionment of the State fund need not be used by the district exclusively for the purpose of paying a teacher's salary, or other running expenses of the school, but may be used for any necessary purpose.

HON. W. W. PENDERGAST,
Supt. of Public instruction.

Dear Sir: Calling attention to the proviso contained in Chap. 107, G. Laws, 1891, you ask the following questions:

"First, must so much of the funds arising from these two taxes be used for the payment of teacher's wages, including board and other current expenses? Or, second, may such money, by direction of the legal voters, be used for building or the payment of debts other than those incurred for the running expenses of the school?" It is declared by the said proviso that "no district shall receive from the apportionment in any given year an amount greater than that appropriated by the district from its special tax and local one-mill tax levied in that year. The only purpose of the said proviso is to place a limitation upon the amount of support which a district may receive from the apportionment of the current school fund. The question raised by you cannot, therefore, be answered by a construction of that proviso. Sec. 3, G. Laws, 1887, makes provision for "maintaining public schools" by a one-mill state tax, which, together with the general school fund, constitutes the "current school fund." Provision is further made for a local one-mill tax "for the support of the public schools." It is therefore seen that the statute employs very general terms in defining the purpose for which these funds may be used. It is obvious that any use of such moneys in the interest of schools, whether for the payment of teacher's wages, the purchase of fuel, or the erection of a school building, would in a measure fall within the contemplation of the terms "support" and "maintain" as employed in the statute.

I am, therefore, unable to reach any other view than that the funds in question may be used for any object properly in aid or support of the school including, of course, the building of a school house

Very respectfully,

Oct. 6th, 1892. H. W. CHILDS.

MAGISTRATE—"Now, then, McCarthy, no prevarication. Tell us all that passed between you and the defendant."

McCarthy—"Brickbats, yer honor; jest brickbats."—*Law Student's Helper.*

FRANK B. KELLOGG, the subject of our portrait this month, was born at Potsdam, St. Lawrence County, New York, in 1856, and was educated in the public schools of that place. He came to Minnesota during the summer of 1865 and settled in Olmstead County, working on a farm during the summer months and attending school during the winter. He studied law at Rochester during the years of 1875-6 and 1877, and was admitted to the bar in 1877. He practiced in Rochester until 1887, when he removed to St. Paul to enter into a partnership with Davis & Severance. Few young men have had the phenominal success of the subject of this sketch. A bright, keen intellect, coupled with a thorough knowledge of the law, places Mr. Kellogg among the leaders of his chosen profession. Among his brethren at the bar he is universally respected, and as a citizen, none outrank him. In politics, Mr. Kellogg is a Republican. He devotes himself entirely to his profession, and the large number of important cases which receive his personal attention and the prominence of the clients and the firm of which he is a member, is sufficient evidence of the position he holds at the St. Paul bar. For a young attorney he has already achieved remarkable success and has won the respect of all with whom he has had occasion to transact business, of a legal nature or otherwise.

I never had a railroad pass,
But that it wrung my modest nature
To feel the trainmen took me for
A member of the Legislature.
—*Law Students Helper.*

C. A. SEVERANCE, ESQ.

CORDENIO A. SEVERANCE is a native of Minnesota and was born on June 30th, 1862. He was educated in the public schools and took a course in Carleton College, Northfield. He studied law in the office of the Hon. Robert Taylor, at Kasson, Minn., and was admitted to the bar in 1883. He removed to St. Paul in 1885, and entered the office of U. S. Senator, Cushman K. Davis. January 1st, 1887, he entered into partnership under the firm name of Davis, Kellogg & Severance. In the practice of his profession, Mr. Severance has gained the respect and confidence of those with whom he has come in contact. As a lawyer he is keen and thorough, prompt in his appointments and thoroughly interested in every department of his profession, and is consequently very successful. Among the other members of the bar, Mr. Severance is regarded as an able lawyer, which among so many good lawyers, is one of the best compliments which can be paid to his abilities. The firm of Davis, Kellogg & Severance occupies the highest position before the bar and bench of the state; and on account of the prominence and recognized ability of the firm, their business and law practice extends into nearly all the states and before most of the courts of the country.

THE INDEX

For Vol. II. of THE JOURNAL *is now in preparation and will be delivered with the December number.*

NON-SUIT IN MINNESOTA.

IN a late number of THE JOURNAL, it was shown that the law-making power prohibits any court from granting a non-suit, but upon failure of proof, towit: "failure to substantiate or establish the claim or cause of action or right to recover," G. S. Ch. 66, § 262 Subd. 3; that failure of proof meant "when the allegations of the cause of action or defense to which the proof is directed is unproved, not in some particular only, but in its entire scope and meaning," G. S. ch. 66 § 122; and that this was the statutory enactment of the common law principle that the weight of evidence is for the jury and the failure of proof for the court, and hence, when there is any evidence, the jury has exclusive jurisdiction, and when there is no evidence the court has exclusive jurisdiction, and whether there is or is not any evidence, is measured by the fixed rules and principles of the law and not the guesses or *ipse dixit* of judges.

Failure of proof and any evidence are the major and minor terms—the converse, the antithesis of each other. If there is any evidence tending to prove the entire scope of the cause of action, not in some particulars only, the court cannot non-suit; and on the other hand, if there is no evidence tending to prove the entire scope, not in some particular only, then and then only, can the court grant a non-suit. For instance, if the cause of action is trespass on the case, that the defendant sold goods after notice that the plaintiff had the exclusive right to sell, the the evidence must prove both the notice and the sale. If there is any evidence tending to prove both notice and sale, the case must go to the jury. If there is no evidence of notice, or no evidence of sale, or no evidence of either, it is a failure of proof.

This principle governs the granting of new trials, except for errors occurring during and after the trial, because, if the jury has exclusive jurisdiction of the weight of evidence, and the court only when there is a failure of proof, the jury has this jurisdictlon, after as well as before the trial, hence the language in section 253 Ch. 66, that a new trial will be granted when the verdict "is not justified by the evidence or is contrary to law " means the same as the doctrine of failure of proof, because, if the verdict is with the weight of the evidence it is justified by the evidence and is not contrary to law.

In violation of this rule laid down by the law-making power, the supreme court in Abbett v. R. R. 30 Minn. 482, legislated a rule of its own, as previously stated. This was followed by Rogstad v. R. R. 31 Minn. 208, holding that if the undisputed facts conclusively show no cause of action and there is no reasonable chance to draw different conclusions from such undisputed facts, and if the jury should on such evidence find a verdict for the plaintiff, it would be the bounden duty of the court to set it aside, the court can grant a non-suit.

Now, keeping in mind the well defined rule laid down by the statute, and this jingle of words formulated by the supreme court, let us see what this court decided. The non-suit was sustained in Abbett v. R.R. and Rag-

stad v. R. R. because the plaintiff went on the track without looking—which is a failure of proof, because it shows no cause of action, being injured by reason of his own negligence. The same principle was announced in Donaldson v. R. R 21 Minn 293; Brown v. R. R. 22 M. 165; Rheiner v. R. R. 36 Minn. 170; Mantel v. R. R. 33 Minn. 62; Marty v. R. R. 38 Minn. 109. In Sweeney v. R. R. 33 Minn. 153, because the plaintiff was running the train at an unreasonable speed, knowing that the condition of the road rendered such speed dangerous; followed in Wood v. R. R. 39 Minn. 435; which is a failure of proof, because there was no cause of action, the plaintiff was hurt by his own act. In Ludwig v. Pillsbury 35 Minn. 256, the plaintiff was hurt by his own act by leaning over the elevator. In Wilson v. R. R. 37 Minn. 326, by continuing to work knowing the danger. In Trask v. Shotwell 41 Minn. 66, by going into danger after notice of the danger. In Heffinger v. R. R. 43 Minn. 503, by walking on the right of way between the track and a dirt pile facing the the coming train, when he should have taken the side walk.

In these cases, and all others where the supreme court sustained the non-suit, it was done on the ground that the plaintiff had no cause of action or that the entire scope was not proved, which is the same thing. Failure of proof and no cause of action is the same, because if the litigant fails to prove his cause, he has no cause, and if he has no cause he cannot prove a cause; but if he proves part of the entire cause, it then becomes the weight or sufficiency of the evidence and not a failure of the cause, because there can be no failure when there is a part.

On the other hand the supreme court refused to sustain the non-suit where there was some evidence, not of some particular, but of the entire scope of the cause, as where the plaintiff looked for the locomotive fifty feet from the track, it was left to the jury to determine whether this was equivalent to looking immediately before crossing. Hutchinson v. R. R. 32 Minn. 398. Where there was some evidence that the plaintiff did not have notice that the dangerous machinery was not covered. Craver v. Christian, 34 Minn. 397; Barbo v. Bassett, 35 Minn. 485; the cause of action hinging on the question of notice. If he had notice, he had no action. If he had no notice, he had an action. In the former case, the court said: "If the determination of the question depends upon numerous facts and circumstances which are to be weighed and considered together, the question must be submitted to the jury," and, therefore, as the evidence does not conclusively show that the plaintiff had notice, it is a case for the jury. To say that where there are numerous facts and circumstances they must be weighed by the jury and *e converso*, that such facts and circumstances cannot be taken from the jury unless they *conclusively show notice*, is the same as saying that when there is some evidence of *no* notice the jury must decide, and when there is evidence *of* notice—when the evidence conclusively shows notice, the court must decide. In Sherin v. Brackett, 36 Minn. 152, the case went to the jury because there was some evidence of possession. And in Thompson v. Pioneer Co., 37 Minn. 285; Hanson v. R. R., 37 Minn. 355; Hutchinson's Case, 32 Minn. 398; Ferguson v.

Glaspie, 38 Minn. 418; Dailey v. Linnehan, 39 Minn. 346, the non-suits were wrong because there was some evidence of the cause of action. Because there was some evidence of the identity of the baggage the case was submitted to the jury in Albeck v. R. R., 39 Minn. 424; and of reasonable care in Bennett v. Ins. Co., 39 Minn. 254; and of negligence in starting the fire in Richard v. Schleusener, 41 Minn. 48; Wilson v. R. R., 43 Minn. 519; and that the derrick was defective because it broke in its usual use, Sather v. Ness, 42 Minn. 379; and that defendant's servant ran an overloaded truck out of its course, Ingalls v. Ex. Co., 44 Minn, 128. In these, as well as in all the other cases, the only principal upon which they can stand is the doctrine of failure of proof, and not the floundering word choppings of the decisions. In Bennett v. Ins. Co., 39 Minn. 254, the plaintiff was hurt while removing wheat from a burning elevator under the direction of defendants, and the question was whether or not the defendants took such precautions as careful and prudent men should have done, or, in other words, whether they knew or could have known the concealed or apparent defects in the walls. Because the evidence was conflicting, it was held to be a case for the jury. Upon this the court assumed to elucidate the rule of non-suit as previously laid down in Abbett v. R. R., 30 Minn. 482, and said that when the evidence is conflicting or when facts are not disputed, but different minds might reasonably draw different conclusions, the case is for the jury and non-suit cannot be granted; but when the facts are undisputed or conclusively established, and there is no reasonable chance for drawing different conclusions from them, the case is for the court and a non-suit can be granted. When the facts are such that fair-minded men of ordinary intelligence may differ as to the inference to be drawn therefrom, or where the evidenee upon material facts is conflicting, a non-suit cannot be granted, and hence, ordinarily, it is only where there is an entire absence of evidence tending to establish the cause of action that a court can enter upon the province of the jury by granting a non-suit or directing a verdict.

The *priori* of this case admits the doctrine of failure of proof without advancing it and without the simplicity of that doctrine. The statement of the court that ordinarily it is only where there is an entire absence of evidence that the court can grant a non-suit, is the doctrine of failure of proof with an exception. That exception is supposed to be contained in the previous language; that if the evidence is conflicting, or if different conclusions can be made when the evidence is not conflicting, a non-suit cannot be granted; and *e converso* if the evidence does not conflict, or the inferences from the evidence differ, a non-suit can be granted. If there is a difference in the evidence or in the conclusions or inference from the evidence, it is the same as saying if there is some evidence, because it is this which makes the conflict and produces the different inference. On the other hand, if there is no evidence, or rather if there is a failure of proof, then there is no conflict and no different inference.

The conclusion is irresistable that the court has been endeavoring to ad-

minister the doctrine of failure of proof as laid down by the statute without a knowledge of that statute, and when the simple rule of failure of proof as given by the statute is compared with the complicated phraseology of the court, the former is the best.

If this conclusion is correct, then the rule in Thompson v. Pioneer Co., 37 Minn. 285, that the *nisi prius* court is not required to submit a case to the jury when it would be the plain duty of the court to set the verdict aside, is not correct, because the rule of failure of proof governs both cases.

It is a deplorable fact that the simple rules laid down in the *statute* for the trial of causes, granting non-suits, dissecting verdicts and setting aside verdicts have rarely, if ever, been followed, so far as the supreme court decisions reveal.

JNO. F. KELLY.

THE DISTRICT COURTS.

A CORRECTION.

M. M. Dye v. Johnson, et al.

(District Court, St. Louis Co.)

The above entitled case, as published in the October number, page 263, was erroneously reported as holding that certain allegations in the complaint were not considered conclusions of law. It was conceded by both parties that the allegation that "thereafter and before maturity defendant B. (the second indorser) indorsed said note for value, and delivered it so indorsed, and that thereafter, and before its maturity these plaintiffs became and now are the owners and holders thereof for value," *was* a conclusion of law, but the demurrer being aimed at the form of allegation rather than the substance thereof, Judge ENSIGN held that the proper remedy was by motion to make more definite and certain, under section 107 of chapter 66 G. S., and for that reason the demurrer to the complaint was overruled.

Alice M. Brown vs. Scandia Bldg. & Loan Association.

(District Court, St. Louis County, No. 10281.)

MORTGAGE FORECLOSURE—COSTS IN.—A party foreclosing a mortgage by advertisement is entitled, prima facie, to his costs and disbursements, though he fails to file within ten days after the sale, the affidavit of costs and disbursements, as provided in section 23 of Ch. 81, G. S. '78.

Eckman & Stevenson for plaintiff. *B. L. Winje* for defendant.

A real estate mortgage was foreclosed by advertisement, and bid in by the mortgagee for $1,126. The amount due thereon, at the time of said sale, exclusive of the costs and disbursements of the foreclosure was $1,044. The mortgagee failed to file any affidavit of costs and disbursements in the office of the register of deeds within ten days after the sale, as by section 23 of chapter 81, G. S. '78 provided.

Plaintiff, the mortgagor, brought this action against the mortgagee, alleging the above facts, and suing as if for surplus purchase money, asking for judgment against defendant for a sum equal to the amount of the bid

above the amount actually due at the date of sale, exclusive of any costs that might have been incurred. Defendant raised the only issue by general demurrer.

Plaintiff argued in opposition to the demurrer, that foreclosure by advertisement is a creature of the statute, and unless the statute allows costs, none can be recovered, and unless the statute is complied with as to the method of obtaining costs, none can be taxed, and with the exception of the said section, there is no provision in the statute for the taxing of costs on foreclosure by advertisement; that the provisions of the statute are of the same effect as if embodied in the mortgage itself. Said section 23 provides that such affidavit *shall* be so filed within a stated time. A failure to so file the affidavit leaves no evidence of record that any costs were incurred—that any attorney's fee was ever actually paid; that the legislature further indicated its intention by the passage of the curative act of 1883, chapter 89; that Johnson vs. Cocks, 37 Minn. 530, holding that such failure did not invalidate the sale, left no other purpose for this section than that contended for by plaintiff.

ENSIGN, J. Failure to comply with said section does not forfeit the costs of such foreclosure, there being no words of forfeiture in the statute, and chapter 81 providing elsewhere for certain attorney's fees on foreclosure, whether by action or advertisement, certainly entitles the foreclosing party to attorney's fees as costs, this section being directory, and not mandatory.

Demurrer sustained.

State vs. A. G. Highton.

(District Court, St. Louis County.)

CRIMINAL LAW.—As to sufficiency of indictment for larceny in second degree.

C. C. Tear for State. *M. H. Crocker* for defendant.

An indictment for larceny in the second degree charged that the defendant "willfully, and feloniously, and with intent to defraud, did obtain of one W. by color and aid of a check for one hundred and nine dollars, dated on said date, payable to the order of said W. and drawn by said defendant upon the —— Bank,—railway transportation for himself and three other persons from Duluth, Minnesota, to St. Paul, Minnesota, in a special car over the —— Railway, which transportation was of the value of one hundred and nine dollars, and was then and there furnished said defendant by said W. in exchange for said check, which the said W. accepted believing it to be of the value for which it was drawn. That said defendant at the time of giving said check, and at the time of its presentment for payment, had no funds in said bank of —— and was not entitled to draw on said bank for the amount specified in said check, as he, the said defendant, then and there well knew."

Defendant demurred, and upon argument presented the following grounds of demurrer:

1. That section 416 of the penal code does not cover the case of a person who passes a check drawn by himself, but is intended to prevent the passing of worthless paper drawn by a third person and known by the person passing it, to be worthless.

2. That the indictment does not state who was defrauded, or that the thing taken was the property of any one in particular.

3. That the indictment does not charge defendant with taking anything but "transportation," not property, nor the subject of larceny—a mere inchoate right or license to ride in a car; and there is no allegation that such right was ever even exercised.

Demurrer sustained. MOER, J.

Contest by Henry Truelson of special election on bonds vs. City of Duluth, Minn., et al.

(District Court, St. Louis County.)

ELECTIONS—The provisions of the General Election Law of 1893 relating to contests and the appointment of inspectors to examine ballots do not apply to special city elections, such as the proposition to issue bonds for a special purpose.

S. T. and Wm. Harrison, for petitioner, and *Page Morris*, for City of Duluth.

A special election was held in the city of Duluth, under the provisions of the charter of said city, submitting to the electors various propositions as to the issuing of water and light bonds, the purchase of a water and light plant already established, and the extension of the present system. T., an elector and taxpayer in said city, gave notice of contest of the validity of said election and the result thereof as announced by the authorities, under the General Election Law of 1893, and then, under section 188 of said law, petitioned the District Court for inspectors to examine the ballots cast at said election.

Upon order to show cause why said inspectors should not be appointed, the city appeared specially and moved the court that the notice of contest of this election and the said petition be dismissed, and the said order to show cause be discharged, on the ground that said court has no jurisdiction to hear and determine said contest, to hear said petition or to grant said order as to this election. There is nothing in the charter of the said city which provides for any such contest, and there is no provision in the General Election Law which provides for any such contest. Motion to dismiss was granted.

LEWIS, J. I am of the opinion that chapter 4 of the General Laws of 1893, the present General Election Law of this state, contains no provision for the contesting of an election such as is referred to in this application. The provisions relative to contesting elections contained in said chapter are found in the following sections, viz.: Sections 181 to 192 inclusive. Section 199 reads as follows: "This act shall apply to all general and special elections in the state of Minnesota, except township and village elections, and shall be known as the General Election Law of the state."

Counsel for the petitioner maintains that the following language used in section 190, viz.: "Or upon any other subjects which by law may be submitted to the vote of the people," and "or as to the result of any vote upon any subject submitted as aforesaid," is a sufficient indication that it was the intention of the legislators that any subject at any general or special election by any city, as well as county, should be contested in the manner prescribed in this chapter. But a mere cursory reading of said section shows that the election referred to is a county election, not a city election. The provision for the giving of notice is to the county commissioners, and there is no provision for giving notice to any one else in lieu of the county commissioners when the election is held by the city, and the contention of counsel that the contestant has the right to assume

that the law intended that the city council should stand in the place of the county commissioners in the absence of any provision other than the one referred to, is altogether untenable. And the provisions of section 191 which provides that this chapter 4 shall apply to all general and special elections in this state cannot expand and widen the scope of the various provisions found within the law, so as to make them applicable to a condition which is evidently excepted from the act.

Counsel for the petitioner relies upon the case of the State of Minnesota v. Andrew Simpson, 33 M. 536, as an indication that the provisions of section 199, being broad and general in its scope, would necessarily include all classes of elections, whether city, town, county or state. Chapter 1 of the General Statutes of 1878 contained the election law in force at the time of the rendering of the decision referred to, and section 52 of that act provided that any elector of the proper county may contest the election of any person declared elected to any county office, and provided that such election should be held in such and such a manner and that notice should be served upon the parties against whom the contest was proceeding. In the Simpson case it was held that section 76 of chapter 1 enlarged the scope of section 52 so that that chapter would apply not only to county offices, but would apply to city offices as well.

There is reason for such holding, but if section 199, as found in chapter 4 of the laws of 1893, had been used in place of section 76 of chapter 1 of the General Statutes of 1878, it might still be held that the provisions of section 52 applied to the election of city as well as county officers. But there is a clear distinction between the method of proceeding to contest the election of an officer in the city, county or state, and the contest of a special election for some special purpose. In the one case there is provided the *modus operandi* or method of the service of the notice, whereas in the other case the statute is absolutely silent.

We therefore come to the conclusion that chapter 4 of the laws of 1893 make no provision for the contest of such an election as the one referred to in the petition.

As to whether the petitioners have any other remedy or as to whether they may not, under proper application and process, have the right to inspect the ballots as a method of providing means of conducting the contest in a proper proceeding, it is not necessary now for this court to determine.

State of Minnesota, ex. rel., Realty Company, Relator, vs. Clayton R. Cooley, County Auditor, Respondent.

(District Court, Hennepin County, No. 63006.)

TAXATION.—Exemption as public property. A city cannot enter into a contract with individuals wherby in consideration of the latter parties improving and using property for a quasi public purpose, and at the same ime be of profit to themselves, the same shall be exempt from taxation.

Ripley, Brennan & Booth, for Relator; *Wilson & Van Derlip*, for Respondent.

In 1892 the Common Council of the City of Minneapolis passed an ordinance as follows, so far as material to the case: "If Thomas B. Walker, Samuel C. Gale and George E. Maxwell, their associates, heirs and assigns, shall submit plans for a central market house to this council for their approval on or before sixty days from the passage of this act, to be located,

&c., &c., all the conditions and acts specified in this ordinance to be by them kept and performed, and shall build such market house according to plans and specifications so approved, &c., &c., and shall have said premises ready for use and occupancy as such public market and market place by July 1, 1892, then such buildings and premises shall be, and are hereby declared to be a "public market for said city of Minneapolis" for the term of twenty-five years from said first day of July, 1892, meaning and intending by the use of the term, "pnblic market," to bring the above premises within the provision of our state tax laws, which exempt public markets from taxation. But this act shall not exempt said property from any special assessment for local improvements."

Pursuant thereto the said Walker, Gale, Maxwell, and their assigns, proceeded to erect and maintain a market in said city. The property so used was not entered for taxation, and this action was brought to compel the county auditor to enter the said property for taxation. Other facts sufficiently appear in the findings and memorandum.

JAMISON, J. The above matter being regularly on the special term calendar of this court, came duly on for hearing on the motion of relator for preemptory writ of mandamus, notwithstanding the answer of respondent to the alternative writ theretofore issued by said court.

After examining the proceedings in said matter and hearing the arguments of said council on said motion, and being advised in the premises, the court finds:

First, That the relator is entitled to have said motion granted.

Second, That relator is entitled to have issued forthwith out of this court a writ of mandamus compelling the respondent, Clayton R. Cooley, County Auditor of said Hennepin County, to enter block (1) one and the various lots composing the same, of Camp and Walker's addition to the City of Minneapolis according to the plat of the said addition of record in the office of the register of deeds in and for said county, upon the assessment and tax books for the years 1892, 1893 and 1894, and compelling them to assess the same together with the buildings thereon, and compelling said respondent to extend all arrearages of taxes against all property upon the proper books in his office, and farther to extend all arrearages of said taxes against the said property upon the tax list for the year 1894.

That the motion of relator be, and the ssme is hereby, in all things granted, and that preemptory writ of mandamus issue in accordance with the foregoing findings. It is farther ordered, that costs shall not be awarded to either party.

Dated Nov. 30, 1894.

MEMORANDUM.

Upon the filing of a petition by the relator, an alternate writ of injunction was issued requiring the county auditor of Hennepin County to enter certain real estate belonging to the Minneapolis Central City Market Company upon the tax books of said county, and to assess such real estate or show cause why the same should not be done. The answer was filed by respondent, and thereupon relator moved for a preemptory writ notwithstanding such answer.

It is undisputed that said property has not been taxed for several years, and the reason therefore is that said property has been deemed exempt.

Relator contends that this property is taxable, while respondent claims the same is exempt from taxation. Whether the property is so exempt is so exempt is the sole question for determination by the court. The title to the property is in the said Market Company, a private corporation of this state.

During the month of May, 1892, a certain contract was entered into between the City of Minneapolis and the Market Company, pursuant a certain ordinance passed the previous year by the City of Minneapolis.

The ordinance and contract provide for the construction of a public market house and that the same shall be exempt from taxation for a period of twenty-five years, as will fully appear from an examination of the respondent's answer answer (see ordinance).

It is undoubtedly true that the proptrty in question was taxable unless the same can be said to be exempt under the constitution of the state. The provision of the constitution relating to taxations and exemptions in Act 9, Sec. 5, which reads as follows: "Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charitv, public property used exclusively for public purposes, and personal property not to exceed two hundred dollars in value, for each individual, shall, by the general laws, be exempt from taxation."

It is urged that this property falls within class designated in the foregoing section as "public property used exclusively for any public purpose." It is true that a thing may be said to be public when owned by the public, and also when its uses are public. The very word "public" has these two meanings. If the words "public property" were alone used, it might be urged with some force that the property is exempt notwithstanding its ownership is private if only its uses are public. Conceding for the argument that the pleadings show this property is used exclusively for public purposes, still it would seem to lack one of the essentials in order to bring it within the class of property evidently intended to be exempt, to-wit, public ownership.

It is significant that the words "public property" are used in connection with the words "used exclusively for any public purposes." The clause must be read in connection with the context. When so read, can it be said that property, independently of its ownership, is exempt if it appears that the same is used exclusively for public purposes? I think such a construction would be improper and do violence to the language used in the section. If that was the intention, then the word public would have been omitted, leaving the clause to read "property used exclusively for public purposes." By using the words "public property" in connection with context, I think the

same should be construed to mean such property as actually belongs to the public. In this case the property actually belongs to a private corporation, known as The Minneapolis Central City Market Company. That corporation owns the title to the same absolutely.

Even if it should be conceded that this property is public property within the meaning of the constitution by reason of its rights acquired by the public under the ordinance and contract, still can it be said that the property is "used exclusively for a public purpose" within the meaning of the constitution?

The building of the market house, it seems, was in fact a private enterprise. The object of its projectors was to make money through operating and maintaining a market thereon. These projectors have received valuable privileges from the city and simply agreed to erect buildings and conduct business thereon, which, while in a measure beneficial to the public, is primarily beneficial to the property owners. The public receives no revenue whatsoever therefrom, but the proceeds of business, the rents and so forth, all go to the market company. The ordinance set out in the contract between the City of Minneapolis and the assignors of said market company in a great measure regulates the manner of conducting the bnsiness of the company, but gives the public no interest in the business itself.

I do not deem the use of this property as the "exclusive use" contemplated by the constitution. I believe that a proper construction of the constitutional provision is, that the ownership of the property should be in the public and that the same should be used exclusively for a public purpose before such property can be held exempt from taxation.

Pursuant to the constitutional provision above set out, a statutory provision sec. 5, chapter 11, of the General Statutes of 1878, was passed seeking to exempt the following property: "All public market houses, public squares, and other public grounds, town or township houses, or halls used exclusively for public purposes, and all works, machinery or fixtures belonging to any town and used exclusively for conveying water to such town."

This provision of the statutes should be read and construed in connection with the constitutional provision. When so read and construed, the words, "All public market houses" must be said to mean market houses belonging to the public and used exclusively for public purposes. At any rate, the statute cannot exempt property not clearly exempt under the constitution. If the statute should be construed to mean that "all market houses" used as public market houses are exempt, where the ownership is private, then the same is in conflict with the constitution and void. No force can be given to that portion of the ordinance of the City of Minneapolis wherein it is sought to exempt the property in question from taxation for a number of years. The city was without authority to pass such a provision and without authority to contract to the effect that the property in question should be exempt.

For the foregoing reasons a preemptory writ of mandamus has been ordered.

Titus Marcek et al, Executors of estate of M. J. Bofferding, vs. Mutual Reserve Fund Life Association.

(District Court, Hennepin County.)

LIFE INSURANCE.—A certain policy of life insurance, construed as rendering the company liable where deceased came to his death by his own hand.

J. F. Byers, for Plaintiffs; *Cobb & Wheelwright*, for Defendant.

It appeared that the defendant had insured the life of plaintiff's deceedent more than five years before his death; that the deceased died by suicide; that no default had occurred in any of the provisions of the policy; and that no waiver had ever been made by the company of the strict performance of any of the provisions of the policy. Plaintiffs demanded judgment for the full amount of policy, and defendant offered judgment for the amount of premiums paid, with interest thereon from their dates of payment respectively.

RUSSEL, J. The policy or certificate of insurance upon which this action is based, when issued to the deceased, included the following statement, printed in red ink across its face:

"After five years from the date of this certificate it is incontestible for any cause except non-payment of dues or morturary assessments at the time and place and in the manner herein provided—the age of the member being correctly stated in the application for this certificate."

It thus became a part of the policy, and entered into the contract between the parties.

The policy also contained the following provision: "The death of the member by his own hand, whether voluntarily or involuntarily, sane or insane, at the time, is not a risk assumed by the association in this policy, but in every such case there shall be payable, subject to all the conditions of this contract, a sum equal to the amount of the assessments paid by said member, with six per cent. interest; but the board of directors or the executive committee of the association, at its option, may, in writing, waive this condition."

The question presented is, has the company the right, under the terms of this certificate including these two provisions, to raise the question of the suicide of the deceased, it being admitted that he came to his death by suicide, and that his death occurred more than five years after the date of this certificate?

Is the company obliged to pay the $5,000, or is it obliged under these circumstances simply to pay an amount equal to the assessments paid by the assured, with six per cent. interest added?

Defendant's counsel urge that the raising of the question of suicide is not a contest of the policy, but a mere carrying out of its terms; that there are included in the policy two separate contracts, viz: first, to pay $5,000 in case of death, if the death is not caused by the assured's own hand; second, a lesser sum if death is caused by the assured's own hand.

With this view we cannot agree. By the terms of the certificate, Mathias J. Bofferding was made a member of the defendant's association. By reason of his being such member- the defendant agrees that within ninety days after receipt of evidence, satisfactory to the association, of the death of the member, upon certain conditions following and fully stated, there shall be payable to the legal representatives of Mathias J. Bafferding, $5,000.

The undertaking is one of insurance on Bofferding's life. The amount of insurance is $5,000. The conditions under which the agreement of insurance is made include the clause above stated relating to suicide. That this is a condition is apparent from the manner in which it appears in the policy, following the references to conditions, and included with and in exactly the same situation as all the others. The suicide clause itself refers to it as a condition which the board of directors or executive committee may waive.

After five years the conditions are not to be taken advantage of by the company, except as stated in the incontestible clause.

Raising the question of suicide and insisting upon it as a defense against the payment of the amount agreed to be paid by the terms of the policy is just as much a contract as it would be to defend on the ground of the violation of the other enumerated conditions, and insisting upon a release from liability by reason of their violation. Courts in construing contracts of insurance will place themselves in the position of the contracting parties, so that they may understand the language used in the sense intended by them. Subtle distinctions not appreciable by ordinary minds will be disregarded.

Conditions providing for disabilities will be construed most strongly, where the intent is doubtful, against the company. Symonds v. N. W. Mutual Life Ins. Co., 23 Minn. 491; Kansal v. Farmers' Mutual Fire In. Ass'n, 31 Minn. 17; Chandler v. St. Paul Fire & Marine Ins. Co., 21. M. 85.

Applying these common and well settled principles to the policy, it means, and must be said to have been accepted as meaning, first, that it was a contract to pay $5,000 to the legal representatives of Mathias J. Bofferding in case of his death, provided that during his life he complied with the obligations assumed in the policy by the assured.

Second, All these conditions must be complied with by the assured during five years, and if not so complied with, the company may contest its liability on account of the failure of the assured to perform any one or more of them.

Third, After five years and the payment of the assessments for that period, the policy cannot be contested except for non-payment of dues or mortuary assessments up to the time of the death of the assured, the age of the member being correctly stated in the application for the certificate.

Wherefore judgment was ordered for plaintiffs for the amount called for by the policy.

Altman, Miller Co., Plaintiff, vs. W. D. Markley et al, Defendants, and The St. Paul Fire & Marine Ins. Co., Garnishee.

(District Court, Hennepin Co., No. 58639-40.)

GARNISHMENT.—An indebtedness to one individual held not subject to garnishment in an action against him and another on a joint debt, on an affidavit which states that the garnishee is indebted to the defendants.

Harrison & Noyes, for Plaintiff; *Kueffner, Fountleroy & Searles*, for Garnishee.

Plaintiffs brought action against the defendants on a joint indebtedness, and garnisheed the St. Paul Fire and Marine Insurance Co. The affidavit for garnishment stated that the garnishee was indebted to the defendants. The garnishee disclosed an indebtedness to one of the defendants. Motion by plaintiff for judgment against garnishee denied.

HICKS, J. The affidavit in this case, which is jurisdictional, makes oath and states that the said garnishee has money, property, or effects in its hands belonging to said defendants, and at the bottom of said affidavit it is stated that said garnishee is indebted to said defendants. It will be noticed here that the debt garnisheed for is a debt due both of the defendants. The disclosure clearly shows, if the garnishee owes anything, that it is indebted to only one of said defendants, to-wit—said W. D. Markley. There is no joint indebtedness proved, nor is there any indebtedness proven to both of said defendants. The debt garnisheed for is not the debt which is disclosed to be owing, if any at all is disclosed, which could be garnisheed.

National German-American Bank vs. Illinois Fuel Co., et al.
(District Court, Ramsey County, No. 55967.)

NOTES AND BILLS—INDORSER BEFORE DELIVERY—The liability of a party signing a note on the back thereof before delivery cannot be varied by parol; the contract which he signs is the note itself.

The fact that all of the parties signing a note on the back thereof are not joined in anaction against the principal maker and certain of such signers is sufficient to abate the action.

John B. & E. P. Sanborn for Plaintiff. *Horton & Denegre* for Defendant.

Plaintiff alleged, in the usual form, upon a prommissory note against certain of the defendants that before delivery thereof they had signed the same on the back thereof. Certain of these latter defendants answered, alleging, among other things, first, that another person, not made a party to the action, had with them signed the note in suit; and, second, that the plaintiff in another state, in a court having jurisdiction of the matter, had recovered judgment against the principal maker of the note; and asked that the action abate. These answers the plaintiff moved to have stricken out as sham, irrelevant and frivolous. Motion denied.

OTIS J. When a third party signs his name on the back of a promissory note before delivery, the law determines the nature of his liability, and the same cannot be varied by parol testimony. He, therefore, becomes "an absolute maker or promisor, and an absolute surety on the note." Dennis v. Jackson, 59 N. W. Rep. 198, overruling, as it would seem, *some dicta* in the earlier cases in this state relating to this form of indorsements, and, also, declaring the rule to be different from that suggested in Riley v. Gerrish, 9 Cush. 104, upon which the plaintiff relies. (It is further to be observed that in the Massachusetts case the question here considered was not discussed, or its determination essential to the case.) For the same reason it is for the court to say, from the paper itself, whether the contract, entered into by such an indorsement, is joint, merely, or joint and several. The contract which the party signs in making such an indorsement is the note itself, since in this state it has been uniformly held that he thereby becomes an absolute maker. By becoming a maker by indorsement of his name on the paper, instead of signing at the end, he simply preserves his right as surety over and upon the person who becomes the maker by signing at the end of the note.

It was in accordance with this principle that Wolford v. Bowen, 59 N. W. 195, was determined, the Court expressly declining to rest its decision upon the doctrine of Riley v. Gerrish, *supra*, as it might have done. An absolute surety may become a joint, or

a joint and several maker, as he pleases, so far as the payee is concerned, the mere fact that as to another maker of the same note he is a surety not affecting his rights under the contract he has chosen to make.

Section 36 of Chapter 66, General Statutes 1878, does not affect the question, as that relates to actions against persons severally liable upon the same obligation or instrument, which in this case the parties have made joint, not a joint and several obligation. These answering defendants have not entered into a collateral agreement, as was the case of Hammel v. Beardsley, 31 Minn. 314, but are joint makers with the Fuel Company, though as between them and the Company the latter must respond for the debt.

I have not considered at length, and do not determine the question whether the suit brought and judgment rendered against the Fuel Company in Illinois would bar the action against the other co-makers, if it does appear that they were not residents of Illinois at the time suit was brought. The fact that Ives, one of the co-makers, is not here made a party is a sufficient plea in abatement.

Elisabeth W. Gilbert, et al. Cary I. Warren.

(District Court, Ramsey County, No. 56307.)

PLEADING—MOTION TO STRIKE OUT—Where defences are pleaded separately, and one is improper, the same will not be stricken out on summary motion, but the same should be demurred to, and reply interposed as to the remainder of the answer.

Stiles W. Burr for Plaintiff. *Frederick A. Pike* for Defendant.

Action for the recovery of rent. The defendant set up separate defences, one of another action pending in the Municipal Court of the City of St. Paul. This the plaintiff moved to strike out as irrelevant, immaterial and redundant. Motion denied.

BRILL J. The motion is to strike out matter pleaded as a separate defense. It is not determined upon this motion whether or not this matter constitutes a defense; but the motion is denied upon the ground that this is not the proper method of testing the question. Under our statute a demurrer may be interposed to a separate defense and a reply to a remainder of the answer. The motion to strike out an entire defense as irrelevant ought not to take the place of a demurrer unless the irrevalency is too clear to admit of serious question. The decision of the Municipal Court in the former action, of course, had no effect upon this case, no judgment having been entered. But whether the pendency of that action may not abate this action, or at least whether the rent for the month of June claimed in this action, was not, in affect, included in that action, raises a nice question of law which ought not to be decided upon a summary motion.

Bank of Commerce of West Superior v. Moses Stewart, et al.

(District Court, St. Louis County, No. 10092.)

COUNTERCLAIM — Existence of at time of commencement of action.

Towne & Davis for Plaintiff. *W. B. Phelps* and *S. T. & Wm. Harrison* for Defendants.

Two defendants, being sued on a promissory note as maker and indorser before delivery, set up as a counterclaim that defendant A. during a certain time performed labor and services for plaintiff, at plaintiff's request, of the reasonable value of a certain sum, that no part thereof has ever been paid, and that "heretofore said defendant A. for a valuable consideration assigned, transferred, and set over to defendant B an equal un-

divided one-half interest in said claim against plaintiff."

Held on demurrer to said counter-claim, that the answer did not sufficiently allege the existence of the claim of defendant B. against plaintiff at the commencement of the action, as is required by Sec. 97, Chap. 66, G. S. 1878. Demurrer sustained.

LEWIS, J.

H. W. Topping v. Odin G. Clay.

(District Court, Ramsey County, No. 56797.)

PLEADING—NEGOTIABLE INSTRUMENTS. A pleading that the defendant executed and delivered his promissory note to T., and that plaintiff is now the owner and holder thereof, held, on a general demurrer, to be a sufficient allegation of transfer thereof to and ownership by plaintiff.

Wheeler & Howell for Plaintiff. *John F. Fitzpatrick* for Defendant.

Plaintiff alleged that the defendant had executed and delivered his promissory note to one Joseph P. Topping; that the plaintiff is now the owner and holder thereof; and that the same had not been paid except in part. Defendant demurred generally. Demurrer overruled.

BRILL, J. The authorities, so far as I have been able to find any bearing upon the point involved in this case, hold that the allegations of the complaint are sufficient as against a general demurrer.

Reeve v. Fraker, 32 Wis. 243.
Brown v. Richardson, 20 N. Y. 472.
Bliss Code Pldg. Sec. 233.

See also Curtis v. Livingston, 36 Minn. 380, and Cleveland v. Stone, 51 Minn. 274.

The cases in Minnesota referred to by counsel for defendant are cases where the general averment of ownership was preceded by specific allegations of endorsement and transfer. This form of pleading is, however, not to be commended.

ATTORNEYS who may be participants in any case involving novel points of law will greatly assist us by furnishing a statement of facts, with a memorandum of the decision, to any of the following correspondents, who will forward them to us, with the names of the attorneys, for publication:

J. A. LARIMORE, 36 E. Third St., St. Paul, Minn.
J. A. GALBRAITH, Oneida Block, Minneapolis, Minn.
GEO. H. SELOVER, Wabasha Minn.
A. E. DOE, Stillwater, Minn.
M. S. SAUNDERS, Rochester, Minn.
W. J. STEVENSON, Duluth, Minn.
A. COFFMAN, St. James, Minn.

MR. JURYDODGER—"Your Honor, I feel that I am not fit to be a juryman."

Judge—"You appear to me to be unusually intelligent, sir."

Jurydodger—"But, your Honor, I can't make head or tail out of what those lawyers say."

Judge—"Neither can I; take your seat in the jury-box."—*Greenbag.*

THE question of wills has its humorous side, as witness the following instance. The members of a certain family, upon the death of their father, had gathered together to listen to the reading of his will. Several legacies were read out, and each recipient, as he was made aware of his good fortune, burst into tears and expressed a filial wish that his father might have lived to enjoy his fortune himself. Finally, there came this bequest: "I give to my eldest son Tom a shilling to buy him a rope to hang himself." Tom, not to be outdone in filial feeling by his brothers, sobbed out, "God grant that my poor father had lived to enjoy it himself."

—*Greenbag.*

HON. HASCAL R. BRILL,

DISTRICT JUDGE, SECOND JUDICIAL DISTRICT.

THE MINNESOTA LAW JOURNAL.

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THE NATIONAL BANKRUPTCY LAW.

EDITOR Minnesota Law Journal: Having read with considerable interest the article of Mr. Hawthorne, in the October number of your valued Journal, headed as above, and not agreeing fully with him, both with respect to the advisability of passing a National Bankrupt Law, and its legal effect, I take this opportunity of reviewing that article, and will point out what I deem at least a misleading expression contained therein.

While I would gladly see passed a law that would relieve the honest man, whether he be in the real estate, law or other business, of debts contracted while plying his vocation according to legitimate rules and good ethics, still I believe that instead of it being the prayers of the many that are going up for some law to rid them of their indebtedness, it is only the wild wailings of the few, and of those who have as little regard now for the rights of others as they had when they were doing business (or professed to be doing it) in a no less conservative way, and by the same principles that a gambler does, when sitting at the gaming table desiring to make a million dollars where there is not one chance in a thousand of him making one tenth of that amount. There is such a class of men, and many of them are now heavily involved. Each one of this class thinks that the world and all things therein were made expressly for him alone, and that no one else has any rights whatever. It is to this class that a National Bankrupt Law would come as a good run of the cards, or a sudden and unexpected rise in the price of stocks purchased. To such a class of debtors I have this to say: "They are victims in the pit themselves have digged." Let them remain in it; tethered as they are by their present indebtedness they are not as liable to injure others in the future.

Mr. Hawthorne says: "Among the powers delegated to Congress by the Constitution, adopted September, 1787, was the following, (Sec. 8, Art. 1), 'to establish uniform laws on the subject of bankruptcies.' It is also interesting to note that Section 10 of the same article prohibited the states from passing any law impairing the obligation of a contract. Now, the courts have held that *if a state passes a bankruptcy law it does not impair the obligation of a contract if there is no existing Congressional legislation*

on the subject." I think it would naturally be inferred from the language used that if there were favorable Congressional laws on the subject of bankruptcy that a State law could impair the obligation of a contract. After stating the effect of a State law (in the absence of Congressional legislation on the subject), he comes to the conclusion, and rightly I think, "that at best State enactments are very unsatisfactory, and have caused much unnecessary litigation."

If we are to have any law on the subject that would effect contracts in the least, by all means let us have one that will not recognize imaginary State lines, and place every citizen of this country on an equal footing, and give the debtor the right to rid himself of debts contracted with a citizen of a state other than that in which he lives, as well as those contracted within his own state.

We have at the present time on the statute books of the different states, laws, termed either bankrupt or insolvent, from the mild form on the statutes of Minnesota, that does not purport to effect or impair a contract, but simply makes the court a medium or agent for the adjustment of the affairs of the debtor, to the extreme one on the statute books of Maine, New York and several other states, that makes a debtor a free man, so far as his debts are concerned, after his discharge under the act. Such a law provides in substance that if a person is indebted in a certain sum (usually three hundred dollars), that he may petition the proper court, be declared insolvent, turn over what property he owns, not exempt from attachment and seizure and sale on execution for the benefit of his creditors, and receive his discharge from all of his debts. Even such a law does not *impair* in a legal sense the obligation of a contract. That was decided by the Supreme Court of the United States in the case of Ogden vs. Saunders, 12 Wheat. 349, which went up from the State of New York, and where the opinions of Chief Justice Marshall, Justices Story and Duvall were weighed in the balance against the opinions of Justices Johnson, Washington, Thompson and Tremble, and were found wanting; a case in the humble opinion of the writer where the tail wagged the dog. But whether the tail wagged the dog or the dog wagged the tail is now immaterial; the decision established a precedent which the court has since refused to disregard. It was there held by the majority of the court (the minority strenuously dissenting) that the law granting to debtors the right to a complete discharge from all of their debts after complying with and performing all of the conditions of the act, entered into and became part of the contract; and that in reality the contract entered into under the law was not for all time, but the length of its days were only until such time as the debtor should file his petition in insolvency, perform the conditions of the act and receive his discharge; it was then a corpse and ready for burial. Of course such a law would have no effect on a contract entered into prior to its passage, which was decided by the Supreme Court of the United States in Sturgis vs. Crouninshield, 4 Wheat., 120, a case that went up from New York prior to the one above cited.

It is then certain that the State cannot affect in any way by the passage of a bankrupt or insolvent law contracts entered into prior to its passage; while it is equally as certain that a State may grant a debtor a complete discharge from all debts contracted with citizens of his own State, after its passage, and not *impair* the contract. And the State can do as much now as it could were there favorable Congressional laws on the subject. Congress cannot confer any powers on the States as against Constitutional prohibition.

If the debtors of this country are to be benefited with reference to their present indebtedness by the passage of a National Bankrupt Law, it will be for the reason that the National Government is not prohibited by constitution from impairing the obligation of contracts; hence, in a case where Congress can properly legislate with reference to contracts, the law is supreme; and it can annihilate, if it chooses, existing contracts. Congress having been granted the power by the Constitution to pass uniform bankrupt laws, may pass any kind of a bankrupt law it chooses, so long as it is uniform in all of the States, and may so frame it as to destroy the validity of existing contracts.

EMERY C. BETTS,
Minneapolis, Minn.

EDITOR MINNESOTA LAW JOURNAL:
SIR: The given names of parties to an action should be written out in full in the pleadings. The Supreme Court has repeatedly said that the record should disclose the full names of the parties to the action, and that the practice of designating them by initials would not be countenanced. *Knox v. Starks*, 4 Minn. 20. That case was entitled *R. H. Knox et. al v. J. A. Starks et al.* The Court said:

"In entitling this case we are compelled to adopt the above inartificial and mutilated form, as there is not a paper in the cause, from the summons to the judgment, that discloses the real names of the parties. We make this statement that it may not be supposed when this opinion becomes a public record, that such a gross disregard of legal accuracy originated in this Court, and for the purpose of announcing that we are not willing any longer, even indirectly, to incur the charge of having sanctioned it by tacitly passing it over."

In *Gardner v. McClure*, 6 Minn. 250, the plaintiff sued by his initial letters and did not disclose his full name. The Court said it was bad practice, and might vitiate a judgment as against a purchaser of land upon which it would otherwise be a lien. If a judgment be taken against a man by his initial letters only, very serious questions might arise as to whether subsequent purchasers would be bound to know that the judgment was against the land of the vendor.

In *Kenyon v. Semon*, 43 Minn. 180, the Court said that the practice of designating the parties, either plaintiff or defendant, by the initials of their Christian names is irregular, and has been more than once disapproved by this Court. The remedy in such a case is, by motion, to require the complaint to be amended or corrected in this respect, and costs should be imposed.

Chief Justice Shaw speaks of this matter in *Sistermans v. Field*, 9 Grey 331, and the English authorities are

cited in the brief for the defendant in that case.

To avoid this loose practice, the editor of the Minnesota Reports is frequently compelled to spend much time searching through the printed record in the hope of finding the given name of one or more of the parties to the action. Sometimes his search is in vain, and the blemish appears in the volume of the reports.

Lawyers sometimes in their briefs cite cases from American Decisions or American Reports, or Lawyers' Reports Annotated, or from a collection of railway or corporation cases, or from the reporters instead of citing from the official reports. This occasions much inconvenience. If lawyers in their briefs cite a case by its proper title in the state reports, it can be readily found in these reprints and rivals, as all of them take excellent care, by tables of cases and blue books, to enable the reader to find the case in their rival publications. It is not the practice in any reputable State or Federal Court to refer to the cases cited in any other way than from the official state reports. The value of a decision as authority in a subsequent case depends much upon a careful statement of the facts out of which the decision arose and upon the contention of counsel for the parties as exhibited in the briefs. These are given in the official reports. A careful and accurate lawyer uniformly examines these statements and briefs before citing the case in his argument. If all lawyers would obsere this rule, they would save those who have to peruse their briefs much needless delay and vexation. No judge in any reputable court in the United States cites the cases mentioned in his opinion from any but the official report, if it is accessible. The labor of hunting out the proper citation of his authorities should not and will not be shirked by the careful practitioner.

In citing cases, lawyers should be careful to give the correct names of the parties to the case cited. If the name of the plaintiff be inaccurately given, the case cannot be fouud in the tables of cases in the text books, digests or subsequent reports. I beg to illustrate by an instance. In *Appleby v. St. Paul City Ry. Co.*, 55 N. W. Rep., 1118. The cases are cited thus: *Railway Co. v. Fix*, 88 Ind., 381; *Railroad Co. y. Riley*, (Miss.) 9 South. Rep., 443; *Railroad Co. v. Rice*, 64 Md., 63; *Railroad Co. v. Griffin*, 68 Ill., 499. A lawyer employed in a similar case of expulsion of a passenger from a street car would desire to see these cases, and what the text books had to say of them, and to see whether they had been overruled, questioned or modified by later authority. But as the correct name of the plaintiff is not given in either of these four cases, he could not find either of them in any table of cases cited, overruled or modified, or in the tables of cases given in text books. When counsel neglect to give the name accurately of the case they cite, the judge who writes the decision in their case may not have the time and patience to hunt it up and cite it correctly, and the labor of doing it falls to the reporter, as in the instance of *Appleby v. St. Paul City Ry. Co.*, 54 Minn., 171 A table of cases cited is an important feature of any well-edited

law book, but none can be made where cases are cited in this careless manner.

It is also desirable to have a uniform method of citing statutes. This method should indicate the edition referred to, as well as the chapter and section. Since Minnesota was first organized as a territory there have been two revisions of the general statutes and two compilations, which have won recognition in the courts and in legal literature, viz: the revision of 1851 and 1866, and the compilations of 1858 and 1878. As an example of an inartificial and cumbersome method of citation, the following may be given, viz: "*Subdivision 2 of Section 6, chap. 41 of Gen. Stat. of 1878.*" The better method of citation is as follows: "*1878 G. S. ch. 41, § 6, subd. 2.*" Unless some such method be adopted and adhered to, it will be difficult, after another twenty-five years has passed, to find the statutes referred to and construed in the decisions.

It is now nearly thirty years since the General Statutes of this State were revised. Innumerable amendments have been made by the Legislature within that time, many of them verbose, inartificial and of doubtful signification when construed in connection with the statute amended. The courts are overcrowded with work settling rights under these discordant provisions. The mass has become a network to trip the unwary. A new revision of the laws cannot be long delayed. Scarcely a State in the Union has suffered her statute law to run so many years without a revision. No abler hand for this work could have been found than that of the late Chief Justice. But, alas, that hand has wrought its last.

C. C. WILLSON.

Rochester, Minn.

EDITOR MINNESOTA LAW JOURNAL.

Sir: While reading with interest the spicy criticisms of brother Countryman in your November issue upon the customary notice of mortgage foreclosure, I felt that although possibly none of the eliminations suggested by him would invalidate a notice, yet, viewed from a practical standpoint, the omission of some of the features which are made the butt of his genial sarcasm would leave us and our successors without guideboards to facts the preservation of which is well worth the cost of printing and recording, and that the extreme conciseness which he advocates would invite ambiguity and even positive error. It seemed especially undesirable to use figures alone to designate dates, books and pages, for we all know that even with the use of every safeguard eternal vigilance alone is the price of preserving the identity of those items through the uncertain manipulations of the office stenographer, the typewriter, the printer and the register's clerk, and I thought that whatever other of his suggestions we might adopt, that feature ought not to be one of them. And lo, at the close of his article we find a proposed form of notice, which is dated "Sept. 29, 1894," and announces that the sale will be made "Nov. 12, 1893." That is "looking backward," surely. No doubt the author wrote "Nov. 12, 1894," as the date of sale, as that would allow just the necessary time for publica-

tion after the date of the notice—and, no doubt, when he discovered the work of the printer he applied to that worthy the customary phraseology used by the profession on such occa- occasions, and used the full text, too, without condensation or ommission, for somewhere between the author's scratch block and the printing press the diabolical tendency to error which seems to infest legal proceedings—possibly the very "devil" who is to be found in every printing office, by one false motion invalidated the whole carefully constructed notice. This would certainly not have happened if the date had been expressed in words. If such a mishap as this can befall an exhibition notice, avowedly "submitted for the criticism of the profession," presumably witten and watched over with extreme care, who can blame the bar for continuing in use many features of the notice which, though not strictly required, diminish the liability to error and often facilitates the investigation of facts—especially when the other fellow pays for it.

Respectfully yours,

F. W. GAIL.

STILLWATER, Minn.

THE LATE CHIEF JUSTICE.

On the 16th of December, 1894, at his home in the City of St. Paul, James Gilfillan, Chief Justice of Minnesota, died after a short illness. His death was somewhat unexpected, although he had been compelled to absent himself from the bench for some time.

On January 7, 1895, the State Bar Association held a meeting at the capitol in tribute to his memory. A memorial, drawn by Mr. Childs, Attorney General, as follows, was presented:

"On the 16th day of December, 1894, James Gilfillan, in the midst of his official duties and before the powers of his mind had been enfeebled by wasting age, was removed by an all-wise Providence from the ranks of the living.

"That the deceased was a great jurist, the voice of the bar of this country and numerous volumes of the reported decisions of this court bear witness. How he adorned his high office by wealth of legal learning, marked powers of analysis, great breadth of mental grasp, quickness of apprehension, unfailing courage, probity and industry, none know so well as those who, during the last twenty years have most frequently appeared before him. All who knew him in the private walks of life testify to the purity of his thoughts, the warmth of his affections and the simplicity of his manners.

"With what wisdom he wrought and how deep was his influence in shaping the jurisprudence of this state must indeed be left to the final judgment of the future, but tested by the opinions of his contemporaries, he has by such labor reared an enduring monument to his fame. His own words, fitly spoken on another solemn occasion over the bier of one he loved, are most appropriate now:

"'The judge who for a considerable time occupies a place in a court of last resort in a comparatively new

country, makes his impress upon the future of the state and society more than almost any other man. True, it is usually done quietly, without display, and almost imperceptibly, as the dew falls or the trees grow. His decisions concern men in all their daily lives and business, and establish their code of business morality. He marks out the path in which those who come after him in the judicial office, or in the profession of the law, must follow.'

"A veil, impenetrable to mortal vision, has been drawn between him and us. The state has thereby lost one of its most illustrious citizens; the bench, a shining ornament; the bar, its most conspicuous member; a family, a devoted husband and father.

"We therefore respectfully request that this memorial, although but feebly expressive of our regard for the memory of the deceased, be entered at length upon the records of the court, with such other proceedings as may be had in connection therewith, and that a copy thereof be transmitted to the afflicted family."

Thereupon the Attorney General delivered an impressive eulogy upon the character of the deceased and his judicial qualities of mind and his legal attainments. He was followed by Judge Atwater, of Minneapolis, who spoke of the great breadth of mind of the deceased, and his learning and christian character.

Hon. George B. Young mentioned some of the decisions which remain as imperishable monuments to his ability. Hon. Charles E. Flandreau recalled the love which he bore to the state which had so greatly honored him, and his great patriotism. Other addresses were made by prominent members of the bench and bar.

The Supreme Court thereupon made the following order, and directed that it be transcribed on the records of the court immediately after the memorial of the Association.

"Gentlemen of the Bar: The Court receives with grateful appreciation your just and merited tribute to the worth and rank of Chief Justice Gilfillan.

"The special work to which he gave long and laborous years of useful service was the moulding of the jurisprudence of our young state. To this work he brought natural abilities of a high order, the ripe experience of a learned lawyer, a keen sense of justice, an extraordinary amount of the resources of reason, perfect integrity and splendid moral courage.

"His judicial opinions in this court are the rich fruit of that work. They are the landmarks of our jurisprudence, and disclose a lawyerlike penetration to the very heart of the matter in hand, and a clearness of statement which leaves no uncertainty as to the point involved and decided; while his conclusions follow naturally from the underlying reasons and principles upon which the science of jurisprudence is based. These opinions are an enduring monument to his fame as a jurist, which will widen as the years advance.

"He administered justice without fear or favor, giving to the weak and the strong, to individuals and corporations their legal rights. His life was pure and his reputation stainless; neither was ever tarnished by an unmanly or dishonest act. Few men have left behind them higher claims to public respect and esteem, and none a more undoubted title to the grateful remembrance of the whole people of the state than he.

"It is fitting, then, that your memorial should be recorded in the records of this court for the day, there to remain a lasting testimonial to the virtues and public services of an honest man and a great judge. It is so ordered."

State vs. Conrad.

(Municipal Court, City of St. Paul, No. 3546.)

TRADES UNIONS—COUNTERFEITING LABELS OF—A dealer in cigars is not liable in a proceeding under Sections 3 and 4, Ch. 24, G. L. 1893, for selling cigars in boxes on which is a counterfeit of a label of a union or association of cigar-makers, which falsely states that such cigars were made by members of such union.

L. T. Chamberlain for Plaintiff, McLaughlin & Morrison for Defendant.

The defendant was prosecuted under sections 3 and 4, Ch. 24, G. L. 1893, for selling cigars in boxes on which was affixed a counterfeit of a union label. He demurred, and argued that said section applied only to manufacturers of and not dealers in cigars. Demurrer sustained.

ORR, J. The complaint in question was concededly formulated under sections 3 and 4 of chapter 24, G. L. 1893. This court approves most strongly of the general policy of such laws. * * * But it seems that in the carrying out of such an intention the legislature evolved a law imperfect and contracted in its scope, and not covering such a case as this at bar. So far as we can gather the scope of the act, from its wording, it would seem to be aimed at and to cover manufacturers of cigars, and not those who, either as jobbers or retailers, * * * deal in them, for section 3 provides that the gist of the offense shall be in knowingly using or utilizing any counterfeit or imitation of any label, trade mark, or form of advertisement of any person, association, union or corporation, by attaching or fixing the same in any manner to any box, package or parcel of goods, and provides that the use or utilization by attaching or affixing such label, trade mark or form of advertisement shall be a misdemeanor. As will readily be seen from an inspection of the complaint in this matter, the offense charged against this defendant is selling a box of cigars with a counterfeit label thereto attached; it does not charge him with attaching or affixing the label. It would, in the opinion of this court, be a violation of the construction to be applied to criminal statutes to find this defendant guilty of an infringement of the law in question. * * * The demurrer should be sustained on the ground that the offense charged in the complaint does not come within the statute.

M. B. Schmitz, Plaintiff, vs. Charles E. Allen, Defendant, and Thomas F. Oakes et. al., Receivers, Garnishees.

(Municipal Court, City of St. Paul.)

GARNISHMENT — NON-RESIDENT DEFENDANT AND PLAINTIFF—A debt due and payable in Minnesota may be garnisheed in this state where both plaintiff and defendant are non-residents.

J. W. Straight, for Plaintiff, Henry and R. L. Johns for Defendant.

Plaintiff and defendant were both residents of North Dakota. The garnishee was indebted to defendant and the debt was payable in this state. Plaintiff brought suit in this court, and obtained service by publication. Defendant appeared and set up the fact of non-residence of the parties. Plaintiff demurred to the answer. Demurrer overruled.

ORR, J. It appears from the answer that both plaintiff and defendant are residents of the State of North Dakota; that the defendant has been and is in the employ of the garnishees, and that he has always been paid his wages in said state.

The contention of the defendant is that this Court has no jurisdiction for the reason that both parties are non-residents and that the debt due from the garnishee has no situs in this state.

Laws for attaching the property of non-residents assume that the property has a situs distinct from the owner's domicile, and for their purpose a debt has a situs wherever the debtor or his property can be found.

Harvey vs. G. N. R'y. Co., 50 Minn., 405.

PERSONAL.

RESOLUTIONS on the death of Chief Justice Gilfillan were adopted in open court by the Olmstead County Bar Assn. at Rochester, on Monday, Dec. 17th, 1894. The resolutions were presented by Hon. C. C. Willson and, after their adoption, court adjourned to December 20th, out of respect for the deceased jurist.

O. B. Gould, of Winona, has been appointed District Judge for the Third Judicial District, to fill the vacancy caused by the elevation of Judge Start to the Supreme Bench. Judge Gould is well qualified to fill this responsible position, and his appointment gives general satisfaction. We hope soon to be able to present his portrait to the readers of THE JOURNAL.

H. H. Phelps has formed a law partnership with Towne & Harris, under the firm name of Phelps, Towne & Harris, with offices in the Palladio Building, Duluth.

L. Arctander, formerly of Duluth, is now located in Minneapolis in the New York Life Insurance Building.

Col. R. C. Benton, senior member of the firm of Benton, Roberts & Brown, died of apoplexy at his home in Minneapolis, on January 7th. Col. Benton occupied a prominent position at the bar of Minneapolis for many years. He was successively City Attorney, counsel for St. P. M. & M. and Great Northern railways.

At a meeting of the Stearns County Bar Association in St. Cloud, on Jan. 4, appropriate resolutions on the death of Chief Justice Gilfillan, prepared by Judge Searle, were adopted. Capt. Oscar Taylor and Judge Searle addressed the Bar in tribute to the memory of the dead jurist.

M. B. Davidson of Minneapolis, has moved to Duluth and formed a law partnership with Messrs. Carey and Agatin under the firm name of Agatin, Davidson & Carey.

REVISION OF OUR STATUTES.

A MEETING of the members of the state bar was held in the supreme court room on Saturday, 19th inst., in response to a call from the joint committee appointed by the St. Paul and Minneapolis Bar Associations to consider the important matter of procuring an act of the legislature authorizing a revision of the Minnesota statutes. As the meeting was not very fully attended owing to the short notice given, it was only informal and after an interchange of views it was adjourned to Tuesday, Jan. 29th, at 4 p. m., and the chair instructed to appoint a committee of five to notify the attorneys throughout the state that a meeting would be held on that date in the supreme court room, and to request the judiciary committees of the senate and house to confer with them at that meeting.

WE acknowledge receipt of a handy desk pad calendar from the Overman Wheel Company, Chicopee Falls, Mass. It is accompanied by the information that it will be sent to any address on receipt of ten cents in stamps to pay mailing expenses.

THE PORTRAIT.

HON. HASCAL R. BRILL, whose portrait appears in this number of the JOURNAL, was born August 10th, 1846, in Missisquoi county, Canada. At an early age he removed to Minnesota. He received his education at the Hamline University in this state, and the University of Michigan. He read law in St. Paul, and was admitted to the bar of the state December 31, 1869. Very shortly thereafter he formed a partnership with the Hon. Stanford Newel, under the style of Newel & Brill, which partnership continued until 1872, when he was elected Probate Judge of Ramsey county. In 1875 he was appointed Judge of the Court of Common Pleas of Ramsey county, which position he held until that court was merged in the District Court of the Second Judicial District, at which time he became, by virtue of the act abolishing the Court of Common Pleas, one of the judges of the District Court of the Second District, and has remained on the bench of that court ever since, being now the senior judge thereof.

On the bench Judge Brill has always been conscientious and impartial, and his decisions, which now regularly appear in these columns, are always learned, clear and perspicuous, especially in questions of practice, the rules of which in his district have to a great extent been settled by his decisions.

In politics Judge Brill has always been a Republican, but he has never been a partisan. His nomination by his own party has always been endorsed by the Democratic conventions of Ramsey County, and he was, at the last election, the candidate of both parties, being elected by an overwhelming majority over his Populist opponent.

REVIEWS.

General Digest, American and English, Vol. IX. Lawyers Co-Operative Publishing Co., Rochester, N. Y.

The General Digest of 1894, which comes to our table this month, is we apprehend, the most complete and thorough work of the kind ever published. In it not only are all the adjudications of all the courts of last resort of this country digested in such manner that a practitioner can speedily find the decisions, if any there be, rendered here upon any point desired, but also the decisions reported in the regular English and Canadian reports, thus rendering the work an almost complete compendium of the law of English speaking countries for the year ending September, 1894. This great work necessarily makes a very bulky volume, over three-thousand pages aside from tables of cases, etc., but the classification is so perfect, with logical subdivisions and ample cross references, that one experiences no difficulty in finding the year's cases upon the question desired, or assuring himself that there are none. Computing from the table of cases digested we judge that the work digests about 10,600 cases. As this immense number of "authorities" is the result of but one year's grind of the courts, and as the grist is annually becoming larger, the legal profession would soon be overwhelmed with the result of its own labors were it not for such works as this General Digest. If a large library is accessible, the Digest is a wonderful time saver; if not, it helps with what one has and furnishes the best possible substitute. The Digest furnishes a perfect key to the work of the courts for the past

year. It cites every publication of the case. It contains a complete table of cases criticised, distinguished, limited or over-ruled during the year, in our opinion an invaluable feature of the Digest. It also contains a table of cases digested. The Digest is issued in current parts and an annual volume, and renders accessible all the new law and legal thought, whether in opinions, treatises or law magazines.

A REVIEW OF THE LAW REVIEWS FOR DECEMBER, 1894.

THE AMERICAN LAW REVIEW leads the list of the Journal's exchanges in articles of timeliness, ability and general interest. Especially noteworthy in the current number is Charles C. Allen's paper on *Injunction and Organized Labor*, which with great learning discusses the new uses to which the injunctionary powers of the courts have been applied in the past year or two. Starting out with the proposition that prior to Judge Taft's Ann Arbor decision there are no precedents in favor of the use of the injunction to prevent crime, except as against parties named in the bill and to protect specific property from irremediable injury, he shows with what startling rapidity have been developed the strange and dangerous doctrines enunciated by Judge Jenkins in the Northern Pacific case and by Judges Woods and Grosscup in the Debs case. If these last are right, he points out that an injunction will lie against persons not parties to the suit, and upon whom process has never been served, to restrain them from the commission of offenses against public convenience, instead of specific property, and that the punishment for crimes enumerated in the statute books is henceforth to be meted out by courts of equity, proceeding on affidavits instead of after a trial on the merits and the determination of the facts by a jury of the accused man's peers. Equally valuable are the Review's *Notes* and *Notes of Recent Decisions*, which in vigorous English criticise and comment on points of contemporary importance. In these days of receiverships, the bar will be particularly assisted by the discussion of the question as to whether a receiver can be appointed for an insolvent corporation on its own petition. The answer is in the negative, the only case to the contrary being the famous one about the Wabash railroad. If courts look at the substance rather than the surface, does not this conclusion mean that there is grave doubt about the validity of half the receiverships of recent date, in view of the fact that they have been instituted after collusive suits in which the nominal complainant has acted only at the request of the insolvent and for the purpose of achieving indirectly, what would have been denied had the insolvent itself made the the application in its own name?

The article of most general interest in the *Yale Law Journal* is one on "The Liability of an Attorney for Erroneous Advice," in which a large number of cases is cited and digested.

In the same connection, *The Green Bag* publishes a London Letter in which it is stated that Sir Richard Webster earned during the legal year which closed last August about $200,000 and that his fees in four days at the summer assizes amounted to $15,000. These figures seem enor-

mous, but the Journal is inclined to believe that attorneys as a rule underestimate the amount of their earnings. Lawyers are slovenly bookkeepers. If they were careful to note every dollar received and spent, many of them would be astonished at their incomes and their expenditures.

The *Harvard Law Review* comments on the case of Minot v. Winthrop, decidedes by the Massachusetts Supreme Court Oct. 17, 1894, in which the constitutionality of the Massachusetts collateral inheritance tax law was sustained. The court for this purpose held that the right of succession was no more a necessary incideut of property nowadays than it was under the old Roman law, but that the state had full power to regulate the devolution of property on the death of its owner. It also held, with perhaps more doubtful accuracy, that the right of succession was a "commodity" and as such taxable. This was on the analogy of the cases holding a corporate franchise a "commodity." Decisions on these questions are of value to Minnesota lawyers, because the present legislature will probably enact a collateral inheritance tax law. For this reason the Journal also calls attention to another case recently decided by the Supreme Court of Maine (State v. Hamlin, 30 Atl. R. 76, 25 L. R. A. 632), which agrees with the Massachusetts court on the first point it enunciates as above noted, but which holds that such a tax is an excise or duty and not a tax on property.

The *Albany Law Journal* (No. 23) reprints from a Washington newspaper an article on the bad manners of the United States Supreme Court Justices while on the bench. The writer finds fault because the justices laugh and talk among themselves, look out of the windows, leave the room, yawn and otherwise discomport themselves during the arguments in their presence. Lawyers of wide experience get hardened to such things, and although the JOURNAL knows of no decisions on the question, it ventures to say that should the question ever come before the courts it will be held that judicial manners are *sui generis*, and that no rudeness of a judge on the bench is a breach of etiquette. No. 23 of the same *Journal* gives an abstract of Corliss et al. vs. Walker et al. recently decided by Judge Colt, of the United States Circuit Court, where it was held that a photographer, even though he owns the negative, may not print copies from it except at the request of his customers, but that when a man becomes a public character by reason of his achievements, or otherwise, the case is different, and he may be said to have surrendered his rights in this respect to the public.

The *New Jersey Law Journal* comments adversely on the rule of the United States Circuit Court stated by Judge Caldwell in Bracken vs. U. P. Railway Co. (12 U. S. App. 421), to the effect that exceptions taken to the charge of the court after the jury have retired to frame their verdict will not be considered on appeal. There is surely little sense in the rule, because the court can always recall the jury if it desires to modify its charge in view of the suggested exceptions, and the difficulties of following a charge for the purpose of making exceptions are great enough for counsel anyhow without imposing a haste which denies all time for reflection.

THE DISTRICT COURTS.

National New Haven Bank vs. Northwestern Guaranty Loan Company et. al.
(District Court Hennepin County.)

CORPORATIONS—DIRECTORS, PERSONAL LIABILITY OF—The proper remedy for the enforcement of the personal liabili y of directors of a corporation under G. S. 1878. ch. 34, sec. 9, is an action in equity on behalf of all creditors, and not an action at law.

John B. Atwater, for Plaintiff, Koon, Wheelan & Bennett for Defendants.

This was an action at law by a creditor of the Northwestern Guaranty Loan Company, a corporation, to enforce the individual statutory liability of its directors.

Plaintiff alleged itself to be the holder of seven promissory notes, endorsed, and payment thereof guaranteed by the Northwestern Guaranty Loan Company.

The directors of the said Guaranty Company approved the said notes, and authorized the company to negotiate the same and to guarantee the payment thereof, and also authorized the company to issue written and printed representations respecting the maker of each note, in substance as follows:

"Northwestern Guaranty Loan Company, Guarantor. Payable at American National Bank, New York City. Maker is a shrewd man, of good character and standing, able to make a showing of ample resources to meet his obligations. The guarantor of this note is secured by ample collateral for its guaranty."

Facts were stated which would show a liability of the directors, not only under Sub-Div. 2, but also under Sub-Div. 3 of Sec. 9, of Chap. 34, G. S. 1878.

Prior to the commencement of this action, the said corporation had become solvent and a receiver of its assets and effects had been appointed pursuant to Chap. 148 of G. L. of 1881.

A demurrer to the complaint was interposed by the directors and was sustained on the ground that the proper remedy under Sec. 9, of Chap. 34, G. S. of 1878, was a suit in equity by one creditor in behalf of himself and all other creditors.

JAMISON,
RUSSELL, J. J.

The cases cited by plaintiff are as follows: Dodge vs. Minnesota, etc., 16 Minn., 368; Johnson vs. Fisher, 30 Minn., 173; Merchants National Bank vs. Bailey, 34 Minn..323; Patterson vs. Stewart, 41 Minn., 84; Nolan vs. Hazen, 44 Minn., 478; Thresher Co. vs. Langdon, 44 Minn., 40.

William Hughes vs. Joseph B. Dearborn.
(District Court Olmstead County.)

NEW TRIAL—INADEQUATE DAMAGES—Action for alleged wrongful acts causing death; verdict for plaintiff for $1.00. Motion to set verdict aside and for a new trial on ground of inadequate and insufficient damages granted.

C. C. Willson for Plaintiff, H. A. Eckholt for Defendant.

Action to recover for the death of a minor son of plaintiff alleged to have resulted from injuries inflicted by a bull owned by defendant. The bull was shown to have been of the value of, and to have sold for $20.00. The jury found brought in a verdict for the plaintiff, but assessed his damages at $1.00. The plaintiff moved for a new trial upon the ground that the damages were inadequate and insufficient, appearing to have been given under the influence of passion or prejudice. (Gen. Laws, 1891, Ch. 80, § 253, Sub-Div. 4.)

START, J. Although a verdict for defendant upon the evidence given upon the trial would not have been

disturbed, this court will not permit such a verdict as was rendered in this case. It is disgraceful to let it appear of record that a jury of Olmstead county value the life of a human being, however young, at $19.00 less than the amount for which the bull that inflicted the injuries was sold. The plaintiff, if entitled to a verdict, should have received a fair sum under the statute. For the honor of Olmstead county, and as the statute as now amended so directs, a new trial of this action is ordered.

Jacob Legre, as Assignee of Stoppel, et. al., vs. Margaret Smith, et al.

(District Court, Olmstead County.)

VENDOR AND VENDEE—POSSESSION OF CHATTELS.—Presumption from—Facts to be established to set aside sale on ground of fraud.

C. C. Willson for Plaintiff, Chas. E. Callaghan and H. A. Eckholt for Defendants.

START J. Under G. S. 1878, Ch. 41, § 15, a *bona fide* purchaser of chattels for value, without notice of the vendor's intent to defraud his creditors, where there is no change of possession of the chattels purchased, is not required to prove that in fact the vendor had no such intent to defraud his creditors in order to maintain title against such creditors.

Where there is change of possession, creditors must, to impeach the vendee's title, affirmatively show, first, that by the sale the vendor intended to defraud his creditors. Second, that the vendee participated in and had notice of the intent. Establishment of the first but failure to prove the second proposition does not impeach the vendee's title. That he is a *bona fide* purchaser is a complete defense in spite of the intent of his vendor. His possession of the chattel raises a presumption that he is a *bona fide* purchaser and *prima facie* proves his defense. The vendor's creditors must, to overthrow his title, rebut this presumption.

But where the chattel remains in the possession of the vendor, the status of the parties is reversed. Such possession by the vendor raises a presumption that the vendee is not a *bona fide* purchaser, and that the sale is fraudulent. The vendee must overcome this *prima facie* case in favor of the creditors and affirmatively establish that he is a *bona fide* purchaser.

The only effect of Section 15 is to change the *onus probandi*. Under it a *bona fide* purchaser for value, without notice of the vendor's intent to defraud creditors, is not deprived of the property purchased, although it is left in the possession of the vendor, because it is impossible for him to affirmatively show what the actual intent of his vendor was in making the sale (48 Minn. 399, 6 Neb. 328). This section is not to be read literally but with reference to its purpose and in harmony with the other provisions of Title 3 and the repeated decisions of the Supreme Court upon fraudulent sales. Plaintiff's motion for a new trial is denied.

In re appeal of the Great Northern Railway Company and the Northern Pacific Railway Company from the order of the Railroad and Warehouse Commission of the State of Minnesota, relating to certain grain rates arrising upon the complaint before said Commission of Elias Steenerson vs. Great Northern Railway Company.

(District Court, Ramsey County, No. 56,120).

RAILROAD AND WAREHOUSE COMMISSION.—Scope of power of—who may appeal from decision of.—The action of the Railroad and Warehouse Commission must be limited in any particular case to remedying the particular wrong complained of. It cannot, under a complaint alleging that the rate between two termini of the road is unjust, make an order regulating the rates to be charged between all points on the road. Any railroad other than the one against which complaint is made, which, by reason of being a competing line or otherwise, may be effected by the proceeding, and the orders made therein, is entitled to intervene and be heard therein.

M. D. Grover and J. H. Mitchell, Jr., for Appellants. *H. W. Childs*, for Respondent.

Complaint was made by one Elias Steenerson before the Railroad and Warehouse Commission on behalf of himself and all others similarly situated, alleging that the rates charged by the Great Northern Railway Company between certain points on its line of road were extortionate and unjust. Application was made by certain other railway companies, among them by the Receivers of the Northern Pacific Railroad Company, for leave to intervene and interpose answers in the said proceeding, alleging that they were interested in the result of the said proceeding and might be seriously effected thereby.

KERR, J. This proceeding was iniated before the Railroad and Warehouse Commission as the law requires, by the complaint of Elias Steenerson, for the specific purpose of having freight charges on grain fixed on the Great Northern Railway, from East Grand Forks, Fisher and Crookston, respectively, to Duluth and Minneapolis, respectively. No charges were made of unfair rates on any other portions of the numerous lines and branches of that railway company in this state, and no relief was sought except as between the terminals named, on through shipments. Upon this complaint, after refusing the petition of the said three railway companies to intervene, the Commission made the order appealed from, fixing a horizortal scale of freight rates for the Great Northern road on all its lines and branches throughout the State of Minnesota without reference to locality. This order fixes the rate per one hundred pounds for five miles and under; for ten miles and over five; for fifteen miles and over ten; and so on for each additional five miles, up to four hundred miles. The first question that confronts us is: Did the Commission, under the complaint of Steenerson, have jurisdiction to make such a sweeping order? If it had, then unquestionably, to my mind, not only the Milwaukee and Omaha roads who here ask to intervene, but every other railroad in the state, which competes with and parallels any part of the Great Northern road, are as certainly affected by this as the Northern Pacific. If the Commission had not power under said complaint to make so comprehensive an order, and if the hearing in this court must be confined to the portions of the road specifically mentioned in this complaint, then, in my opinion, sufficient has not been shown to justify the intervention of any road except the Northern Pacific. I am constrained to adopt the view that the Honorable Commission has exceeded its powers under that complaint. The law provides that such action of the Commission shall be based upon a complaint duly verified, and the phraseology of the law throughout implies the correction simply of the abuse or wrong complained of. It is true it may be necessary to examine into conditions and freight rates on other roads, or on other lines or branches of the same road, to arrive at a wise solution of the question involved, but that does not imply the power to fix rateson such other lines or branches in this proceeding. It is, therefore for the purposes of this trial here announced that nothing will be tried or determined by this court except the issues raised by the complaint and the answers thereto. The next question which is seriously contested

is the right of the Northern Pacific, which is a parallel and competing line between the points mentioned in the complaint, to appear and be heard as a party interested. It is contended by the respondent that the Northern Pacific is not interested in the sense that an intervenor must be, under the statutes of this state governing intervention, and the construction of the same by our Supreme Court. It is urged, on the other hand, by the appellant that this is not an ordinary action; that it differs so widely in spirit and form from the ordinary suit in equity or action at law *inter partes*, as to take it out of the technical rules governing such actions. Be this as it may, it must be manifest, viewing the case from the standpoint of common sense and common experience, that two parallel and competing lines of railway between the same termini and with practically the same track mileage, must charge a uniform rate of freight in order to both do business. A compulsary reduction of freight rates on the one, is practically as effectual to reduce the freight rates on the other, as though it had been named in the order. But it is argued that complaint being against the Great Northern Railroad alone, the investigation can only be as to what is a reasonable rate for that road, without reference to any other; and that it would therefore subserve no beneficial end or purpose for the Northern Pacific to intervene, although it might be able to show that the rate would be ruinous to it. I will not pass upon this question now, but I may suggest that this case itself affords an illustration of the possibilities such a view would entail. The Commission has fixed these rates at fifteen cents for the Great Northern alone, with a view solely to its conditions and circumstances. We will assume for the purposes of this argument, that the rate thus fixed is correct and just, viewed from that standpoint, and cannot be successfully resisted. Thereupon it becomes unlawful for the Great Northern to charge any other rate than that fixed; for the law provides (Amendment of 1891) that thereafter "it shall be unlawful for such common carrier to charge or maintain a higher or lower rate, fare, charge, etc., than that so fixed by said Commission, unless and until a court of competent jurisdiction shall have otherwise ordered." Now comes some disaffected citizen and makes complaint of similar character against the Northern Pacific, with respect to the same haul, rendering it obligatory upon the Commission to investigate and establish the rate between the same points for that company also. This it does upon the same theory, and finds that a proper and reasonable rate for that company, in view of its condition, value, circumstances of haul, etc., is seventeen cents or thirteen cents, as the case may be. This decision also, *as thus arrived at*, is correct and invulnerable, and such rate thereupon becomes the only rate that can be charged by the Northern Pacific Company. It is obvious that the inevitable result of such action is to deprive the Company for whom the higher rate is fixed, of all such freight. Is it possible that the legislature intended that the law should bear such construction? It may be well that the shipper should not be compelled to pay the rate found reasonable for the *least* favored road, or the road whose

cost and management has been so extravagant as to make higher rates necessary; but may it not also be that competing and parallel lines of Railroad should not be compelled, regardless of condition, to carry freight at the lowest figure that can be borne by road most highly favored as to cost, management and circumstances of haul? Such might be the result, it is true, if the roads were permitted to act as private enterprises; but this is a public question, and only in virtue of its being such it is before this Court. Viewed in that light, we must consider not only the interest of the shipper but that of the State, and the people living along the lines of both roads, who are interested, to some extent at least, in the maintenance and existence of both roads, and in the welfare and compensation of their employs, as well as in the lowest freight rates. The law should be construed, if possible, so as to subserve and protect all these interests, in fixing public freight rates, albeit in the difficulties in the way of such construction may seem almost insurmountable, under the letter of the law. The act establishing the Commission provides that any carrier affected by the order may appeal. The signification of the term "affected," as thus used, is "impressed, moved or touched, either in person or interest." (Vide Webster.) The Northern Pacific Company has appealed under this provision, as in my opinion it was entitled to do. It is, therefore, I think, a party to the case in this Court, even without the formality of the intervention it seeks, but as it can do no harm to grant its motion in that regard, it is so ordered.

Martin Morgan vs. St. Paul City Railway Company.

(District Court, Ramsey County, 55,227.)

PRACTICE—SETTLING CASE—LACHES.—An unexcused delay of five months from notice of an adverse decision to be giving of notice of motion to settle a case or for a bill of exceptions constitutes such laches that the case will not be settled if objection be made.

S. P. Crosby for Plaintiff. Munn, Boyeson & Thygeson for Defendant.

BRILL, J. This action was brought on for trial before the court with a jury, April 5, 1894. A very important question of law was raised at the trial upon the determination of which depended the plaintiff's right to recover. It was the only question in the case, aside from the amount of damages. It being of great importance and somewhat doubtful, and the same question being under consideration of this court, it was agreed by counsel at the trial, at the suggestion of the Court, perhaps, or with its concurrence at any rate, that the point should be reserved for future hearing, and the verdict should be taken simply on the amount of damages; and it was agreed that there should be a further hearing by the Court upon the question of law, and that the Court should direct judgment for the plaintiff or defendant as it might determine the law to be. Accordingly, assessment of damages was made by the jury, and the attorneys were heard at a subsequent day upon the question of law, and upon July 23, 1894, the Court made its order directing judgment to be entered for the defendant. Upon the next day notice of the filing of the order was given to plaintiff. August 7, 1894, plaintiff took an appeal from the order, to the Supreme Court. On December 29th a proposed case was served for the first time, and notice of settlement for January 5, 1895, was served. On January 5th the parties

appeared before the Court and the defendant objected to a settlement of the case, and moved to dismiss the proceedings taken in that behalf. Sec. 255, Chap. 66, G. S., 1878, provides that

"The party preparing a bill of exceptions or case shall, within twenty days after the trial, serve it upon the adverse party, who may, within ten days after such service, propose amendments thereto; and within fifteen days after service of such amendments, the same, with the amendments proposed thereto, shall be presented to the judge or referee who tried the cause, for allowance, or settlement or signature, upon a notice of five days; if not presented within the time aforesaid, or such further time as may be stipulated or granted, the same shall be deemed abandoned."

Twenty days after trial, where the case is tried by the Court, is construed to mean twenty days after the filing of the decision. Rule 47 of the rules of the District Court, provides that

"In case of trials by the court or by referees, the time for serving a case or bill of exceptions shall be computed from the date of service of notice of filing the report, decision or finding."

Where a motion for a new trial is made upon the minutes of the Court, the statute provides that the case or exceptions must be settled "in the usual form." The statutory provision as to time, before quoted, applies to such a case, time being reckoned from the time of filing the decision upon the motion. This was not, however, a motion for a new trial upon the minutes; but the hearing upon the question of law was a continuance of the trial and the case was not fully decided until the order of the court was filed. And the statutory provision as to time must be held to apply. If the statute did not make provision for such a case, yet a party desiring to make a case must undoubtedly proceed with diligence. In this case more than five months have elapsed since the decision of the case, and no excuse for the delay appears.

The objection of defendant to the settlement of the case at this time must be sustained, and its motion to dismiss the proceedings is granted.

Nickell, as Assignee, vs. Fond du Lac Light, Power and Railway Company.

(District Court, Ramsey County, 60,101.)

CORPORATIONS, FOREIGN—SERVICE ON —Jurisdiction of Contracts.

A. D. Polk for Plaintiff. H. S. Cole for Defendant.

A foreign corporation, whose principal place of business is in another state, but which has a managing agent and an office in this state, and which conducts some of its business here, may be subjected to the jurisdiction of the Courts of this state by service upon such managing agent.

An action for payment of amount due under a contract which is performed in another state, but made in this, in which no place of payment is named, and the payee in which is a resident and citizen of this state, is upon a cause of action rising in this state within the meaning of the statute subjecting a foreign corporation defendant to the jurisdiction of the Minnesota Courts.

BRILL, J. The defendant is a Wisconsin corporation, transacting its principal business within that state. Its president resides in the state of Minnesota. Service of the summons was made upon the president in this state. The Cooley and Vater Company, with whom the contract was made with defendant, is a corporation organized and existing under the laws of this state, and with its principal place of business in this state. The laws of the state applicable to the question raised present a peculiar condition of things. Sec. 59 of Chap. 66

of the G. S., 1878, provides that the summons shall be served by delivering a copy thereof, if the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein. Section 71, of the same chapter, provides that

"No corporation is subject to the jurisdiction of a Court of this state, unless it appears in Court, or has been created by or under the laws of this state, or has an agency established therein for the transaction of some portion of its business, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and, in the last case, only to the extent of such property at the time the jurisdiction attached."

These provisions were found in the Revised Statutes of 1866. In 1866 at the same session at which the Revised Statutes were adopted, the legislature passed an act in the following terms:

"Section 1, that the summoned in any civil action or proceeding wherein a foreign corporation is defendant may be served by delivering a copy thereof to the president, secretary or any managing or general agent of said foreign corporation, and such service shall be of the same force, effect and validity as like service upon domestic corporation; Section 2, this act shall have full force and effect, notwithstanding any provisions of the General Statutes, or other law of the state inconsistent herewith, and shall be published with and as a part of the General Statutes."

In 1891 the legislature substituted for said last named act of 1866 the following (omitting therefrom provisions which are not material to this inquiry):

"That the summons, or any process, in any civil action or proceeding, wherein a foreign corporation or association is defendant which has property within this state, or the cause of action arose therein, may be served by delivering a copy of such summons or process to the president, secretary or any other officer, or to any agent of such corporation or association, and such service shall be of same force, effect and validity, as like service upon domestic corporations. * * * This act shal have full force and effect, notwithstanding any provisions of the General Statutes or other law of the state inconsistant therewith."

The only other provision in the statute relating to service upon foreign corporations, aside from insurance companies, is the provision found in Sec. 64, Chap. 66, which provides for publication of the summons

"When the defendant is a foreign corporation and has property within this state."

It is claimed by counsel for defendant that the law of 1891 and Sec. 71 of Chap. 66 are to be construed together, the latter fixing cases in which Courts may obtain jurisdiction, and the former relating to the manner of obtaining jurisdiction, and that in this case the service upon the president is ineffectual, because none of the conditions specified in Sec. 71 exist. If this claim is correct, the anomaly may be presented, that a foreign corporation may have an agency established in this state for the transaction of some portion of its business, which is sufficient under Sec. 71 to give the courts of this state jurisdiction, but the Court cannot subject the corporation to its jurisdiction because there is no method provided for the service of summons or rather process upon it in such case, there being no provision either in Sec. 59 or Sec. 64 or in the law of 1891 for service in such a case. However, in the case at bar, if it is conceded that the claim of the defendant is correct as to the construction of these various provisions, I think it must be held that defendant has an agency in this state for the transaction of a portion of its business. The principal business of the defendant is

transacted in the state of Wisconsin, but the president has an office in St. Paul and the corporation has designated his office as the place for the transaction of such business incidental to its main business, as may be conveniently done here. The letter heads of the company are as follows: "Fond du Lac Light, Power and Railway Company, Fond du Lac, Wisconsin. Office of the President, No. 517 Manhattan Building, St. Paul, Minnesota." The affidavit of the president says that this is "only for the purpose of locating him, as a matter of convenience." That is, any person who has business to transact with the company, which may be done by the president (and he states that he has general charge of all the property and business of the company) may transact it at No. 517 Manhattan building in St. Paul. It appears that considerable business of importance has been done by the president at that office. The contract in this case was made there; payments have been made and notes given, and negotiations for settlement have been had there; and no change in the situation appears since these things were done. It is not necessary that the company should pay the rent of the office, nor that it should keep its accounts thereat. It has established an agency at the place named for the transaction of a portion of its business in this state.

The remaining question is whether the cause of action in this case arose in this state, within the meaning of the law of 1891. The cause of action in this case is not the contract, but the failure by defendant to pay plaintiff, or his assignor, according to the terms of the contract.

The contract was made in this state, and the work for which payment was to be made was to be done in Wisconsin. No place of payment was designated in the contract. It was necessary for the defendant, in order to discharge its obligation, to find the payee and make payment. The Cooley and Vater Company, to whom payment was to be made, was necessarily within this state, and payment could be made to it here only, unless some person was found outside the state authorized to receive payment, and it does not appear that there was. The contract was made here, the payee was a resident here and had its place of business here, and in the absence of any agreement to the contrary, it must be taken that payment was to be made to it here. It appears that some notes were given which were made payable in Chicago, but to what extent notes were given or whether they have yet been paid does not appear; and the action is not brought on the notes. I think it must be held that the cause of action against the defendant arose within this state.

Jennette W. Hale vs. Life Indemnity & Investment Company.

[District Court, Hennepin County.]

LIFE INSURANCE.—SUICIDE.—Presumption of law.

Larrabee & Gammons for Plaintiff, *James O. Pierce* for Defendant

When it appears from the evidence that the insured was found suffering from the effects of morphine poisoning, and that he subsequently died from the effects of a large quantity of morphine taken internally, there being no evidence to show that the morphine was in fact taken by the deceased with the intent to destroy his life, or that there existed any of the conditions which ordinarily lead men to commit suicide, there arises a rebuttable presumption of law that death was occasioned by accident and not by design.

ELLIOTT, J. At the trial the court directed the jury that there was no evidence upon which they would be justified in finding that the assured came to his death by his own volun-

tary act; and that the only question for them to determine was the value of the insurable interest, if any, which the plaintiff had in the life of the assured. This instruction proceeded upon the theory that the evidence on this issue was not sufficient to support a verdict, had one been rendered in favor of the defendant.

It appeared that on Sept. 7, 1892, the defendant company issued its policy numbered 14,146 for $10,000 upon the life of James Burr Rouse, who then resided at 2614 Portland avenue, in the City of Minneapolis, Minnesota, and was engaged in business as an insurance agent. It further appeared that Rouse was indebted to the plaintiff, Jennette W. Hale, and that on the 13th day of September, 1892, this policy was duly assigned, with the assent of the defendant company, to the said Jennette W. Hale as security for the payment of $10,000. The notes in evidence had been given by Rouse for the purpose of paying and taking up the note for $10,000 above referred to, bearing date the 13th day of September, 1892, which latter note was surrendered and destroyed at the time of giving the new notes. There is no reasonable doubt but that Mrs. Hale was a creditor, and as such had an insurable interest in the life of Rouse for the full amount of the policy. Rouse died at Minneapolis November 25, 1893. The greater part of the evidence offered by the defendant was directed to showing that the death of the assured was caused by morphine poisoning, and there can be no serious question but that his death was caused by the taking of a large quantity of morphine. Dr. Dennis was called to see Rouse, and reached him about 6 o'clock in the morning of Nov. 25. He found Rouse lying on a bed in a comatose condition, breathing loud, unable to speak, blue in the face, pulse irregular, some perspiration, eyes contracted, and unable to swallow. From his own observations, and from information as to the patient's condition prior to the time that Dr. Dennis saw him (obtained from Dr. Austin) witness testified that Rouse was suffering from the effect of a large quantity of morphine taken internally. Both Dr. Dennis and Dr. Austin treated the patient for morphine poisoning. On cross-examination Dr. Dennis disclaimed any knowledge as to whether Rouse had taken the morphine himself or whether it had been administered to him. The evidence of the other physicians was practically the same and tended to show that the deceased came to his death from morphine poisoning. The evidence of the undertaker, Landis, tended to show that Rouse was in good health up to the time of his death, and that his death came suddenly and not from natural causes. Counsel for the defendant claims the benefit of any admissions which may be found in the proofs of death and the exhibits attached thereto. The proofs of death were offered in evidence by the plaintiff for the purpose of showing compliance with the conditions of the policy and could be offered by the plaintiff for no other purpose. "The proofs of death, including the coroner's inquest and the verdict of the coroner's jury, are not admissible, except for the pur-

pose of showing the performance of conditions in regard to preliminary proofs." May on Ins., sec. 325; Cook Life Ins., sec. 119; U. S. L. Ins. Co. v. Kidgart, 26 Ills. App. 566. But the defendant would be entitled to the benefit of any admissions contained therein on the theory that when they are once in evidence they may be considered for any purpose for which they are competent. Cook Life Ins., sec. 119; Walthus v. Mut. Ins. Co., 65 Cal. 417; Helwig vs. Mutual Ins. Co., 132 N. Y. 331. In Walthus v. Mut. L. Ins. Co., 65 Cal. 417, the proof of death and verdict of the coroner's jury, which were offered to show compliance with the conditions of the policy, showed also that the deceased came to his death from the effect of prussic acid taken voluntarily, and it was held to make a prima facie case of death by voluntary act. See Biddle II., sec. 1012. In Mut. L. Ins. Co. v. Stibbe, 46 Md. 302, the proofs were also offered by the defendant. In Bendz v. Mut. Ben. Co., 40 Minn. 202, it was held that plaintiff was not concluded by statements contained in the proofs, but might at the trial offer evidence on the issue. To the same effect is Mut. P. L. Ass'n. v. Keels, 29 Fed. Rep. 198; Parmelee v. Ins. Co., 54 N. Y. 193; Home Benefit Ass'n v. Sargent, 142 U. S. 691; Biddle, Life Ins. II., sec. 1013; Bliss, Life Ins., sec. 295, and cases cited in note 2. I am unable to discover anything in the proofs and exhibits attached thereto, which were offered in this case, which even tends to sustain defendant's contention that Rouse's death was caused by his own voluntary act. It contains no admissions. In answer to question nine of her affidavit, plaintiff says: "According to physicians, meningitis, death hastened by an accidental overdose of morphia. See report of coroner hereto attached, marked 'Exhibit A.'" There was no verdict of a coroner's jury, but attached to the proofs are statements of two physicians and a statement of the coroner to the effect that he deemed an inquest unnecessary. If these documents are to be considered as independent evidenc of the facts stated therein, they are evidence that death "was caused by cerebral meningitis (commencing meningitis) in conjunction with an overdose of morphia." (See Exhibit A.) Or, as stated by the coroner, Dr. Spring, "Said person came to his death by meningitis, death hastened by accidental dose of morphine."

The evidence, then, simply shows that the deceased was found suffering from morphine poisoning and that he died from the effect of morphine taken internally. There is absolutely no evidence direct or circumcumstantial which shows, or tends to show, that the poison was taken by Rouse with suicidal intent. The policy contains a provision that it shall be void if the assured dies by his "own voluntary act." The cause of death must be inferred from the condition in which the deceased was found by Dr. Dennis. Would the jury have been at liberty to infer voluntary self-destruction from the facts in evidence? Whether in any given case death is or is not the result of suicide is obviously a question which should be determined by a jury, if there is any evidence which would sustain the verdict of the jury should they find that the deceased committed suicide. Cook, Life Ins., sec, 44; Washburn v.

Nat. Acc. Ass'n, 10 N. Y. Sup. 366; Shank v. United Brethren, etc., Soc., 84 Pa. St. 385. But this rule is subject to the limitation that where the facts proved with reference to the mode of death admit equally of the inference that death was the result of accident or suicide, the finding should be that death was accidental, the presumption being that the instinct of self-preservation would prevent a person from destroying his own life. Cook, Life Ins., sec. 44. In this case the plaintiff had the burden of showing the fact of death (Biddle II., sec. 843), and the defendant of showing that the assured came to his death by his own voluntary act, and this burden remained upon the defendant throughout the trial. Mut. L. Ins. Co. v. Hayward (Tex.), 27 S. W. Rep. 36; Gooding v. U. S. L. Ins. Co., 46 Ills. App. 307; Goldsmith v. Mut. L. Ins. Co., 102 N. Y. 486; Whitloch v. Fidel. & Cas. Co., 78 Hun. 262; Piedmont, etc., L. Ins. Co. v. Ewing, 92 U. S. 377; L. Ins. Co. v. Durgan, 58 Fed. Rep. 945; Biddle II., sec. 482, and cases there cited. It was therefore necessary for the defense to prove by a fair preponderance of the evidence that the assured voluntarily took his own life. In my judgment the evidence fell far short of this. It was essential that it should go further than it did, and show some surrounding facts and circumstances from which the fact of self-destruction might reasonably be inferred. It appeared that the assured died from the effects of poison, but it was incumbent upon the defendant to show some facts inconsistent with accidental death or at least raise a reasonable suspicion of suicide. There is nothing in evidence to show a motive for self-destruction. It does not appear that the deceased was financially embarrassed or that there was anything in his family or social relations which would make life unattractive to him. The fact that he was indebted to Mrs. Hale on these notes standing alone is not evidence from which even the slightest inference could be drawn. The law presumes that the love of life is sufficient for its preservation unless some stronger influence operates upon the mind of the individual. Scientific writers state that there are about sixty conditions or causes other than ethnological and social to which the act of suicide can ordinarily be traced. Morcilli on Suicides. The defendant should be able to produce evidence tending to show the existence of certain of these conditions, but nothing of the kind appears. It does not appear that Rouse was of a temperament predisposed to those conditions and diseases which lead to suicide, or that he was then or had ever been suffering from melancholy or such kindred weaknesses. Something of this nature, some facts, some circumstances should appear in order that the jury might have something upon which to base a conclusion that the deceased voluntarily took his own life. Had the case gone to the jury upon the evidence it is possible that the jury might have inferred that it was a case of suicide; but it could have been nothing more than a mere inference from a fact from which the law draws a contrary inference. When a man is found with a pistol ball in his head, one man may infer that he has committed suicide, while another man with equal reason might infer that it was a case of accidental shooting. The one would

have as strong reasons for his belief as the other, but there would be no evidence of either. There would appear simply the condition from which there would arise the presumption of accidental death. In all legal discussions the existence of certain qualities in human nature such as sanity, honesty and proper conduct is and always has been presumed. "De quodlibet homine præsumi turquod sit bonus homo donec probitur in contrarium." So says Bracton years ago. Hence, in the case at bar the plaintiff is aided by a presumption which arises from the condition disclosed by the evidence.

Much confusion has grown out of the attempts to classify presumptions as presumptions of law and presumptions of fact. Counsel for defendant, while admitting that there is a presumption against self-destruction, would evidently classify it as a presumption of fact, that is, a mere inference, which the jury was at liberty to draw as a logical conclusion from other facts in evidence, but it seems rather to be a rebuttable presumption of law, the *presumptio juris*, of the Roman law, *i. e.* one which compels the Court to draw a particular inference from a particular fact or from particular evidence. From the facts disclosed by the evidence in the case at bar there arose a disputable presumption of law that the deceased did not voluntarily take his own life. The strength of this presumption is well stated by the supreme court of Wisconsin in *Bochmyer* v. *The Mutual Reserve Fund Life Ass'n.* (Wis. 1894), 58 N. W. Rep. 399, where Pinney, J. said: "Again, the presumption in such a case against suicide is but a disputable presumption, and stands for the fact only until it is broken by evidence. Preponderating evidence is all that is necessary to displace it. Lawson, Pre. Ev. 138-9; Ins. Co. v. Delpeuch, 82 Pa. St. 235. It was not correct to characterize this presumption as a strong one any more than in a charge to characterize any particular facts as strong evidence of a conclusion sought to be established, for this would be the invasion of the province of the jury. Bigelow v. Doolittle, 36 Wis. 119; Rindskopf v. Myers (Wis. 1894), 57 N. W. Rep. 967. It may be said that presumptions are not of uniform strength or weight. It is so, not as a matter of law, but by reason of the facts out of which they arise or with which they are met or opposed. In any such case the question is one of fact whether the evidence introduced preponderates against and overcomes the presumption. The question is one of fact for the jury and the duty of the Court is fully performed when it declares the existence of the presumption and that it may be displaced or overcome by evidence in the case the weight and effect of which is for their determination." In other words, if there is any evidence in the case tending to overthrow the presumption, it should be submitted to the jury; if not, the Court should assume the responsibility and direct a verdict. This presumption against suicide is recognized in many cases and by all the text writers. "When the dead body of the assured" says May, "is found under circumstances and with such injuries, that the death may have resulted from negligence, accident or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, a gross moral turpitude not

to be presumed in a sane man." May on Ins. (3rd Ed.) Sec. 325; Phillips v. La. Eq. Ins. Co., 26 La. An. 402; Travelers Ins. Co. v. Sheppard, (Ga.) 12 S. E. Rep. 18; Keels v. Mut. Resv. Fund Life Ass'n., 29 Fed. Rep. 189; Mac Donald v. Refuge Co., 17 Scotch Sessions 4th Series, 955 (1890); Biddle Vol. II, Sec. 842, and cases there cited. As said in Mallary v. Ins. Co., 47 N. Y. 54, "The presumption is against the latter (suicide). It is contrary to the general conduct of mankind, and shows a gross moral turpitude in a sane person." So in Waycott v. Metropolitan &c. Co. (Vt.,) 24 Atl. Rep. 992, the court says: "Nothing appearing to the contrary, whether a man died from the effect of insanity or any other disease, the legal presumption is that he died a natural death from natural causes and not from an act of self-destruction. A person is found dead and the presumption is that the death was natural or accidental. The mere fact of death in an unknown manner creates no legal presumption of suicide or the taking of one's own life by his own hand or act. Upon evenly balanced testimony the law assumes innocence rather than crime." Lawson, Pre. Ev., 192; Freeman v. Ins. Co., 144 Mass. 572. At common law suicide was a felony, and by the criminal code of Minnesota it is said to be a "grave public wrong" and an attempt to commit suicide is made a felony. In the very recent case of Leman v. Manhattan L. Ins. Co., (La.) 15 S. Rep. 388, the fact that the dead body of the assured was found with a mortal gunshot wound, and a discharged pistol wedged on the thumb as if thrust in forcibly was held insufficient to prove the defense of suicide. As the burden was on the insurer, it was said that the defense failed unless the circumstances excluded with reasonable certainty any hypothesis of death by accident or by the act of another. In Travelers Ins. Co. v. McConkey, 127 U. S. 661, it was held that where a party was found dead with a pistol bullet through his heart it would be presumed that it was the result of an accident and that in the absence of evidence to rebut this presumption, the claimant would be entitled to recover. In Washburn v. Nat. Acc. Ass'n, 10 N. Y. Sup. 366, the question was submitted to the jury, but the evidence pointed very strongly toward suicide with very slight probability of an accident. It was said, however, that where death was the result of suicide or accident, the presumption is against suicide, citing Mallary v. Ins. Co., 47 N. Y. 52. In Cronkite v. Travelers Ins. Co., 75 Wis. 216, it was necessary for the plaintiff to show under the conditions of the policy that the deceased came to his death by reason of an accident. The assured was a conductor on a railway train and it appeared that he returned from a trip with marks of external violence on his back apparently inflicted recently, and that in the opinion of the doctors these injuries were the cause of his death. There was no evidence as to how the deceased received these injuries and the plaintiff rested his case on the presumption which it was claimed arose from the condition then disclosed that the violence was the result of accident. The trial court held that there was no such presumption and that the plaintiff must go further and show affirmatively that the injuries were the re-

sult of an accident by showing the manner in which they were inflicted, as under the policy injuries resulting from certain causes were excluded. Lyon J. said: "We think that the court took an erroneous view of the law. Unless the injuries which are alleged to have caused the death of the assured were intentionally self-inflicted * * * the legal presumption is that they were accidental. 'No presumption can be indulged that the law has been violated, as it would have been were the injuries intentionally inflicted by another. On the contrary the presumption is that they were not. * * * Were it claimed that the injuries were self-inflicted or were caused by the negligence of the assured, until self-infliction or negligence should be affirmatively proved, the same presumption of accident would prevail." Freeman v. Travelers Ins. Co., 144 Mass. 572. Peck v. Eq. Acc. Ass'n., 59 Hun. 255. The same general principle is stated by Biddle II, Sec. 810, who says: "The presence of bruises and wounds *prima facie* is considered to be rather evidence of an accident than design or self-infliction." The facts upon which the recent case of Whitloch v. Fid. & Cas. Co., 25 N.Y. Sup. 537 (1893), was decided sufficiently appear in the following statement by Pratt, J. "The deceased was found dead with a discharged pistol by his side, and the defense may fairly claim it to be established that death was caused by the ball discharged from that pistol, but we do not succed in finding proof that the deceased voluntarily discharged the pistol, much less that he did so with the intent to take his own life. While the position of the wound does not preclude the possibility of the weapon having been held in the hand of the deceased, it at least renders it improbable; but the letters written that evening do not disclose any expectation of death, but the contrary. * * * The only affirmative defense open to the defendant under the pleadings is found in the averment that the deceased intentionally inflicted the injuries. Being an affirmative defense unless proved the plaintiff was entitled to recover. The burden of proof to establish intentional injury rests upon the defendant. If the proof failed to show whether or not the injuries were intentional, the defense was not made out. The plaintiff was not required to prove a negative." Citing Ins. Co. v. McConkey, 127 U. S. 661, which latter case was very recently approved in Conn. Mut. Life Ins. Co. v. Akens, 14 Sup. Ct. Rep. 155 (1894.)

In German v. Brooklyn Life Ins. Co., 26 Hun. 604, the court said: "The party alleging suicide, must prove it. The mere fact of death in an unknown manner creates no presumption of suicide. Upon evenly balanced testimony the law presumes innocence rather than crime." In Guardian Ins. Co. v. Hogan, 80 Ill. 35, we find the same presumption of love of life stated, although it is said that if there is "any doubt" the presumption is destroyed. A mere absurdity. If there is any doubt, raised by competent evidence, the case should go to the jury under an instruction stating the existence of the presumption. The general rule has been recently stated in Mut. Life Ins. Co. v. Hayward, (Tex. 1894) 27 S. W. Rep. 36, where it was said that the burden of proving suicide as a defense rested upon the defendant throughout and is

not shifted by the verdict of the coroner's jury. The evidence was not unlike that in the case at bar, so far as it went; but it also appeared that the deceased left a letter directed to a friend, containing the words "I have broken my sworn vow and have ceased to live. I am no longer a man." This letter was almost conclusive evidence of suicide, and is a circumstance which would make it necessary to send the case to the jury.

The cases which I have cited establish beyond all cavil, that there is a general presumption against suicide, and that the burden is upon the defendant alleging self-destruction to prove the same by a fair preponderance of evidence. There is also no question but that the question whether the issue should be submitted to the jury depends upon the same general principles which govern the submission of other issues. If there is any evidence which overcomes this presumption or has a tendency to overcome this presumption, it should be submitted to the jury. But I think that a careful examination of the cases cited by the defendant will fail to disclose any instance where the court properly submitted to a jury a case like that at bar. Judge May, after stating the general presumption says, that whether the death was the result of accident or suicide, "if there is any evidence bearing upon the subject, it is a question for the jury; as for instance whether the taking of an overdose of laudanaum was intentional or a mistake." In support of this statement he cites Pierce v. Travelers Ins. Co., 34 Wis. 389; Lawrence v. Mutual Life Ins. Co., (Ills.) 9 Ins. Law Jour. 313; Shank v. United Brethren &c., 84 Pa. St. 385; Newton v. Mut. Ben. Ins. Co., 2 Dillon (C. C.) 154. An examination of these cases, however, will disclose the fact that there was evidence tending to overcome this legal presumption. In Pierce v. Travelers Insurance Co., 34 Wis. 389, it appeared that the deceased was found dead in a room at a hotel, with a pistol wound through the heart and a discharged pistol by his side. There was also a letter signed by the deceased directed to the hotel proprietor, stating that he intended to commit suicide. In Shank v. United Brethren &c. Soc., the circumstances were apparently inconsistent with the hypothesis of accident. It appeared that the deceased went to his room stating that he was going to read the newspaper, and that three-quarters of an hour later he was found dead in bed with a discharged pistol lying on his breast. He had put on his wrapper and slippers, and there was a bullet hole about an inch above the right ear. One barrel of the pistol had been discharged. The doctor testified that it was plain the pistol had been held against the head when discharged, as there were no grains of powder in the skin. In Mut. Acc. Co. v. Bennett, (Tenn. 1891) 20 Ins. Law Jour. 771, the court approved an instruction that, "the presumption of law is that Bennett did not commit suicide and was not murdered;" but that "either of these presumptions may be overcome by facts and circumstances which establish the contrary." The evidence showed that the deceased was found dead in a house with a pistol shot through his heart. In an adjoining room was found the dead body of a woman with whom he had been living as his mistress. The evidence also showed that he was solici-

itous as to the woman's fidelity in his absence, that he was oppressed by the shame of the relation he was maintaining, and was desirous of breaking with her. The facts and circumstances made a case for the jury and it was very properly left to them to determine the cause of death. In Bois v. Mass. Mut. Life Ins. Co., (La.) 14 Ins. Law Jour. 237, cited by counsel, the evidence was inconsistent with any other hypothesis than that the assured died by his own hand. He was found with a pistol shot wound in the mouth, the ball having entered the "upper portion and went through the hard palate." From the location of the wound it was evident that the following actions must have occurred. First, the deceased must have opened wide the mouth; second, that he must have placed the muzzle of the pistol within his mouth, or at least have pointed it toward the roof of his mouth thus opened wide; third, that with the mouth thus opened and the pistol thus pointed, he had discharged the weapon. As said by the court these deductions resulted from the nature and location of the wound, and were as well established as though they had been testified to by eye witnesses of the acts. But nothing of the kind can be inferred from the evidence in the case at bar, where every fact is consistent with the hypothesis of accidental poisoning. No such deductions can be drawn from the mere fact of death by morphine poisoning. Counsel also cites McClure v. Mut. Life Ins. Co., (N. Y.) 13 Ins. Law Jour. 229, in support of the proposition that "any fact or circumstance equally consistent with two opposite hypotheses must be disregarded in determining the truth of either." The application of this rule would wipe out every vestige of defendent's evidence on the issue of suicide, because there is no item which is inconsistent with the hypothesis of death from an accidental overdose of morphine.

Guardian Ins. Co. v. Hogan, 80 Ills. 85, appears to be irreconcilable with the other cases supporting the general proposition, as the charge there was held to be objectionable because, "stating in effect that if there was under the evidence any doubt of the fact that the deceased destroyed himself, the law presumed death to have occurred by accident." Cook, Life Ins. Sec. 44, Note 2. Mut. Ben Life Ins. Co. v. Davies, 87 Ky. 541, is an exceptional case and can hardly be reconciled with the cases above cited. I have examined the other cases cited by counsel for the defendant and have been unable to find anything in any of them which militates against the position taken by this court. The general principle appears to be well settled. In each case there was evidence which appeared to be inconsistent with accidental death, and which pointed toward self-destruction. Under such circumstances it was for the jury to determine the cause of death from the evidence in the case.

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INDEX TO VOLUME II.

ANNOUNCEMENT.

THE MINNESOTA LAW JOURNAL.

Opinions of our Subscribers, 121.
Promise for Future, 121.
Scope of the Journal, 121.

BAR ASSOCIATIONS.

AMERICAN BAR ASSOCIATION.

Strikes and Trusts—Hon. U. M. Rose, 1.

OLMSTED COUNTY BAR ASSOCIATION.

Death of Chief Justice Gilfillan, 305.

RAMSEY COUNTY BAR ASSOCIATION.

Death of Judge Wescott Wilkin, 127.

STATE BAR ASSOCIATION.

Address of Hon. C. E. Flandrau, 149.
Death of Chief Justice Gilfillan, 302.
Revision of Minnesota Statutes, 305.

STEARNS COUNTY BAR ASSOCIATION.

Death of Chief Justice Gilfillan, 305.

UTAH BAR ASSOCIATION.

Addresses and proceedings, 178.

BIOGRAPHICAL SKETCHES.

Hon. Hascal R. Brill, District Judge, Fourth District, 306.

Hon. Pierce Butler, County Attorney of Ramsey County, 208.

Hon. Leon T. Chamberlain, Corporation Attorney of St. Paul, 235.

Hon. Loren W. Collins, Associate Justice of Supreme Court, 236.

Hon. Charles B. Elliott, District Judge, Fourth District, 12.

Frank B. Kellogg, Esq., 281.

Hon. Frank M. Nye, County Attorney of Hennepin County, 208.

Cordenio A. Severance, Esq., 281,

Hon. David F. Simpson, Corporation Attorney of Minneapolis, 234.

Hon. Charles M. Start, Chief Justice of the Supreme Court of Minnesota, 201.

Hon. Wescott Wilkin, Late District Judge, Second District, 127.

DECISIONS OF DISTRICT COURTS.

ACTIONS.

Abatement of—Suit not prematurely brought, Johnson vs. Wennerskirsch, 183.

APPEAL.

Bond on appeal to supreme court to act as supersedeas must be served with notice of appeal. DeBarnett vs. Tharaldsen, 137.

Bond on appeal to supreme court not served with notice of appeal in an action under chapter 76 of Gen. St. 1878 against insolvent corporation and stockholders will not stay proceedings. Danforth vs. Nat. Chemical Co., 83.

Bond in unlawful detainer must comply with section 13 of chapter 84 of Gen. St. 1878 and not with section 114 of chapter 65. Mills vs. Wilson, 58.

Going to trial in justice court after objecting to pleadings being filed on adjourned day and moving to dismiss is not a waiver of same objections on appeal. Stevens vs Hendee, 260.

Justice of peace must return evidence without additional cost on appeal on questions of law alone, under Gen. St. 1878, Ch. 65, Sec. 159, as amended by Gen. Laws 1883, Ch. 61. Diricks vs. Maher, 25.

Notice of appeal from justice signed by attorney who did not appear at trial, with admission of "service" by attorney and of "due service" by party held sufficient. Herman vs. Nieman, 212.

Notice of appeal from justice of peace cannot be served by mail. Pond vs. Anderson, 212.

Proof of service of notice of appeal from justice must show residence of appellee. Pond vs. Anderson, 212.

Settlement of case refused after unexplained delay of five months. Morgan vs. St. Paul City Ry. Co, 313.

APPEARANCE.

Any act which calls into action the powers of the court, save to determine its own jurisdiction, is an appearance and a submission to the jurisdiction of the court. How vs. American Masonic Accident Association, 220.

ATTACHMENT.

An action to enforce liability of stockholder in a national bank is an action arising on contract under subdivision 3 of section 64, chapter 66 of General Statutes of 1878, and an attachment sale thereunder of land after service by publication is valid. Hencke vs. Twomey, 26.

Amendment of affidavit may be allowed to make it conform to complaint which has been amended. Benedict vs. Heidel, 60.

Venue of action considered and motion to dismiss denied. Barnet vs. Thoraldsen, 114.

ATTORNEY AT LAW.

Dismissal of action cannot be objected to by attorney who appears for plaintiff and also for one of the defendants. Gellity vs. Gellity, 264.

Fees for drawing assignment and other services rendered insolvent will not be allowed under rule 12 of district court. In re Horton, 118.

ATTORNEY AT LAW.—(Continued.)

Lien for compensation after due notice given is superior to right of defendant to set off against the judgment against him a judgment held by him against plaintiff, Maxon vs. Glover, 213.

Judgment of solvent creditor may be set off against insolvent judgment creditor, notwithstanding notice by attorney of his lien for compensation. Jacobson vs. Johnson, 243.

Pleadings must be signed by attorney, and not by party. Hainert vs. Howard, 164.

BANKS.

Bond signed by cashier alone and without corporate seal held sufficient. City of St. Paul vs. Seven Corners Bank, 165.

Checks signed and delivered, although not presented or paid constitute a transfer of the fund. Griggs, Cooper & Co. vs. Bixby, 165.

Stockholder who transfers his stock within one year prior to assignment of bank, is liable to creditors of bank in an action brought more than one year after transfer. Harper vs. Carroll, 219.

BUILDING ASSOCIATIONS.

In action by withdrawing member burden of proof is on association to show that there are no funds in treasury applicable to payment of stock. Heinbokel vs. National S., L. & B. Association, 57.

Holder of stock of a mutual building association, desiring to withdraw therefrom, who has brought himself within the rules by notice, cannot be permitted to take judgment against the corporation where, under the by-laws of the association and the laws of the state, there are no monies in the treasury legally applicable to pay his claim. Heinbokel vs. National S., L. & B. Association, 49.

CHANGE OF VENUE.

Action under Chapter 76 of Gen. St. 1878, against corporation and stockholders will not be removed to another county on motion of corporation alone where it appears one or more necessary parties defendant reside in county where suit is brought. Danforth vs. National Chemical Co., 83.

Action to recover damages for conversion of logs cut on state lands is not an action to recover for injuries to real property, and as such triable only in county where land is located. State vs. Shevelin-Carpenter Co., 109.

Demand of change by attorney for defendant before answering or making other formal appearance held sufficient. How vs. American Masonic Accident Association, 220.

In actions for divorce Gen. St. 1878, Ch. 66, Sec. 49, does not apply. Cormany vs. Cormany, 25.

Replevin for logs cut contrary to law on state lands should be brought in county where they are at time of bringing suit, and case may be sent to that county although state brings the action. State vs. Shevelin-Carpenter Co., 109.

State bringing an action to replevy logs illegally cut on state lands is subject to right of defendant to remove case to county where logs are at time of bringing suit. State vs. Shevelin-Carpenter Co., 109.

CHATTEL MORTGAGE.

Sale of property by mortgagor claiming to have acted as agent of mortgagee—Consent Agency. State vs. Hammond, 240.

COLLATERAL SECURITY.

Accommodation maker of renewal note held released by exchange of collaterals put up as security for payment of original note. Franzen vs. Mabon, 216.

CONSTITUTIONAL LAW.

Class legislation. Penal Code § 346 providing for guarding openings made upon waters in this state "for the purpose removing ice for sale" is void. Korman vs. Peoples Ice Co., 240.

Municipal assessments under Chapter 206 of Gen. Laws 1893 sustained. In re City of Duluth, 88.

CONTEMPT.

Failure to appear before referee in supplementary proceedings at adjourned session, after making full disclosure held not a contempt. Rogers vs. Latomelle, 115.

Order to show cause refused in supplementary proceedings under Court rule 2 of Hennepin County. Hill vs. Houston, 117.

CONTINUANCE.

Costs including witness fees allowed on continuance on stipulation. Brown vs. Burns, 58.

Justice of the peace should continue case on application of defendant on return day where complaint is filed, although no answer has been put in. Quent vs. Hallstrom, 111.

CONTRACT.

Public policy forbids contract to procure act of congress giving trespasser on public lands exclusive right to acquire title thereto. Houlton vs. Dunn, 133.

CORPORATIONS.

Actions under Chapter 76 of Gen. St. 1878 are governed by same rules as to bond on appeal, and change of venue as other civil actions. Danforth vs. Nat. Chemical Co., 83.

Director's liability must be enforced by suit in equity in behalf of all creditors, and not by action at law. Nat. New Haven Bank vs. N. W. Guaranty Loan Co., 309.

Foreign corporation, having principal place of business in another state, but an office and managing agent in this state, and transacting some of its business at such office, may be subjected to the jurisdiction of the courts of this state by service upon such agent. Nicoll vs. Fond du Lac Light, Power & Ry. Co., 314

Foreign corporation may be sued in this state to collect amount due under a contract which is performed in another state, but made in this, in which no place of payment is named, and the payee in which is a resident and citizen of this state. Nicoll vs. Fond du Lac Light, Power & Ry. Co , 314.

Garnishment of stock of foreign corporation. Puget Sound Nat'l Bank vs. Elliott, 112.

Newspaper printing and publishing is not a manufacturing or mechanical business. Oswald vs. St. Paul Globe Publishing Co., 89.

Partnership liability of members wherein corporation is not perfected. Prost Mfg. Co. vs. Barnes Vitrified Brick Co. 139. Roberts Mfg. Co. vs. Wright, 267.

CORPORATIONS.—(Continued.)

Receiver may be appointed under section 17 of chapter 76, Gen. St. 1878 on application of creditors who have not reduced their claims to judgment although corporation has made an assignment Klee vs. E. H. Steele Co., 116.

Stockholder in bank who transfers his stock within one year prior to assignment of bank is liable to creditors of bank in an action brought more than one year after transfer. Harper vs. Carroll, 219.

COSTS.

Appeal from justice of the peace being taken on questions of law alone additional costs for returning evidence will not be allowed. Diricks vs. Maher, 25.

Assignee of insolvent must pay costs incurred by appeal to supreme court before any claims of creditors. In re St. Paul German Insurance Co., 237.

Continuance on stipulation being allowed prevailing party held entitled to witness fees. Brown vs. Burns, 58.

Court reporter's fees for transcript made without order of court cannot be taxed. Sanborn vs. Webster, 112.

Municipal corporation, when liable for costs in criminal prosecutions that fail. Hammond vs. City of Rochester, 59.

Statutory costs and disbursements allowed to plaintiff in foreclosure of mechanic's lien but not to prevailing defendants. Murray vs. Rhodes, 139.

Statute costs are not allowed when judgment is rendered for defect of parties defendant, and case continued to allow proper parties to be joined. Pike vs. Robertson, 166.

Statutory costs of ten dollars may be taxed where claim exceeds one hundred dollars but less than amount claimed is recovered. Snow vs. Street Ry. Co., 89.

Witness fee of physician limited to ten dollars. Cornfeldt vs. City of St. Paul, 113.

Witness fees of defendant not allowed where case is dismissed on his motion. Schultz vs. Brown, 138.

COUNTER CLAIM.

Pleading must set up that counter claim existed at commencement of action. Bank of Commerce vs. Stewart, 295.

COVENANT.

Contract to sell land to third party is not an incumbrance and therefore action against vendor by vendee must be for breach of covenant of seizure. Petre vs. Plotnizke, 87.

CRIMINAL LAW.

Costs of prosecution that fails, when chargeable to city, 59.

Indictment for larceny in second degree held insufficient. State vs. Highton, 286.

Penal code, § 346, is void. Korman vs. Peoples Ice Co., 240.

Sale of mortgaged property—agency, how proved. State vs. Hamilton, 240.

DAMAGES.

Measure of damages in breach of warranty as to character, location, size and value of land. Marshall vs. Gillman, 187.

New trial granted on ground of inadequacy of damages for death of child. Hughes vs. Dearborn, 309.

Verdict for $28,000 for personal injuries held excessive. Nowak vs. N W. Cordage Works, 56.

DEATH BY NEGLIGENCE.

Damages of one dollar only for death of child held inadequate and new trial granted. Hughes vs. Dearborn, 309.

DISMISSAL OF ACTION.

Attorney appearing for plaintiff and also for one of the defendants cannot object to dismissal of action by plaintiff in person, but in such case motion to substitute administrator should be denied. Gellity vs. Gellity, 264.

DIVORCE.

Alimony and counsel fees can not be allowed in action to vacate a voidable decree of divorce. Colby vs. Colby, 262.

Alimony refused because answer was sham. Andrus vs. Andrus, 118.

Change of venue will not be allowed in action for divorce on ground that defendant is not a resident of county within which action is brought. Cormany vs. Cormany, 25.

Divorce obtained in another state on service by publication. Thurston vs. Thurston, 20.

Pleading being sham alimony may be refused. Andrus vs. Andrus, 118.

DURESS.

License fee paid under threats of arrest and that business will be stopped is paid under duress and may be recovered if it was not due or legally collectable. Moore vs. St. Paul, 238.

ELECTIONS.

City elections to vote on issue of bonds not governed by general election law of 1893, as to contest. Truelson vs. City of Duluth, 287.

ESTOPPEL.

Judgment against lot for special improvement tax estops owner from suing city for damages. Farrell vs. St. Paul, 237.

Judgment on general verdict in action on two counts where evidence offered to prove one has been excluded. Spooner vs. Christian, 117.

EVIDENCE.

Agency, how proved as defense to sale of mortgaged property by mortgagor. State vs. Hamilton, 240.

Death presumed to have been occasioned by accident rather than by design. Hale vs. Life Indemnity & Investment Co., 316.

Parol evidence is not admissible to vary the liability of party who has signed note on back before delivery. Nat. German-American Bank vs. Illinois Fuel Co., 294.

Presumption is in favor of accidental death, rather than of suicide. Hale vs. Life Indemnity & Investment Co., 316.

Suicidal intent will not be presumed, the presumption being that insured came to his death by accident. Hale vs. Life Indemnity & Investment Co., 316.

EXEMPT PROPERTY.

Musical instruments used by teacher of music are exempt as implements of his profession whereby he gains a livelihood. Rogers vs. Latomelle, 115.

Non-resident is not entitled to benefit of exemption laws. Titlow vs. Holman, 238.

Watch worth two dollars held not exempt but order for sale refused. Rogers vs. Latomelle, 115.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

Appeal from justice of peace ordering restitution of premises will be dismissed where the bond given is under section 114 of chapter 65 instead of section 13 of chapter 84 of Gen. St. 1878. Mills vs. Wilson, 58.

FRAUD.

Agent authorized to sell certain lots pointed other lots to purchaser. Held that principal not having been informed of the fraud, nor having ratified it was not liable in damages for deceit practiced. Ickler vs. Shanley, 83.

FRAUDULENT CONVEYANCE.

Insolvent and others may be compelled to appear and testify as to disposition of property before assignment. In re Smith, 162.

Possession of goods by vendor, how far evidence of fraudulent intent. Legre vs. Smith, 310.

FRAUDS, STATUTE OF.

Contract to perform labor and services for a period of more than one year is void if not in writing, but the oral contract may be set up to show amount due in action for *quantum meruit*. Young vs. Donaldson, 262.

Oral agreement by vendor to assign to vendee of land insurance thereon is void. Hagelin vs. Wachs, 118.

GARNISHMENT.

Debt due one defendant held not subject to garnishment in joint action against several. Altman, Miller Co. vs. Markley, 293.

Exemptions under Minnesota statutes cannot be claimed by non-resident. Titlow vs. Holman, 238.

Insurance agent held liable as garnishee in action against company when he has collected and holds premiums on policies subject to cancellation by insured. Joy vs. Burlington Insurance Co., 263.

Insurance money not liable to garnishment until proof of death received and accepted by home office. Rouchleau vs. Dodge, 86.

Stock of foreign corporation held subject to garnishment. Puget Sound Nat'l Bank vs. Elliott, 112.

Service of notice on defendant after return day, but before day to which case had been continued, held sufficient on motion to dismiss. Webb vs. Capitol Consol Co., 89.

INSOLVENCY.

Assignment by insurance company held not to abrogate clause in policy requiring action to be brought within one year from date of loss. Halstead vs St. Paul German Insurance Co., 218.

Attorney is not entitled, under Rule 12 of District Court, to fees for drawing deed and bond and preparing schedules. In re Horton, 118.

Bond may be filed by order of court more than five days after schedules. In re Blake, 81.

Claim against insolvent insurance company disallowed because not proven in time fixed by policy. In re St. Paul German Ins. Co , 81.

Complaint to recover money alleged to have been fraudently paid to defendant must show whether assignment was under statute or common law. Young vs. Ulmer, 110.

Costs of appeal by assignee to Supreme Court must be paid in full to prevailing party before any dividends can be allowed to creditors. In re St. Paul German Ins. Co., 237.

Deed of assignment held never delivered so as to take effect as a valid assignment. Holboquist vs. Clark, 85.

Foreign attachment of partnership land, levied after assignment, and before filing thereof in county where land is situated, but after actual notice to attaching creditors, is invalid. Brainard vs. Myers, 242.

Fraudulent disposition of property before assignment may be inquired into by order of court by compelling assignor or third parties to testify before it or a referee. In re Smith, 162.

"General creditors" in composition agreement held to mean "unsecured creditors, and not those having specific liens, or recourse by reason of indorsement." Noyes vs. Chapman-Drake Co., 58.

Holder of note may prove his claim against estate of insolvent endorser although the makers are good and no action has been brought against them, nor the note surrendered to the assignee. In re Beaupre Mercantile Co., 56, 81.

Intervention to attack attachment on merits. No provision in deed for filing releases. Benedict vs. Heidel, 135.

Lease held to bind assignee as to covenants to pay taxes, and other covenants that run with land. Cook vs. Parker, 89.

Partnership assignment under law of 1881 executed by one partner only, and conveying his own property, and that of the firm, but not the individual property of his co-partner is void. In re Crittenden & Son, 261.

Partnership assignment by one partner held valid. Brainard vs. Myers, 242.

Receiver may be appointed for corporation after assignment on application of creditors who have not obtained judgments. Klee vs. E. H. Steele Co., 116.

Stockholder in bank who transfers his stock within one year prior to assignment of bank is liable to creditors of bank in an action brought more than one year after transfer. Harper vs. Carroll, 219.

INSURANCE.

Assignment by insolvent company held not to abrogate a clause in the policy requiring action thereon to be brought within one year from date of loss. Halstead vs St. Paul German Ins Co., 218.

Claim against insolvent company disallowed because not proved within time fixed by policy. In re St. Paul German Ins. Co., 81.

Garnishment of money not allowed until proof of death has been received and accepted by home office. Rouchleau vs. Dodge, 87.

Garnishment of premiums collected by agents and held for company on policies, which insured has right to cancel, allowed. Joy vs. Burlington Ins. Co., 263.

Oral agreement by vendor to assign insurance on land to vendee is void. Hagelin vs. Wachs, 118.

Suicide held not proven by the evidence where insured died from morphine poisoning, the presumption being that death was occasioned by accident and not design. Hale vs. Life Indemnity and Investment Co., 316.

Suicide of insured under terms of policy held not to avoid policy. Mareck vs. Mutual Reserve Fund Life Association, 292.

JUDGMENT.

Amendment *nunc pro tunc* allowed to correct mistake as to amount entered after sale by debtor. Chase vs. Stewart, 139.

Attorney's lien is superior to right to set off one judgment against another. Maxon vs. Glover, 213, see 243.

Default because of non-appearance of defendant at trial sustained on ground answer did not set up a defense. Anchor Investment Co. vs. Hartman, 115.

Default for want of reply ordered because reply not signed by an attorney. Hainert vs. Howard, 164.

Estoppel by general verdict in action on complaint setting up two causes of action after exclusion of testimony offered to sustain second count. Spooner vs. Christian, 117.

Estoppel by judgment against lot for special improvement tax in action by owner against city for damages. Farrell vs. St. Paul, 237.

Modification of order by court on entry by mistake. Payne vs. Loan & Guaranty Co., 110.

Set off of one judgment against another can not be allowed without order of court. Maxon vs. Glover, 213.

JURISDICTION.

Any act which calls into action the power of the court, save to determine its own jurisdiction, is an appearance and a submission to the jurisdiction of the court. How vs. American Masonic Accident Association, 220.

Foreign corporation, having principal place of business in another state, but an office and managing agent in this state, and transacting some of its business at such office, may be subjected to jurisdiction of courts in this state by service on such agent. Nicoll vs. Fond du Lac Light, Power & Ry. Co., 314.

Foreign corporation may be sued in this state to collect amount due under a contract, which is performed in another state, but made in this, in which no place of payment is named, and the payee in which is a resident and citizen of this state Nicoll vs. Fond du Lac Light, Power & Ry. Co., 314.

Justice loses jurisdiction of replevin where plaintiff testifies property is worth more than $100. Wilson vs. Mills, 260.

Service by publication is sufficient to sustain sale of land made prior to amendment of Gen. St. 1878, Ch. 66, Sec. 64, Sub-div. 3, by act of 1881, under attachment in an action against a non-resident to enforce his liability as a stockholder in a national bank. Hencke vs. Twomey, 26.

Service by publication held insufficient by reason of defective affidavit. Hay vs. Tuttle, 89.

Validity of decree of divorce on service by publication. Thurston vs. Thurston, 20.

JUSTICE OF THE PEACE.

Appeal from judgment ordering restitution of premises in an action for unlawful detainer will be dismissed where the bond is given under Sec. 114 of Ch. 65, instead of Sec. 13 of Ch. 84 of Gen. St. 1878. Mills vs. Wilson, 58.

Amending answer after appeal to conform to fact proved before justice. Wagner vs. Zelch, 81.

Continuance should be granted defendant on his motion on return day, when plaintiff has filed complaint, although defendant has filed no answer. Quent vs. Hallstrom, 111.

Costs for return of evidence will not be allowed on an appeal on questions of law alone. Diricks vs. Maher, 25.

Jurisdiction in replevin is lost where plaintiff testifies property is worth more than $100. Wilson vs. Mills, 260.

Notice of appeal signed by attorney who did not appear at trial, with admission of "service" by attorney and of "due service" by party held sufficient. Herman vs. Nieman, 212.

Notice of appeal cannot be served by mail. Pond vs. Anderson, 212.

Where pleadings are not had on return day of summons, and defendant on adjourned day objects to pleadings being filed, and moves to dismiss, but is compelled to go to trial, he can raise same objection on appeal. Stenson vs. Hendee, 260.

Pleadings must be filed within what time where a change of venue is taken. Jones vs. Neville, 59.

Proof of service of notice of appeal must state residence of appellee. Pond vs. Anderson, 212.

Replevin judgment by default modified on appeal. Karan vs. Mott, 166.

Replevin writ cannot be issued until bond with more than one surety has been filed. Notting vs. McDermid, 85.

LACHES.

Receiver will not be appointed for judgment debtor in supplementary proceedings where creditor has delayed for more than four years after disclosure, to ask for appointment. Stromberg vs. Rogers, 58.

Settlement of case after unexcused delay of five months refused. Morgan vs. St. Paul City Ry. Co., 313.

LANDLORD AND TENANT.

Appeal from judgment of justice of peace ordering restitution of premises will be dismissed where the bond given is under Sec. 114 of Ch. 65, instead of Sec. 13 of Ch. 84, of Gen. St. 1878. Mills vs. Wilson, 58.

Assignee in insolvency liable on what covenants in lease. Cook vs. Parker, 89.

Duty of landlord to notify tenant of intention to hold him liable after removal for rent to end of term. Neil vs. Eustis, 185.

Landlord is not liable for injury to person using defective elevator at request of tenant. Tenant only is liable. Hanson vs. Burris, 57.

LARCENY.

Indictment for obtaining railroad transportation by giving worthless check. State vs. Highton, 286.

LIBEL.

Reports made by one merchant to others for mutual protection as to failure of customers to meet payments at maturity are privileged, and no action will lie by customer in absence of malice. Tuft vs. Cudahy Packing Co., 214.

LICENSE.

Payment under threat of arrest and that business will be stopped is made under duress, and money may be recovered if license was not properly collectible or due. Moore vs. St. Paul, 238.

LIEN.

Attorney's lien is subject to equities between the parties, and where judgments should be set off against each other, and one judgment creditor is insolvent, his attorney cannot by giving notice deprive the other of his right of set off. Jacobson vs. Johnson, 243.

Attorney's lien on judgment after notice to defendant is superior to his right to set off the judgment against him against a judgment held by defendant against plaintiff. Maxon vs. Glover, 213.

MARRIAGE.

Evidence sufficient to prove common law marriage. In re Terry, 56.

MECHANIC'S LIEN.

Costs allowed to plaintiff in foreclosure proceedings, but not to certain prevailing defendants. Murray vs. Rhodes, 139.

MORTGAGE.

Costs in foreclosure by advertisement may be allowed though affidavit of disbursements and costs is not filed within ten days. Brown vs. Scandia Building & Loan Association, 285.

Foreclosure notice published in one county held sufficient where mortgage covered two tracts of land situated in different counties. Paulle vs. Wellis, 117.

Promissory note secured by mortgage is like any other negotiable note, and fact that it is so secured is no defense in action by holder, if it is not paid at maturity. Clark vs. Patrick, 110.

MUNICIPAL CORPORATIONS.

Constitutionality of chapter 206 of Gen. Laws 1893 considered. In re City of Duluth, 88.

Duluth charter construed, and held that defective notice of assessment and application for order of confirmation is not jurisdictional. In re Merchant et al., 239.

Elections to vote on issue of bonds, by what law governed. Truelson vs. City of Duluth, 287.

Judgment against lot for special improvement tax estops owner from suing city for damages. Farrell vs. St. Paul, 237.

Rochester city is not liable for the costs of a criminal prosecution under the state laws for an offense not indictable committed within the city limits where the prosecution fails. Hammond vs. City of Rochester, 59.

Sewer assessment under Duluth charter can not be levied upon lots not at the time of construction benefited. In re Sewer in Second Street West, 138.

Special assessment paid may be recovered where city abandons improvement. Bromley vs. Stillwater, 138.

NEGLIGENCE.

Landlord is not liable for injury to person using defective elevator at request of tenant. Hanson vs. Burris, 57.

License to cross railroad tracks, how to be pleaded. Bamka vs. C., St. P., M. & O. R. R. Co., 87.

Pleading alleging simple negligence will justify special finding by jury of "wilful" negligence when evidence sustains the finding. Bone vs. St. Paul City Ry. Co., 161.

Pleading failing to allege that defendant "wilfully" ran over child, notwithstanding other allegations, held demurrable. Bamka vs. C., St. P., M. & O. R. R. Co., 87.

Verdict specially finding "wilful" negligence sustained where complaint alleged simple negligence only. Bone vs. St. Paul City Ry. Co., 161.

NEWSPAPER.

Corporation organized to print and publish a newspaper is not one for carrying on a manufacturing or mechanical business. Oswald vs. St. Paul Globe Pub. Co., 89.

NEW TRIAL.

Damages of one dollar for death of child held inadequate. Hughes vs. Dearborn, 309.

Evidence improperly admitted held ground for new trial. Leonard vs. M., St. P. & S. Ste. M. Ry. Co., 113.

Newly discovered evidence contradicted by affidavits not sufficient. Nichols vs. City Ry. Co., 81.

PARTIES.

Abatement of action on note because one of several co-makers was not made a party. Nat. German-American Bank vs. Illinois Fuel Co., 294.

SEE VENDOR AND VENDEE.

PARTNERSHIP.

Assignment by one partner held good as a common law assignment. Brainard vs. Myers, 242.

Assignment for benefit of creditors under law of 1881, executed by one partner only and conveying all the partnership property and his own property, but not the property of his co-partner is void. In re Crittenden & Son, 261.

Corporation not becoming properly organized, members are liable as partners. Frost Mfg. Co. vs. Barnes, 139. Roberts Mfg. Co. vs. Wright, 267.

Retiring partner held not liable on notes of firm, which continuing partners had agreed to pay. Stoppel vs. Marton, 211.

Unnecessary expense incurred by one partner cannot be charged to co-partners. Yorks vs. Tozer, 187.

PHYSICIAN.

Witness fee as expert limited to ten dollars as taxable costs. Cornfeldt vs. City of St. Paul, 113.

PLEADING.

Alimony refused where answer was sham. Andrus vs. Andrus, 118.

Attorney must sign all pleadings. Hainert vs. Howard, 164.

Complaint for slander need not give the names of the persons in whose presence words were spoken. Borg vs. Peterson, 261.

Complaint in action by assignee for benefit of creditors for recovecy of money fraudulently paid defendant by insolvent, must show whether assignment was under state or common law. Young vs. Ulmer, 110.

Counter Claim set up must be alleged to have existed at commencement of action. Bank of Commerce vs. Stewart, 295.

Demand of payment for entire amount claimed where several causes of action are joined, held bad on demurrer. Jones & Langlelin vs. Clyde Iron Co., 139.

Frivolous demurrer to complaint being stricken out, party has no right to answer. Perry vs. Reynolds, 166.

PLEADING.—(Continued.)

Motion to make more definite held proper remedy, and not demurrer where complaint alleged that plaintiff was owner and holder of note for value. Dye vs. Johnson, 263, 283.

Motion to strike out one of several defenses pleaded separately should not be granted, but plaintiff should demur to such defense and reply to others. Gilbert vs. Warren, 295.

Money paid upon express request of another may be recovered without alleging that he was obligated to make such payment or was benefited thereby. National Investment Co. vs. Igel, 263.

Negligence causing personal injury. Bamka vs. C., St. P., M. & O. R. R. Co., 87.

Negligence being alleged, jury may find specially that defendant was guilty of "wilful" negligence. Bone vs. St. Paul City Ry. Co., 161.

Parties in action by assignee to recover unpaid instalment on contract to convey land. National Investment Co. vs. Igel, 263.

Promissory note being alleged to be merely held, but not owned by plaintiff, judgment on complaint granted. Hill vs. N. W. Benefit Assoc., 118.

Sham answer—Motion to strike out denied. Walter A. Wood Mowing and Reaping Machine Co., vs. Parker, 187.

Time to answer—Amendment—Notice of motion. State vs. Shevelin-Carpenter Co., 136.

PLEDGE.

Accommodation maker of renewal note held released by exchange of collaterals put up as security for payment of original note. Franzen vs. Mabon, 216.

PRINCIPAL AND AGENT.

Fraud of agent authorized to sell particular lots in showing purchaser other lots will not make principal liable in damages, where it is not shown he was informed of the deceit, or ever ratified the action of the agent. Ickler vs. Shanley, 83.

Sale of mortgaged property by mortgagor claiming to act for mortgagee. State vs. Hamilton, 240.

PRINCIPAL AND SURETY.

Bond given by bank as principal held sufficient although corporate seal was not attached, and it was only signed by cashier. City of St. Paul vs. Seven Corners Bank, 165.

Exchange of collateral put up as security for payment of original note, held to release accommodation maker of renewal note. Franzen vs. Mabon, 216.

PROMISSORY NOTES.

Abatement of action on ground that one of several co-makers of note was not made a party. Nat'l German American Bank vs. Illinois Fuel Co., 294.

Accommodation maker of renewal note held released by exchange of collaterals put up as security for payment of original note. Franzen vs. Mabon, 216.

Judgment by default sustained, answer not setting up a defense. Anchor Investment Co. vs. Hartman, 115.

Liability of party signing a note on the back thereof before delivering is determined by law, and its nature cannot be varied by parol testimony. Nat'l German-American Bank vs. Illinois Fuel Co., 294.

Mortgage note is like any other negotiable note, and suit may be brought thereon after default. Clark vs. Patrick, 110.

Partner retiring from firm not liable on notes which partners continuing business had agreed to pay. Stoppel vs. Marton, 211.

Pleadings admitting that plaintiff is not the owner but only the ho der of note, motion for judgment on pleadings granted. Hill vs. N. W. Benefit Association, 118.

Pleading alleging that plaintiff became the owner and holder of note for value is bad; but defendant's remedy is not to demur, but to move to make more definite and certain. Dye vs. Johnson, 263, 283.

Pleading that defendant executed and delivered his note to T, and that plaintiff is now the owner and holder thereof, held sufficient allegation of transfer to, and ownership by plaintiff. Topping vs. Clay, 296.

Pleading in action on notes held sufficient on demurrer. Marshall Wells Hardware Co. vs. National Iron Works, 87.

Sham answer—Motion to strike out denied. Walter A. Wood Mowing and Reaping Machine Co. vs. Parker, 187.

PUBLIC POLICY.

Contract to procure act of congress giving trespasser on public land exclusive right to acquire title thereto is void. Houlton vs. Dunn, 183.

RAILROAD AND WAREHOUSE COMMISSION.

Commission in any particular case can only remedy the particular wrong complained of, and under complaint alleging that the rate between two termini of the road is unjust it cannot make an order regulating rates between all points on road. Steenerson vs. Great Northern Ry. Co., 310.

Intervention by any railroad, other than the one against which complaint has been made, that may be affected by the proceedings and orders made therein, should be allowed. Steenerson vs. Great Northern Ry. Co., 310.

RECEIVER.

Corporation may be put in hands of receiver after assignment on application of creditor who has not obtained judgment. Klee vs. E. H. Steele Co., 116.

RELIGIOUS CORPORATIONS.

Property in printing house outfit, &c.—Gift. United Norwegian Lutheran Church of America vs. Augsburg Seminary, 135.

REPLEVIN.

Justice of peace has no jurisdiction to issue writ until a bond with more than one surety is filed. Notting vs. McDermid, 85.

Justice judgment modified on appeal where judgment was rendered on failure of defendant to appear. Karan vs. Mott, 166.

Justice loses jurisdiction where plaintiff testifies property is worth more than $100. Wilson vs. Mills, 260.

State is subject to right of removal in actions of replevin. State vs. Shevelin-Carpenter Co., 109.

Venue of action for logs cut illegally from state land is in county where logs are when suit is brought, although brought by state. State vs. Shevelin-Carpenter Co., 109.

SALE.

Pleading held demurrable where several causes of action are stated, and one demand of payment for entire amount alleged. Jones & Laughlin vs. Clyde Iron Co., 139.

Warranty, Breach of—Reliance on—Damages for. Marshall vs. Gilman, 187.

SERVICE.

Notice of appeal from justice signed by attorney who did not appear at trial, with admission of "service" by attorney and of "due service" by party, held sufficient. Herman vs. Nieman, 212.

Notice of appeal from justice of peace cannot be served by mail. Pond vs. Anderson, 212.

Papers served on attorney by slipping through letter slot in office door held good. Errieson, Brady & Co. vs. Donnelly & Schwartz, 139.

Published notice which failed to state where complaint was filed held insufficient. Abbott vs. Gamewell Fire Alarm Co., 116.

SEE SUMMONS.

SETTLED CASE.

Laches by reason of unexcused delay of five months held sufficient to debar plaintiff from having a proposed case settled. Morgan vs. St. Paul City Ry. Co., 313.

SET OFF AND COUNTER CLAIM.

Attorney cannot deprive solvent judgment creditor of his right to offset his judgment against judgment of insolvent by giving notice of lien. Jacobson vs. Johnson, 243. See 213.

Judgments can be set off against each other only by order of court. Maxon vs. Glover, 213.

SLANDER.

Complaint for slander need not give the names of the persons in whose presence the slanderous words were spoken. Borg vs. Peterson, 261.

"You are a liar and you are both liars" held not actionable *per se* as imputing perjury. Statesbury vs. Frazer, 58.

STATE.

Change of venue may be had by defendant in actions brought by state, when. State vs. Shevelin-Carpenter Co., 109.

SUICIDE.

Evidence examined and death held not to have been caused by taking morphine with intent to commit suicide. Hale vs. Life Indemnity & Investment Co., 316

SUMMONS.

Service by publication held insufficient because notice did not state where complaint was filed. Abbott vs. Gamewell Fire Alarm Co., 116.

Service by publication is sufficient to sustain sale of land made prior to amendment of Gen. St. 1878, Ch. 66, Sec. 64, Subd. 3, by act of 1881, under attachment in an action against a non-resident to enforce his liability as a stockholder in a national bank. Hencke vs. Twomey, 26.

Service by publication held insufficient because of defects in affidavit. Hay vs Tuttle, 89.

SUPPLEMENTARY PROCEEDINGS.

Checks when signed and delivered although not presented or paid by bank constitute a transfer of the fund. Griggs, Cooper & Co. vs. Bixby, 165.

Contempt by reason of not appearing before referee at adjourned session, after making full disclosure. Rogers vs. Latomelle, 115.

Order to show cause why defendant should not be punished for contempt dismissed under special court rule two of Hennepin County. Hill vs. Houston, 117.

Receiver will not be appointed where judgment creditor has delayed more than four years after disclosure of debtor to ask for appointment. Stromberg vs. Rogers, 58.

SURFACE WATER.

An owner of land may raise embankments and dams on his own land to drain the same, even to the center of a highway, and will not be liable for damage caused to adjoining lands by thus turning the surface water upon them. Ristad vs. Hendersen, 25.

TAXATION.

Exemption of market house built and operated by private parties under contract with city. In re Cooley, 288.

TRIAL.

Exception to erroneous instruction under stipulation not taken at trial. Nowak vs. N. W. Cordage Works, 56, 113.

VENDOR AND VENDEE.

Covenant of seizin and not covenant against incumbrance is broken by existence of contract to sell to third party. Petre vs. Plotnizke, 87.

Pleading in action by assignee of contract to recover unpaid instalments need not allege that vendor had declared contract void for default, or had demanded possession of premises. National Investment Co. vs. Igel, 263.

Vendor is not a necessary party to an action by one to whom he has assigned his contract to recover unpaid instalments. National Investment Co. vs. Igel, 263.

WITNESS.

Fees not taxable by defendant where case is dismissed on his motion. Schultz vs. Brown, 138.

Physician held entitled to only ten dollars for service as. Cornfeldt vs. City of St. Paul, 113.

DECISIONS OF MUNICIPAL COURTS.

CONFLICT OF LAWS.

Garnishment by non-resident of debt due non-resident defendant in this state allowed. Schmidt vs. Allen, 304.

COUNTERFEITING.

Trades Union labels—who liable for using. State vs. Conrad, 304.

EXEMPT PROPERTY.

Insurance money in hands of company arising from partial destruction of homestead is exempt. Rogers vs. O'Brien, 259.

GARNISHMENT.

Non-resident plaintiff may reach debt due and payable in this state to non-resident defendant. Schmidt vs. Allen, 304.

TRADE UNION.

Counterfeiting labels—Jobbers not liable, but only manufacturers. State vs. Conrad, 304.

DECISIONS OF SUPREME COURT.

CONSTITUTIONAL LAW.

Constitutionality of act failing to award compensation to owners of lands flooded by raising water in Lake Minnetonka as authorized thereby, 43.

Constitutionality of law authorizing erection and operation of grain elevator by state. Rippe vs. Becker, 44.

Insanity act of 1893 is unconstitutional, and commitments thereunder are illegal. State vs. Billings, 39.

COURTS.

Receiver appointed by federal court subject to garnishement in state courts. Irwin vs. McKechnie, 154.

DIVORCE.

Divorce on ground of cruelty, although actual violence is not resorted to. Marks vs. Marks, 22.

GARNISHMENT.

Receivers appointed by federal court may be garnished, when, and how judgment enforced. Irwin vs. McKechnie, 154.

INSANE PERSONS.

Constitutionality of act of 1893 considered, and law held void. State vs. Billings, 39.

INSOLVENCY.

Fraudulent preferences. Thompson vs. Johnson, 57 N. W. Rep. 223, 11.

JURISDICTION.

Garnishment in state court of receiver appointed by United States court. Irwin vs. McKechnie, 154.

NEGLIGENCE.

Frightening horse on street by driving wagon decorated with flags and streamers. Jones vs. Snow, 57 N. W. Rep. 478, 42.

RECEIVERS.

Garnishment in state court of receiver appointed by federal court. Irwin vs. McKechnie, 154.

EXCHANGES AND BOOKS REVIEWED.

Albany Law Journal, 105, 153, 308.
American Lawyer, 23, 55.
American Law Review, 307.
Atlantic Monthly, 207, 259.
Boston Transcript, 258.
Criminal Law Magazine, 79.
Digest to Minnesota Laws.—By John F. Kelly, 152.
General Digest of Decisions of the Principal Courts in the United States, England and Canada for 1894. Vol. IX, Lawyers Co-operative Publishing Company, 306.
Greenbag, 54, 55, 307.
Harvard Law Review, 308.
Jury System, Historical Development of. Maximus A. Lesser, A. M., L. L. B., 206.
Kelly's Index Digest to Minnesota Laws, 152.
Law Book News, 51.
Law Times, 107.
Law Student's Helper, 209, 280, 281.
Lawyer's Reports Annotated, 235, 270.
New Jersey Law Journal, 308.
Ohio Legal News, 255.
Reflector, 259.
University Law Review, 49, 53, 55, 78.
Weekly Law Bulletin, 80.
Yale Law Review, 307.

LEADING ARTICLES.

Arbitration as a remedy for strikes.—Hon. U. M. Rose, 7, 8.

Amendment of answer not properly verified within twenty days after service.—John F. Kelly, Esq., 141.

Bankruptcy law.—Emery C. Betts, Esq., 297.

Bankruptcy law—Need of.—J. M. Hawthorne, 256.

Boycotts as conspiracies.—George H. Selover, Esq., 167.

Briefs—Correct method of citing cases and statutes.—Hon. C. C. Wilson, 299.

Conspiracies—Boycotts as.—George H. Selover, Esq., 167.

Conversion of trust funds.—John A. Larimore, Esq., 27.

Corporations and their relation to labor.—Hon. U. M. Rose, 3, 4.

Dismissal of action.—John F. Kelly, Esq., 231, 282.

Evidence—Photographs as.—John A. Larimore, Esq., 92.

Evidence—Positive and negative testimony in accident cases.—N. M. Thygeson, Esq., 221, 245.

Fraudulent conversion of trust funds.—John A. Larimore, Esq., 27.

Homestead law.—Ambrose Tighe, Esq., 195.

Inheritance taxes and probate fees.—Albert B. Ovitt, Esq , 123.

Labor associations—Their antiquity.—Hon. U. M. Rose, 2.

Lawyers from a moral standpoint, 179.

Mechanic's lien folly.—Daniel Fish, Esq., 61.

Mortgage—Notice of foreclosure by advertisement.—
M. L. Countryman, Esq., 271.
F. W. Gail, Esq , 301.

Names of parties—How stated in citing cases in briefs.—Hon. C. C. Wilson, 299.

Negligence—Evidence positive and negative, effect of discussed.—N. M. Thygeson, Esq., 221, 245.

Non-suit may be granted, when.—John. F. Kelly, Esq., 231, 282.

Notices in mortgage foreclosures.—
M. L. Countryman. Esq., 271.
F. W. Gail. Esq., 301.

Photographs as evidence.—John A. Larimore, Esq., 92.

Pleadings—Amendment of answer not verified within twenty days after service.—John F. Kelly, Esq , 141.

Practice—Amendment of answer not properly verified within twenty days after service.—John F. Kelly, Esq., 141.

Probate fees and inheritance taxes.—Albert B. Ovitt, Esq , 123.

Revision of Minnesota Statutes needed.—Hon. C. C. Wilson, 300.

Statutes of Minnesota—Proper citations.—Hon. C. C. Wilson, 300.

Trust funds—How same may be followed.—John A. Larimore, Esq., 27.

Trusts and strikes.—Address of Hon. U. M. Rose, before American Bar Association, 1.

NOTES AND COMMENTS.

Attorneys at law—Admission of women to bar, 23.
Attorneys at law—Reforms in New York, 105.
Constitutionality of anti-scalper law, 19.
Contempt—Remission of sentence by executive, 55.
Evidence—Photographs as evidence, 24.
German jurists and poets, 12.
Insolvency—Fraudulent preference, 11.
Intoxicating liquors—South Carolina dispensary law, 19.
Jurists and poets of Germany, 12.
Justice of peace—Remedy where record is falsified, 10.
Legal ethics—Opinion of Chief Justice Houston, supreme court of Idaho, 102.
Legislator not exempt from service of summons, 11.
Legislative invasion of rights of citizen, 11.
Photographs as evidence, 24.
Probate judges—Term of office should be extended. Hon. John H. Steele, Hon. John B. Olivier, Hon. H. L. Buck, Hon. H. Blackmer, Hon. Wm. B. Torrey and Hon. John Constans, 34.
Process serving in New York as an art, 79.
Sentences—Inconsistent sentences in England, 107.
Sentence suspended on condition criminal leaves town, 80.
Special legislation under recent constitutional amendment, 14.
Witness—Cross-examination of women. Advice of Rufus Choate, 23.

NOTES OF RECENT CASES.

Building Association—Right of withdrawing member to sue. Heinbokel vs. National S. L. & B. Association, 49.
Chinese exclusion act—Restaurant keeper—"Laborer" defined. In re Ah Tow, 59 Fed. Rep. 561, 74.
Constitutionality of act authorizing flooding of lands to raise water in Lake Minnetonka, 43.
Constitutionality of insanity law of 1893. State vs. Billings, 57 N. W. Rep. 794, 39.
Constitutionality of Minnesota anti-scalper law, 19.
Constitutional law—Special legislation under recent amendment to constitution. State vs. Cooley, 14.
Constitutional law—State elevator case.—Limitations upon power of government. Rippe vs. Becker, 57 N. W. Rep. 331, 44.
Criminal law—Suspension of sentence "during good behavior."—Subsequent commital illegal, 106
Divorce—Cruelty without actual violence, 22.
Divorce—Foreign divorce on service by publication. Thurston vs. Thurston, District Court Ramsey County, 20.
Easement destroyed by closing public alley. Van Witzen vs. Gutman, 24 L. R. A., 403.
Evidence—Declarations as to intention. Commonwealth vs. Trefethen, 24 L. R. A. 235, 235.
Fraudulent preference by insolvent—Thompson vs. Johnson, (Minn.) 57 N. W. Rep. 223, 11.
Garnishment in state court of receiver appointed by United States court, 149, 154.
Homestead exemption under hotel lease allowed, 45.
Husband and wife—New York statute—Two spouses at same time, 78.
Infant—Life insurance may be disaffirmed. Johnson vs. N. W. Mut. Life Ins. Co., 57 N. W. Rep. 934, 76.
Insanity law of 1893 unconstitutional. State vs. Billings, 57 N. W. Rep. 794, 39.
Insolvency—Fraudulent schemes—Contempt of court. Burt vs. Minneapolis Stock Yards & Packing Co., 57 N. W. Rep. 940, 75.
Interstate commerce act—Witness cannot be compelled to give testimony incriminating himself, 71.
Jurisdiction—Service by publication.—Decree of divorce. Thurston vs. Thurston, District Court, Ramsey County, 20.
Jury trial as a bulwark of freedom. Western Railway vs. Mulch, 21 L. R. A. 316, 53.
Liability for using person of another to ward off threatened attack—Burden of Proof—Leidlaw vs. Sage, 18.
Life insurance—Infant—disaffirming contract. Johnson vs. N. W. Mut. Life Ins. Co. 57 N. W. Rep. 934, 76.
Lotteries—Prizes offered by newspaper. United States vs. Wallis, 58 Fed. Rep. 942, 42.
Municipal corporation, when liable for freezing of plants from failure to supply water to steam boiler. Watson vs. Needham, 24 L. R. A. 287, 235.
Newspaper prizes and anti-lottery law. United States vs. Wallis, 58 Fed. Rep. 942, 42.
Parent and child—Custody of child where father and mother are not legally married, 78.
Postal laws—Mailing newspapers offering prizes a violation of. 58 Fed. Rep. 942, 42.
Negligence—Frightening horse on street by driving wagon decorated with flags and streamers. Jones vs. Snow, 42.
Negligence—Right to recover for illness caused by fright, 54.
Strikes—Intimidation defined by Judge Sanborn, 104.
Witness cannot be compelled under interstate commerce law to give testimony incriminating himself, 71.
Witness may be discredited by party calling him, when. Selover vs. Bryant, 49.

OBITUARY NOTICES.

Chief Justice Gilfillan, 302, 305.
Hon. R. C. Benton, 305.
Myra Bradwell, 52.
Hon. Wescott Wilkin, late Judge District Court of Ramsey County, 127.

OPINIONS OF ATTORNEY GENERAL.

ANIMALS.

Owner of glandered horse killed is not entitled to compensation, 253.
Village officers may enter premises to kill dogs not kept in accordance with ordinance, 144.

ARREST.

Game law confers what power upon warden who has no warrant issued, 148.

AUCTIONEERS.

License limited to county in which issued, 100.

BAIL.

Game and fish commissioners not entitled to benefit of forfeited bail, as it belongs to county, 101.

BANKS.

Chapter 119, Sec. 3 of Gen. Laws of 1889, relating to savings banks has fully superseded the law of 1879 and the prior enactment thereof, 203.

Taxes levied upon bank stock, how to be collected, 145.

BOARD OF HEALTH.

Glandered horses killed by order of board need not be paid for, 253.

CITIES.

Duty of city treasurer of Little Falls to enquire into validity of orders for payment of bonds, 129.

Militia may be called out to suppress riot by mayor of St. Paul, 176.

CONSTABLE.

Village constable may act in both counties when village situated in two, 100.

CONSTITUTIONAL LAW.

Amendment providing for inheritance tax, 146.

Election law requiring assemblymen in St. Paul to live in certain districts invalid, 174.

Taxation to pay for glandered horses killed illegal, 130.

CORPORATIONS.

Member of co-operative association organized under Gen. Laws 1879, Ch. 29, entitled to one vote only at corporate meeting, however many shares of stock he may own, 70.

COUNTIES.

Advertisement of meeting at county seat for examination of teachers is chargeable to county, 202.

Auditor cannot designate official paper after county commissioners have improperly designated one that was not lowest bidder, 97.

Bail forfeited under game and fish laws belongs to county, 101.

Bonds may be issued to build court house, 69.

Commissioners cannot designate as official paper one that is not lowest bidder, 97.

Commissioners should redistrict a county to conform to boundaries of ward lines of a city the boundaries and wards of which have been changed, 252.

Commissioner's term of office is not affected by a redistricting of a county, 252.

Publication of financial statement must be made in legal newspaper, 68.

Salary of deputy county auditor must be paid to him so long as he retains the office, whether he properly performs his duty or not, 278.

COUNTY ATTORNEY.

Complaint may be drawn by county attorney, and he may prosecute a criminal before a justice of the peace without request of justice, 229.

COURT HOUSE.

County authorized to issue bonds to build, 69.

CRIMINAL LAW.

County attorney may draw complaint and prosecute criminal before justice of peace without being requested by justice so to do, 229.

ELECTIONS.

Convention or assembly defined, 277.

Indian reservation is not subject to laws of state and election district cannot be formed therein, 255.

Judge of election—Residence in precinct, 279.

Official ballot must not contain more than one name as the candidate of a party for same office, 277.

Residence—Law requiring assemblymen in St. Paul to live in certain districts is unconstitutional, 174.

Students attending college not legal voters, 132.

Vote of precinct should be canvassed if there has been substantial compliance with law in holding election, 174.

GAME AND FISH LAWS.

Bail forfeited belongs to county, and not to game and fish commissioners, 101.

Warden cannot command bystanders to assist in arresting offenders unless he has warrant, nor deputize persons to accompany him to place of arrest, 148.

GUARDIAN AND WARD.

Exemption from taxation allowed by law to each minor may be claimed by guardian for several, 230.

HEALTH.

Glandered horses killed by order of board of public health need not be paid for, 253.

HIGHWAYS.

See *Roads and Streets*, 144, 203, 231.

INDIAN LANDS.

Election district cannot be formed within Indian reservation, 255.

INSANE PERSONS.

Fee of probate judge for acting on jury, 133.

INSOLVENCY.

Taxes due state levied before or after assignment must be paid before claims of creditors, 175.

INTOXICATING LIQUORS.

License, for what term granted, 68.

License issued under special law which authorized town supervisors to issue same are annulled by repeal of law, 147.

License issued by village expires one year from date and may be for any sum not less than $500, 133.

License to keep saloon not transferable, 130.

Village cannot grant a rebate on a license except where local option is adopted, the prohibition to go into effect during term of license, 278.

Village incorporated under laws of 1883 within provisions of chapter 145 of laws of 1885, 133.

JUSTICE OF THE PEACE.

Appointment to fill vacancy, how made, 255.

County attorney may draw complaint and prosecute criminal without being requested by justice so to do, 229.

Person refusing to pay penalty for violation of road duty may be committed to jail by magistrate, 231.

LEGAL NOTICES.

Newspapers—Law of 1893, 68.

MILITIA.

Mayor of St. Paul may call out militia to suppress riot, 176.

Pay for service allowed only when militia are called into active service by commander in chief, 176.

When the national guard is called into actual service by the commander in chief it is to be furnished subsistence by and at the expense of the state, without any deduction being made in the per diem of enlisted men on account thereof, 204.

MUNICIPAL CORPORATIONS.

Ordinances passed in pursuance of a special law are repealed by a repeal of such law, 147. See *Cities, Counties, Townships, Villages.*

NEWSPAPERS.

Change of name—Consolidation of papers, 130.

County commissioners cannot designate as official paper one that is not lowest bidder, but after such designation county auditor cannot proceed to designate a different paper, 97.

Law 1893—Legal notice means any publication required by law to be made, 68.

NOTARY PUBLIC.

Commission avoided by removal from county, 68.

NURSERY STOCK.

Who required to give bond before selling. Ch. 196, Gen. Laws 1887, construed, 67.

OFFICERS.

Salary must be paid so long as an officer retains his position, whether he properly performs his duties or not, 278.

Superintendent of schools and district treasurer's office may be held by same person, 254.

PROBATE JUDGE.

Fees for serving on jury to determine sanity of alleged insane person, 133.

REGISTER OF DEEDS.

Entries in reception books should be sufficiently explicit to locate property, 252.

Fees of register for indexing reception books, 251.

Index should be in name of each grantor and grantee where there are several, 252.

ROADS AND STREETS.

Fee in soil of highway, unless otherwise expressly provided by the legislature, remains in owners of abutting property, 203.

Justice of peace may commit delinquent who refuses to pay penalty for violation of ward duty to jail, 231.

Street commissioner cannot place upon poll list name of person arriving at majority after list has been made up, 231.

Town supervisors may designate when and how road districts shall be laid out, 144.

SAVINGS BANKS.

Sec. 3 of Ch. 119, Gen. Laws 1889 has superseded law of 1879 and prior enactments, 203.

SCHOOLS.

County is liable only for expense of advertising meeting for examination of teachers to be held at the county seat, 202.

District in which for three years there had been no school, although a district organization has been maintained, is entitled to a reapportionment as a new district when new school house has been erected and school taught therein for two months, 202.

Fund received from state need not be used exclusively in paying teachers' salaries, but for any other necessary purpose, 280.

Joint district partly in two counties may be considered in determining salary of county superintendent as in either or both counties regardless of location of school house, 230.

Superintendent of schools and district treasurer may be same person, 254.

TAXATION.

Assigned property of insolvent liable to taxes levied by state before or after assignment, 175.

Constitutional amendment authorizing inheritance tax, 146.

Exemption allowed by law for each minor may be claimed by guardian of several minors, 230.

Proceedure to enforce payment of taxes vied upon shares of bank stock, 145.

lePublic purposes—Payment for glandered horses killed, 130.

Tax certificate is liable to taxation as personal property until time to redeem has expired, 204.

TOWNSHIPS.

Bonds in aid of railroad may be issued, upon what vote, 145.

By-laws must be general in their nature, 130.

Organization is not dissolved by failure to elect officers, but only by act of legislature, 177.

Supervisors may designate road districts, when and how, 144.

Treasurer authorized to endorse orders drawn on him, when, 148.

Treasurer cannot be relieved by vote from personal liability for money lost by deposit in insolvent bank, 131.

VILLAGES.

Constable may act in two counties when village is situated in both, 100.

Liquor license may be issued for a period of one year, regardless of time when issued, 68, 69.

Liquor license expires one year from date, and may be for any sum not less than $500, 133.

Officers may enter upon private property to kill dog kept contrary to ordinance, 144.

Quo warranto proceedings to dissolve—Petition of majority of citizens, 99.

Recorder is only entitled to fees provided by section 46 of chapter 145 of Gen. Laws of 1885, and council cannot increase them, 229.

Separation from township—Election—Notice, 279.

Tramp nuisance may be regulated by village ordinance, 144.

RULES OF COURT.

HENNEPIN COUNTY.

Special terms—Calendar—Filing papers, 60.

Stay of proceedings after verdict or decision, 60.

ELEVENTH DISTRICT.

Corporations—Receivers—Intervention of Claimants—Notice, 270.

ELEVENTH DISTRICT.—(Continued.)

Divorce cases placed on general term calendar when defendant does not answer, 119.
Judgment by default on negotiable instrument—Notes must be filed, 119.
Jury and court cases, how tried—Call of calendar, 118.
Mistrials go to foot of calendar for trial same term, 119.
Receivers for corporations—Intervention—Claims—Notice, 270.
Special terms, when held—Call of calendar, 119.
Trial by jury—Amendment of rule 29 of district court rules, 119.

RAMSEY COUNTY.

Insolvency—Notice to creditors to file claims within 20 days or be barred, 26.

WIT AND HUMOR.

Arson or breach of promise of marriage, 178.
Bigamy defined, 236.
Brewer's label, 259.
Challenging the judge, 55.
"Et al" defined by Irish justice, 201.
Expense vs. profits, 209.
Lawyer a failure as a political speaker, 207.
Lawyer crediting fine for contempt on note of judge, 236.
Lawyer's death a subject for thanksgiving, 193.
Lawyer's "Lullaby," 258.
Lawyer making an honest living, 207.
Legal courtesy illustrated, 153.
Jury properly rebuked, 193.
Jury—Experience of city lawyer in country, 148.
Jury dodger, 296.
Judge following example of Solomon, 236.
Plea of guilty by champion liar, 178.
Progressive student, 209.
Railroad Pass, 281.
Return of warrant by constable, 54.
Sentence in consideration of attorney's youth, 108.
Solomon as a modern judge, 236.
Warning to trespassers, 193.
Wife as assistant editor, 209.
Wills and filial affection, 296.
Witness—Female's first suit, 108.
Witness—Giving language used by accused, 78.
Witness—Judge mistaken for green goods man, 153.
Witness—Name of other eye, 255.
Witness—What passed between the parties, 280.