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Minnesota State Bar Association

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FOREWORD

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DENNIS & CO., INC.

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MINNESOTA LAW JOURNAL.

A MONTHLY PUBLICATION

DEVOTED TO THE INTERESTS OF THE STATE BAR AND THE REPORTING OF ALL IMPORTANT DECISIONS OF THE DISTRICT COURTS.

VOLUME V.

COVERING THE YEAR

1897.

PUBLISHED BY

FRANK P. DUFRESNE,

PUBLISHER AND LAW-BOOK-SELLER,

ST. PAUL, MINN.

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A PRACTICAL MONTHLY MAGAZINE.

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CONTENTS.

COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

THE JOURNAL'S FIFTH YEAR.

With this number the Minnesota Law Journal enters upon its fifth year of literary life, and it is with feelings of pride and gratification that its publisher and editor assure its subscribers that it is no longer a mere venture, but a sucessful enterprise, in spite of the many obstacles it has had to overcome.

The publication of a state law journal must necessarily be largely a labor of love. Its circulation is so limited that pecuniary gain is out of the question, and but for the recognition of the fact that the members of the legal profession appreciated its efforts to cater to their wants the Journal would long ago have been discontinued. It has, however, thanks to the support it has received, lived through its infancy, and is now looking forward to a career of increased usefulness. How far our hopes will be realized must depend upon the aid our subscribers will lend us in calling our attention to important District Court decisions, and other matters of interest to the profession. One of the most valuable features of the Journal is the reporting of these decisions, and if the attorneys who try important cases will kindly furnish us with brief statements of the facts involved, and the authorities cited to sustain the positions assumed, we will fully and carefully re-

port these decisions. Unless the attorneys interested in a case assist us in this way it will not be possible to make as good a report of a decision as we desire. While any assistance on this line will be highly appreciated by the Journal, it will also redound to the benefit of the profesion throughout the state.

We propose to add several new features to the Journal during the coming year, and will spare no pains or expense to make it deserving of the patronage we ask for it.

A NEW DEPARTURE.

Beginning with this number of the Journal we will furnish a digest of the current decisions of the Supreme Court of Minnesota, referring to the advance sheets of the Northwestern Reporter where the cases are reported in full. The cases will be classified in each number on the same general plan, so that, when the numbers have accumulated, very little time will be consumed by a lawyer using this digest in ascertaining whether the Supreme Court has recently passed upon any question being examined.

The Minnesota Law Journal will in this way provide the profession with an accurate digest of the decisions of the Supreme Court in advance of any other publication, and when a volume has been completed and bound it will contain a digest for the year covered by it of all Minnesota cases alone, and a subscriber will not be compelled to hunt through the thousands of cases decided in other states, digested in the American or General Digest, to find the decisions of his own state on the points he is seeking light upon.

LIABILITY OF STOCKHOLDERS IN MANUFACTURING CORPORATIONS.

Judge Brill of the District Court of Ramsey county in the case of the National German American Bank v. Haynie et al., reported in this number of the Journal, decides that the liability of a stockholder under the constitutional provision of this state is to be determined by the terms of the articles of incorporation, and that the stockholders in an association, that by its articles is thorized to engage in manufacturing solely, are not individually liable for its debts, where it has also to some extent carried on a mercantile business not authorized to engage in manufacturing here announced, with the limitations placed upon it in the opinion of the learned judge, is undoubtedly correct.

LIABILITY OF HOLDERS OF NATIONAL BANK STOCK AS COLLATERAL SECURITY.

The Supreme Court of the United States in Pauly v. National Bank, which is reported in full herein, passed upon the liability of one to whom stock of a national bank had been transferred as collateral security, and held that where the name of the transferee "never appeared upon or in the stock or other corporate books" of the bank except as "pledgee," and there was no element of fraud or collusion in the transaction, he could not be held liable as a shareholder under section 5151 of the United States Revised Statutes. This decision is of such general interest and so fully reviews and distinguishes the former decisions of the court upon the point involved, that we have thought it well to call attention to it.

NEGLIGENCE OF RAILWAYS IN THEIR DUTY TO TRESPASSERS.

The dissent of Magruder, C. J., in the late case of Wabash R. R. Co. v. Jones (45 N. E. 50), Supreme Court of Illinois, while taken on a point of pleading, marks an attempt to escape the consequences of the Illinois rule on the subject of duty to tresspassers on railroads, (says the American Law Register and Review).

The material facts were that a child was injured, while walking on the track, in a manner and for a purpose pursued by many of the community and sanctioned by a usage of twenty-five years. The railroad company sought to escape liability for its servant's alleged want of care, on the ground that plaintiff was a trespasser. To this view the majority of the Court inclined.

The jurisdictions adopting the Illinois view hold that the railroad never has any duty toward persons found on its tracks other than the duty to avoid willful injury, unless those persons

have been positively invited by the railroad company to go upon its tracks. They draw a sharp "distinction between cases where there is a mere naked license or permission to enter upon or pass over an estate and cases where the owner or occupant holds out any enticement, allurement or inducement to persons to enter upon or pass over his property:" Ry. v. Bodemer, 139 Ills. 596 (1892). The view which is found in the majority of American jurisdictions is clearly expresed by Boggs, P. J. in the decision of this same case in the Appellate Court: 123 Ills. 125 (1893). "We do not think that this evidence was admitted for the purpose, as is supposed, of establishing a legal right in the plaintiff to be upon the track; its admission was proper for another purpose. * * * If the evidence * * * tended to show that persons were likely to be upon the track at the time and at the place where the appellee was injured, and that the company had notice thereof and had reason to anticipate the presence of persons there, though trespassers, then * * * the evidence was competent."

This theory does not require the railroad constantly to exercise vigilance, in order to ascertain whether the track is free; the company is not required to anticipate the presence of any unauthorized persons upon its tracks, in the absence of knowledge or notice. "The degree of care required in the operation of trains is proportioned to the danger likely to result therefrom." Texas & P. R. Co. v. Watkins, 26 S. W. 760 (1894).

This is the rule followed in New York, Pennsylvania, Missouri, Powell v. R. Co., 59 Mo. Ap. 626 (1894); Wisconsin, Johnson v. R., 86 Wis. 63, 56 N. W. 161 (1893), and most of the Western states. The Massachusetts view is somewhat uncertain. In Chenery v. Fitchburg, etc., R., 160 Mass. 211, it was held that the existence of a license by acquiescence to cross at a private way was a question for the jury. The Illinois rule prevails in Alabama and a few other states.

The first case in Illinois laying down the rule now followed in that state was R. v. Godfrey, 71 Ills. 500 (1874). This case (which did not go quite the length of the principal case, since the decision was based partly on the contributory negligence of the plaintiff) seems to have been decided largely on the authority of the Pennsylvania cases of R. v. Hummel, 44 Pa. 375, and Gillis v. R., 59 Pa. 129. In R v. Hummel, Strong, J., employed what is now generally regarded as a mistaken analogy in the following language:

"There is as perfect a duty to guard against accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad where the public has no right to be." The Supreme Court of Nebraska, R. v. Wymore, 40 Neb. 645, 58 N. W. 1120 (1894), refused to follow this ruling.

This expression of Mr. Justice Strong was, nevertheless, quoted with approval by Sharswood, J., in Gillis v. R. (supra), and the latter judge on the authority of R. v. Hummel (supra) dissented in Kay v. P. R. Co., 65 Pa. 269 (1879). It was held, in this case, distinguishing and virtually overruling R. v. Hummel (at least so far as it was made use of in the Illinois cases), that if a railroad company allowed the neighboring population to use its tracks as a way, the presumption of a clear track could not arise as in other parts of the road, and that greater precaution was necessary under these circumstances than elsewhere. To the same effect is Taylor v. Canal Co., 113 Pa. 162 (1886).

The Illinois courts continue to cite R. v. Hummel (supra) and Gillis v. R. (supra), as though they embodied the Pennsylvania law on the subject.

The Supreme Court of Washington, in a case almost on all fours with the present one, Roth v. Union Depot Co., 13 Wash. 525 (1896), have gone into a most elaborate and exhaustive survey of the authorities, and have reached a conclusion contrary to that of the Illinois court. It is interesting to observe that Hoyt, C. J., dissents, on the ground that he can see no difference between the duty of a railroad to trespassers, and that of any other land holder.

This analogy is surely a false one. Certainly a railway does owe some duty of caution toward persons whose presence on the track it has reason to

anticipate. Common justice and humanity demand that a railroad use a greater degree of care in a crowded country where it knows that trespassers are likely to be, than in lonely and unfrequented places. To this demand the great majority of authorities respond, and the Supreme Court of Illinois, when it frees the railroad in such cases from liability for all negligence except such gross want of care as will amount to willfulness, announces a rule of law which few jurisdictions approve.

CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

In a forgery prosecution and conviction in Beyerline v. State (Ind.), 45 N. E. Rep. 772, the Supreme Court investigated the question how far communications between husband and wife are privileged. It was held competent to show by the wife's evidence that he took her by the neck, and led her into a bed-room, where he made her sign her name to a promissory note. The objection made to this evidence was that it detailed a confidential communication made to the wife by her husband. The Court properly replied that in the conduct, shown in the evidence, the husband was occupied in a double wrong, instead of being engaged in a confidential communication, such as the marital relation would shield from public exposure.

The Court treated further on the subject, as follows:

"It is not every conversation between husband and wife, nor every word or act said or done by either in the presence of the other, that is protected under the seal of secrecy, but only such communications, whether by word or deed, as pass from one to the other by virtue of the confidence resulting from their intimate relations with one another. Where the criminal, in seeking advice and consolation, lays open his heart to his wife, the law regards the sacredness of their relation, and will not permit her to make known what he had thus communicated, even as it will not ask him to disclose it himself. But if what is said or done by either has no relation to their mutual trust and confidence as husband and wife, then the reason for secrecy ceases. Accordingly, many conversations and actions by and between husband and wife have been held not to be privileged. In Beitman v. Hopkins, 109 Ind. 177, 9 N. E. 720, which was an action to set aside an alleged fraudulent conveyance made by a husband to his wife, the wife was allowed to give evidence as to negotiations between her and her husband prior to and resulting in the conveyance of the land to her. The ruling of the trial court in admitting the evidence was approved, this Court holding that the negotiations were in no sense such communications as are made incompetent by the statute. So, in Brown v. Norton, 67 Ind. 424, it was held that a wife might testify as to a parol contract entered into between her husband and another person; and in Schmied v. Frank, 86 Ind. 250, a like ruling was made concerning evidence given by a wife as to conversations between her and her husband, whereby she constituted him her business agent. In Williams v. Riley, 88 Ind. 290, it was likewise held that a wife should have been permitted to testify that she was present when a certain note executed by her husband and others had been paid. 'Husband and wife,' said the Court in that case, 'are not longer incompetent witnesses for or against each other, except that neither of them is allowed to testify in relation to a communication made by the other.' A similar holding was made in Jack v. Russey, 8 Ind. 180. In divorce and other like proceedings a still larger liberty is permitted. Smith v. Smith, 77 Ind. 80, was an action for divorce brought by a wife. It was there held proper for her to testify as to her conduct as a wife, and as to her husband's habits of intoxication and his abuse of her. Also, in Stanley v. Stanley, 112 Ind. 143, 13 N. E. 261, being an action on an ante-nuptial bond given by the husband, it was held that the wife might testify as to the conduct of the husband in matters relating to the alleged violation of the conditions of the bond. And in Mainard v. Reider, 2 Ind. App. 115, 28 N. E. 196, which was an action by a husband to recover for the seduction of his wife, the evidence of the husband as to statements made in his presence

by his wife to her seducer was held competent."

"In criminal prosecutions the restrictions as to the competency of offered evidence are still further removed. By section 504, Rev. St. 1894 (section 496, Rev. St. 1881), all persons not expressly excepted are declared to be competent as witnesses in civil actions. In the succeeding section, those excepted as incompetent are the insane; children under 10 years of age, save in certain cases; attorneys, physicians, and clergymen, as to confidential matters; and, 'sixth, husband and wife, as to communications made to each other.' Other exceptions, not necessary to state here, are made in the sections of the statute immediately following. By section 1867, Rev. St. 1894 (section 1798, Rev. St. 1881), all persons competent to testify in civil actions are declared to be also competent in criminal prosecutions, and, in addition, three other classes of witnesses are named as competent—that is, the accused, if he wishes to testify; his accomplices, if they consent; and the injured party. Under the last of these cases, it has been held that a wife, when the injured party, is competent to testify, even as to confidential communications between her and her husband. Doolittle v. State, 93 Ind. 272. It has also been held that, for the purpose of showing the relations that existed between husband and wife, letters written by her to her husband might be read in evidence, in a prosecution afterwards instituted against him in which he was charged with her murder. Petit v. State, 135 Ind. 393, 34 N. E. 1118. In Perry v. Randall, 83 Ind. 143, the actions of a husband in taking money belonging to another, counting it over, putting it into his pocket, and not returning it to the owner, all in presence of his wife, were held to be confidential communications, which could not be testified to by her, even though she avoided the statement of any words spoken by her husband. Yet in Hutchason v. State, 67 Ind. 449, the testimony of a wife as to the acts of her husband in the commission of arson was held competent; and in Jordan v. State, 142 Ind. 422, 41 N. E. 817, a husband was permitted to testify as to a communication to him by his wife that she intended to burn a certain mill. The reason given for this last holding was, that the husband was under the statute above cited, an 'injured party,' being part owner of the mill which she was charged to have set on fire."

"In the light of the interpretation so given to the statutes relating to a wife's testimony, there can be no doubt that the evidence here objected to was competent. It was not concerning any confidential or other communication made by the husband to the wife, but, as in several of the cases cited, was evidence of a crime committed by him in her presence. He, besides, forced her to aid him in the commission of the forgery; and appellant says that she herself committed the forgery. If she had been thus wrongfully accused by him, she might testify as an injured party; and, if she were indeed an accomplice with him, she might testify as such. If, on the other hand, as seems to have been the case, she was an abused and maltreated wife, forced, also, into the commission of a criminal action against her will, the marital relation had no connection with his act, and she might then, also, give evidence of the crime."

SUPREME COURT OF THE UNITED STATES.

Frederick N. Pauly, Receiver of the California National Bank of San Diego, Plaintiff in Error vs. The State Loan and Trust Company, Defendant in Error.

National Banks—Liability of Stockholders--Pledgee of Stock.

One who does not appear upon the official list of the names and residences of the shareholders of a national banking association otherwise than as "pledgee" of a given number of shares of the capital stock of such association—nothing else appearing—is not liable as a "shareholder" of such association under section 5151 of the Revised Statutes of the United States declaring that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the amount of their stock herein at the par value thereof, in addition to the amount invested in such shares." Pullman v. Upton, 96 U. S. 328, National Bank v. Case, 99 U. S. 628, Bowden v. Johnson, 107 U. S. 251 and Anderson v. Philadelphia Warehouse Co. 111 U. S. 479 distinguished.

In Error to the United States Circuit

Court of Appeals for the Ninth Circuit. Affirmed.

Mr. Justice Harlan delivered the opinion of the court.

This was an action to recover the amount of an assessment made on the shareholders of a national banking association in the hands of a receiver.

Is the defendant in error, the State Loan and Trust, company, a "shareholder" of the California National Bank of San Diego within the meaning of the statute relating to national banking associations? That is the sole question presented by the pleadings.

By the Revised Statutes of the United States, it is provided:

"Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired."

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * * "

"Sec. 5152. Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such funds would be, if living, and competent to act and hold the stock in his own name."

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency."

The comptroller of the currency appointed the plaintiff in error, receiver of the California National Bank of San Diego, California. R. S. Sec. 5234. He gave bond as required by law, and thereafter entered upon the discharge of the duties of his trust.

In virtue of the authority conferred upon him by law, the comptroller made an assessment on the shareholders of the bank for $500,000, to be paid by them on or before the 18th day of June, 1892. The assessment was equally and ratably upon shareholders to the amount of one hundred per centum of the par value of the shares of the capital stock of the bank held and owned by them respectively at the time of its failure or suspension, and the receiver was required by an order of the comptroller to institute suits to enforce against each shareholder his personal liability to that extent.

The receiver gave due notice of the assessment, in writing, to the State Loan and Trust Company—which is a corporation of California, having its principal place of business at the city of Los Angeles in that state—and made demand upon it therefor, but the company did not pay the same or any part thereof.

The facts upon which the claim against the defendant company is based are these: S. G. Havermale and J. W. Collins, owners and holders respectively of certificates numbered 286 and 297 issued to them for one hundred shares, each, of the capital stock of the California National Bank of San Diego, were indebted to the State Loan and Trust company upon their promissory note for $12,500, besides interest. These certificates having been indorsed by the respective holders by writing

their names across the back thereof, were transferred and delivered to the State Loan and Trust company as collateral security for the payment of the above note, and, so indorsed, were, in ordinary course of mail, transmitted and surrendered to the California National Bank of San Diego. New certificates, numbered 308 and 309, respectively, were thereupon issued to the State Loan and Trust company of Los Angeles, as "pledgee," in lieu of certificates 286 and 297.

Each of the new certificates showed upon its face that it was issued to the "State Loan and Trust company of Los Angeles," and each purported to be for one hundred shares of the capital stock of the California National Bank of San Diego.

The defendant, after receiving certificates 308 and 309, held them "as pledgee, and as collateral security for the payment of said note, and for the unpaid balance of the debt thereby represented."

Otherwise than as just stated, the State Loan and Trust Company of Los Angeles never had, owned or held any shares of the capital stock of the California National Bank of San Diego, and never was entitled to hold the usual stock certificate as such shareholder to the amount of two hundred shares or to any other amount.

Except as pledgee of the stock represented by certificates 308 and 309, respectively, the name of the State Loan and Trust company never appeared upon or in the stock or other corporate books of the California National Bank of San Diego as a shareholder. The entries in the books of the bank showed that the new certificates were issued to the State Loan and Trust company as pledgee, and not otherwise.

A jury having been waived by the parties in writing, the case was tried in the circuit court, and judgment was rendered for the defendant: 56 Fed. Rep. 430. Upon appeal to the circuit court of appeals that judgment was affirmed: 15 U. S. App. 259.

Is one who does not appear upon the official list of the names and residences of the shareholders of a national banking association otherwise than as "pledgee" of a given number of shares of the capital stock of such association—nothing else appearing—liable as a "shareholder" of such association under section 5151 of the Revised Statutes of the United States, declaring that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares?"

As both sides contend that their respective positions are in harmony with decisions heretofore rendered in this court, it will be necessary to refer to some of the cases cited by counsel.

In Pullman v. Upton, 96 U. S. 328, 330, which was an action by the assignee in bankruptcy of an insurance company to compel a holder of shares of its stock to pay the balance due thereon, the court said: "The only question remaining is, whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt. That the original holders and the transferees of the stock are thus liable, we held in Upton v. Tribilcock, 91 U. S. 45, Sanger v. Upton, Id. 56 and Webster v. Upton, Id. 65; and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they can not have, if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner—that is, the one in whose name the stock stands on the books of the corporation—is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein."

In National Bank v. Case, 99 U. S.

628, 631, 632—which was an action to make the Germania National Bank of New Orleans liable as a shareholder of another national bank that had become insolvent—it appeared that Phelps, McCullough & Co. borrowed money from the defendant bank, and to secure the payment of the loan, evidenced by note, pledged one hundred shares of the stock of the Crescent City National Bank, with power on non-payment of the sum borrowed to dispose of the stock for cash without recourse to legal proceedings, and to that end to make transfers on the books of the latter corporation. The note not having been paid, the stock was transferred on the books of the Crescent City National Bank to the Germania National Bank. The latter subsequently caused the stock to be transferred, on the books of the former, to one of its clerks, who acquired no beneficial interest in it, and between whom and the officers of his bank it was understood that he would retransfer the stock at their request. This court, observing that notwithstanding the transfer to the clerk the stock remained subject to the bank's control, and that the transfer to him was made to evade the liability of true owners, said: "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in Pullman v. Upton, 96 U. S. 322; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: Adderly v. Storm, 6 Hill (N. Y.), 624; Roosevelt v. Brown, 11 N. Y. 148; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Magruder v. Colston, 44 Md. 349; Crease v. Babcock, 10 Metc. (Mass.) 525; Wheelock v. Kost, 77 Ill. 296; Empire City Bank, 18 N. Y. 199; Hale v. Walker, 31 Iowa, 344.

For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. * * *

When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made." After referring to some of the English cases, the court proceeds: "The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect of such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.' Nathan v. Whitlock, 9 Paige (N. Y.), 152; McClaren v. Franciscus, 43 Mo. 452; Marcy v. Clark, 17 Mass. 329; Johnson v. Laflin, by Dillon, J., 6 Cent. Law Jour. 131 (5 Dillon, 65). The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder."

It may be here observed that in Pullman v. Upton, the person who sought to escape liability as a shareholder appeared on the books of the insolvent insurance company as the owner of

the stock; and that in National Bank v. Case, the Germania National Bank, after the original transfer under the power of attorney executed by its debtor, appeared on the books of the other bank as the owner of the stock, and that the liability arising therefrom could not be defeated or avoided by a transfer, however regular in form, to another who acquired no beneficial interest in it, and was to hold the stock simply for its benefit. Nothing appeared upon the stock list, in either case, to indicate that the person or corporation who appeared on such list as a shareholder was not, in fact, the actual owner.

In Bowden v. Johnson, 107 U. S. 251, 261, which involved the liability as a shareholder of a national bank of one who became the purchaser and owner of some of its shares, and who, in apprehension of the bank's failure, and in order to escape liability, transferred his stock to an irresponsible person, the court said: "The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a bona fide transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any liability to respond for the individual liability imposed by the statute in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder quoad the creditors, although he may be able to show that there was a full or partial consideration for the transfer, as between him and the transferee.

The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in National Bank v. Case, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

But the case to which our attention has been particularly called is Anderson v. Philadelphia Warehouse Company, 111 U. S. 479, 483-5, in which the question was as to the liability of the Philadelphia Warehouse Company as a shareholder of a national bank that had become insolvent. The facts in that case were these: Blumer & Co. (the senior member of that firm being president of the bank) arranged with the Warehouse company for a loan or banker's credit, to be secured by collaterals. Kern, a member of the firm, transferred 450 shares of the stock of the bank, standing in his name on the books of the bank, and caused a new certificate to be issued in the name of Henry, as president of the Warehouse company, and it was taken or sent to that company as further security for the credit extended to Blumer & Co.

The fact of this transfer of stock to the name of Henry, as president, having come to the knowledge of the directors and executive committee of the Warehouse company, they caused a transfer to be made on the books of the bank to one McCloskey, an irresponsible person, and a porter in its employment, and a new certificate to be issued in his name, because they deemed it inadvisable to have the stock stand in the name of the company's president, and thus incur the

liability imposed upon shareholders of national banks. McCloskey never had possession of the certificate and gave to the Warehouse company an irrevocable power of attorney for the sale and transfer of the stock. Upon McCloskey's death the stock was transferred on the books of the bank to Ferris, also an irresponsible person and an employe of the Warehouse company. A new certificate was issued to him, and delivered to the company, Ferris indorsing thereon an irrevocable power of attorney for its transfer. When the bank failed the stock stood in the name of Ferris, the Warehouse company holding the certificate. That company never received any dividends on the stock, and never acted as a shareholder, but held the stock as security for the debt due it.

This court in that case recognized it to be well settled that one who allows himself to appear on the books of a national bank as an "owner" of its stock is liable to creditors as a shareholder, whether he be, in fact, the absolute owner or only a pledgee, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors—citing National Bank v. Case, 99 U. S. 628; Bowden v. Johnson, 107 U. S. 251. It was further said to be beyond question that the beneficial owner of stock registered in the name of an irresponsible person may under some circumstances, be liable to creditors as the real shareholder; "but," the court observed, "it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

It appeared, according to the opinion in that case, that there was no evidence of actual fraud or bad faith; that the warehouse company never was the owner of the stock in question, and never held itself out as such; that the transfer of Kern and Blumer & Co. was only by way of pledge, and the company was bound to return the stock whenever the debt, for which it was held, was paid; that the company never consented to a transfer of the stock to its name on the books, or to that of its president, and that for seven years before the failure of the bank, and at least five years before its embarrassments were known to the company or the public, the stock, with the assent of Kern, Blumer & Co., and the officers of the bank, stood in the name of McCloskey or Ferris; that during all that time neither the registered holders nor the warehouse company claimed dividends or in any way acted as shareholders; that either Kern or Blumer & Co. took the dividends as they were paid, and to all intents and purposes controlled the stock; that there was no concealment on the part of the warehouse company, and no effort to deceive; that it had possession of the certificates representing the stock, with full power to control them for all the purposes of its security, but never was or pretended to be anything else than a mere pledgee; that those who examined the list of shareholders would have found the name of McCloskey or Ferris as the registered holder of four hundred and fifty shares; there was nothing on the books of the bank to connect them, or either of them, with the warehouse company, and, therefore, no credit could have been given on account of the apparent liability of the company as a shareholder.

"If," the court said, "inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. Blumer & Co. and the bank were fully advised who McCloskey was, and of his probable responsibility, when they allowed the transfer to be made to him, and they undoubtedly knew who Ferris was when the stock was put in his name after McCloskey's death. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as a pledgee, without making itself liable

as an apparent owner. Kern or Blumer & Co. still remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their, debt. They consented to the transfer, not to escape liability as shareholders, but to save the company from a liability it was unwilling to assume, and at the same time to perfect the security it required for the credit to be given. As between Blumer & Co. and the warehouse company, Blumer & Co. or Kern were the owners of the stock and the company the pledgee. As between the company and the bank, or its creditors, the company was a pledgee of the stock and liable only as such.

The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co., who were always the real owners. To our minds the fact that the stock stood registered in the name of Henry, president, from December 27th, to January 10th, is, under the circumstances of this case, of no importance. The warehouse company promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose. It asked that the transfer might be made to McCloskey. To this the owners of the stock and the bank assented, and from that time the case stood precisely as it would if the transfer had originally been made to McCloskey instead of Henry, president, or if Henry had retransferred to Kern or Blumer & Co., and they had at the request of the company made another transfer to McCloskey. The security of the warehouse company was perfected without imposing on the company a shareholder's liability. All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment. So far as the company was concerned, the transfer was not made to escape an impending calamity, but to avoid incurring a liability it was unwilling to assume, and which it was at perfect liberty to shun."

Another of the cases referred to, although it did not relate to the liability of the shareholders of national banking associations, is Easton v. German-American Bank, 127 U. S. 532, 536-7, in which it was said: "Where personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can be only where the pledgor holds as agent of the pledgee. By virtue of the pledge, the pledgee has the right by law, on default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he can not also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale. The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as security for the payment of an obligation, with a power to sell in case of default. There the creditor is also a trustee to sell, and can not purchase the property at his own sale for his own use."

It is apparent that the precise question before us was not involved in any of the above cases, although the principles announced in them bear upon the issue here presen

From those cases the following rules relating to the liability of shareholders of national banking associations may be deduced:

That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151;

That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Re-

vised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association;

That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed;

That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151; and,

That the pledgee of personal property occupies toward the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor.

The present case differs from those cited in the important particular that the stock list of the bank gave information to all who examined it that the State Loan and Trust company was not the real or absolute owner of the shares in question, but held them only as "pledgee;" that there was no "out and out" transfer of the stock, whereby the transferrer, as between him and the transferee, parted with his interest; and that the real ownership remained with the pledgor, the pledgee acquiring only a lien upon the stock to secure its debt.

In the case of Finn v. Brown, 142 U. S. 56, 71, the question was as to the liability as a shareholder of a director of a bank who appeared upon its books to be the owner of a given number of shares of stock. The court said: "It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock book. The jury would not have been justified in holding the defendant not liable for the assessment on the 50 shares or for the $1,750 dividend. The dividend was undoubtedly fraudulent, and the records of the bank were falsified in showing that the defendant was present at the meeting at which the dividend was declared. It was declared, probably, by De Walt himself alone, for the purpose of showing a fictitious prosperity and of concealing from the public and the directors the real condition of the affairs of the bank. The defendant had had no previous connection with a banking business, and was deceived by De Walt. But all this can not relieve him from liability. The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds; and it can not be held, with any safety to the interests of the public and those who deal with national banks, that a director, who also is vice-president and acts as cashier, can shield himself from liability by alleging ignorance of what appears by the books of which he has charge."

Does the statute, in letter or spirit, require that the word "pledgee," appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee? The statute requires that there shall be kept, at all times, in the office where the business of a national banking association is trans-

acted. and subject, during business hours, to the inspection of shareholders and creditors of the association, as well as of officers authorized to assess taxes under state authority, a full and correct list of the names and residences of all the shareholders of the association, and of the number of shares held by each. Sec. 5210. Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as state authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements. Referring to this provision this court said, in Waite v. Dowley, 94 U. S. 527, 534, that the act of congress "was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank." And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, "in addition to the amount invested in such shares." The word "invested" plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and can not refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral security for debts or obligations already or to be contracted.

It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value.

But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was not assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. Upon inspecting the stock registry or any list of shareholders or of transfers kept by the bank, creditors will know that they can not regard a pledgee as the actual owner. If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that, upon any principle of justice, or upon grounds of public policy, the pledgee could have been held to the liability imposed by section 5151 upon shareholders. But the liability being purely statutory, the result ought not to be different because of the circumstances that the name of the pledgor was omitted from the certificates, since that which did appear in them was sufficient to inform creditors that the State Loan and Trust company was only a pledgee, and by slight diligence they could have ascertained the name of the pledgor.

It may be suggested that if the pledgee is not held liable as a shareholder, in respect of the shares of stock standing in its name as pledgee, then no one is liable to assessment as the owner of such stock. But it is a mistake to suppose that Havermale and Collins ceased to be shareholders for the purposes of the liability imposed by section 5151. They remained, notwithstanding the pledge, the actual owners of the stock, a right which they would have promptly asserted if the pledgee had assumed to be the owner and had sold the stock, appropriating to itself all the proceeds of sale. The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of parties as they ac-

tually are, or as, by reason of their conduct, they must be assumed to be for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official list of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners.

It was under this construction of the statute that one was held liable as a shareholder who, in the belief that the bank was about to fail, and whose liability as a shareholder had equitably attached, collusively transferred his stock to an irresponsible person, in order to escape responsibility as a shareholder. This was held to be a fraud upon the statute, and the transferrer was held, as between him and the creditors, as the real owner of the stock, and, therefore, liable, although the transferee appeared on the stock registry as the shareholder. Bowden v. Johnson, above cited. Under the same interpretation a corporation was treated as a shareholder who held shares of stock only as collateral security, but who allowed its name to appear and remain on the stock registry of the insolvent national bank association as owner, without anything indicating that it held such stock as collateral security: National Bank v. Case, above cited. So, in another case, it was held that the transferrers "remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt." Anderson v. Philadelphia Warehouse Co., above cited.

Our conclusion is that the defendant in error can not be regarded otherwise than as a pledgee of the stock in question, is not a shareholder within the meaning of section 5151 of the Revised Statutes, and is not, therefore, subject to the liability imposed upon the shareholders of national banking associations by that section.

This view of the case makes it unnecessary to consider whether the State Loan and Trust company, being a pledgee of the stock, was a "trustee" within the meaning of section 5152, providing that "persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders."

The judgment is affirmed.

DISTRICT COURT DECISIONS.

Julia Fulmore v. St. Paul City Railway Company.

(District Court, Ramsey County.)

Personal Injuries—Excessive Damages.

A verdict for $3500 damages, on the evidence as to the nature of the injuries received by plaintiff, held excessive and a new trial ordered.

Motion by defendant made on the minutes of the court for a new trial on the ground of excessive damages.

Samuel A. Anderson, for Plaintiff;

Munn & Thygeson, for Defendant.

WILLIS, J. (Orally.) One of the pronounced convictions which I have always entertained, both in professional and judicial life, has been respect for the jury system. I still believe that system is the best that has yet been devised by the wit of man for the adjudication of disputed questions of fact. I am always reluctant to disturb the verdict of a jury, and I have been accustomed in all cases to sustain a verdict wherever it was possible.

The verdict rendered in this case seems to me so far out of proportion to the injuries disclosed by the testimony, and so much at conflict with

the facts as developed at the trial, as to be calculated to shock the moral sense of mankind. It is a verdict which can scarcely be characterized too severely. The verdict, in my opinion, in the case of Morrow against the St. Paul City Railway company was too small, and I so expressed myself at the time the motion was made for a new trial. In this case, no verdict in excess of $500 could possibly be sustained by any court exercising due discretion, good judgment and that sense of fairness and justice which ought to govern all courts. Not only is that the case, but the verdict is contrary to the evidence, justly considered. I think no lawyer of experience, sitting in a court-room and hearing a man who was absolutely uninjured in a collision, say that he could not tell what happened to his wife, or how he got out of the car at the time or immediately after the collision, and does not know anything about his wife until he finds her falling on the ground outside the car, could possibly place any dependence on the testimony of such a witness. Grave suspicion attaches to the testimony of a witness who does not remember what happened to him or her, when there is no testimony that insensibility occurred, that nobody saw the person in a state of insensibility or that any blow was struck on the head or neck which would naturally tend to cause insensibility.

The medical testimony was, highly, essentially, unsatisfactory. The only possible difficulty from which this plaintiff could have been suffering was neuralgia in her right side and there was no testimony that the nerves supplying that portion of the body were severed or had been crushed or injured in any particular way.

The plaintiff appeared in court, a well-nourished person, no signs of unsoundness about her, a woman apparently strong, not having been subjected to injuries permanent in their nature; apparently a person who could endure blows and shocks much more severe than any that has appeared in the testimony here, without any great damage to her physical or nervous system. There was no testimony that her injuries were permanent.

The amount awarded her, at six per cent per annum, would yield $210 each year for the remainder of her life, and that sum thus capitalized is probably in excess of all that she could accumulate if she lived to the farthest limit of human existence. It is clearly excessive. The damage to the rib, if it really existed, amounting to a laceration of the cartilaginous tissue connecting the anterior portions of the rib, was readily cured and could result in injury to the liver only in case it lacerated the peritonaeum, and that would set up a peritoneal inflammation, which would be readily ascertainable by a medical expert. Nothing of that kind appeared in the testimony. The subjective symptoms were not such as to clearly lead the mind to the conclusion that any physical disorder existed in the plaintiff; and the numerous cases related in medical jurisprudence where hysteria has resulted in physical sensitiveness where it has been manifest at the trial and where it has been shown that simply hysteria has been a substitute for physical injury, leads us to be extremely cautious in taking a large sum of money from an individual in the community on the theory that he has wronged some one, where the claimant comes before the court with a purely subjective statement of his condition as the basis of such claim. If we had plainly seen in this case an alteration of tissue, a disturbance of the circulation, an impairment of the mental faculties, an impairment of vision, an obliteration in whole or in part of plaintiff's senses, the situation would have been entirely different. But to say that $3,500 should be taken from any individual, or any association of individuals, and awarded to this plaintiff on the testimony submitted in this cause, would be to undermine the principles of justice which should govern courts and juries.

For these reasons the motion for a new trial, made upon the minutes of the court, is granted. The case will be tried either at this term or the next, as the plaintiff may desire. Mr. Clerk, enter an order granting a new trial.

National German American Bank v. Haynie & Co., et al.

(District Court, Ramsey County.)

Corporations—Liability of Stockholders—Articles of Incorporation.

Stockholders in a corporation authorized by its articles of incorporation to carry on a manufacturing business solely, are not individually liable for its debts, although it may engage in other business than manufacturing, or such as is incidental thereto.

The National German-American Bank obtained a judgment against Haynie & Co., a corporation, and brought this action to enforce the double liability of its stockholders under chapter 76, General Statutes. The complaint contained the jurisdictional allegations, but the case was tried only on the question whether a corporation organized, according to its articles of incorporation, for the purpose of engaging in the manufacturing business solely, by thereafter engaging in mertantile or other business not authorized by its articles of incorporation, subjected its stockholders to the liability imposed by the constitution on stockholders of corporations other than those organized for the purpose of carrying on a manufacturing business. A motion by defendants was made to dismiss on account of the failure by plaintiff to show that the corporation, although organized ostensibly for manufacturing purposes, was formed actually for the purpose of carrying on a mercantile business. Motion granted.

Ambrose Tighe for plaintiff.

Jared How, Charles E. Flandrau, J. D. O'Brien and Flannery & Cook, for defendants.

BRILL, J.—This question is a difficult and somewhat doubtful one. It has been presented with great ability by counsel for the plaintiff, as well as by counsel for the defendants. It is conceded that so far as indicated by the articles of incorporation themselves, this was a manufacturing corporation.

It is claimed upon the part of the plaintiff that while this is true, yet it was not in fact organized for the purpose of a manufacturing business exclusively. And it is claimed also that in fact it did other business than a manufacturing business and such as was incident to a manufacturing business.

It has been claimed that there was fraud in the organization. I think that the purposes of the corporators, if it can be inquired into at all, aside from the indication given by the articles themselves, must have been fraudulent in order to make the claim effectual. Without going over the question in detail, it hardly seems to me that there is evidence in the case sufficient to warrant a finding that there was a fraudulent purpose in the organization of this corporation.

It appears that it in fact did a manufacturing business; and also that it did a mercantile business to some extent. The evidence is indefinite and rather unsatisfactory as to the volume and extent of the outside business done by the corporation. And yet I think there is evidence sufficient in the case to warrant a finding that the corporation did business not incidental to the business of manufacturing. Whether that should be the finding or not will be another question if the finding is made. The motion is made to dismiss., and that question must be considered upon the basis of whether or not there is evidence in the case at this time sufficient to warrant the finding to that effect. And my impression is at this time that there is evidence in the case that would warrant such a finding. So this case to my mind comes to the question where a corporation is formed for manufacturing purposes and it engages in other business not warranted by its articles, whether stockholders in the corporation are individually liable.

This must depend, of course, upon the construction given to the language of the constitution. Now, by its language the constitution excepts from its provisions imposing individual liability upon stockholders in a corporation, stockholders of any corporation 'organized for the purpose of carrying on any kind of manufacturing or mechanical business.' That language seems plain and clear. Taken in its ordinary meaning, there can be little doubt about what effect should be given to it.

It seems to me that the construction placed upon this language by the supreme court is equally clear; that is, while it has not passed upon a state

of facts here represented, yet it has been held in cases involving the liability of stockholders in corporations that the purpose for which a corporation is organized is to be determined by its articles, and not by what it in fact did. And that the liability of its stockholders is to be determined by what it was authorized to do in its articles and not by the business which, in fact, the corporation carried on.

That decision, or declaration of a principle, by the supreme court, it seems to me, logically, governs this question. If the liability of the stockholders is to be determined not by what the corporation in fact did, but by what it was authorized to do by its articles, it applies to this case, as well as the case that was before the supreme court.

Now, of course, something may be said as to the injustice or unfairness of allowing the corporation to carry on a business other than a manufacturing business, and holding the stockholders exempt from liability. But persons dealing with a corporation must take notice of its powers as fixed by its articles of incorporation. And it seems to be fair that when a stockholder takes stock in a manufacturing corporation he should not be required to act as a manager of the corporation. Any other construction would make it necessary that a stockholder stand over a corporation and direct its affairs, whether he desired to or not.

This provision of the constitution was adopted, as the supreme court has said, and as is generally understood, in order to foster manufactures. But if the stockholder is to be liable because the corporation may inadvertently, or otherwise, overstep the bounds, then the purpose of the enactment would be a good deal impaired.

As I have said, the question is not free from doubt, and I think the bar have not entirely agreed as to what the proper construction should be, but it seems to me that it should be held, following in analogy, at least, what the supreme court has already held, and following the plain and clear language of the constitution, that the stockholders are not liable.

I am not prepared to say that there might not be circumstances under which the stockholders might be held liable by reason of the fact that the corporation had exceeded its powers. But it seems to me that would be upon some other principle than that presented in this case.

I do not think that the principle of estoppel arises here, as it does not appear that persons who are seeking to enforce this liability were in any way misled.

A motion to dismiss, I think, will have to be granted.

Hattie E. Munclair v. The Minneapolis Street Railway Company.

(District Court, Ramsey County.)

Street Railway—Failure to Carry Passengers to Destination—Act of God.

Plaintiff, a woman, took passage about 10 o'clock at night in the city of Minneapolis on one of defendant's electric cars to go to a point in the city of St. Paul, to reach which it was necessary to obtain a transfer at Midway to the Prior Avenue line. She paid her fare to the point of destination. When the car reached Midway a violent storm was raging, and it could not proceed further owing to the destruction of the electric wires and poles by the wind. The same state of affairs prevailed on the Prior Avenue and other connecting lines, but the car could have returned to Minneapolis, and defendant offered to take her back to that city. She neither asked for a transfer to the Prior Avenue line nor returned to Minneapolis, but after waiting in one of defendant's cars from 11 o'clock P. M. to 3 o'clock in the morning, voluntarily, and without any compulsion on the part of defendant, left the car and walked to her destination. Held she was not entitled to recover damages for the delay at Midway, or for the failure of defendant to carry her to her destination.

Motion by defendant for an instruction directing a verdict in its favor. Motion granted.

MacDonald, Quist & Kane, for Plaintiff; Munn & Thygeson, for Defendant.

WILLIS, J. The complaint alleges that this defendant, in bad faith, knowing that it could not complete its contract of carriage, received this plaintiff as a passenger at a point in the city of Minneapolis for transportation to a point in the city of St. Paul. That it partly performed its contract of carriage and deposited the plaintiff at a point designated as Midway carhouse, as it is termed in the complaint. The complaint expressly alleges that the motive power for propelling street cars over all the lines operated by the defendant or controlled by the defend-

ant east of the Midway car-house had ceased at the time when the car arrived at that point. That allegation would cover the Prior avenue line and the interurban line and the lines that were operated by the defendant or connected with the system connected with the defendant. It proceeds to allege that after reaching this point known as the Midway car-house, the plaintiff remained in one of the street cars of the defendant for a considerable length of time and afterwards left the car and walked to her original place of destination, the place designated in her own mind at the time of starting on the journey as the place of destination.

The cause has not been tried precisely upon the theory laid down in the complaint. The cause has been tried upon the theory of a breach of the contract of carriage and the initial tort, misrepresentation, lack of good faith, seems to have been practically waived. However, the decision of the pending motion does necessarily hinge upon a rejection of that theory of bad faith, but it is proper to incidentally remark the fact that there has been practically a waiver of that claim as the trial has proceeded.

When the plaintiff reached the Midway car house, if she desired to procede upon the Prior avenue line it was her duty, if she desired to lay a basis for an action against the defendant or any other railway company, to make a demand for a transfer which would entitle her to travel over the Prior avenue line. There is no evidence that she was then and there misled by the defendant, that the defendant misrepresented the condition of affairs or exercised any fraud or deception whatsoever.

The compltaint concedes that all motive power for propelling cars east of the Midway carhouse was at an end. It was in a state of suspense, was nonoperative at that time. The testimony shows that under ordinary circumstances the plaintiff, for the rate of fare paid, was absolutely entitled to be transported as far eastward as a point known as Snelling avenue, the junction of Snelling avenue and University avenue. The testimony of the witness Smith, the testimony of the witness Hield and others, and also the testimony of the plaintiff shows that the fare originally paid in the city of Minneapolis entitled the passenger to travel as far eastward as Snelling avene. If no excuse were shown, such as an overpowering force, the act of God, or a public enemy, the plaintiff in this case would have established a cause of action for damages arising from a wrongful detention at the Midway car house for the period of time commencing at a quarter before 11 on the evening of the 6th of June and ending at 3 o'clock in the morning of the 7th day of June, the time when she left the car and proceeded eastward upon foot. However, the undisputed testimony shows that the suspension and non-operation of the motive power for all street cars eastward of the Midway car house arose from an accident which the defendant company and the corporations owning connecting lines could neither foresee nor avoid or by the exercise of the highest care and diligence could they have prevented the occurrence of this accident. The non-operation of the motive power, then, east of the Midway car house was owing to the action of the elements. It comes within the definition of those occurrences commonly denominated under the generic term of the act of God, and constituted a sufficient excuse for the suspension of the act of transportation.

The furthest limit of liability established by the testimony in any event would be a delay of the plaintiff at the Midway car house. Non constat, but the contract of transportation would have been performed on the following day if the plaintiff had waited for the defendant to put itself into a position to complete the contract. She did not wait. She was under no compulsion to leave the car. There is no testimony that she was ejected from the car. There is no testimony that she would not have been permitted to wait at the Midway car house if she had chosen so to do. She, however, acts upon her own independent judgment, and undertakes a journey upon a wet night and her health suffers by reason of her own action in that respect. She does not ask for a transfer entitling her to ride

on the Prior avenue car line. And so far as she might have been injured by want of good faith on the part of the defendant in indicating through its conductor in laconic language that a journey was to be undertaken to St. Paul, (he saying, according to her testimony, "All aboard for St. Paul."), that wrong was remedied by the plain and distinct offer of the defendant, accompanied by the present existing power to execute that offer, to carry the plaintiff back to the point at which she started. Consequently, to give force to that provision of the law which governed by the highest wisdom, excuses a common carrier for a failure or suspension in regard to the execution of a contract for transportation where such failure or suspension arises from the act of God, it becomes proper to instruct the jury in this case that for the damage arising from the suspension of the journey, for the interruption of the course of transportation of the plaintiff from the point in the city of Minneapolis at which she embarked to the point of her destination in the city of St. Paul, she cannot recover in this action, and the defendant is entitled to a verdict. In any event the plaintiff would not be entitled to recover for the rheumatism and other physical injuries received by reason of the excursion which she made upon foot, because the was voluntary upon her part, undertaken without compulsion; and under all the circumstances it was absolutely unnecessary, she having the option to remain in the car so far as the testimony shows, to remain at the Midway car-house or to go back to the city of Minneapolis. The jury is instructed for these reasons to render a verdict in favor of the defendant.

DIGEST OF MINNESOTA DECISIONS.

ADVERSE POSSESSION—ADMISSION OF TITLE—LEASE.

When the statute of limitations has run in favor of a disseisor, no subsequent acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will divest the title acquired by adverse possession. But an acknowledgment by the disseisor of the record or paper title, as by accepting a lease from the owner of it, is in the nature of an admission that he had no title, and is competent evidence tending to prove that his possession was not adverse.

Sage v. Rudnick, 69 N. W. Rep. 1096.

APPEAL — ORDER DIRECTING NEW TRIAL BUT NOT JUDGMENT.

The plaintiff made an alternative motion for judgment notwithstanding the verdict, pursuant to Laws 1895, c. 320, or for a new trial. The trial court made its order denying the first request, and granting the plaintiff a new trial. The plaintiff appealed from the part of the order denying its motion for judgment. Held, that no appeal lies from such part of the order.

St. Anthony Falls Bank v. Graham, 69 N. W. Rep. 1077.

—RAILROAD CONDEMNATION PROCEEDINGS.

An order denying a motion to set aside the report of the commissioners in condemnation proceedings by a railroad company, is not appealable. Whether an order appointing them is, query.

Fletcher v. St. P. M. & O. Ry. Co., 69 N. W. Rep. 1085.

—SETTLED CASE.

The certificate of the trial court that the settled case contains all the evidence is not controlling, when the case itself shows the contrary.

Sage v. Rudnick, 69 N. W. Rep., 1096.

ASSIGNMENTS — VERDICT FOR PERSONAL INJURY.

Gen St. 1894, sec. 5171, provides that, after a verdict of a jury or report of a referee in any action for a wrong, such action shall not abate by the death of any party. Held, that, under this statute, a verdict in an action for a wrongful personal injury is assignable. Hunt v. Conrad, 50 N. W. Rep. 614; 47 Minn. 557, distinguished.

Kent v. Chapel, 70 N. W. Rep. 2.

BANKS—CERTIFICATE OF DEPOSIT.

The defendant was sued as indorser

on the following certificate of deposit: "The Bank of Zumbrota, Zumbrota, Minn., July 27, 1893. J. J. Starz has deposited in this bank two thousand dollars, payable to the order of himself on the return of this certificate properly indorsed, with interest at 4 per cent. To be left six months. No interest after maturity. Not subject to check. (Signed) E. V. Canfield, Cashier." Held, that this was a "time" and not a "demand" certificate; that payment was demandable at the expiration of six months, and, as between the holder and the indorser, it matured at that date; that, to hold the indorser, it should have been presented for payment on the last day of grace, January 30, 1894. Buck, J., dissenting.

Towle v. Starz, 69 N. W. Rep. 1098.

BILL OF PARTICULARS—WHEN DEMANDABLE.

In an action for money paid by a third party to defendant for plaintiff's use and benefit, and which defendant has refused to pay over on demand, the latter is not entitled to a bill of particulars, as a matter of right, under the provisions of Gen. St. 1894, sec. 5246.

Jones v. Northern Trust Co., 69 N. W. Rep. 1108.

CONSTITUTIONAL LAW — TITLE OF ACT.

Laws 1893, c. 143, entitled "An act to provide for the creation and organization of new counties and government of the same," is not unconstitutional for the alleged reason that its subject is not expressed in its title, as required by article 4, sec. 27, of the constituion.

State v. Bd. of Co. Comrs. of Red Lake Co. 69 N. W. Rep. 1083.

— DELEGATING LEGISLATIVE POWER.

The fact that the taking effect of an act in a city is made contingent upon a vote of the city council does not constitute a delegation of legislative power.

State v. Sullivan, 69 N. W. Rep. 1094.

—MUNICIPAL COURTS—SPECIAL LEGISLATION.

Gen. Laws 1895, c. 229, entitled "An act to establish municipal courts in incorporated cities having a population of less than 5,000 inhabitants," is not an act "regulating the affairs of cities," within the meaning of section 33, article 4, of the constitution, prohibiting special legislation on certain subjects.

State v. Sullivan, 69 N. W. Rep. 1094.

EVIDENCE—JUDICIAL NOTICE.

The court will take judicial notice of acts of the legislature providing for the erection of a public building for a "court house and city hall."

Burlington Mfg. Co. v. Bd of Court House and City Hall Com., 69 N. W. Rep. 1091.

GARNISHMENT—ALLOWANCE OF INTEREST.

The rule that a garnishee is not chargeable with interest (as damages for the detention of money), while he is, by the operation of an attachment, restrained from making payment, applies only where he stands in all respects as a mere stakeholder, ready and willing to pay to whomsoever the court directs, and not where he assumes the attitude of a litigant.

Ray v. Lewis, 69 N. W. Rep. 1100.

HUSBAND AND WIFE—ALIMONY.

Under Gen. St. 1894, Sec. 4807, the aggregate award and allowance made to the wife from the estate of her husband in actions for divorce cannot in any case exceed in present value the one-third part of the personal estate of the husband and the value of her dower in his real estate; and, in estimating the value of this estate, the husband's income from professional services cannot be considered.

Wilson v. Wilson, 70 N. W. Rep. 154.

JUDGMENT—RES ADJUDICATA.

The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name, but in fact and in substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression—then the truth is

not excluded, and the judgment no answer to the different issue.

Village of Wazata v. Great No. Ry. Co., 69 N. W. Rep. 1073.

LIBEL—ATTORNEY—MALICE.

A certain publication made by the defendant of and concerning the plaintiff as an attorney at law and county attorney, set forth in the opinion, considered, and held, that it is obviously libelous per se, and that the trial court rightly instructed the jury that the plaintiff was entitled to a verdict in some amount without proof of malice. Canty, J., dissenting.

Sharp v. Lawson, 70 N. W. Rep. 1.

MECHANIC'S LIENS — PUBLIC PROPERTY.

A subcontractor who furnished material for the erection of the building known as the "New Courthouse and City Hall," being erected for Hennepin county and the city of Minneapolis, cannot acquire a mechanic's lien on the building, or the land on which it is being erected.

Burlington Mfg. Co. v. Bd of Court House and City Hall Comrs., 69 N. W. Rep. 1091.

—EXEMPT PROPERTY.

The amendment of 1888 to section 12 of Art. 1 of the Constitution does not give a subcontractor who furnishes material for building a lien.

Burlington Mfg. Co. v. Bd of Court House and City Mall Comrs. 69 N. W. Rep., 1091.

— SUBCONTRACTOR — PERFORMANCE.

In order that a subcontractor may acquire a mechanic's lien, it is not necessary that his contract and his performance of the same should conform in all respects to the contract between the contractor and the owner; and where brick furnished by the subcontractor, and used in the building, were inferior in quality to those called for by either contract, the owner has no defense against the lien except such as could have been interposed by the contractor against the claim for personal judgment against him.

Wisconsin Red Press Brick Co. v. Hood, 69 N. W. Rep., 1091.

—LATENT DEFECTS.

There was a latent defect in the brick, caused by the use of unfit clay in their manufacture, and not discoverable by the exercise of care and skill in inspecting the brick after they were manufactured. The contractor, in good faith, and without knowledge of the defect, purchased the brick, and used them in the erection of the building, which, after being completed, was accepted by the owner. By exposure to the weather, the defect in the brick subsequently developed, and was discovered. Held, the contractor, being without fault, is entitled to recover the contract price.

Wisconsin Red Press Brick Co. v. Hood, 69 N. W. Rep. 1091.

MORTGAGE—GRANTEE—TAX TITLE.

Held, following Trust Co. v. McKenzie (Minn.) 66 N. W. 976, that the grantee of a mortgagor, who has covenanted to pay the taxes on the mortgaged premises, whether he is the immediate or remote grantee, or whether he gets his title by deed or through a second mortgage, is disqualified from acquiring and holding a tax title to the mortgaged premises, as against the mortgagee.

American Baptist Missionary Union v. Hastings, 69 N. ... Rep. 1078.

—REIMBURSING GRANTEE.

Held, upon the special facts of this case, that equity did not require that the plaintiff should reimburse the grantee of its mortgagor for the amount paid by him for certain tax certificates of sale of the mortgaged premises.

American Baptist Missionary Union v. Hastings, 69 N. W. Rep. 1078.

—VOLUNTARY PAYMENT.

The plaintiff herein paid certain money under protest to the county treasurer, in redemption of the mortgaged premises from tax sales, the certificates whereof were held by a grantee of his mortgagor, but whose relation to the plaintiff's title did not appear of record. Held, following Joannin v. Ogilvie, 52 N. W. 217, 49 Minn. 564, that such payment was not a voluntary one.

American Baptist Missionary Union v. Hastings, 69 N. W. Rep. 1078.

MUNICIPAL CORPORATIONS — LIGHTING STREETS.

A city is under no obligation to light its streets, where they are safe and convenient for travel the whole width, unless the duty to do so is imposed by its charter.

McHugh v. St. Paul, 70 N. W. Rep. 5.

—FAILURE TO FENCE STREET.

A city is not ordinarily liable for an injury to a traveler while straying outside of an unfenced street, when the whole street is safe and convenient to travel upon.

McHugh v. St. Paul, 70 N. W. Rep. 5.

—LIABILITY FOR TORT OF OFFICER.

As a general rule, a municipal corporation is not responsible for the unauthorized and unlawful acts of its officers, though done colore officii; but where such corporation itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and

enjoys its benefits, it is liable in damages.

Schussler v. Hennepin County, 70 N. W. Rep. 6.

PLEADING—SPECIAL AND GENERAL FACTS.

Held, following Pinney v. Friuley, 9 Minn. 34 (Gil. 23), that where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control, and the pleading is bad.

Carlson v. Presbyterian Board of Relief for Disabled Ministers, 70 N. W. Rep. 3.

RAILROAD COMPANIES — CONDEMNATION PROCEDURE.

The petitioner in condemnation proceedings may legally amend his petition, with leave of the court, so as to strike therefrom land as to which he does not wish to continue the proceedings, the owner of such land not objecting.

Fletcher v. St. Paul, M. & O. Ry. Co., 69 N. W. Rep. 1085.

—PETITION—NATURE OF USE.

It is not necessary, in a petition to condemn land for railway purposes, to specify the particular public use to which each tract of land is to be put. A general allegation of the purposes for which it is sought to acquire the land described in the petition is sufficient, for the landowner's damages are to be assessed upon the hypothesis that the land to be acquired is liable to be appropriated for any or all of the public uses stated in the petition at any time when the railway company deems such use necessary or expedient.

Fletcher v. St. Paul, M. & O. Ry. Co., 69 N. W. Rep. 1085.

—PUBLIC INTEREST.

On such hearing the material and competent evidence was such as ao require a finding that public interests required and would be promoted by the construction and operation of the proposed new line. Held, that it was not reversible error to receive other evidence tending to show the amount already expended by respondent on the line.

Fletcher v. St. Paul, M. & O. Ry. Co., 69 N. W. Rep. 1085.

—ORDINANCE AS EVIDENCE.

The respondent, having decided to change the line of its railway through the city of Mankato, instituted proceedings in this matter to condemn the right of way for its new line, and on the hearing of its petition it offered in evidence an ordinance of the city authorizing such change, which was objected to on the ground that its provisions as to rights in the streets which it purported to grant to the respondent were invalid. No rights of the respondent in any of the streets were involved in such hearing. Held, that the ordinance was rightly received in evidence.

Fletcher v. St. Paul, M. & O. Ry. Co., 69 N. W. Rep. 1085.

—CHANGE OF ROUTE.

Gen. St. 1894, Sec. 2750, which authorizes any railroad corporation to alter its railway line whenever it shall appear to its board of directors that the line can be improved thereby, and expressly confers upon such corporation "the same rights and privileges to build such road as altered, as if it were the original line," construed, and held, that it authorizes such corporation to condemn land for such new line, and that the respondent herein has such right.

Fletcher v. St. Paul, M. & O. Ry. Co., 69 N. W. Rep. 1085.

—VOTE TO CHANGE.

Held, that the evidence was sufficient to sustain the finding of the trial court to the effect that the board of directors of the respondent duly determined, by a two-thirds vote of the whole number thereof, to alter the line of its railway as proposed in its petition

Fletcher v. St. Paul, M. & O. Ry. Co., 69 N. W. Rep. 1085.

SCHOOLS—AWARD OF FUNDS TO DISTRICT.

A division and award of the moneys, funds, and credits of a school district, made by the board of county commissioners under the provisions of the last paragraph of Gen. St. 1894, Sec. 3674, is governed by the rules applicable to awards made by statutory or common-law arbitrators. Technical precision and definiteness are not required, but there must be no uncertainty as to the intention of the board; and it will not be uncertain where the award sufficiently indicates the means by which the amount thereof may be ascertained, leaving nothing to be done but a ministerial act or an arithmetical calculation. Held, under these rules, that the statute had not been complied with in the purported division and award upon which this action was based.

Gregg v. Frenc.., 69 N. W. Rep. 1100.

TELEPHONE — EVIDENCE—IDENTITY OF WITNESS.

Evidence held sufficient to identify witness as person who spoke through telephone.

William Deering Co. v. Sleumpik, 69 N. W. Rep. 1088.

(To be Continued.)

HON. J. H. QUINN.

Judge Seventeenth Judicial District.

...THE..

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CONTENTS.

COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

IMPORTANT DECISIONS.

In addition to the monthly publication of a digest of the cases decided by the supreme court of Minnesota, we will in each number of the Journal publish brief abstracts of the most important decisions of the courts of last resort in all of the other states. References will be made to the National Reporters, where the cases are published, as well as to the Lawyers' Reports Annotated. In the Lawyers' Reports Annotated most of the cases are very exhaustively annotated, and in the citation of cases reported in that valuable series attention will be called to such annotations. The value of these two working digests of recent cases will increase as the numbers of the Journal accumulate, and we feel confident that our subscribers will appreciate our efforts to make the Minnesota Law Journal a sine qua non to the practicing lawyer in this state.

DISTRICT COURT DECISIONS.

We desire to repeat our request that attorneys throughout the state who try cases in which new points of law are raised, especially in matters of practice, will send us a statement of the facts, and a list of the cases cited to sustain the points made by counsel. We can generally obtain a copy of the decision of the judge, but without other data a case cannot be properly

reported. Aid us in this matter and you will advance your own interests, and that of your brother lawyers.

PRECISION OF DEFINITION AND STATEMENT.

The late Mr. Justice Bradley, of the United States supreme court, in an address to the graduating class of a law school, used the following forcible language:

"There is no science in which the words and forms of expression are more important than in the law. Precision of definition and statement is a sine qua non. Possessing it, you possess the law; not possessing it, you do not possess the law, but only the power of vainly beating the air. It is of the utmost importance to the student of the law to acquire, besides a knowledge of the law itself, the power of expressing it in correct and appropriate language, such as is found in books of authority. One of the best aids to the accomplishment of which I speak is to choose some author of pure and accurate diction, and make his work a vade mecum, until you have become so familiar with its contents that, although not absolutely committed to memory, the words and forms of expression will spontaneously suggest themselves whenever you begin to speak or write on the subject. Of course, there can be no doubt what book should be chosen for this purpose. There is nothing to compare with Sir William Blackstone in completeness of scope, purity and elegance of diction, and appositeness, if not always absolute accuracy, of definition and statement. One of the greatest, if not the greatest, of forensic speakers, as well as lawyers, that I ever knew, was the late Mr. George Wood, of New York—in his early days a leader of the bar of New York. I have often hung upon his lips with chained attention, even when opposed to him in a case, and can truly say that I never enjoyed a greater intellectual treat than in listening to his arguments. Now I happen to have heard an account of the method which he pursued for acquiring his wonderful command of choice judicial diction. It was his custom for many years to read a chapter of Blackstone of a morning, and then take a long walk and repeat to himself all that he could remember of what he had read, even to the very words and phrases in those parts that were important, such as definitions and the like.....and in this way he went through the commentaries until they were perfectly mastered, both in matter and form, so that he became almost a walking commentary himself. His case illustrates the oft-repeated injunction, "Beware of the man with one book," and when the one book mastered in this way is such a book as Blackstone's Commentaries, it is easy to comprehend what power and beauty may be acquired and laid by for future use in the display of forensic eloquence."

DEPARTMENT STORES.

Judge John A. Jameson, the learned author of "Constitutional Conventions," delivered a paper before the Illinois State Bar Association in January, 1892, wherein he discussed as one of the chief problems of our time, the question, "How, without violating essential rights of property, to regulate the accumulation and use of capital, so as to make them consistent with public safety?"

After discussing ancient and modern monopolies, he mentioned the monster retail dry goods establishments, which at that time had not yet reached their full development, and which now flourish under the name of "department stores." "A monster retail dry goods establishment in the center of a town inevitably works disaster to smaller stores. A butter or cheese factory, in a farming district, stops the diversified industries of the country dairies for miles around. Great manufacturers of clothing, of shoes, of agricultural implements, employing machinery, and large numbers of workmen, discourage the trades of the tailor, the shoemaker, and the blacksmith, as carried on in the good old times, when each artificer was skilled in every branch of his craft, and give us, instead, mere fractional men, who can peg or sew, but cannot make a boot, or who can fasten on the buttons or insert the pockets, but can neither cut nor finish a coat. These evil consequences which, I admit, are attended by some compensations, and which are of such a nature that no regulation can wholly avert them, touch the economical or industrial condition of the country."

Judge Jameson, in answer to the possible argument that the attempt to

regulate and, more especially, to restrict the accumulation of persons engaged in private business, would be morally wrong, and impracticable, gave as a reply that nothing is wrong which is necessary. As to the question of the practicability of such measures, he answered, when the people are determined that monopolies shall be abated, they will go down "lawfully if they may, unlawfully if they must." "When the people are in earnest, governments usually find ways and means, because those which will not, perish, and others that will, succeed them."

The writer of the paper was unable to advocate any scheme of remedial measures to secure these rights, but he believed that the claim is not without solid foundation. With warning voice, he insisted that the claim has to be met and to a reasonable extent allowed. "For governments to meet it frankly, fairly and early, is a duty transcending in importance and urgency any that can be named."

The importance of this matter has not abated since these warning words were delivered. The present unrest against trusts, monopolies and department stores, is only the forerunner of some great movement of the future which may uproot constitutions and statutes.

POLICE POWERS AND THE FOURTEENTH AMENDMENT.

The authors of the Fourteenth Amendment to the Constitution of the United States did not dream of the wide sweep which has since been given to it by the courts. Every conceivable argument has been pressed into service to make the amendment applicable to legislation which applies to classes, under the claim that such legislation is partial and arbitrary. But the police power of the states has thus far been sacredly protected by the supreme court, whenever an attempt was made to subordinate it to the great amendment. A late example of such extreme claim appears in a review of a Utah decision made in reference to a state statute, creating a liability for damages done by herd drivers on a highway along a hillside. Jones v. Brim, February 1, 1897. The law under consideration belongs to that class which creates a conclusive presumption of negligence from a particular state of facts, and for which exists a reasonable necessity, or, as Mr. Justice White happily states it, it is but "an illustration of the power to classify." The denial of the equal protection of the laws was asserted to consist in an unjust and illegal discrimination between drivers of herds and others, who use the highway without such liability.

Mr. Justice White (who is now deemed one of the ablest members of the bench) delivered a clearly conceived statement, overruling the claim of the driver of a band of sheep, who had been compelled to pay the sum of $10 as such damages.

"We premise," said the Court, "that the clause of the fourteenth amendment of the constitution referred to was undoubtedly intended to prohibit an arbitrary deprivation of life or liberty, or arbitrary spoliation of property. Barbier v. Connolly, 113 U. S. 53, 5 Sup. Ct. 371. But it does not limit, nor was it designed to limit, the subjects upon which the police power of a state may be lawfully exerted. Railway Co. v. Beckwith, 129 U. S. 29, 9 Sup. Ct. 207. Embraced within the police powers of a state is the establishment, maintenance, and control of public highways. New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 661, 6 Sup. Ct. 252. The legislation in question would clearly seem, therefore, to come within the narrowest definition of the police power, and be properly classed as a reasonable regulation incident to the right to establish and maintain such highways. The statute is analogous in principle to the one considered in the case of Railway Co. v. Mathews (decided at this term), 165 U. S. 1, 17 Sup. Ct. 243, wherein it was held that a law of Missouri was valid which made every railroad corporation owning or operating a railroad in the state absolutely responsible in damages for the property of any person injured or destroyed by fire communicated by its locomotive engines. That decision was based upon the right of a state, in the exercise of its police power, to classify occupations with relation to their peculiar liability to cause injury to property, from the dangerous nature of the implements employed in the business. The legislation here in ques-

tion undoubtedly proceeds upon this theory. The statute was manifestly not designed to impose a liability upon the owners of herds for damage occasioned by the mere passage of a drove of animals over a hillside road. If these herds were kept in the road, the banks would not be caved, or rocks rolled into the traveled way. The damage contemplated must therefore be occasioned by animals going outside the beaten roadway. In effect, the legislature declared that the passage of droves or herds of animals over a hillside highway was so likely, if great precautions were not observed, to result in damage to the road, that, where this damage followed such driving, there ought to be no controversy over the existence or non-existence of negligence, but that there should be an absolute legal presumption to that effect, resulting from the fact of having driven the herd."—National Corporation Reporter.

TAXING INTERSTATE EXPRESS COMPANIES.

By a bare majority the Supreme Court of the United States has just decided a group of cases sustaining the Ohio and Indiana statutes for the taxation of express companies. The opinions, to be published under the title of Sanford v. Poe, hold that a state in taxing the personal property of an interstate express company within that state may consider the whole property of the company as a single profit-producing plant, taking into consideration the value of its capital stock as an element of the value of the property, and that for the purpose of determining the value of that portion of the plant which it has within the state intangible as well as tangible property, including contracts for transportation facilities, may be taken into account. This is declared not to be a taxation of interstate commerce or of property outside the state.

The immense increase of taxes made by these laws is illustrated by one case in which on a return of $23,430, made by the company as the valuation of its personal property in the state, the assessment was $499,373.60. The gross receipts of that company in the state for one year amounted to $275,446.

In support of the theory that the property of such a company may, like that of a railroad, telegraph, or telephone system, be regarded as a unit, and in answer to the contention by the express company that its taxable personal property in the state consisted only of horses, wagons, and other specific items of tangible property, Chief Justice Fuller says: "Considered as distinct subjects of taxation a horse is indeed a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,430 worth of horses, wagons, safes, and pouches produce $275,446 in a single year? * * * The answer is obvious." On the other hand, Mr. Justice White in his dissenting opinion speaks of such unit as a fiction, and says: "The conception of the unity of railroad and telegraph lines is necessarily predicated upon the physical connection of such property. To apply a rule based upon this condition to the isolated ownership by an express company of movable property in many states in reality declares that a mere metaphysical or intellectual relation between property situated in one state and property found in another creates, as between such property, a close relation for the purposes of taxation." And again: "Certainly the mere fact that the same owner has movable property in one state and movable property in another state does not from the fact of the one ownership create a link of continuity between the property for the purpose of taxation." But is there not something more than a mere metaphysical or intellectual relation between property interests in different states when they are all a part of a great system of transportation? Is the plant of an express company any less a unit because it merely hires the use of railroad lines and does not buy them? Do not the railroads in some sense belong to the express companies for all the purposes of the express business so long as the contracts for their use are in force? The owner would be prompt to recognize the unity of the plant in fixing its value for the purpose of a sale. Is that unity any less real when the value is

to be fixed for taxation?—Case and Comment.

HAS THE PHYSICIAN EVER THE RIGHT TO TERMINATE LIFE?

Read before the Medico-Legal Society, Indiana.
Read before the Medico-Legal Society, New York.

(By Clark Bell, Esq., LL. D., President Medico-Legal Congress.)

Perhaps no part of the proceedings of the late Medico-Legal Congress held in the Federal Court rooms in the city of New York, September, 1895, gave rise to more criticism than the comments upon this subject introduced by Mr. Albert Bach, of the bar of New York city, and one of the officers of that congress, in the discussion of the papers of Mr. Gustave Boehme, and of Dr. L. Forbes Winslow, on the subject of suicide, in which the author, Mr. Gustave Boehme, had asserted the right of every human being to end his life under certain conditions.

As it is in such cases better to go by the record, I quote from the language used by Mr. Bach in the discussion, from advance sheets of the bulletin of the Medico-Legal Congress:

"The question of the right of a human being to end his own terrestrial life has been frequently mooted. There is opened up, by the mere putting of the question, a broad field of argument—and there have been and are able advocates of both the affirmative and negative sides of the propositions involved. In behalf of the negative side, it has been asserted that God's given life is too sacred to be terminated by the wilfull act of man; that the duty we owe not only to our dependents, but to our fellow beings in general, is too imperative to be shirked by the so-called cowardly act of suicide; that the commandment, "Thou shalt not kill," applies as well to the act of self-destruction as to the wrongful slaying of another; that the welfare of humanity at large demands that the continuance of human life should in no way be interfered with by man, unless under sanction of law; and that our laws not only neither permit self-killing nor recognize any justification therefor, but specifically prohibit it, and provide a punishment for attempted suicide. Those holding the affirmative side of the question contend that under certain circumstances and conditions suicide is justifiable, and in support of their contention they paint and present to us pictures of human suffering so agonizing, so irretrievably hopeless and irremediable in the light of experience, as to make many waver in their opinion that earthly pains and woes should be forever evidenced, no matter howsoever excruciating, rather than be ended by suicide. The advocates of self-killing cite history to prove that the act in the past, and among certain people at present, has been considered the only honorable, manly and respectable way to meet defeat or disgrace, and they ridicule those who enact laws providing punishment for attempted suicide, and scoff at such laws as stupid and ineffectual. There is not sufficient time afforded me to make a comprehensive statement of my views on this subject. I will merely say that I deem our statute law appertaining to attempted suicide absurd and farcical, for the reason that it will not deter any one from attempting suicide, and, furthermore, it induces would-be suicides to see to it that their efforts in that direction are entirely successful."

"Personally I can conceive of conditions that would justify a person in ending his life, and in some instances I am convinced that such self-inflicted death would be beneficial to the community at large. There is considerable cant and hypocrisy connected with the discussion of this subject, but before a scientific body such as this is, we should express our views fearlessly. I admit that the advocacy of advanced and progressive doctrine before weak-minded persons may do harm, but feel that I will not particularly shock any one here present by stating that I believe that there are cases in which suicide is morally justifiable, and that there are also cases in which the ending of human life by physicians is not only morally right, but an act of humanity. I refer to cases of absolutely known incurable, fatal, and agonizing disease or condition, where death is certain and necessarily attended by excruciating pain, when it is the wish of the victim that a deadly drug should be administered to end his life and terminate his irremediable suffering. And I may add that I know that physicians do so end life, although they term it "producing euthanasia." If those very physicians were to use English words rather than their Greek equivalent, we would find them producing an easy, painless death, instead of euthanasia."

These sentiments were met then by Dr. Isaac N. Quimby, of New Jersey, who said:

"I must disagree entirely with the learned jurist in his statements regarding the right of any human being under any circumstances to take his own life—and there are no culmination of circumstances that would justify a

physician in taking the life of his patient. The agony of the sufferer, or even his consent, in no wise alters the case; neither does the certain fatality of the disease change the matter. Human life is sacred, and no law, human or divine, can be found that would justify a physician terminating the life of a patient, and I must protest and dissent in behalf of my profession from the statements made by Mr. Bach."

"The physician who errs in a fatal case or where agonizing pain is endured by the sufferer, must not do so to end life, and he would be amenable both to the law of God and the State if he attempted to do so. No self-respecting physician would even consider such a murderous proposition."

Judge Abram H. Daily took part in the discussion thus: "I ask Dr. Quimby this question: Is it right to prolong the agony of a patient if the physician knows positively that death is inevitable in a short time?"

Dr. Isaac N. Quimby (with great emphasis) replied: "To the bitter end. A physician has no right to terminate the life of a patient, even when to prolong that life is to cause the most agonizing tortures.'

Dr. Forbes Winslow added: "I quite agree with Dr. Quimby in the views he expresses as to such a case.

The sentiments avowed by Mr. Bach were denounced in vigorous terms by the New York Sun, editorially, and that branch of the discussion was continued in the Sun newspaper, between the editor of that journal and Mr. Bach. And on both sides of the Atlantic the views of Mr. Bach met with general disapproval from medical men.

Among the many medical criticisms that have fallen under my eye, one of the most interesting, to me, was the views of Sir Benjamin Ward Richardson, giving an incident of his own practice, in No. 44 of Vol XI. of his journal, the Asclepiad—which will form an interesting part of the discussion here, under the heading of "Lethal Death in Painful Diseases," and from which I quote:

OPUSCULA PRACTICA.

"There are mites in science as well as in charity.'

Benjamin Rush.

"Lethal Death in Painful Diseases."

"The New York Medical Journal for September 21, 1895, has a paragraph on what it calls 'Euthanasia by Homicide,' and in which it says that, at the Medico-Legal Congress lately held in New York, it was implied, if not directly stated, that physicians often killed patients deliberately in some merciful way, when they were suffering from inevitable fatal disease or injury. One speaker found no fault with this alleged practice, but rather commended it, as well as the destruction of new-born monsters, which was also said to be resorted to by physicians. Such practices, it was stated, especially that of taking the life of monsters, had occasionally found advocates among members of the medical profession, but had never been sanctioned by any representative body of medical men; indeed, they had been utterly condemned by the great body of the profession, and physicians all over the world would resent any statement to the contrary, no matter if it were made approvingly. The writer supposed, 'That there are conceivable instances under which it would be justifiable to kill a person for his own sake; but these are no more apt to involve physicians than persons of other occupations. Medical men aim to prolong life; they do not destroy it because it is painful to such a degree that the sufferer thinks he would prefer death.'

"This paragraph brings to my mind a case which occurred to myself, in which the facts were of singular import. The late Mr. Jervis asked me to go to an hotel, not far from here, where he was attending a patient, in conjunction with the late Mr. Caesar Hawkins. He wished me to go without him or Mr. Hawkins, but I declined until Mr. Hawkins himself sent me a short letter to the same effect, and in which he pressed me earnestly to concede. I was informed that the patient was suffering from malignant disease of the throat, and had taught himself to administer chloroform to himself with the intention of relieving pain, or, if it so happened, of destroying life. It was felt that if he destroyed life, he would be guilty of suicide, and that not only would the feelings of the family be harrowed, but that there might be a dispute about property in the administration of the estate. The patient had read my edition of Dr. Snow's work on "Chloroform and Anaesthesia," a work that was then attracting a good deal of notice, and he wished to see me, hoping that I would ratify his treatment, while the others, including both petitioners, trusted that I should have influence enough to stop him. On my visit, I found a deep, wide, malignant ulcer at the back of the pharynx of the sick man, involving a pulsating vessel, which could be seen pulsating. The patient inquired of me how long he should be likely to

live, and if an operation were possible. I was obliged to confirm what my predecessors had said—namely, that an operation was impossible, and that death might be imminent from the rupture of the vessel, whilst, unfortunately, it was certain under any circumstances. He, then, lying down in bed, took up an inhaler which he had primed with chloroform, and put himself to sleep, on which the inhaler fell from his hands. It seemed a very happy sleep, and I watched him for half an hour or more. On his recovering consciousness, he explained that he had no other mode of relief; that he could not swallow properly; that he spoke with difficulty, but was soothed at once by the chloroform when he inhaled it, whilst any kind of medicine, administered by the mouth, produced such intense pain, that he would rather die than bear it. I explained to him all the difficulties, in the proposed hypodermic injection, which was not very well known at that time, and injected him twice with morphia, but without affording the same relief as he had obtained by the chloroform. He said that he had used the chloroform for seventeen days, and that, according to his own judgment, the ulcerous surface had contracted, and was much less painful, so that he could swallow better, I went several times, and myself administered the chloroform, but in spite of everything, he not infrequently got it for himself, and slept under it for the greater part of day and night. This went on for three weeks, with a skilled attendant; and, I am bound to say, as a matter of precise fact, that he improved. I have no doubt that contraction of the open surface occurred: that the pulsation was not so marked: that he spoke better and more cheerfully; and that he swallowed better, more freely and with less pain. I should have been content to go on with the treatment, being deeply interested in seeing how prolonged sleep would act in such a case. Also, I lost any dread that death would follow the application, and I was given to feel that if I were exactly in that man's state of hopeless misery, I should like to be treated precisely in the same way. He was removed, however, from our care, taken to some health resort, was there peremptorily refused the chloroform, and in about four weeks died from pain, sleeplessness, inability to swallow food, and the consequent exhaustion, with wide extension of the malignant mischief."

"The question is: What is the right thing to do in an extreme case of this kind? I hold tenaciously to the general opinion of the profession, that it is best not to recognize what may be considered slow suicidal attempts, but I think the plan carried out by this patient was justifiable. It was so on all grounds, and it was, perhaps, consistent to attend to the wishes of a patient in such a dilemma. But what was most important was the circumstance that the method seemed useful, and straightforwardly was useful, as a mode of cure. Menander said that all diseases were curable by sleep,—a broad statement, in which, nevertheless, there may be something that is true, for good sleepers are ever, as I think, the most curable patients; and I would always rather hear that a sick person had slept, than had taken regularly the prescribed medicine during sleeping hours."

There has always been a popular impression that a physician had the right to prevent the birth of monstrosities or monsters, when they occur. Such has been the popular belief, and, so far as I know, none such are permitted to live by medical attendants. Medical men can best state what their own practice would be in such cases. If the cord was not tied, it would usually prove fatal.

Neglect to tie the cord properly would result in death. Some physicians may neglect to tie a cord when they are unwilling to kill, knowing that death would probably ensue.

This has been held to be manslaughter in the mother, and would be so held as to the physician who acted from intentional design. (Reg. v. Conde, 10 Cox C. C. 547; Reg. v. Bubb, 4 Cox C. C. 455; Reg. v. Mabbitt, 4 Cox C. C. 239; Reg. v. Edmds., 8 C. & P. 611.)

The English law, however, does not allow the destruction of life in monstrous births. (Tayler's Medical Jurisprudence, 566-601, 11th Bell's American edition.)

Though a monster could not inherit under English law and tenancy by the curtesy would not vest. Id. 598.

But able medical men have insisted that the Caesarian operation, hysterotomy, is legally justifiable when the life of the mother is in danger.

It was by an ancient view in England, however, usually supposed to be performed only after the death of the mother, but cases have occurred where it has been successfully performed and the life of mother and child both saved; but the act could not be classed as criminal, even though the death of

the living child had to me sacrificed to save the mother's life.

The courts have sustained the right of a physician to destroy a living unborn child, in order to save the life of the mother, as in a case of deformity of the pelvis in the mother, where normal delivery of the child was impossible.

As this rests upon judgment and opinion as to the physical ability of the mother, it should be exercised with great caution, and only on full consultation; and even then, not if any doubt exists, because:

a. The Caesarian operation in such a case might save the mother and the child.

b. Because, in many cases, after experienced physicians have decided that natural births was impossible, by reason of pelvic malformation, and the Caesarian operation decided upon, natural birth has followed before the operation was performed. (Cases cited by Tayler in a French hospital, p. 507, 12th Am. edition, Tayler's Medical Jurisprudence.)

c. The operation of symphyseotomy, or enlargement of the pelvis by separating the bones by which an enlargement of the pelvis, at the brim, is made of more than an inch, is effected without serious risk, and even larger temporary expansion in the pressure of delivery.

Also a case in Scotland in 1847 is reported in Edinburgh Monthly Journal, 1847, ii. p. 30, and is quoted by Taylor.

MEDICAL RESPONSIBILITY.

Medical responsibility in this class of cases arises usually at an earlier stage than at the full period where the Caesarean operation would be possible. It is usually performed by what is called among medical men "inducing premature labor."

It is regarded as justifiable by physicians in three classes of cases:

1. Certain cases of disease.
2. Deformity of pelvis preventing natural normal delivery, and
3. Excessive vomiting in pregnancy, which threatens the mother's life.

Casuists have denounced this as both immoral and illegal, but high medical authorities justify its morality and its legality. (Ramsbotham's Obstetrical Med., p. 328, 5th ed.)

Taylor's Medical Jurisprudence (12th ed., p. 529) fully justifies this practice, on both moral and legal grounds, because medical men claim that when it is bona fide applied and with the hope of benefitting the mother, and not with a criminal design, it can not be held to be unlawful.

And this view is maintained under English law, notwithstanding the fact that no statute law in England makes any exception in favor of medical men in such cases, nor is there any exception in the statute regarding wounding as to surgical operations.

And this even when the death of the child is actually intended and accomplished, but fully believed to be necessary.

The Roman Catholic Church forbids the sacrifice of the child even though the life of the mother might in all probability be saved thereby.

This would doubtless control or affect the action of a surgeon of that faith, but medical authorities in England and America justify the destruction of even a seven-months child to save the mother of the child. (Vide Dr. A. F. Currier, Vol. II, Hamlin's Work, p. 460-1.)

The question raised by Mr. Bach as to the right of the physician to terminate the life of a patient suffering from an agonizing and fatal disease, on the request and even entreaty of the patient to end his agony and terminate his sufferings, presents some peculiar ethical questions.

Take the case of a man suffering from cancer of the throat, near the fatal moment, when the disease will eat into the carotid artery and the act is demanded as one of humanity and friendship to the afflicted sufferer—as substantially that presented by Mr. Bach in his remarks at the Medico-Legal Congress.

Dr. Edward P. Thwing, one of the most charming of men, and a highly esteemed physician, and also a clergyman, who recently passed to his reward in China, read a paper on this subject, before the Medico-Legal Society, in 1888, entitled "Euthanasia in Articulo Mortis" from which I will read a few selections as indicating the

conduct, motives, and action of one medical man of the highest standing and purity of life. (Medico-Legal Journal, Vol. 6, p. 282.)

"EUTHANASIA INARTICULO MORTIS."

"By Edward P. Thwing, M. D., Ph. D."

"Death is ordinarily painless. The phenomena which precede it often indicate extreme suffering, but the final juncture of dissolution measured by moments or hours is generally one of physical and mental placidity. And yet we have in medical nomenclature the word euthanasia. It expresses a fact. Some deaths are agonizing. The spectacle is harrowing to survivors, even if assured that the conclusive movements are partly or wholly automatic and intelligent. The propriety of an anaesthetic in such cases is naturally suggested.

"Now the question arises just here, has a dying man a right to demand euthanasia thus induced? Or has his family this privilege? How far can the medical man extend relief to the dying? Is a coup de grace allowable? Clearly enough he cannot, morally or legally, abridge life by an hour.

"Common law guards this point by the most sacred sanctions. It rests on the divine precept, 'Thou shalt not kill.' The character of the patient's sufferings, whether resulting from some terrific casualty or from hopeless disease, their intensity and probable duration, are matters not relevant to the issue in a legal point of view.

"The patient's prayer to be put out of misery must be disregarded. Galens, dictum, 'Dolor dolentibus in utilus est.' we admit. Equity which is good sense used in the interpretation of law on the part of its administrators, will regard the intent of the physician who humanely assists the patient in, or out of, his sufferings; still, the letter of the statute stands. We may not give the mercy stroke. Hence the cynic phrase of long ago, 'Durum sed ita lex scripta est.'

"On the other hand, while criminal suit might be brought against a practitioner for hastening death, a civil suit for damages might be brought for professional neglect if he does not do for his patient all that he should do, even in the article of death.

The following case presents no novel features in its medical aspects, but it is cited to elicit a discussion, here and elsewhere, of its forensic relations.

"Last June a telegram called me to a distant city to a person stricken with apoplexy and hemiplegia. The age of the patient, a widow of sixty-six years, the severity of the attack and her plethoric habit, promised a fatal issue within a day or two. She lingered, however, five days, speechless from the first and comatose. Her vigorous constitution yielded but slowly. Automatic movements like pulling of the clothes, lifting the hand to the head and other signs of restlessness, continued until near the end. The head and eyes were turned to the paralyzed side—which is unusual—the pupils were equal, the face flushed and livid, pulse dicrotic and loud rhonchal, stertorous, respiration twenty-seven, extremities cold, and the bruit humorique in the precordian region marked. Signs of suffocation appeared.

The attendant physician had left the case in my hands forty-eight hours before, believing that life would soon be extinct. The reality of suffering I could not admit, but the appearance of its actions, purely reflexed, was painful to me. As her surviving kinsman, I took the responsibility of administering a mild anaesthetic, moistening a handkerchief at intervals from a vial containing two drachms of chloroform and six drachms of sulphuric ether. The handkerchief happened to be one just saturated freely with cologne by the nurse, so that the substance inhaled, as well as the method of inhalation produced a bland, anodyne effect.

"Essential oils have sometimes been used, in foreign practice, to cover the repulsive odor of ether. The handkerchief was not held so near the nostrils as to prevent the free admixture of atmospheric air, and the facial expression of the unconscious sufferer was carefully studied. In two or three minutes the stertor ceased. The spasmodic actions of the arms were arrested. Respiration became easy and a general quietude secured Euthanasia was gained and apparently painful dissolution avoided.

"Fifteen minutes after drawing the anaesthetic, the final breath came, without the slightest spasm of the glottis or respiratory muscles, without any other physical struggle or sound. At the autopsy was revealed excessive sanguineous effusion, red sotening and clot in the interior, ascending convolution, calcic and fibrous degeneration, thrombosis of the basilar vein, and other vascular obstructions. One of the five physicians present gave a case where he had, at the request of the parents, administered ether to a child suffocating in membranous croup, and produced euthanasia, not less to the relief of the parents than to that of the patient.

"The queries, therefore again return. Has the dying man a right to ask of us this or some other form of assistance? If he is speechless, may his family demand it? How far may the

medical man extend this boon to the dying?"

This paper created as much remark as did the view of Mr. Bach at the Medico-Legal Congress, and Mr. Leslie Stephens assailed the author of the paper and the Medico-Legal Society for allowing it to be presented, by a very strong denunciatory article entitled, "Murder According to Law."

I am of those who regard it as beyond the right of the physician at law to intentionally destroy life in cases of this character.

And I believe that the advance of scientific knowledge has been so great in the use of anaesthetics and remedies to allay human suffering, that it is now in the power of the intelligent physician to relieve suffering and pain in all stages of disease, however, agonizing, and it is the right not alone of the physician, but his bounden duty, not to terminate human life, but to extend the relief of well-known remedies to assuage pain in all stages of disease; but that this right and this duty exists even in alleviating the agonies of death itself, not as a cause or death, but as robbing it of its terrors and its agonies.

An old doctrine has recently been brought forward as to the hopeless and incurable insane and some others of the defective classes of humanity, and the power and right of society, in its own interest and defense, to consider the propriety of arresting life in the interest and for the welfare of the living.

The savage regards it a sacred duty to end the life of any member of the tribe who bacomes incurably mad, and I recall a tragic description of the method employed among an aboriginal tribe of American Indians, witnessed by a lady, long a resident and teacher among them, where, from a high sense of public duty, all the men became the ministers of a rite that ended a life, no longer of value to its possessor or of the slightest use in the tribe in the chase or in war.

The doctrine of Malthus rests on a lower plane than the ethics of the aborigines, and it is difficult for us, with our training and environment, to pass judgment upon it.

If a great man is smitten with paresis, and he commences that living death, "that dying at the top," as Dean Swift died, who shall say that philanthropy, humanity or the sacred teachings of religion demand the extension of a life, past consciousness, past even suffering, and that duty makes its prolongation a necessity higher than the humanity which kills our beast when it has suffered irrecoverable injury.

We shoot a favorite, high prized and loved horse to, as we say "end its misery," who has broken a leg, or met with such an accident as cannot be cured; but we do not thus reason, of the man or woman who stricken, with a suspension of all the faculties of consciousness, lives on unconscious or suffering or the value of life.

Under our civilization no power is given by the law to end even such a life; but the inherent right of society to regulate its affairs in its own best interests must be conceded to be broad enough to justify any legal enactment, passed under the forms of and not inconsistent with the organic law of any community, authorizing the terminating of human life in such cases. This would require legislation in England, and, indeed, in all English-speaking countries where the principles of the common law was the basis of the organic law of the land. (From advance sheets of the Medico-Legal Journal.)

PRIVILEGE OF COUNSEL IN ARGUMENT.

The Supreme Court of Tennessee, in a recent case, passed, incidentally, upon the novel question of the right of counsel to shed tears before a jury. The case was Ferguson v. Moon, for breach of promise and seduction. It had been asigned as error that counsel for plaintiff in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, "shed tears and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant." The court confessed itself unable, after diligent search, to find any direct authority on the point, the

conduct of counsel in presenting their cases to juries being a matter which must be necessarily left largely to the ethics of the profession and the discretion of the trial judge. The court concluded:

"No cast-iron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel which no statute or constitution could take away. It is certainly a matter of the highest personal privilege. Indeed, if counsel have tears at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass, or delay the business before the court. In this case the trial judge was not asked to check the tears and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason; but for other errors indicated the judgment is reversed and cause remanded for a new trial."

GRAND LARCENY.

Two of the most unique cases of thieving on record are being investigated in Haverhill, New York. One is the stealing of 15,000 live fish, and the other the theft of a big stone wall surrounding the cemetery of the Hebrew Burial Association. This is believed to be the first instance ever chronicled of the larceny of a stone wall from a grave-yard.

CAPITAL PUNISHMENT DEFINED.

Teacher—Johnny, you may tell me what is meant by capital punishment.

Johnny (speaking from experience)—That's what a feller gits fer commencin' his sentences with small letters.

JUDICIAL NOTICE OF SLANG.

"Ten dollars," said the Magistrate.

"But, Your Honor," said the prisoner, "I protest against this fine. I have the right to make a defense against the charge."

"But you have already pleaded guilty," said the Magistrate.

"I beg Your Honor's pardon; I denied the charge in the plainest terms."

"Young man," said the Magistrate sternly. "I want to call your attention to the fact that the Court understands the English language. You have pleaded guilty in unmistakable words. The plaintiff charges you with assault and battery. It is clearly evident that he has been assaulted and battered. According to your statement, he approached you on the street and used abusive language toward you. Then you say that you 'didn't do a thing to him.' If the Court understands the language spoken by seventy millions of people, you immediately wiped up the earth with him. The fine stands, and any further reflection upon the Court's knowledge of English will cost you ten more."

HON. JAMES H. QUINN.

Gov. Clough has appointed James H. Quinn of Wells, Faribault County, Judge of the Seventeenth Judicial District recently created by the legislature, and composed of Faribault, Martin and Jackson counties. Judge Quinn was born on the banks of the Dells near Kilburn City, Wisconsin, June 23rd, 1857. His parents removed to Blue Earth County, Minnesota, in June, 1863, and he resided with them on their farm until about his twentieth year. In 1882 he began the study of law in the office of William N. Plymat at Mapleton, was admitted to practice May 25, 1884, at Mankato, and has since pursued his profession with marked success in Faribault County. He was County Attorney from 1887 to the time of his elevation to the bench, and his promotion to the latter position has been received with great satisfaction by the lawyers and citizens residing in the counties embraced with in the new district.

DISTRICT COURT DECISIONS.

R. L. Wharton v. the City of St. Paul.
(District Court, Ramsey County.)

Injunction—Park Assessments.

An action will not lie to enjoin the collection of an assessment made and confirmed by the board of public works in the City of St. Paul to pay for lands condemned and taken for a public park, on the ground that the board, in collusion with the owners of the property condemned, placed an excessive valuation thereon, and fraudulently apportioned the assessments on lots alleged to have been benefitted by the improvement, as the owners of such lots have an adequate remedy under the city charter by filing objections when application is made to the district court for judgment against the lots for the amounts assessed against them.

On demurrer to complaint. Demurrer sustained.

Harold Harris for Plaintiff.

H. W. Phillips for Defendant.

OTIS, J.: The purpose of the action is to enjoin the collection of an assessment made and confirmed by the board of public works to pay for lands condemned and taken for Phalen Park. If the objections urged to the assessment are well grounded, and plaintiffs are without other adequate remedy, then this action in equity will lie, otherwise not. It appears that these proceedings have so far progressed that a confirmation of assessments has been made, and the next step therein is the issuance of a warrant to the city treasurer for their collection. And if not paid within the unusually short time limited, it becomes his duty to make application to the district court for judgment against the several tracts of land so assessed for the amounts respectively assessed against them.

The law requires the various officers charged with the duty of making and collecting these assessments to proceed with reasonable dispatch, and there speedily comes a time when the tunity to contest in the courts the vatunity to contest in thec ourts the validity of such assessment.

At this time the property owner may make any proper objection to its validity, whether the objection go to the authority of the council to order the improvement or to the authority of the board of public works to have the work done, or go to show that the assessment ought not to have been confirmed.

The gravity of the charge made in this complaint is fraudulent collusion between the owners of the property condemned and taken for park purposes and the board of public works whereby an exorbitantly excessive valuation was put upon the property, and also misconduct on the part of the board in apportioning the assessment on property alleged to have been benefited by the improvement, amounting to fraud to a demonstrable mistake of fact.

If these objections are sufficiently alleged they go to the very root of the assessments, and if established they go to show that the assessment ought not to have been confirmed.

It follows that the property owners may avail themselves of these objections when application is made for judgment in these proceedings and injunction will not lie. See Albrecht against the city. The case last cited would seem to be exactly in point, for, although the proceeding to which that case had reference had so far progressed that application to the court for judgment had been made when the injunction suit was brought, while here suit has been brought at an earlier stage of the proceedings, still the underlying principles there laid down are quite as applicable to the case at bar.

The making of the assessment and steps thereafter taken, down to its ultimate collection by judgment, are treated as a single proceeding, and since one of those steps affords the property owner his day in court, the proceeding cannot be intercepted by injunction, but the property owner must resort to his remedy in the proceeding itself. The cases cited by counsel, in which an injunction has been allowed, were cases where no remedy in the courts was provided in the proceedings and are not applicable.

And, in another respect, there is a marked difference, in that the proceeding sought to be enjoined created a lien and so operated as a cloud on the title.

No such consequences follow from park assessments which do not become

liens until they ripen into judgment.

In my opinion, section 126, page 125, of the Municipal Code of 1893, does not apply to this class of assessments.

The statute provides that they are to be collected in the same manner as other assessments, but does not give them the same effect. In my view, this form of action will not lie at all and the complaint cannot be helped by amendment.

James E. Weirick v. John Wagner.

(District Court, Ramsey County.)

Exempt Property—Action by Indorsee of Purchase Money Note.

The endorsee of a note given for the purchase price of property that under the statute is exempt, except for such purchase money, may levy on the property to satisfy a judgment obtained by him in an action on the note.

Plaintiff alleged that judgment was obtained against him by F. W. Romer in an action upon two notes executed by said Weirick to the E. M. Hallowell Co. for the purchase price of a bicycle; that the Hallowell Company sold said notes to Romer; that the defendant as sheriff levied upon said bicycle to satisfy said judgment; and that plaintiff was a resident of Ramsey County, Minnesota, and claimed the bicycle as exempt. Defendant demurred to the complaint. Demurrer sustained.

Morton Barrows for Plaintiff.

Tompkins & Burr for Defendant.

OTIS, J.: In this state it is held that a suit upon a note given for the purchase price is a suit for the purchase price. Rogers v. Brackett, 34 Minn. 279.

It would seem to follow that an assignment of such note would operate as an assignment of the purchase price and an action on it by the assignee would still be a suit for the purchase price. The rule in this respect differs from the Michigan rule as declared in Shepard v. Cross, 33 Mich., 96, so that in this and in other particulars that case is not applicable.

The statute providing that the thing sold is not exempt from execution issued on a judgment for the purchase price is plain and unambiguous in its terms and covers the assignee of such a claim in as express terms as it does the assignor.

The privilege of exemption should extend to such a claim into whosever's hands it may come.

See Romer v. Weirick, 4 Minn. Law Journ. 242.

Flora Meyers, Administratrix, v. Chicago, St. Paul, Minneapolis & Omaha Railroad.

(District Court, Ramsey County.)

Conflict of Laws—Action for Death.

An action may be maintained in Minnesota by an administrator appointed therein to recover damages under the statute of another state for the death of a person caused by negligence in that state.

Plaintiff sued for damages alleging that intestate, her husband was employed as brakeman by defendant and was killed at Hudson, Wisconsin, while performing his duties as such brakeman; that the bridges over defendant's track were imperfectly constructed; and that while standing on top of the train which was going at a rapid rate of speed plaintiff's intestate's head came in contact with one of said bridges causing his immediate death.

Defendant demurred to the complaint. Demurrer overruled.

C. D. & Thos. D. O'Brien for Plaintiff.

L. K. Luse for defendant.

BRILL & BUNN, JJ.: While we do not regard the case of Herrick v. M. & St. L. Railway Co., 31 Minn. 11, as decisive, we think that the best considered cases, if not the weight of authority, support the rule that an action under a statute of another state, brought by personal representatives of a deceased person for causing his death in that state, may be brought in any state the courts of which have jurisdiction of the parties, and that the personal representatives appointed in the state where the action is brought have the right to enforce the foreign statute. Story on Conflict of Laws, 844, Note a; Leonard v. Columbia Nav. Co., 84 N. Y. 48; Dennick v. Central R. R. Co., 103 U. S. 11.

The question as to whether the complaint should plead the Wisconsin statute, under which, if it exists, the plaintiff must recover, if at all, or whether the courts of this state will presume, in the absence of pleading or proof to the contrary, that the statute law in Wisconsin is the same as the statute law of this state, on this point, was not argued by counsel, and we presume not intended to be raised. We do not, therefore, decide it.

DIGEST OF MINNESOTA DECISIONS.

COUNTIES — ORGANIZATION—PETITIONS.

An elector may legally sign two or more noncompeting petitions for the creation and organization of new counties under the provisions of this statute.

State v. Bd. of Co. Comrs. of Red Lake Co., 69 N. W. Rep. 1083.

—ELECTION.

All propositions for the creation of such new counties, whether competing or otherwise, if supported by valid petitions, must be submitted to the electors; but only one of the competing propositions can be adopted at the same election, and to secure this result it must receive a majority of all the votes cast thereon, also a plurality of the votes cast on the propositions with which it is competing.

State v. Bd. of Co. Comrs. of Red Lake Co., 69 N. W. Rep. 1083.

—CHANGE OF SEAT.

Where a petition for the change of a county seat, in due form, and in fact containing the required number of signatures, has been presented, no competing petition can be received or acted on until an election has been held on the first petition, and until the expiration of five years thereafter, or until it has been withdrawn without an election. Streissguth v. Seih, 69 N. W. Rep. 1079.

—INJUNCTION.

Injunction will lie to prevent unauthorized action by the board of county commissioners and county auditor on such second petition. Id.

CUSTOMS DUTIES—ENTRY FOR IMMEDIATE CONSUMPTION.

Entry for "immediate consumption" and not for "transportation," held properly made by railroad agent.

Mitchelson v. Minneapolis St. & S. S. M. Ry. Co., 69 N. W. Rep. 1106.

DAMAGES — BREACH OF CONTRACT.

Held, that the evidence was not such as to require an assessment of defendant's damages, for breach of a contract, at a greater sum than that awarded by the trial court.

Ray v. Lewis, 69 N. W. Rep. 1100.

ESTOPPEL — WAIVER — FORFEITURE—FORECLOSURE.

Lessor by bringing suit to have amount under terms of lease of unpaid rents and taxes ascertained, and lease declared forfeited if not paid in certain time, obtaining final judgment, and taking possession of land and buildings thereunder, held to have waived a strict forfeiture, and his right of entry under the terms of the lease, and elected to assume the position of one who applies for and obtains a strict foreclosure of a mortgage or other lien, which operates to satisfy the debt pro tanto, and hence he must be deemed to have accepted the unexpired term of the lease and the buildings erected by the lessees in full satisfaction of his claim for rent and taxes.

Cooke v. Parker, 69 N. W. Rep. 1099.

HUSBAND AND WIFE—DEED BY HUSBAND—ESTOPPEL.

A wife whose husband lived apart from her in another state, held estopped to claim an interest in property conveyed by him, as a single man, to one believing him to be unmarried, after the property had greatly enhanced in value, and been improved by the owner, she, with full knowledge of the conveyance for eight years, having made no claim to the land.

Holcomb v. Independent School District of Duluth, 69 N. W. Rep. 1067.

INJUNCTION—EXECUTION SALE.

In an action to enjoin an execution sale of real estate, when it appears from the allegations in the complaint that the plaintiff is in possession of the property, of which he claims to be the legal owner, and, by his admission, that the legal title under which he claims ownership is of record, and claims it to be superior to any that can be acquired by a purchaser at the sale, and the gravamen of the complaint is that, by reason of such threatened sale, insurance has been, and other insurance will be, canceled, a temporary injunction to restrain such sale is properly refused.

Pelican River Milling Co. v. Marvin, 69 N. W. Rep. 1149.

INSOLVENCY — PRIORITY OF CLAIMS.

Corporations A and B, each a creditor of D., a third corporation, whose

respective claims were due, agreed that, if B would extend the time of the payment of its claim, it should under all circumstances be preferred, and paid its claim in full, before any payment should be made or demanded on the claim of A. The contract was made at the solicitation of D, and for its benefit. B, at the request of D, extended the time of payment of its claim, pursuant to the contract. Afterwards a receiver was appointed of the property of D under the insolvency laws of this state. A and B proved their respective claims. Held, that B is equitably entitled to be paid the dividends on A's claim until B's claim is paid in full, but that B is not entitled to have paid to it the proceeds of certain notes, collateral, transferred to A before the contract was made. Plymouth Cordage Co. v. Seymour, 69 N. W. Rep. 1079.

Upon the findings of fact herein,held, that B's equitable right to such dividends is superior to any claim thereto of any of the trustees or receivers defendant. Id.

JUDGMENT — DEFAULT — RELIEF.

Held, that the trial court did not err in relieving the city from a judgment obtained against it by default, and allowing it to answer on the merits.

Gleaser v. St. Paul, 69 N. W. Rep. 1101.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

Evidence set out in opinion held to show contributory negligence on the part of an employee injured while operating a circular saw.

Wulf v. Walter A. Wood Harvester Co., 70 N. W. Rep. 156.

MORTGAGE—RIGHT TO INSURANCE MONEY.

A mortgagee, holding a fire policy providing that the loss, if any, should be payable to the mortgagee as his interest might appear, which was procured and paid for by the mortgagor, foreclosed his mortgage, and bid in the premises at the sale for the full amount of his debt. Afterwards, but before the expiration of the time for redemption, the dwelling house covered by the mortgage and policy was injured by fire, and the insurance company paid the loss to the mortgagee. No redemption was made from the sale. Held, that the mortgagor could not recover of the mortgagee the amount so paid, but, if he had redeemed, he would have been entitled to have had the amount applied pro tanto on the redemption.

Carlson v. Presbyterian Bd. of Relief, 70 N. W. Rep. 3.

PRINCIPAL AND AGENT—EVIDENCE.

Evidence held sufficient to prove that the alleged agent was either duly authorized, or that his acts were subsequently ratified by his principal.

William Deering & Co. v. Shumpik, 69 N. W. Rep. 1088.

PROMISSORY NOTE — PAYMENT BY EXCHANGE.

An instrument in these words: "$1,673. Halstad, Minn., July 26th, 1894. For value received, we promise to pay to the order of the John Good Cordage & Machine Company the sum of sixteen hundred and seventy-three dollars as follows: Payable by New York or Chicago Exchange. $560, Nov. 15th, 1894; $560, Dec. 1st, 1894; $560, Dec. 15th, 1894. Without interest, if paid as due; if not, then legal rate from date until paid."—held not negotiable, for it is not payable in money, but by bills of exchange.

First Nat. Bank of Brooklyn v. Sletty, 69 N. W. Rep. 1148.

RAILROADS—USE OF HIGHWAY—NECESSITY.

Under a law which authorizes a railroad company to construct its road along and over any public or private way, if it shall "be necessary," a practical, and not an absolute, necessity is intended; and the burden of proof would be upon the company to show this practical necessity, if questioned when originally locating the line. Village of Wayzata v. Great No. Ry. Co., 69 N. W. Rep. 1073.

The necessity upon which the company acted when first establishing the line and when building the road is presumed to be continuous, and to exist, in proceedings instituted to compel a change of the track and its appurtenances. Id.

In such proceedings the burden of proof is upon the party demanding a change of the line, as constructed and used, to show, by clear and convinc-

ing testimony, not only that the original necessity no longer exists, but that there are substantial reasons for holding that the public interests demand that a change be made. Testimony which would warrant a court, on a hearing to locate a line, in finding that the public interests required it to be located elsewhere than upon a particular public or private way, would not uphold a like finding where the proceeding was to change and remove a line already constructed and in operation. Id.

Held, in a proceeding to compel defendant railway company to remove its tracks and appurtenances from a certain street in plaintiff village, and to elsewhere locate them, that a finding to the effect that a more practical, feasible, and convenient route for such tracks and appurtenances, or one which would less interfere with the safety and convenience of the public, or afford less obstruction to the public ways in said village, than the one now occupied, could not be found, is sustained by the evidence. Id.

—DEATH OF EMPLOYE.

In action, against a railroad company to recover damages for the killing of plaintiff's intestate, a yard switchman, held that, upon the facts as shown upon the trial and conceded by both parties, the plaintiff failed to prove anw negligent act upon defendant's jart upon which to sustain a verdict in her favor.

Moore v. Great Northern Ry. Co., 69 N. W. Rep. 1103.

—CUSTOM.

When it is established, upon the trial of a case, that a custom in regard to the operation of trains, designed for the protection of employes, has been unobserved and disregarded, but it appears conclusively that an observance of thec ustom would have been of no service or value in the particular case, a verdict for damages cannot be based solely on the failure to observe this custom.

Moore v. Great Northern Ry. Co., 69 N. W. Rep. 1103.

—CONTRIBUTORY NEGLIGENCE.

Evidence considered, and held, that the trial court was justified in ordering judgment for the defendant notwithstanding the verdict, for the reason that it conclusively shows that the deceased, for whose killing by the defendant's railway train at a highway crossing this action was brought, was guilty of contributory negligence.

Bureau v. Great Northern Ry. Co., 69 N. W. Rep. 1149.

WILL — WITNESS — RELIGIOUS ORDER.

The will of a member of an incorporated religious order, devising and bequeathing all her property to the corporation, was witnessed by two other members of the order. Section 4428, Gen. St. 1894, declares void all devises and legacies to subscribing witnesses. The corporation was organized for charitable purposes, not for pecuniary gain to its members. Each member was, by its by-laws, required to give all her present and future property to the corporation, as well as her services, without compensation. Held, the witnesses did not have any such present, certain, and vested pecuniary interest in the property devised by the will as to make them incompetent.

In re Will's Estate, 69 N. W. Rep. 1090.

—EVIDENCE—UNDUE INFLUENCE

Oral evidence tending to prove that a member of a religious order was not, as recited in her will, required to make a vow to leave her property to the order, held, admissible.

In re Will's Estate, 69 N. W. Rep. 1090.

—UNDUE INFLUENCE.

Evidence held not sufficient to show that will by member of a religious order leaving her property to the order was procured by undue influence.

In re Will's Estate, 69 N. W. Rep. 1090.

ABSTRACTS OF RECENT CASES.

ANIMALS—CRUELTY.

Shooting live doves released from traps, as a matter of amusement, although those that are killed outright or afterward captured and killed are used as food, is held, in Waters v. People (Colo.) 33 L. R. A. 836, to be within the prohibition of Mills' Anno. Stat. Sections 104, 117, against torturing,

tormenting, or needlessly mutilating or killing animals, or causing them unnecessary or unjustifiable pain or suffering. S. C. 46 Pac. 112.

BANKS—DEPOSIT—TRUST.

A deposit of money by a person described as "manager" is held, in Leaphart v. Commercial Bank (S. C.) 33 L. R. A. 700, to be subject to his checks, even if the bank knows that the money was originally obtained by him from other persons on a certificate of deposit. A deposit with the manager of a "Depositors' Co-operative Association" on a certificate of deposit is held to create a loan, and not a trust. S. C. 23 S. E. 939.

—FRAUD—NOTICE.

A bank purchasing a note from strangers at a discount of 20 per cent, knowing the maker to be perfectly solvent, is held, in Oppenheimer v. Farmers' & M. Bank (Tenn.) 33 L. R. A. 767, to be not chargeable with constructive notice of fraud in procuring the note, when it is a custom to discount notes of solvent parties at from 12 to 25 per cent. S. C. 36 S. W. 705.

—ELECTION—CLAIMS.

An election by one who deposited money in an insolvent bank, to claim as a general creditor rather than to rescind the deposit and pursue the money into the hands of the receiver, is held, in Standard Oil Co. v. Hawkins (C. C. App. 7th C.) 33 L. R. A. 739, not to be conclusively made by proving his claim as a creditor, when this was done in ignorance that he had any other remedy, and no detriment has been occasioned thereby to other creditors. S. C. 74 Fed. 395.

CONSTITUTIONAL LAW—PERSONAL LIBERTY.

An ordinance rohibiting association with thieves, etc., with intent to agree to commit any offense or to cheat any person is held, in Ex parte Smith (Mo.) 33 L. R. A. 606, to be an unconstitutional invasion of the right of personal liberty. S. C. 36 S. W. 628.

—GIFT OF PUBLIC FUNDS.

The power of the legislature to direct the use of the money of a municipal corporation to make a gift or pay a claim based on a purely moral or equitable obligation is held, in Conlin v. Board of Supervisors (Cal.) 33 L. R. A. 752, to be in violation of the California Constitution. S. C. 46 Pac. 379.

—NUISANCE.

The destruction of a lake and the creation of a nuisance thereby to the great injury of a riparian owner cannot be authorized by the legislature, although acting under the guise of legislation for the public health, when it is done merely for private purposes and for the sole benefit of private parties. Priewe v. Wisconsin State Land & Imp. Co. (Wis.) 33 L. R. A. 645. S. C. 67 N. W. 913.

—PROHIBITING SUNDAY TRAINS.

The supreme court of appeals of Virginia overrules a prior decision by holding, in Norfolk & W. R. Co. v. Com. (Va.) 34 L. R. A. 105, that a state law prohibiting the running of railway trains on Sunday if enacted in good faith and for the preservation and protection of the health and morals of the people and without discrimination against interstate or foreign commence does not conflict with the Federal Constitution. S. C. 24 S. E. 837.

CORPORATIONS — RECEIVERS — CLAIMS.

A claim against the reciver of a corporation based on the theory that the property constitutes equitable assets of another corporation which owned all the capital stock of the former is denied, in McTighe v. Macon onstruction Co. (Ga.) 33 L. R. A. 800, at least when the party attempting to reach the property does not claim as a creditor of thec ompany which is in receivership. S. C. 21 S. E. 701.

ELECTIONS — INSPECTING RECORDS.

The right of a citizen to inspect and take memoranda from the records of an electoral board is limited in Gleaves v. Terry (Va.) 34 L. R. A. 144, to so much of the records as relates to the appointment and removal of judges and commissioners of election and registers or the ordering of a new registration, and not to extend to what relates to the reparation and printing of the ballots and their certification and distribution. S. C. 25 S. E. 52.

FRAUD—REPRESENTATIONS AS TO VIRTUE.

A new application of settled princi-

ples to a case without precedent is made in Kujek v. Goldman (N. Y.) 34 L. R. A. 156, which holds that a man who induces another to marry a girl by false representations that she is virtuous when in fact she has been seduced by himself and has become pregnant is liable for damages in an action by the husband for the fraud. S. C. 44 N. E. 773.

HUSBAND AND WIFE—ALIMONY.

The right of a husband to recover alimony out of a divorced wife's separate estate is denied, in Greene v. Greene (Neb.) 34 L. R. A. 110, whether the divorce be granted to the husband or to the wife. With the case is a note presenting the authorities, which are somewhat numerous, on the allowance to a husband from property held by the wife in divorce cases. S. C. 68 N. W. 947.

MARRIAGE—INTOXICATION.

The intoxication of one of the parties to a marriage contract such as to render him non compos mentis for the time being is held, in Prine v. Prine (Fla.) 34 L. R. A. 87, to render the marriage invalid, although a less degree of intoxication would not have this effect. The other authorities on the effect of intoxication on marriage are found in a note to the case. S. C. 18 S. 781.

INSURANCE—ALLOWANCE OF ASSIGNMENT.

Probably the first case respecting "permanent insurance" that has ever come before a court of last resort is that of Marshall v. Franklin Fire Ins. Co. (Pa.) 34 L. R. A. 159. The question there was as to the rights of an assignee of the policy which provided that the insurance company should be "forever" liable to the assured, his heirs, and "assigns," and that any assignment should be brought to the company's office to be entered and "allowed." It was held that the allowance of an assignment was not discretionary with the company but could be claimed by the assignee as a right. S. C. 35 Atl. 204.

LANDLORD AND TENANT—EXPIRATION OF LEASE.

The "expiration" of a lease within the meaning of a covenant to turn over the property in good condition at the expiration of the lease is held, in Marshall v. Rugg (Wyo.) 33 L. R. A. 679, to be the actual termination of the tenancy, although this is made earlier than the time specified in the lease by a subsequent contract. S. C. 45 Pac. 486.

MUNICIPAL CORPORATIONS—EXPLOSION OF SEWER.

The explosion of a public sewer on account of the formation of gasses from crude petroleum which was turned into it by city authorities after escaping from oil works is held, in Fuchs v. St. Louis (Mo.) 34 L. R. A. 118, to render thec ity liable for the damage, if the city did not exercise due care to avoid such explosion. S. C. 34 S. W. 508.

—FAILURE TO ENFORCE POLICE REGULATIONS.

The failure of a city to enforce police regulations, such as an ordinance against unfenced excavations, is held, in Moran v. Pullman Palace Car Co. (Mo.) 33 L. R. A. 755, to create no liability for the drawning of a boy while bathing in a pond of water allowed to remain on vacant land a short distance from a highway. S. C. 36 S. W. 659.

NEGLIGENCE—BATHING RESORT.

A company maintaining a bathing resort and letting out its privileges to the public for hire is held, in Brotherton v. Manhattan Beach Imp. Co. (Neb.) 33 L. R. A. 598, to be bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances. And in this case it was held that the company was liable for failure to keep persons on hand to watch bathers and rescue those in danger, or at least to make immediate search when notified of a bather's disappearance. S. C. 69 N. W. Rep. 757; 67 Id. 479.

PARTNERSHIP — IMMORAL PURPOSE.

A partnership to carry on the business of letting for immoral purposes furnished apartments is held, in Chateau v. Singla (Cal.) 33 L. R. A. 750, to be based upon an illegal contract under which relief will not be granted to either party for a settlement of the partnership, although the tenements leased for such purposes are in a section of the city which is mainly given up to such business without interference by the police. S. C. 45 Pac. 1015.

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CONTENTS.

COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

LAWYERS AND COURTS OF MINNESOTA PRIOR TO AND DURING ITS TERRITORIAL PERIOD.

By Judge Charles E. Flandrau.

Judges and lawyers generally occupy such a large space in the growth and progress of a country that what they say and do makes one of the factors of history, and usually gets itself upon the records in some way. It certainly cannot be the result of self-assertion, as their modesty is proverbial. I am inclined to attribute it to the fact that their doings possess some real interest to the other members of society. They ought to be men of learning, and, as a general thing, they individually and as a body possess a large share of the brilliancy and wit of a community. They fill a large share of the public trusts, and shape the policy and laws of a country as naturally as water seeks its level. Their light is seldom hidden from the genration of which they form a part; but there always seems to be a desire to learn of their career in the early and unwritten period of a country, and I have been requested to prepare a paper for this occasion, noting who they were and what they did in the early days of Minnesota.

Our state had rather a mixed origin. Its mothers were the Northwestern Territory and Louisiana. The first gave us what lies east of the Missis-

sippi, and the last what we embrace west of that stream; and before this area became Minnesota, it was, on the west side of the river, first Louisiana, then Missouri, then Michigan, then Wisconsin, then Iowa.

On the east side of the Mississippi it was, first, a part of the Northwest Territory, which belonged to Virginia and was ceded by that state to the United States; later it was a part of Indiana; and afterwards of Wisconsin.

I once took the trouble to look up all the acts of Congress which created these several changes, and I have the dates of their passage, but I will not inflict them upon you at this time, preferring to confine myself to those matters that are more germane to the subject in hand. When Wisconsin was a territory, its part lying west of the St. Croix river was in St. Croix county, which included St. Anthony Falls, Stillwater, Point Douglas, Marine Mills, Arcola, and St. Paul, and was the home of a good many men of standing and ability. The admission of Wisconsin into the Union in 1848, with the St. Croix river for its western boundary, left all the country west of that stream without any government, and the lawyers without courts, which presented quite a formidable obstacle to their business prospects; but they were equal to the occasion. They claimed that the remnant which had been abandoned by Wisconsin, as a state, was still Wisconsin as a territory. They induced Mr. John Catlin, the Secretary of the Territory of Wisconsin, to remove from Madison to Stillwater, and, as ex-officio governor, to proclaim the existence of the territory and call an election for a delegate to Congress. Henry H. Sibley was elected, and was admitted to a seat from Wisconsin, and in March, 1849, procured the passage of an organic act for the territory of Minnesota.

Sibley was a lawyer, but he never practiced the profession. He lived at Mendota, then called St. Peter's, and hung out a lawyer's sign in 1835. This sign was in the possession of his family at the time of his death, and either is, or should be, now in the museum of this Society.

While living at St. Peter's, Mr. Sibley was the first judicial officer who ever exercised the functions of a court in Minnesota. He was commissioned a justice of the peace in 1835 or 1836 by Governor Chambers of Iowa, with a jurisdiction extending from twenty miles south of Prairie du Chien to the British boundary on the north, to the [illegible]te River on the west, and to the Mississippi on the east. His prisoners could only be committed to Prairie du Chien. Boundary lines were very dimly indicated in those days. Minor magistrates were in no fear of being overruled by superior courts, and tradition asserts that the writs of Sibley's court often extended into Wisconsin and other jurisdictions. One case is recalled which will serve as an illustration: A man named Phalen was charged with having murdered a sergeant of the United States army named Hayes, in Wisconsin. He was arrested under a warrant from Justice Sibley's court, was examined and committed to Prairie du Chien, and no questions were asked. Phalen Lake, from which our water supply is partially derived, is named after this prisoner. Sibley was the first governor of the state, commanded a large part of the forces in the Indian war of 1862, and was made a Major General of Volunteers by the President for his services. He was one of our best citizens and is lamented by all.

An attempt was made in 1842 to hold a court in St. Croix county by Judge Irwin, then one of the teritorial judges of Wisconsin. It came about in this way: There was a very enterprising settler here then, named Joseph R. Brown, who came to Fort Snelling with the regiment which laid the cornerstone of the fort, in 1819, and was discharged from the army in 1826 or thereabouts. In 1842 he was clerk of the courts in St. Croix county, and for some reason, best known to himself, procured the Legislature of Wisconsin to appoint a court in his county. Judge Irwin came up to hold it; and on arriving at Fort Snelling he found himself in a country which indicated that disputes were more frequently settled with the tomahawk than by the principles of the common law. The officers of the fort could give him no information, but fortunately he discovered Norman W. Kittson at his

trading house near the Falls of Minnehaha. Kittson knew Mr. Brown, the clerk, who then lived on the St. Croix near where Stillwater now stands, and directed the judge to him. He furnished a horse, and his honor struck across the country and found his clerk, who had either forgotten all about the court or had never heard of it. The disgusted judge took the first chance down the river, a very angry man.

After five years from this futile attempt, the first court was held by Judge Dunn, then Chief Justice of Wisconsin. This occurred in June, 1847. The term was important, not alone as being the first term ever held in what is now Minnesota, but on account of the trial of an Indian chief named "Wind," who was indicted for murder. Samuel J. Crawford, of Mineral Point, was appointed prosecuting attorney for the term, and Ben C. Eastman, of Platteville, defended the prisoner. "Wind" was acquitted. This was the first jury trial ever had in any part of the region now embraced in Minnesota.

The admission of Wisconsin into the Union left Morton S. Wilkinson and Henry L. Moss in Stillwater, the former having located there in 1847 and the latter in 1848. Mr. Wilkinson afterward became distinguished in his profession as a lawyer, and also in political life. He represented our state in the House of Representatives and Senate of the United States, and was always a genial and interesting man, much beloved by the old settlers up to the time of his death.

Mr. Moss was appointed United States District Attorney, when the Territory of Minnesota was organized, and practiced law for some years, but has been engaged in other business during a long time past. Mr. Moss is one of the very few survivors, in fact, I think the only one, of the lawyers dating back of the organization of our territory. He still lives, and has added some of his recollections of those interesting times to the annals of our State Historical Society.

The first court house that was erected within the present limits of Minnesota was in Stillwater in 1847. A private subscription was taken up and $1,200 raised, to be supplemented by the county of St. Croix with sufficient to complete the structure. It was perched upon the top of one of the high points in that town, and many are the citizens who have been winded and made to blaspheme in ascending to its lofty pinnacle. The first territorial court in Minnesota was held in it in 1849 and I held one there in 1857.

The first judges of Minnesota Territory were Aaron Goodrich, Chief Justice, and David Cooper and Bradley B. Meeker, Associate Justices; and the first court, of which I have spoken, was presided over by Chief Justice Goodrich, assisted by Judge Cooper. The court lasted one week. There were thirty-five cases on the calendar. The grand jury returned ten indictments, one for assault with intent to maim, one for perjury, four for selling liquor to Indians, and four for keeping gambling houses. Only one of these indictments was tried at this term, and, being the first, and the prisoner being a prominent member of the bar, Mr. William D. Phillips, it may be interesting to give a brief history of the case and of the defendant.

Mr. Phillips was a native of Maryland, and came to St. Paul in 1848. He was the first District Attorney of the county of Ramsey, elected in 1849. He left this country when General Franklin Pierce was elected to the presidency, and never returned. He was a very eccentric person, and many anecdotes are related of him. On one occasion, when discussing the construction of a Minnesota statute with an attorney fresh from the east, his adversary made some classical allusion in which the name of Cicero or Demosthenes occurred. Mr. Phillips, answering, became very much excited, and in a rising flight of eloquence said: "The gentleman may be a classical scholar; he may be as eloquent as Demosthenes; he has probably ripped with old Euripides, socked with old Socrates, and canted with old Cantharides; but, gentlemen of the jury, what does he know about the laws of Minnesota?"

Another story is told of him, which proves that he possessed in a high degree that prime quality generally attributed to the profession, of always

charging for services rendered. Mr. Henry M. Rice had presented him a lot on Third street for the purpose of building an office for his business, and when he presented his next bill for services to Mr. Rice there was a charge of four dollars for drawing the deed.

The indictment against Mr. Phillips charged him with an assault with intent to maim. In an altercation with a man, he had drawn a pistol on him, and the defense was that the pistol was not loaded. The witness for the prosecution swore that it was, and further, that he could see the load. The prisoner, as the law then was, could not testify in his own behalf, and he could not directly disprove this fact. He was convicted and fined $25. He was very indignant, and explained the assertion of the witness that he saw the load in this way. He said he had been electioneering for Mr. H. M. Rice against Mr. Sibley, and from the uncertainty of getting his meals in such an unsettled country he carried crackers and cheese in the same pocket with his pistol, a crumb of which had got into its muzzle, and that the fellow was so scared when he looked at the pistol that he thought it was loaded to the brim.

Many of the first lawyers of the territory were admitted to the bar at this term, among whom were Morton S. Wilkinson, Henry L. Moss, Edmund Rice, Lorenzo A. Babcock, Alexander Wilkin, Bushrod W. Lott, and a good many others. Of the whole list, Mr. Moss is the only survivor.

Edmund Rice was one of the pioneers of our railroad system. Mr. Babcock was Attorney General of the Territory from 1849 to 1853. Alexander Wilkin commanded our Ninth Regiment in the Civil War, and was killed at the battle of Tupelo; and Bushrod W. Lott was the first president of the village of St. Paul, and afterwards was United States Consul at Tehauntepec, Mexico.

Among the "forty-niners" were William P. Murray and George L. Becker. Mr. Murray served many terms in Minnesota legislatures, was for a long series of years corporation attorney of St. Paul, and is now living in this city. If Mr. Murray is engaged in the practice of law now, he enjoys the distinction of being the oldest living practitioner in the state in date of service. If he has retired from practice, that honor belongs to me, as every lawyer who was in practice forty-three years ago, at the date of my arrival, except Mr. Murray, has either died or retired from the profession. Mr. Becker was prominently connected with our railroad system, and is now on the Railroad and Warehouse Commission of the state.

Henry F Masterson and Orlando Simons also came in 1849. They were partners for many years. Mr. Masterson was the first railroad lawyer we ever had. He was attorney for the first corporation formed. Mr. Simons became District Judge of Ramsey county.

The year 1850 gave us William Hollinshead, who was at the head of the bar for several years; Rensselaer R. Nelson, who became one of the territorial jdges of the Supreme Court, and was made judge of the United States District Court on our admission into the Union, which position he held until he was the oldest United States judge by date of commission; Lafayette Emmett, who was the first Chief Justice of our State, and who now resides in New Mexico; William H. Welch, who was Chief Justice of the Supreme Court of the Territory; and Jacob J. Noah, who was first clerk of the Supreme Court of the State.

I recall a very good anecdote in which the Major, as we called Mr. Noah, figured. He lived at Mendota and practiced law there. About the year 1855 Mr. John B. Brisbin arrived in St. Paul and commenced practice. A great deal of the business was done in courts of justices of the peace, and Mr. Brisbin was called to Mendota to defend a client who was charged with trespassing on another's land, or, as we then called it, "jumping his claim." Major Noah appeared for the plaintiff and filed his complaint. Mr. Brisbin demurred to it, and made a very eloquent and exhaustive argument in support of his position. The Justice was a very venerable looking old Frenchman (the greater part of the population being French at that time). He listened very attentively and occasionally bowed when Mr. Brisbin became

most impressive, leaving the impression upon the speaker that he comprehended his reasoning and acquiesced in his conclusions. When Mr. Brisbin closed his argument, Major Noah commenced to address the court in French. Mr. Brisbin objected; he did not understand French, and judicial proceedings must be conducted in English. The Major replied that he was interpreting to the court what Mr. Brisbin had been saying. "I desire no interpretation; I made myself clear," said Mr. Brisbin. "Certainly," said the Major, "Your argument was excellent, but the court don't understand any English," which was literally true. Tradition adds that, when the court adjourned, the judge was heard to ask the Major, "Est ce qu' il y a une femme dans cette cause la?" Whether the judge decided the case on the theory of there being a woman in it or not, history has failed to record.

In 1850 Allen Pierce from Mississippi, who had been a partner of Senator Henry S. Foote of that state, settled in St. Paul, but did not remain any length of time. He went to Willow River (now Hudson), in Wisconsin.

Charles J. Hennis, an Irishman, came from Philadelphia and settled in St. Paul. The very mention of his name recalls eloquence and scintillating wit. He was a jovial fellow, but died early in the fight.

C. S. Todd, of Kentucky, and William G. Le Due, arrived in 1850. The former remained only a short time. General Le Duc became Commissioner of Agriculture under President Hayes' administration. He now lives in Hastings.

In 1851 came DeWitt C. Cooley, of New York, who emigrated here from Texas; also a Frenchman named T. P. Watson, from Detroit. I do not recall that either of these gentlemen developed more than a routine professional career.

In 1852 Mr. Isaac V. D. Heard settled here. He was prominent at the bar, and was the author of a history of the Sioux war of 1862, in which he acted a prominent part as aid-de-camp to the commanding general. Mr. Charles L. Willis, from Ohio, also coming in 1852, settled in St. Paul and practiced for some years. He is the father of Judge John W. Willis, now on the district bench of Ramsey county.

Mr. Daniel Breck, of Kentucky, was likewise an acquisition of 1852, but, in true Kentucky style, he killed a man shortly after his arrival and departed.

Mr. John E. Warren settled in Minnesota in 1852, coming from Troy, New York. He was a lawyer by education; but, having ample means at his command, he followed the dictates of his taste, which led him into literature and travel. He wrote a work on Spain, and another entitled "Para, or Adventures on the Amazon." He was once mayor of St. Paul, and United States District Attorney of the territory. I recall with much pleasure the sumptuous but refined hospitality of Mr. Warren's house, which was made doubly attractive by the brilliancy of his charming wife. They are both alive and reside somewhere in the east.

We must keep in mind that St. Anthony was part of Ramsey county up to 1856, and that it contained some of our prominent lawyers. Conspicuous among them were Isaac Atwater, afterward Associate Justice of the Supreme Court of the state; Ellis G. Whitall, William H. Hubbard, James H. Strader, and Samuel M. Tracy; William H. Welch, whom I have heretofore mentioned as Chief Justice of the territory; George A. Nourse, who emigrated to Nevada and became Attorney General of that state; Israel I. and Dan M. Demmon; George E. H. Day; David A. Secomb, a very militant gentleman, whom some one once spoke of as being in collusion with a party, to which my old partner, Mr. Bigelow, who knew him intimately, answered: "It can't be true; he never colludes,—he always collides;" Mr. John W. North, who also went to Nevada and became one of its territorial judges; Abram R. Dodge; James M. Shepley; George W. Prescott, who was for a time clerk of the territorial Supreme Court, and the first clerk of the United States District Court after the admission of the state; E. L. Hall, R. L. Joice, Henry W. Cowles, and a good many others whose names I forget. The only survivors of all these gentlemen that I know of are Judge Atwa-

ter, who lives in Minneapolis, and, I think, George A. Nourse, who, when I last heard of him, lived in California.

The growth of the country was very rapid from 1852 to its admission into the Union, on May 11th, 1858. Many considerable towns had sprung up along the Mississippi river, and throughout the interior, and of course had their quota of lawyers; but St. Paul, Minneapolis, St. Anthony, Stillwater, and Winona, were the centers of judicial and legal business. In the latter years of the territorial period many distinguished lawyers took their place at our bar. Willis A. Gorman came as the second governor of the territory. He was from Indiana. Among others who came during that time were J. Traverse Rosser, from Virginia, secretary of the territory under Gorman's administration; Westcott Wilkin, from New York, who presided over the District Court of Ramsey County for a quarter of a century with distinguished honor and ability; E. C. Palmer, who became the first District Judge of Ramsey county; William Sprigg Hall, from Maryland, who became the first judge of the Court of Common Pleas of Ramsey county, which court was afterwards merged into the District Court; S. J. R. McMillan, who filled the position of Associate and Chief Justice of the Supreme Court of the state, and served two terms in the United States Senate; and Michael E. Ames, from Vermont, a queer but talented specimen.

Mr. Horace R. Bigelow and I arrived in 1853. Mr. Bigelow was one of the best of men, and at the head of his profession. He allowed his name to go before the first Republican convention ever held for the nomination of state officers, and was nominated for Chief Justice; but the Democrats won the fight. He would never run again for any office. I was a little more given to politics and office than my partner, Mr. Bigelow, and sat in the Legislature, in the Constitutional Convention, and on the Supreme Bench of both territory and state, and administered the affairs of the Sioux Indians; but I always excused myself and my constituents on the ground that we were very young and inexperienced in those days.

Previous to the admission of Minnesota as a state, there also came Alexander C. Jones, who was Judge of Probate of Ramsey county, and has for many years represented our country in China and Japan; John B. Sanborn, much distinguished as a fighting general in the Civil War; John Penman, a Methodist preacher turned lawyer, who was Judge of Probate of Ramsey county; Morris Lamprey, once a Regent of the State University; Oscar Stevenson, Judge of Probate of Ramsey county; John M. Gilman; James Smith, Jr.; Thomas Wilson, of Winona, afterwards Chief Justice and member of Congress; George L. Otis; Henry J. Horn; William P. Warner; William Lochren, now United States District Judge; George W. Batchelder, of Faribault; and many more gentlemen whom I will have to omit for want of time and space.

The bar of Minnesota in its early days was especially a fraternal and agreeable body among its members. I recall no incidents that reflect any discredit upon it. There was no jealousy within its ranks, but a generous courtesy existed. The professional word of a reputable lawyer has always passed current and rarely failed of redemption. What is termed sharp practice has been so universally discountenanced that it never gained a footing, and the progress of the profession has been characterized by a reciprocal accommodation among its members, which has made it a graceful fellowship of gentlemen. I have had forty-three years of actual experience both at the bar and on the bench, and I think I can speak with some degree of authority.

The period of the state is outside of the limits of this paper, but I am proud to be able to say that although the bar has been augmented vastly in numbers since our admission into the Union, my observation leads me to the conclusion that if any change has occurred in its ethical development, it has been on the side of improvement, rather than deterioration; and, so far as its professional and intellectual growth is concerned, it has produced, and now embraces within its membership, some whose fame extends throughout the national domain, and

one who is attracting the consideration of the country as worthy of the highest honors at the bestowal of the whole people.

When the territory was organized, its judicial power was vested in a Supreme Court, District Courts, Probate Courts, and Justices of the Peace. Three judges were allowed it, a Chief Justice and two associates. The judges held the trial courts individually, and assembled in banc to sit as a Supreme Court of Appeals. This allowed a judge to sit in review of his own decision, which is not to be commended, but did not produce any noticeable disturbance in the administration of justice that I remember.

The first chief justice was Aaron Goodrich. I think he came from Tennessee. He was quite an eccentric person, and not particularly eminent as a lawyer. He presided from June 1st, 1849, to November 13th, 1851. When his successor, Jerome Fuller, was appointed, he declined to yield, claiming that, as his office was judicial and Federal, his term lasted during good behavior; but his contention, of course, did not prevail. At one time Judge Goodrich, Judge Chatfield, and William Hollinshead, were appointed to compile the statutes from 1849 to 1858. Goodrich got up a code of his own, which was unique. It was not a compilation at all, but an original code. I remember one provision, which was a cure-all for matters unprovided for; it was about as follows: "If any question shall arise, civil or criminal, which is not provided for in this revision, the ancient statutes shall prevail in regard to it." It got into print, but no further.

David Cooper was one of the first two associate justices. He was from Pennsylvania, and a very peculiar man for the position. We always called him a gentleman of the old school. It was not on account of his age, because he was quite a young man, but arose from his manners and dress. He was a very social man, and liked good things, and, when exhilarated, the more punctilious and ceremonious he became in his deportment. He always wore shirts with cambric frills down the front, and lace dangling from each cuff, in the manner that French courtiers decorated their hands in the days of Louis Quatorze. He remained in St. Paul and practiced his profession until June, 1864, when he went to Nevada, and thence to Salt Lake City, where he died some years later.

Bradley B. Meeker was the other associate justice on the organization of the territory. He served from June 1st, 1849, to April 7th, 1853. He was born in Connecticut, but studied law in Kentucky and was appointed from that state. Meeker held the first court in Hennepin county. He was a queer genius in his way, and became the owner of a considerable tract of land between St. Paul and St. Anthony, which included the famous Meeker's island in the Mississippi, where so many dams and other improvements have been projected, and still remain, in the clouds instead of the water. Meeker died suddenly at a hotel in Milwaukee, having started on a journey to pass through that city.

The next territorial bench consisted of Jerome Fuller, Chief Justice, and Andrew G. Chatfield and Moses Sherburne, associates. Fuller only remained a short time, and I find no record of his making. Chatfield was from New York originally, but was appointed from Wisconsin. Sherburne was from Maine. These two latter gentlemen were good lawyers, and made good judges. They served from April 7th, 1853, to April 23d, 1857.

After these came Henry Z Hayner, as Chief Justice. There seems to be no record of his ever presiding at any court. He may have done so, but I have been unable to find anything that shows it, and tradition has never affirmed it to my knowledge. He was succeeded as Chief Justice by William H. Welch, with whom were associated Rensselaer R. Nelson and myself. We all served from April 13th, 1857, to May 24th, 1858. The state was admitted on May 11th, 1858. Judge Welch was from Michigan, but was living in the Territory of Minnesota when appointed. Nelson and I were from New York, but both were appointed from the territory.

It can readily be seen that the practice in the courts in those days must have been just a little mixed. The New York code was invented in 1849,

and being such a radical departure from the common law and chancery practice, the older lawyers were reluctant to learn its ways, even in its home in New York, but when administered by judges from Tennessee, Pennsylvania, Michigan, Maine, and Kentucky, all of whom were wedded to their own way of doing things and thought they could not be improved upon, the jumble was of course rather amusing. As in everything else, however, we all got through,—people usually do,—and the territory flourished.

I remember a remark which was made by a philosophical old gentleman to a party who thought everything was going to the dogs. He said: "Don't bother; you will get through the world; I never yet have known anybody to stick."

If you will indulge me, I will give you an instance or two of the physical labor involved in the early practice. In 1855 I walked from St. Peter to Winona in mid-winter, with the snow fifteen inches deep, a distance of a hundred and fifty miles, and back again, to try a lawsuit. On another occasion I paddled a canoe a hundred and fifty miles down the Minnesota, to oppose a motion, sold the canoe for three dollars, and footed it home. The home trip was, however, only a hundred miles. I was offered forty acres of land as a fee for my Winona tramp, but declined it and accepted a twenty dollar gold piece instead. The rejected land has since become the heart of Mankato, worth a quarter of a million dollars.

The first visit I ever made to the Supreme Court was shortly after my arrival in 1853. A case was being argued in which a Sioux Indian had killed an immigrant woman in the neighborhood of Shakopee. He was convicted and had taken an appeal. Major Noah appeared for the prosecution, and ex-Chief Justice Goodrich for the prisoner. The Indian's name was "Zu-ai-za." His counsel could not pronounce it readily, and, being very familiar with Bible names, he called him all the way through the argument, "my client, Ahasuerus."

The Major in his brief had made some allusion to St. Paul, the Apostle, and Judge Goodrich responded by saying, "that his reference to St. Paul was the only authority he had cited that was in point, but he had such an intimate acquaintance with and high respect for the Apostle Paul, that he was assured he never would have recorded himself as the gentlemen had quoted him had he not found himself in a very tight place." He used a much stronger term than "very." Zu-ai-za was hanged. It was our first execution which took place according to law. I have known of others, but I am happy to say that they were quite infrequent.

It is difficult to determine whether one was happier in those free and easy days than under the more advanced civilization of the present time. We cannot make a fair comparison between a period from which we looked at the world as a prospect, and one from which we take it in as a retrospect, since the environments of the observer are so very different; but my recollection is that we were all about as joyous and free from care as the larks we whistled with when tramping the prairies; and, if you will allow me to express a personal opinion, I would like very much to be transported back to those light-hearted times.

RAILROAD POOLING UNLAWFUL.

(Albany Law Journal.)

The United States Supreme Court, in a decision handed down on the 22d of March, sustains the so-called Sherman anti-trust law, and holds that it, in effect, forbids all pooling arrangements by railroad corporations. The court was divided—five to four—and Justice Peckham, of New York, wrote the majority opinion. The cause came up on an appeal from the decision of the United States Circuit Court of the district of Kansas. That court decided in favor of the railroads. The government appealed to the United States Circuit Court of Appeals for the Eighth District. Here the railroads were again successful. Then the government appealed to the United States Supreme Court.

The decision says the two important questions which demand examination are whether the trust act applies to and covers common carriers by railroad, and, if so, does the agreement set

forth in the bill violate any provision of that act?

As to the first question the court says:

"The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several States or with foreign nations.

"Unless it can be said that an agreement, no matter what its terms, relating only to transportation, can not restrain trade or commerce, we see no escape from the conclusion that the agreement is condemned by this act.

"It can not be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce and might more or less restrain it.

"We have held that the trust act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of the United States v. E. C. Knight Company, because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon.

"The interstate commerce act does not, in our opinion, authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring, either directly or by implication, any authority to make it. If the agreement be legal, it does not owe its validity to any provision of the commerce act, and if illegal, it is not made so by that act.

"The general nature of a contract like the one before us is not mentioned in or provided for by the act.

"One of the contentions was that Congress, in the passage of the anti-trust act, had intended to direct against combination and conspiracy such as the beef trust, the Standard Oil trust, the steel trust, the sugar trust, the whisky trust, etc., and these trusts, it was stated, had assumed an importance and had acquired a power which was dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity.

"It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably thought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them.

"But a further investigation of 'the history of the times' shows also that those trusts were not the only associations controlling a great combination of capita. which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations between the different roads.

"A reference to this history of the times does not, as we think, furnish us with any strong reasons for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom.

"The very fact of the public character of the railroad would itself seem to call for special care by the legislature in regard to this conduct, so that its business should be carried on with as much preference to the proper and fair interests of the public as possible.

"It is true the results of trusts or combinations of that nature may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest.

"In business or trading combinations they may even temporarily, or perhaps

permanently, reduce the price of the article traded in or manufactured by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under these circumstances may, nevertheless, be badly restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.

"Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner and method of doing business, it seems to be an inevitable necessity that distress, and perhaps ruin, shall be its accompaniment in regard to some of those who were engaged in the old methods.

"A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purposes leave behind them, for the time, a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes.

"It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment by reason of such changes as we have spoken of may find opportunities for labor in other departments than those to which they have become accustomed. It is a misfortune, but in such cases it seems to be the inevitable accompaniment of change and improvement.

"It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article.

"In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small, but independent, dealers, who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein.

"Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transforming an important business man, the head of his establishment, small though it may be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

"Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of the combination of capital.

"Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company, such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are, nevertheless, of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common.

"It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business, but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are

unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same statute by general language sufficiently broad to include them both.

"We think, after a careful examination, that the statute covers and was intended to cover common carriers by railroad."

In discussing the second question, as to what is the true construction of the statute, assuming that it applies to common carriers, Judge Peckham entered into a lengthy argument in contravention of the position that the common-law meaning of the term, "contract in restraint of trade," includes only such contracts as are in unreasonable restraint of trade.

He says the term is not of such limited signification, and no exception or limitation can be added without placing in the act that which has been omitted by congress. He discusses the difficulty of judging what is a reasonable rate and argues that to say that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

"We recognize," says the opinion, "the argument upon the part of the defendants, that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation, and prevents the deadly competition so liable to result in the ruin of the roads, and to thereby impair their usefulness to the public, and in that way to prejudice the public interest.

"But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public, and by those who assume to defend its interests both in and out of congress.

"Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

"Considering the public character of such corporations (railroads), the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.

"It is true that as to a majority of those living along its lines each railroad is a monopoly.

"According to the argument of counsel, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving perhaps one to raise rates indefinitely when its rivals have been driven away.

"It is a matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. These agreements have never been found really effectual for any extended period.

"Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

In conclusion, Judge Peckham's opinion says:

"The question is one of law in regard to the meaning and effect of the agreement itself, namely, does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does.

"The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight

traffic, both through and local.'

"To that end the association is formed, and a body created, which is to adopt rates which, when agreed to, are to be the governing rates of all the companies, and a violation of which subjects the defaulting company to the payment of a penalty; and although the parties have a right to withdraw from the agreement, on giving thirty days' notice of a desire so to do, yet, while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon commerce, as described in the act.

"For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restricting trade or commerce, or for maintaining rates above what was reasonable."

CONSTITUTIONALITY OF LAW TAXING DEPARTMENT STORES.

At the request of several members of the senate the attorney general has written an opinion as to the validity of the proposed law taxing department stores. This opinion is as follows:

State of Minnesota, Attorney General's Office, St. Paul, April 5, 1897.—I have examined the provisions of S. F. 424, entitled "A bill for an act authorizing cities to tax certain occupations and privileges," submitted by senators, with a request that I advise you as to the validity thereof.

You are so familiar with the provisions of the bill in question that I shall content myself with a brief reference to only a few of its most salient features. Personal property is grouped by it into forty-eight classes, which are intended to and do embrace every article of merchandise. By its terms it is designed to tax occupations and privileges "to provide for the current expenses" of city government. Cities are divided by it for purposes of taxation into the three classes authorized by the constitution. The bill fixes maxima taxes upon occupations and privileges, within which limitations municipalities may prescribe by ordinance the taxes to be enforced. Only those engaged in dealing in more than .. ee classes of business, as defined by the bill, become subject to its provisions. No account is made as to the volume of business transacted, or the valuation of the stock in trade or capital invested; hence the tax is purely arbitrary in its nature and will increase with the number of kinds of business transacted by the same individual, with no regard to ratio whatever. Under the operation of the bill one who is subject to the tax therein authorized by reason of engaging in four or more classes of business cannot engage in an additional class without becoming subject to a tax ranging from $50 to $50,000, providing the maxima rates are adopted.

Two questions have suggested themselves to my mind in considering the bill:

First—Is it a revenue measure and therefore in violation of article 4, section 10, of the constitution, which provides that every such measure shall originate in the house of representatives?

Second—Does it violate article 9, section 1, of the constitution, requiring equality and uniformity of taxation?

I find no difficulty in answering the first question in the negative. It is not a measure for raising revenue within the meaning of the constitution. That provision contemplates revenues for state as distinguished from municipal purposes. But whether this be true or not, the bill does not levy a tax, but merely confers authority to levy one for local purposes. Even conceding that article 4 of the constitution is restrictive to a greater extent than that above suggeste.., the bill is not even then a revenue measure. (Harper vs. Commissioners, 23 Ga., 570.)

Second—The remaining question is not so easily disposed of. Indeed, I am not fully satisfied that the bill can be sustained as a valid measure, either for purposes of taxation or police.

I have no doubt that occupations and privileges may be taxed; nor do I entertain any doubt that such form of taxation may exist concurrently with the taxation of property in specie. The authorities upon this proposition are numerous and decisive. While there are decisions containing dicta to the contrary, it is my view of the

law that where a business or occupation is taxed the tax must be laid with substantially a uniform hand upon every business or occupation of the same class.

Assuming that the bill is what it purports to be and what is claimed for it by its friends—a measure authorizing the levy of a tax for municipal purposes—there is then but one theory upon which it can be sustained, if at all, and that is that it contemplates a tax upon the privilege of doing four or more of the kinds or classes of business enumerated therein, regardless of their character. There are certainly authorities holding that the privilege of doing business is taxable, and it is perhaps competent for the legislature to prescribe the same tax for the privilege of doing a given number of the said classes of business; yet I am far from satisfied that the principle contended for can be successfully applied in the case of the bill in question. The privilege of doing any kind of business is deemed a valuable property right which enhances with every increase in the scope of the business transacted and justifies a heavier tax; but the question naturally arises whether the tax is one which will receive judicial sanction.

By the terms of the bill, one who desires to engage in twenty of the lines of business enumerated will be required to pay an annual tax in round numbers of $20,000, if the maxima amounts are adopted. It is safe to say that such a rate of taxation is nowhere approached in our present system of tax legislation. The very burdensomeness of such a tax suggests that the bill seeks another object than revenue, namely regulation. The subject of the regulation is obvious enough.

DAKOTA DIVORCES.

It seems altogether probable that the Supreme Court of the United States will be called upon ultimately to render an opinion concerning the validity of divorces granted by the courts of certain Western states, particularly the Dakotas and Oklahoma. The recent decision in New York in the McGowan case, in which it was held that neither the wife nor the husband can acquire temporary residence in another state for the purpose of securing a divorce, has, in the opinion of eminent lawyers, laid the groundwork for the entire "fake divorce" system which has flourished so remarkably for some years past. The case is now pending in the New York court of appeals, but whatever may be the decision there, it has been definitely arranged that the matter shall be carried to the United States supreme court for a definite and final adjudication of the questions involved. To this end it is stated that five husbands who have been victims of Dakota decrees have subscribed $10,000 each to a fund to be used in taking the appeal to the highest court in the land. Should this august tribunal decide that the decrees heretofore issued by the courts in question are invalid and of no legal effect, there will be a remarkable condition of affairs presented. Women who now regard themselves as wives will realize that they have been living for a greater or lesser period under conditions not sanctioned by the law; husbands will find themselves in a similar predicament, while the number of children who will thus be branded is too large to be calculated. —Albany Law Journal.

AN ENGLISH RETROSPECT OF COMPANY LAW.

Looking back with the experience of thirty-five years, what are we to designate as the chief defect in the working of the company system? Not the statutory machinery. That has worked well. Not the losses of creditors, though they have been considerable. Not the glowing falsehoods of prospectuses. The real defect, the cardinal vice, has been that the company has been too much the mere puppet of the promoter, and has had contracts fastened on it in its helpless infancy which never ought to have existed. We know the modus operandi well. The unscrupulous promoter having got something marketable—a patent, a concession, or a mine—sets himself to palm it off on the public at an exorbitant price. For this purpose he forms the company, drafts its memorandum and articles, furnishes it with directors, perhaps qualifies them, and then presents to the company—that is,

his director-nominees—for acceptance a cut-and-dried contract made with a trustee for the company. The purchase is improvidently adopted at the first board meeting, and the company stands committed to a ruinous bargain, starts waterlogged, and shortly founders. The directors—good, easy men—may not actually mean to betray the company, but they may not be men of business, or they may be dupes of a plausible promoter, or they may say to themselves: "Here is the company's memorandum. The company was formed to carry out this very agreement." The result, whatever the reasoning, is the same: the company is made the prey of the promoter-vendor, and is commercially lost by over-capitalization. Unfortunately, this evil is as rife to-day as it was thirty years ago, only instead of the promoter we have the promoting syndicate.—Law Journal (London).

PERSONAL INJURY LITIGATION.

The prosecution of personal injury suits has grown to be a business by itself. Those engaged in it rarely have any other occupation. There are several corporations and many law firms and brokers in the city of Chicago, as in other cities, doing a speculative business in these claims. They employ "runners" as a commercial house employs traveling salesmen. These runners have business relations with saloonkeepers near manufacturing works or railway crossings, and surgeons and police officers may be found in many parts of the city having their connection with this business. Sooner or later the runners succeed in obtaining admission to every public hospital in the county. It rarely happens that an accident is mentioned in the newspapers, but the unfortunate person who may be injured, or his family in case of his death, is at once overrun with applicants desiring to procure an assignment of the claim. It will be remembered that under a recent decision of the Illinois supreme court—a decision which happily the court has again taken under advisement—a personal injury claim is property, capable of being put on the market and transferred from hand to hand, like stock in a corporation. In most cases, the runner who has succeeded in procuring an assignment of the claim, has it transferred to some person as trustee. This trustee represents the runner, the saloonkeeper, the hospital nurse or other person through whom he may have procured the claim, the attorney, surgeons and other witnesses who may be called upon to testify, and who will, therefore, have a right to share in the proceeds, and, incidentally, the injured person.—North American Review.

FREE CONSULTATIONS.

At a recent meeting of the Gloversville (N. Y.) Bar Association, after some discussion, it was decided that the practice of giving free consultations and advice, so long indulged in by the lawyer, should be eliminated, and thereafter all consultations and advice given by members of the association should be charged for. This is a move in the right direction. In the smaller cities and towns the practice of making no charge for consultation and advice has been the rule rather than the exception and one which it has been a difficult matter to do away with.

A lawyer's legal knowledge is his stock, his capital, his merchandise. He has spent money and valuable time to acquire it, and there is no more reason why he should give it to another's use and benefit without receiving pay for it than there would be for a clothier to give away his goods or the merchant his stock. If the advice of a lawyer is worth anything it is worth paying for. The principle of charging for advice should be strictly adhered to. The Gloversville association has taken a step in the right direction, and it should be universally adopted.—The American Lawyer.

DISTRICT COURT DECISIONS.

Charles H. Stevens et al vs. Frank A. Seymour, et al.

(District Court, Ramsey County.)

Banks—Receivers—Schedules of Assets and Liabilities.

Receivers of an insolvent bank appointed under Gen. Laws 1895, ch. 145, may, when no public interests will be jeopardized by so doing, be ordered by the court to make and file for examination by depositors and other creditors full and detailed schedules of its assets and liabilities.

Petition for an order to show cause why Frank A. Seymour and W. H.

Lightner, as Receivers of the Bank of Minnesota, William Dawson, Sr., and William Dawson, Jr., as president and cashier, respectively, of said bank, and M. D. Kenyon, as state bank examiner, should not be required to furnish full and detailed statements of the assets and liabilities of said bank for the information of depositors and other creditors.

J. M. Hawthorne, for Petitioners. Geo. B. Edgerton, Assistant Attorney General, for M. D. Kenyon. Young & Lightner, for Receivers.

LEWIS, J. The Bank of Minnesota is now in the hands of Frank A. Seymour and William H. Lightner, receivers, appointed by this court, pursuant to chapter 145, Laws of Minnesota of 1895. This law requires the receivers so appointed to make report of their acts and proceedings when required to the superintendent of the banks, in such form and manner as he shall prescribe. This act does not authorize or require the receivers to report to or file schedules in court, and had the receivers in this matter published or filed schedules without direction of this court they had assumed to act without authority and upon their own responsibility, so far as the law provides; but receivers are officers of the court appointing them and no one can successfully deny the authority of the court to require receivers appointed under this act to make and file from time to time such reports as will inform the court and those interested upon the condition and progress of all matters pertaining to the receivership.

In cases of insolvent banks there may be instances where panics and failures among their patrons may be averted by temporary suppression of detailed statements and schedules disclosing names of persons caught in the failure. But in the case under consideration, the reason for secrecy, if any there was, no longer exists. More than ninety days have elapsed since the failure of this bank and reasonable opportunity has been given the community to adjust all affairs depending upon the changed conditions resulting from the insolvency of the bank, and the public and all persons interested are entitled to such protection as may be derived from a full opportunity to examine and inquire into the affairs of the insolvent institution, especially at a time when publicity will not jeopardize its assets or reduce its securities.

It appears that the receivers in this matter, so far as consistent with their duties and responsibilities, have afforded persons interested reasonable opportunity to inspect and examine the affairs and the schedules of this bank, and the receivers express themselves as ever willing to comply with any order this court may make in the premises.

For more than three months the records, books and affairs of the Bank of Minnesota have been in the hands of the receivers.

The order to show cause as to the Bank of Minnesota and William Dawson, its president, is discharged, because the records and data necessary to prepare the required schedules are all in the hands of the receivers, and beyond the possession and control of the officers of the bank, and any schedules which the bank might prepare would necessarily come through and with the consent of the receivers; and for the further reason that the cashier of the bank, the officer best qualified to furnish information and verify schedules upon personal knowledge, is now in a position under the law which relieves him from rendering statements which might be incriminating in their character.

DIGEST OF MINNESOTA DECISIONS.

APPEAL — TIME — ADDITIONAL FINDINGS AND ORDER.

Where a trial court makes findings of fact and an order thereon, and subsequently, by agreement of parties, makes additional findings and an order thereon and files the same, the last order is the final one and an appeal may be taken therefrom within 30 days after written notice of the same. Billson v. Lardner, 69 N. W. Rep. 477.

—TEMPORARY INJUNCTION.

The granting, refusing, or dissolving of a temporary injunction pendente lite rests necessarily in judicial dis-

cretion; and, unless there has been an abuse of such discretion, appellate courts will not interfere, especially where the prosecution of an enterprise of a public nature is involved. Gorton v. Town of Forest City, 69 N. W. Rep. 479.

ASSIGNMENT— AGREEMENT—ACTION BY ASSIGNEE.

H. sold a threshing machine to S. & E., and by parol contract they were to pay H. therefor from the first earnings of the machine. By use of the machine they earned an account of $84 against B., and thereupon they again agreed with H. that he should have and collect such account from B., to apply on their indebtedness to H., of which fact B. had due notice. Held, that such agreement operated as an assignment of said account from S. & E. to H.; that it need not be in writing; that H. thereby became the real party in interest, and might maintain an action in his own name for its recovery. Hurley v. Bendel, 69 N. W. Rep. 477.

ASSIGNMENT FOR BENEFIT OF CREDITORS—LIEN.

Lien established by commencement of supplementary proceedings is removed by assignment for benefit of creditors. Billson v. Lardner, 69 N. W. Rep. 477.

BANKS—CONVERSION OF COLLATERALS.

Held, that the finding and decision of the trial court, to the effect that the appellant bank converted certain stock held by it as security for the payment of its claim against the principal defendant, is not sustained by the evidence. Mitchell and Canty, JJ., dissenting. McKusick V. O'Gorman, 69 N. W. Rep. 317.

INSOLVENCY — FRAUDULENT PREFERENCE.

Held, in an action brought under the provisions of Gen. St. 1894, sec. 4243, to have a transfer and assignment of certain promissory notes made by an insolvent bank to one of its creditors set aside, and to recover possession of such notes, that the findings of fact that the transfer and assignment were made by the bank with a view to giving the creditor an unlawful preference over other creditors upon a pre-existing debt, and that at the time the creditor had reasonable cause to believe the bank insolvent, are supported by the evidence. Held, further, that other findings to the effect that by and with the consent of the creditor the notes remained in the actual possession of the bank after the alleged transfer and until the creditor, a corporation, was itself placed in the hands of a receiver; that they were treated and ealt with as the property of the bank while in its custody; that there was no actual delivery of the same to this creditor at he time of the transfer, nothing but a pretense at delivery, and that there was no continued change of possession,—were also supported by the evidence. Held, further, that not only was the transfer fraudulent and void as to the pre-existing debt, but that it was invalid as security for a debt subsequently incurred by reason of deposits made in the bank after the transfer. Mahoney v. Hale, 69 N. W. Rep. 334.

CORPORATIONS—ENFORCING LIABILITY OF STOCKHOLDERS.

Following Minneapolis Paper Co. v. Swinburne Co. (filed this term), 69 N. W. 144, held, where the assets of a corporation not a moneyed corporation have been sequestered by an assignment under the insolvency law, an action may be maintained by a simple contract creditor on behalf of himself and all other creditors, under chapter 76, Gen. St. 1894, to enforce the constitutional liability of the stockholders of the corporation. Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co., 69 N. W. Rep. 324.

ACTION AGAINST OFFICERS FOR FRAUD.

Held, a cause of action under the third subdivision of section 2600, Gen. St. 1894, against the officers of the corporation for their fraud, unfaithfulness, or dishonesty, resulting in loss to the particular creditor, cannot properly be joined with a cause of action to enforce such constitutional liability of the stockholders, for this reason both the proposed amended complaint and the proposed cross bill were demurrable for misjoinder of causes of action; and the court below properly refused to allow either to be filed or served. Sturtevant-Larrabee Co. v.

Mast, Buford & Burwell Co., 69 N. W. Rep. 324.

—RECEIVER ENFORCING LIABILITY OF STOCKHOLDERS.

A receiver appointed in an action for the sequestration of the assets of an insolvent corporation, under the provisions of Gen. St. 1894, c. 76, has no authority, except in cases where it is otherwise provided by statute, to enforce the individual liability of the stockholders for the debts of the corporation. Minneapolis Base Ball Club v. City Bank, 69 N. W. Rep. 331.

DEED—DELIVERY.

Where a grantee named in a deed subsequently conveys in due form the land described, it is immaterial that the deed was executed without his knowledge, and was not actually delivered to him, but was delivered to the party who actually purchased the land and procured the execution of the deed in which he was named as grantee. He acquiesces and assents to the transaction by his subsequent conveyance. Nor is the validity of the deed to him affected by the fact that his grantor had no knewledge, when executing and delivering the same, that the real purchaser was not named as grantee therein. Crowly v. C. N. Nelson Lumber Co., 69 N. W. Rep. 321.

EVIDENCE—RES GESTAE—HEARSAY.

In an action where the controversy related to the execution and acceptance of a written lease, a witness was permitted to testify, against objection, as to the declarations of a third person tending to establish the time of execution and acceptance of such lease, which declarations were not a part of the res gestae. Held, that the admission of such declaration as testimony was error. Paget v. Electrical Engineering Co., 69 N. W. Rep. 475.

EXCEPTIONS—REFUSAL OF REQUESTS FOR INSTRUCTIONS.

Seven vseparate requests for instructions to the jury were made by the defendant in this case, several of which were erroneous, and all were refused, except as given in the general charge. The only exception taken to the action of the court was to the effect that the defendant excepts to the refusal to give those portions of the requests which the court refused, and which were not covered by the general charge. Held, that the exception was insufficient as a basis for any assignment of error. Lane v. Minnesota State Agricultura. Soc., 69 N. W. Rep. 463.

EXECUTORS AND ADMINISTRATORS—SALE OF LAND.

Gen. St. 1894, sec. 4612, which provides at no sale of real estate by a guardian, executor, or administrator shall be avoided on account of any defect in the proceedings if it appears that the five essentials of a valid sale therein named are complied with, was intended to be a curative statute; and it and the records of the probate court relating to the sale of land must be liberally construed, and land titles depending on such records sustained, notwithstanding any mere irregularities or technical omissions in such records as to such five essentials. Buntin v. Root, 69 N. W. Rep. 330.

—DESCRIPTION OF LAND.

The father of the appellant died intestate, seized of the S. ½ of the S. W. ¼ of section 28, township 50, range 14, in St. Louis county. He owned no other land in the section. It was sold at administrator's sale. There were no defects in the proceedings, except that in the order of license and confirmation the land was described as 20 acres in section 28, township 50, range 14, in St. Louis county; and, further, there was no scroll or seal to the signatures of the obligors in the sale bond. Held, that the sale was valid. Buntin v. Root, 69 N. W. Rep. 330.

FRAUD — ERRONEOUS INSTRUCTION.

The defendants counterclaimed damages for alleged false and fraudulent representations made to them by plaintiff's testator in regard to the financial responsibility of the makers of promissory notes accepted by defendants in exchange for the notes in suit, and the evidence was conflicting as to whether such representations were made before or after the exchange was completed, and as to whether one Foster had authority, as agent of defendants, to make the exchange. Held, that the court erred in charging the jury as follows: "If you find that, before Mr. Wallace and Mr. Snider met, on Au-

gust 3, 1891, Mr. Foster had given Mr. Wallace to understand, and Mr. Wallace did understand, that the exchange had been agreed to on both sides, and the agreement was afterwards, and on that day, carried out without change or variation, and no intimation was given Mr. Wallace, and he had no knowledge or suspicion, that the matter was still open, then your verdict will be for the plaintiff for the full sum of $29,040, no matter what statements were made by Mr. Wallace to Mr. Snider. Wallace v. Hallowell, 69 N. W. Rep. 466.

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—PLEADING.

Although the general allegations in the complaint state that an order in supplementary proceedings was duly issued by the court herein, and thereafter a hearing was had in supplementary proceedings, and disclosure and report of the referee, and that the plaintiff herein was on motion appointed receiver, but it does not appear that such supplemental proceedings were founded upon the judgment defendant's creditor. Held, that the complaint is not sufficient to show that plaintiff occupies a status, either as creditor or as the representative of creditors, which entitled him to assail conveyances as fraudulent. Sawyer v. Harrison, 45 N. W. 434, 43 Minn. 297, followed. Tvedt v. Mackell, 69 N. W. Rep. 475.

INTOXICATING LIQUORS — INDICTMENT FOR KEEPING OPEN AFTER 11 P. M.

Gen. St. 1894, sec. 2012, provides that all persons licensed to sell intoxicating liquors "are hereby required to close their places of business (hotels excepted) at eleven o'clock at night." J. and H. were indicted under this statute, charged with having unlawfully kept open after 11 o'clock at night their saloon, being a place wherein the sale of liquor was licensed; but the indictment contained no allegation that the place was not an hotel. Held, that the facts stated in the indictment did not constitute a public offense, inasmuch as it did not negative the exception. State v. Jarvis, 69 N. W. Rep. 474.

JUSTICE OF PEACE—PROOF OF SERVICE OF NOTICE OF APPEAL.

Proof of service of a notice of appeal from a judgment rendered in justice's court upon "Empey and Empey, the attorneys for the plaintiff," is not proof of service of such notice upon "E. E. Empey," who, according to the record, was the only attorney appearing in justice's court for plaintiff. Graham v. Conrad, 69 N. W. Rep. 334.

—AMENDING PROOF OF SERVICE.

Proof of service of such a notice cannot be amended, so as to show due service, after the expiration of the 10 days within which such proof must be filed with the justice. Graham v. Conrad, 69 N. W. Rep. 334.

MECHANIC'S LIENS—VENDOR OF MATERIAL WHEN ENTITLED TO LIEN.

R. was building a greenhouse upon his own land, and entered into an agreement with H to furnish the necessary glass at a fixed price. H purchased the glass of the R. D. Co., a wholesale dealer, upon credit, and in the regular course of business, and it was delivered to R for H. R used the glass in his greenhouse and paid H. the agreed price. Held, that the R. D. Co. was not entitled to a lien for the value of the glass upon the building in which it was used. Ryan Drug Co. v. Rowe, 69 N. W. Rep. 468.

MORTGAGE — FORECLOSURE — ATTORNEY'S FEES.

Held, that there was no error in the trial court's denying the defendant's application for a modification of the judgment in an action foreclosing a mortgage directing the payment of attorney's fees, upon the ground that the same was not authorized by the pleading or finding of the court. Murray v. Chamberlain, 69 N. W. Rep. 474.

MUNICIPAL CORPORATIONS—ACTION AGAINST TOWN BEFORE FILING CLAIM.

Gen. St. 1894, sections 989, 990, provides that the supervisors constitute a town board for the purpose of auditing all accounts payable by said town; and section 687 of said statute provides that "before any account, claim, or demand against any town or county of this state, for any property or services

for which such town or county shall be liable, shall be audited or allowed by the board authorized by law to audit and allow the same, the person in whose favor such account, claim or demand shall be, or his agent, shall reduce the same to writing in items, and shall verify the same to the effect that such account, claim or demand is just and true, that the money therein charged was actually paid for the purpose therein stated, that the property therein charged was actually delivered or used for the purpose therein stated, and was of the value therein charged." Held, that the filing of an itemized and verified claim against the town with the auditing town board was a condition precedent to commencing an original action thereon against such town. Old Second National Bank of Aurora v. Town of Middleton, 69 N. W. Rep. 471.

—DEFECTIVE STREET—REPAIRS AFTER ACCIDENT.

The plaintiff, against objection, was permitted by the trial court to introduce evidence tending to prove that the defendant city had, subsequent to the time of the personal injury sued for, repaired the defective place in the sidewalk where the injury was sustained. Held error. Hammergren v. St. Paul, 69 N. W. Rep. 470.

NEGLIGENCE — ALLOWING VICIOUS HORSE TO RACE—EVIDENCE.

The basis of the plaintiff's cause of action was the negligence of the defendant in knowingly permitting a dangerous horse, a track bolter, to run in a race controlled by it, and in which the plaintiff rode and was injured, without informing her of the vicious character of the horse, of which she was ignorant. On the trial there was evidence tending to show that the horse, to the knowledge of one of the officers of the defendant, would bolt in practice; also that the horse came upon the track wearing blinkers. Held, that it was not error for the trial court to receive evidence to show that a race horse which bolts in practice will usually do so in an actual race; and, further, for what purpose blinkers are put on race horses. Held, further, that the trial court did not err in sustaining an objection to a question intended to show the position of the horses at the time plaintiff was injured, for the reason the witness had previously fully and clearly testified upon and covered the point. Lane v. Minnesota State Agricultural Soc., 69 N. W. Rep. 463.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE NOT CUMULATIVE.

Cumulative evidence is additional evidence of the same kind and to the same point as that given on the first trial, but it is not cumulative if it relate to distinct and independent facts of a different character, though tending to establish the same ground of claim or defense. Held, that the trial court did not abuse its discretion in granting a new trial in this case on the ground of newly-discovered evidence; and, further, that such evidence was not cumulative. Layman v. Minneapolis St. Ry. Co., 69 N. W. Rep. 329.

PARTNERSHIP — AUTHORITY OF PARTNERS.

A firm carrying on the business of boring wells, buying materials for pumps and windmills, putting these materials together, and then placing these articles into wells bored by the firm, or already bored or dug by other parties, cannot be held, as a matter of law, to be a trading co-partnership; each member having implied authority to borrow money for the use of the firm, and to execute and deliver negotiable paper therefor. Vetsch v. Weiss, 69 N. W. Rep. 315.

—NOTES MADE BY PARTNER.

Whether one member of a partnership can bind his partners by making promissory notes in the firm name is a question of authority to execute the notes, and is not to be determined by simply ascertaining for whose benefit the notes were made. Vetsch v. Neiss, 69 N. W. Rep. 315.

—BORROWING MONEY ON NOTES.

The authority to borrow money for the use of the firm, and to execute negotiable paper therefor, may be implied from the nature of the business, according to the usual course in which it is carried on, or as reasonably necessary or fit for its successful prosecution; or, if it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the part-

nership itself, as personally carried on, with the knowledge, actual or presumed, of the partner sought to be charged. Vetsch v. Neiss, 69 N. W. Rep. 315.

PHYSICIANS — MALPRACTICE — PROVINCE OF JURY.

This action was brought to recover damages which the plaintiff claims she sustained by the defendant's malpractice, while attending her as her physician during her illness due to a miscarriage, in not seasonably discovering and removing a remnant of the placenta. Evidence considered, and held, that the question of the defendant's negligence in the premises was one for the jury, and that the trial court erred in dismissing the action. Moratzky v. Wirth, 69 N. W. Rep. 480.

PLEDGE — ACTUAL DELIVERY AND POSSESSION.

In case of a pledge, the requirement of possession in the pledgee is an inexorable rule of law, adopted to prevent fraud and deception. There must be an actual delivery of the chattels as distinguished from a mere pretense, and the change of possession must be continuing, not formal, but substantial. Mahoney v. Hale, 69 N. W. Rep. 334.

SALE—CORRESPONDENCE.

The complaint herein alleged that the plaintiff sold and delivered, at French, this state, to the defendant, a quantity of wheat, for which it agreed to pay, at any future time when demanded, the then market price of wheat of the same grade at Duluth or Minneapolis, less 13 cents per bushel. Held, that certain correspondence between the parties did not establish such contract. Held, further, that the trial court did not err in dismissing the action on the ground that plaintiff failed to prove such contract. Wemple v. Northern Dakota Elevator Co., 69 N. W. Rep. 478.

STREET RAILWAYS—INJURY TO PASSENGER — CONTRIBUTORY NEGLIGENCE.

Evidence considered and held insufficient to justify verdict in favor of plaintiff. Sairs v. St. Paul City Ry. Co., 69 N. W. Rep. 473.

TAXATION—REFUNDING TAXES.

Section 1610, Gen. St. 1894, provides that when a tax sale is declared void by a judgment of the court, stating for what reason the sale is annulled, the amount paid the state at the tax sale or for the tax title shall be refunded, with interest thereon. Held, this section does not apply to cases where, as between the party purchasing the tax title and the owner of the land, such purchase is merely a payment of the taxes. Easton v. Schofield, 69 N. W. Rep. 326.

—FRAUD ON STATE.

The party claiming refundment in this case had a title on which he would have prevailed in the action in which the judgment declaring the tax sales void was entered. He failed to prove this title, but relied wholly on his tax titles. Held, from these facts and other facts stated in the opinion, it conclusively appears that he was guilty of bad faith towards the state, or such gross neglect that bad faith must be imputed to him, and that he is not, on such judgment, entitled to refundment. Easton v. Schofield, 69 N. W. Rep. 326.

TRIAL — PROVINCE OF JURY — PARTNERSHIP.

In all cases where the court cannot hold, as a matter of law, that the firm is a non-trading co-partnership, and that its members cannot bind the firm by the execution of promissory notes without the knowledge and assent of all of its members, and the question arises as to the authority, it is for the jury to say what the nature of the business in each case is, what is necessary and proper to its successful prosecution, and what is involved in the usual and ordinary course of its management by those engaged in it; and for the jury to ascertain and determine whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all of its members. Vetsch v. Neiss, 69 N. W. Rep. 315.

...THE...

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CONTENTS.

COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

PRACTICE IN ACTIONS AGAINST PARTIES DOING BUSINESS UNDER COMMON NAME.

The decision of Judge Kelly, of the District Court of Ramsey County, in Dimond v. The Minnesota Savings Bank, reported in this number, is of unusual interest. The practice in actions under section 5177, of the General Statutes of 1894 has not been definitely settled by the courts of this state, although the Supreme Court in Gale v. Townsend, 45 Minn. 357, in which a judgment in an action brought under this section was sustained in a collateral attack upon it, discusses the matter somewhat at length.

In that case the action was brought against "Davidson, Perkins & Co., doing business under the common name of Davidson, Perkins & Co.," and none of the individuals composing the firm were named as defendants in the summons or complaint, because, as alleged in the complaint, their names were unknown to plaintiff. Among the persons served as supposed partners was John G. Sherburn, and certain land owned by him was sold under the judgment entered against him individually. Gale had acquired title by conveyance from the purchaser at the sale under that judgment, and his title was assailed on the ground, that, as Sherburne was not named as a defend-

ant in the summons or the complaint, the judgment purporting to bind his individual property was void.

The court, after showing that the action under this section is not an action against the association as defendant, but against the "associates" composing the association, proceeds as follows: "They are all defendants, though described, not by their individual names, but by the common name; and when they are all brought in by personal service, the jurisdiction of the court over the person of each and all is full and complete to render such judgment against them as their joint liability will justify. In such case the court might order the summons and complaint amended by inserting the individual names of those so brought in, in place of the common name by which they were previously designated; and, regularly, that ought to be done before proceeding further against them individually. Had the court in this case ordered the names of those personally served to be inserted in the proceedings, the jurisdiction acquired by the service would have sustained its order and its judgment against those whose names were so inserted. Such order and insertion would not bring in new defendants, but merely designate those already in by their separate names, instead of by the common name. The jurisdiction to render the judgment would depend, not on the order inserting their names, but on the service of the summons. So that the entry of the judgment against the individual associates served, without inserting their names in the prior proceedings, was at worst a mere irregularity."

In his decision Judge Kelly calls attention to the fact that "leave to amend either the summons or the complaint was not asked by plaintiff on the hearing," but he does not intimate whether, if such leave had been asked, it would have been granted as of course and without costs or not.

Under this ruling, the safest practice would seem to be to apply to the court for leave to amend the summons and complaint, by inserting the names of the individuals served, as soon as possible after such service, and not to wait until the time allowed them to answer or demur had expired

We understand that plaintiff has served notice of appeal to the Supreme Court from the order of Judge Kelly, and has also served notice of an application to amend the summons and complaint as to the defendants who were served by adding their names thereto.

INDIANS SUBJECT TO STATE GAME LAWS.

On April 14th the board of pardons denied the application for pardon of the two Indians, McCarthy and Porter, who are serving a sixty-day sentence in the Carlton county jail for having venison in their possession while off the reservation. In denying the application the board expressed the opinion that the game laws of the state apply to red men as well as white, regardless of the Indians' rights under their treaties. This opinion was conveyed in the following memorandum:

"The applicants are Indians residing on the Fond du Lac Indian reservation. They seek a pardon on the ground that they were not amenable to the game and fish laws of the state by reason of the terms of certain treaties entered into between the government and their tribe or nation. Such a question should be addressed to a court rather than a board of pardons. The board is, however, clearly of the opinion that the point is without merit. Whatever doubt may have previously existed is dispelled by the decision of the supreme court of the United States in the case of Ward vs. Race Horse, 163 U. S., 504. The acts and treaties there considered are not essentially different from those which control in the matter presented to the consideration of the board. We have no doubt that the game laws of the state are as applicable to Indians as to white men."

It is known that Chief Justice Start and Attorney General Childs were in consultation over this matter for some time, and that the opinion was rendered after a careful review of the authorities bearing on the case, and that it represents their best judgment, as far as they were able to investigate. It seemed to them that in any event the proper course was to let the courts

pass on the question, so that it may be settled finally and definitely.

United States District Attorney Stringer in no way accepts the opinion of the board of pardons as final, and will at once report the situation to the attorney general of the United States, and await instructions as to the course he is to pursue.

YALE COLLEGE GRADUATES PRACTICING LAW IN MINNESOTA.

By Francis Bergstrom.

According to the Directory of the Graduates of Yale College in the practice of law, recently compiled, there are thirty-two Yale men in this state,

"Mastering the lawless science of our law,
That codeless myriad of precedents,
That wilderness of single instances."

Hon. Isaac Atwater, of Minneapolis, is the pater familias of Eli in Minnesota. He graduated from Yale College in 1844, and came West, settling in St. Anthony (now East Minneapolis). He was associate justice of the supreme court in the sixties. His opinions are reported in volumes two to nine of the Minnesota Reports.

Hon. R. R. Nelson is next on the Yale-Minnesota list, being a graduate in the class of '46. He was also an associate justice of the supreme court of this state at about the same time as Judge Atwater. Until within a year ago, he was judge of the United States District Court of the District of Minnesota. Having attained the age of 70 years, he retired, agreeable to the United States statute in such case made and provided. He may draw his salary, however, as long as he lives.

John B. Brisbin, a class-mate at Yale of Judge Nelson, is one of St. Paul's earliest and ablest lawyers. It is doubtful if any attorney in Minnesota has had more cases in the Supreme Court than Mr. Brisbin. One thing is certain that no lawyer ever practiced at the bar with a higher and keener sense of honor than he. Upon one trial, the testimony of his client having proved disappointing, Mr. Brisbin at once arose and announced to the presiding judge that his client had deceived him, and he therefore wished to retire from any further connection with the case.

Hon. Chas. E. Vanderburgh, of the class of '52, has been a judge nearly all his life after leaving Yale; first of the District Court of Hennepin County (or common pleas, as it was called in those days). Then, until within two years ago, he was associate justice of the Supreme Court of this state. Since then he has traveled in Europe, and is now a member of the Minneapolis Bar.

William A. Norris, of the class of '54, is and has been for many years, solicitor of the Chicago, Milwaukee & St. Paul Railway.

Col. Geo. C. Ripley, '62, is one of the very ablest real estate lawyers in the Northwest. He won his laurels in the famous King-Remington suit, which involved over a million dollars in real property. The Colonel, after working on this case several years, won it and also a fortune for himself. He is still practicing in Minneapolis.

Stanford Newel, '61, is one of the most prominent members of the St. Paul Bar. He is president of the Yale alumni Association of the Northwest.

Chas. S. Jelly, '71, is the Chauncey DePew of the Northwest. His reputation as an after-dinner speaker wins him this honor easily. He is one of the most prominent members of the Minneapolis Bar.

The remaining graduates of Yale College who are practicing law in Minnesota, in order of their classes, are:

Minneapolis: Capt. E. A. Pratt, '58; Wm. H. Bennett, '66; Geo. H. Benton, '75; John B. Atwater, '77; Elbridge C. Coake, '77; Chas. B. Peck, '79; Frank W. Booth, '80; Louis K. Hull, '83; Sam'l A. Booth, '84; Edward C. Gale, '84; W. M. Babcock, '87; Francis Bergstrom, '88; Geo. P. Douglas, '89; John Crosby, '90.

St. Paul: T. Dwight Merwin, '77; Ambrose Tighe, '79; Otis H. Briggs, '81; Edward B. Graves, '81; Robert C. Hine, '81; Harris Richardson, '81; W. S. G. Noyes, '91; and, last, but not least, William R. Begg, '93, who is the highest stand man who ever graduated from Yale College.

Duluth: James B. Howard, '77.

BANKS RECEIVING DEPOSITS WHEN INSOLVENT.

The Supreme Court of Illinois has recently made a very thorough examination of the act of that state of June 4, 1879, P. L. 113, which enacts (sec. 1) that "If any banker or broker or person or persons, doing a banking business, or any officer of any banking company, or incorporated bank doing business in this state, shall receive from any person or persons, firm, company, or corporation, or from any agent thereof, not indebted to said banker, broker, banking company, or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery, when at the time of receiving such deposit, said banker, broker, banking company, or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker, or officer so receiving said deposit, shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined, in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, may be imprisoned in the state penitentiary, not less than one nor more than three years. The failure, suspension, or involuntary liquidation of the banker, broker, banking company, or incorporated bank within thirty days from and after the time of receiving such deposit, shall be prima facie evidence of an intent to defraud, on the part of such banker, broker, or officer of such banking company or incorporated bank." This it holds to be constitutional, not being a deprivation of property without due process of law, in that it curtails an inherent right to contract, nor violating the provision that the right of trial by jury shall remain inviolate, nor that no person shall be deprived of life, liberty, or property without due process of law.

It was also held that an indictment under this act alleging that the accused corruptly, wilfully, fraudulently and feloniously received a deposit, etc., was sufficient, without specifically alleging that the deposit was received with intent to defraud; that an allegation that the accused, "being persons then and there doing a banking business * * * did receive" from one D. certain moneys, of the property of said D., the said D. then and there not being indebted to the accused, sufficiently alleged that the accused were doing a banking business, and that the moneys were received as a general deposit; and that an indictment alleging that the accused were doing a banking business under the name of "Meadowcroft Bros.," and that they were insolvent at the time they received the deposit, was sufficient, without alleging that the partnership of Meadowcroft Bros. was insolvent, as a partnership is not a legal entity, independent of the persons composing it.

It was further held that the crime denounced by the act is consummated when the banker receives the deposit, and is unable, by reason of his insolvency, to repay the entire sum deposited; that it is not necessary to demand the return of the deposit, when the day after the deposit a receiver was appointed for the bank, which was hopelessly insolvent; that a deposit was lost to the depositor, so as to warrant a conviction of the banker for receiving it, though pending the prosecution therefor the full amount of the depositor's claim was tendered to him; and that a general verdict fixing the amount of the fine (which by the act is double the amount of the deposit,) and the term of imprisonment, without finding as to the amount of the deposit, was valid: Meadowcroft v. People, 45 N. E. Rep. 303.

Statutes of this kind are to be found in most, if not all of the states of the Union, and it has been uniformly held that the provision that subsequent failure shall be prima facie evidence of insolvency at the time of the receipt of the deposit does not render them unconstitutional: State v. Beach, (Ind.) 43 N. E. Rep. 949, 1896; State v. Buck, 120 Mo. 479, 1894.

In order to sustain a conviction, the state must prove beyond a reasonable doubt:—

(1) Actual insolvency at the time the money is received;

(2) The defendant's knowledge of the insolvency;

(3) The receipt of the money as a bank deposit: Commonwealth v. Jun-

kin, 170 Pa. 194, 1895, reversing 16 Pa. C. C. 116, 1895.

When a banker or officer of a bank receives money over the counter at the time when he knows the bank to be insolvent, but keeps it separate from all other funds, with the intention of returning it, and actually does return it, he cannot be convicted of a criminal receipt of the money as a bank deposit; and if a clerk, against the order of the defendant, receives a deposit and fails to keep it separate, but the next day the amount of the deposit is returned to the depositor by the banker, the latter is not guilty: Commonwealth v. Junkin, 170 Pa. 194, 1895, reversing 16 Pa. C. C. 116, 1895. It is not necessary, however, to constitute a violation of the statute, that the deposit should be received in the bank building or rooms; a receipt of money on deposit for the bank outside of its rooms is sufficient: State v. Yetzer, (Iowa,) 66 N. W. Rep. 737, 1896; State v. Smith, (Minn.) 64 N. W. Rep. 1022, 1895. And it is not necessary that the defendant should receive it himself; if any one under his authority, as a cashier or clerk, receives it, he is liable: State v. Cadwell, 79 Iowa, 432, 1890. Partners who are bankers may accordingly be jointly guilty of committing the offence denounced; one by directing, aiding or advising, the other by actually receiving the deposit: State v. Smith, (Minn.) 64 N. W. Rep. 1022, 1896. Under the Missouri statute, which provides, that "if any officer * * * shall create or assent to the creation of any debts or indebtedness by any such bank * * * in consideration of or by reason of which indebtedness any money or valuable property shall be received into such bank, he shall be guilty of larceny," (Rev. Stat. Mo. 1889, sec. 3581,) it has been held that it is the duty of an officer, on becoming aware of the failing condition of the bank, to revoke the authority of an employe under him and subject to his authority to receive any further deposits; and his failure to do so will be construed as continuing authority to receive them, and as an assenting thereto: State v. Sattley, 131 Mo. 464, 1895.

A firm engaged in banking is insolvent, within the meaning of these statutes, when it is unable to meet its liabilities as they become due in the ordinary course of business; and bankers who receive deposits, knowing themselves to be thus insolvent, cannot escape the penalty of the law on the ground that they believe that, with time and indulgence, they can settle all demands: State v. Cadwell, 79 Iowa, 432, 1890. A deposit is "lost" to the depositor, whenever it cannot be repaid on demand, owing to the insolvency of the bank: State v. Beach, (Ind.) N. E. Rep. 949, 1896.

The mere act of receiving a deposit when insolvent does not constitute the offence. Without any special provision to that effect, the Supreme Court of Nebraska has held that the statute of that state forbidding the receipt of deposits by an insolvent bank, ought not to be construed to render an officer of a banking association guilty of a crime for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent; and that the rejection of evidence tending to show that the deposit was received in payment of a debt to the bank is error: Nichols v. State, (Neb.) 65 N. W. Rep. 774, 1896. To the same effect is Commonwealth v. Schall, 12 Pa. C. C. 209, 1892; Commonwealth v. Delamater, 2 D. R. (Pa.) 118, 1892. But the indebtedness of a depositor to the bank, within the meaning of the exception in the statute, must be such that the bank has a legal right to apply the deposit thereon, such as a matured obligation, so that the depositor has no right to have the deposit repaid on demand, and it is consequently not "lost" to him by the bank's insolvency: State v. Beach, (Ind.) 43 N. E. Rep. 949, 1896.

The officers of national banks are amenable to these statutes, since Congress has not by any legislation declared it to be criminal to receive a deposit knowing or having reason to believe the bank insolvent, and its exclusive jurisdiction has therefore not attached: State v. Bardwell, 72 Miss. 535, 1895; and further, such acts are not void on the ground that they are attempts to control and regulate the business of national banks, and to prescribe a condition on which deposits

may not be received: State v. Fields, (Iowa,) 62 N. W. Rep. 653, 1895. The owner of a private bank is liable, though he is doing an unauthorized business, not having complied with the requirements of the statute in the organization of his bank: State v. Buck, 108 Mo. 622, 1891; State v. Buck, 120 Mo. 479, 1894; but a trust company, not authorized to receive deposits, is not a bank or banking institution within these statutes, though it has and exercises some of the functions of a bank; and the fact that it receives deposits subject to check in violation of its charter, does not render it a banking institution, so that its officers are amenable thereunder: State v. Reid, (Mo.) 28 S. W. Rep. 172, 1894.

An indictment, though charging the offence in the exact language of the statute, is fatally defective if it fails to aver the essential fact that the bank was actually insolvent: State v. Bardwell, 72 Miss. 535, 1895; and in case of a general partnership, it must be averred that both the partnership and the individuals composing it are insolvent; but in case of a special partnership the averment of the insolvency of the firm alone is sufficient: Commonwealth v. Delamater, 2 D. R. (Pa.) 118, 1892. Unless the statute so provides, however, the indictment need not allege that loss occurred to any one by reason of the receipt of the deposit: State v. Myers, 54 Kans. 206, 1894. A charge that the defendants were "engaged in the business of carrying on a private bank," does not sufficiently allege that they were "bankers" within the meaning of the act: Commonwealth v. Delamater, 2 D. R. (Pa.) 118, 1892. Under the Missouri statute, which makes it a criminal offence for any officer of a bank to "receive or assent to the reception of any deposit of money," etc., knowing the bank to be insolvent, a conviction cannot be had on an indictment which merely charges that the defendant did "receive" the deposit, on proof that he "assented" to the reception thereof; the two offences are distinct: State v. Wells, (Mo.) 35 S. W. Rep. 615, 1896; and if the indictment charges that money was received "on deposit and for safe-keeping," it must be proved that the money was received for safe-keeping, or as a special deposit, and proof of a general deposit is insufficient: Koetting v. State, 88 Wis. 502, 1894.

In prosecutions under these acts, a deed of assignment made by the defendant, under the general assignment law, the inventory, appraisement, and all proceedings had thereunder, are competent evidence on the question of the defendant's insolvency: State v. Beach, (Ind.) 43 N. E. Rep. 949, 1896; State v. Cadwell, 79 Iowa, 432, 1890. So, is evidence that depositors demanded their money, and that the bank employes refused to pay them, competent to show the failure of the bank to meet its obligations in the ordinary course of business, and this, whether the defendant personally heard the demands or not: State v. Sattley, 131 Mo. 464, 1895. A bank is not necessarily, insolvent, however, because it does not retain on hand all of the money of its depositors; it is not expected to pay all its depositors at once, but simply to pay or provide for its deposits and other debts as they are demanded in the usual course of business: State v. Myers, 54 Kan. 206, 1894; and in deciding the question of solvency, the capital stock and surplus fund of a bank are not to be considered as liabilities tending to show insolvency. The capital and surplus are resources, which may be used to pay depositors and other creditors when there has been loss by loans or otherwise: State v. Myers, 54 Kan. 206, 1894.

The opinion of a witness as to the insolvency of the bank is not admissible. The actual facts concerning the conditon of the bank at the time of the deposit must be shown: State v. Myers, 54 Kan. 206, 1894. But an expert accountant, who has examined the books of the bank, with reference to its solvency, at different times, may, in connection with the data upon which it is founded, testify as to his opinion concerning the solvency or insolvency of the bank: State v. Cadwell, 79 Iowa, 432, 1890.

An instruction that a bank is not insolvent so long as it is meeting its liabilities as they become due in the ordinary course of business, and there is reasonable expectation on the part

of the officers familiar with its affairs it will continue to do so, is correct: Minton v. Stahlman, (Tenn.) 34 S. W. Rep. 222, 1896; and so is one that the failure of the bank "is prima facie evidence of the knowledge on the part of its cashier that the same was in failing circumstances," when it is explained that "prima facie evidence is such that it raises such a degree of probability in its favor that it must prevail unless it be rebutted or the contrary be proved:" State v. Sattley, 131 Mo. 464, 1895. When the deposit is in fact received by a cashier or clerk, it is sufficient to instruct the jury that the deposit must have been received on the authority of the defendant, and that he must have received it knowing of his insolvency: State v. Cadwell, 79 Iowa, 432, 1890.

The Iowa statute, (McClain's Ann. Code, Iowa, sections 1824, 1825,) differs from some others, in that it makes it an offence for "any officer or managing party" of the bank, who, knowing of its insolvency "shall knowingly permit the receiving of any such deposit as aforesaid." Under this statute it has been held, that an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offence described, whether he is a managing party or not; that when the deposit in question is not received personally by the officer charged with the offence, it is not necessary that the person who actually receives it knows that the bank is insolvent, if the defendant knew it, and allowed such person to receive it for the bank; and that when an officer of a bank, knowing the bank to be insolvent, assists and advises the keeping of the bank open for the receipt of deposits, and while it is so kept open a deposit is received, that officer is guilty under the statute, though the deposit is actually received by another: State v. Yetzer, (Iowa,) 66 N. W. Rep. 737, 1896. Accordingly, it is proper to charge on the trial of a banker for receiving deposits when insolvent, that, though the deposit was received by the defendant's son, after the defendant had instructed him to refuse deposits, if the defendant, on learning that the deposit was so received, placed it among the funds of the bank, he knowingly accepted and received it: State v. Eifert, (Iowa,) 65 N. W. Rep. 309, 1895.

The provision that subsequent failure shall be prima facie evidence of insolvency applies to civil actions to recover the deposit, as well as to criminal prosecutions: American Trust & Sav. Bk. v. Gueder & Paeschke Mfg. Co., (Ill.) 37 N. E. Rep. 227, 1894.—American Law Register and Review.

CORPORATE FRAUDS — NOTICE TO PURCHASER.

A thoroughly contested litigation, wherein the fundamental question was the fraudulent character and intent of the sale of a stock of goods of the W. O. Peeples Grocery Co., and the honesty and good faith of the purchaser will be found in Levins v. W. O. Peeple's Grocery Co. (Tenn.), 38 S. W. Rep. 736. It appears, that the officers and directors of the Company permitted its president and active manager (also owning most of the stock), to get individual control of all its cash and available assets by substituting therefor quantities of real and personal property, not then in condition for use in disposition to meet the corporate debts. The bulk of the evidence surrounded the sale with circumstances, engendering suspicion and calling for close scrutiny of the situation, motives and conduct of the actors in the sale. The important question in the case, stoutly disputed, was whether the purchasers of the stock of goods were innocent in their purchase. The fact, that the corporation, or its officers had a fraudulent purpose in making the sale, would not, of itself, either in fact or law, implicate the purchasers in the fraud of the vendor. If they, however, had actual knowledge of the illegal purpose of the corporation, or of its officers in making the sale, they would be aiders and abettors of the fraud, and would acquire no rights under their purchase, as against the complaining creditors of the corporation.

So, if the sale was made under circumstances or facts, evidently calculated to arouse their suspicion, and put them upon inquiry, so as to enable them to discover the fraudulent aim of their vendor, the purchasers

would be deemed to have had notice of the fraud, and the sale would be void, as to the creditors of the Company. Innumerable cases, as well as abundant text book authorities may be cited in support of these general statements of principles. The Tennessee Court cited Le Neve v. Le Neve, 2 White & T. Lead Cas. Eq. Pt. 1, p. 109, and full note of English and American cases there collected; McConnel v. Reed, 4 Scam. 117, 38 Am. Dec. 125, and Lodge v. Simonton, 23 Am. Dec. 36, and cases cited in notes to both cases; 16 Am. & Eng. Enc. Law, p. 788 et seq., and cases cited in note; 2 Pom. Eq. Jur. Sec. 591 et seq., and cases cited in notes.

The Court disbelieved the charge of actual fraud as against purchasers, stating that, while it is a question, which might be settled differently, by different impartial investigators, each seeking to reach the truth, yet every case of this character must be decided in the light of its individual status and peculiar incidents and legal suggestions.

The main disputable question was whether the purchasers were affected by notice, in its legal import, of the fraud of the vendors. This charge was also disbelieved by the Court, after considerable discussion of the facts, and in the light of the following legal suggestions, as to the scope of notice.

Notice in its general classification in the books, is of two kinds, actual and constructive.

"Knowledge and notice are not synonymous, although the effects produced by notice are the same, in many cases, as result from actual knowledge. Id. 'Actual notice,' says Prof. Pomeroy, 'is information concerning the fact, * * * directly and personally communicated to the party.' 'In short,' says he, 'actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence.' 2 Pom. Eq. Jur. Sec. 595. Constructive notice assumes that no information concerning the prior fact, claim, or right has been directly or personally communicated to the party, but is only inferred by operation of legal presumption. 2 Pom. Eq. Jur. Sec. 604. Le Neve v. Le Neve, supra, and note. Constructive notice is said by certain authorities to be irrebuttable, but this is not so in all instances of its application and enforcement in the administration of equity. Aside from rights affected by our registry laws, or by some public record, the fact of notice is a matter of proof and legal inferences therefrom, and is rebuttable. Authorities, supra. The fact of notice and its character is in any case, as a general principle, determined by its own facts and circumstances. This being so, the question is, in this aspect of the subject, were the Messrs. Davenport affected by notice of the fraudulent aim of W. O. Peeples or the grocery company in making the sale to them? In the solution of this question, the relations of the parties, their intimacy, the terms of the trade, their business connections, the subject of the trade, the price to be paid, and its magnitude, and all matters in pais leading up to it, or facts cognizable by the parties and relating to it, are legitimate evidence to be weighed. While it is true that whatever puts a party on inquiry amounts to notice, provided knowledge of the requisite fact would be obtained by the exercise of ordinary diligence (authorities supra; Wilson v. McCullough, 62 Am. Dec. 347; Litchfield's Appeal, 73 Am. Dec. 662; Gibson v. Winslow, 84 Am. Dec. 552; Converse v. Blumrich, 90 Am. Dec. 230; Hoy v. Bramhall, 97 Am. Dec. 687; Knapp v. Bailey, 79 Me. 195, 9 Atl. 122; s. c. 1. Am. St. Rep. 295, and note), nevertheless the party will not be charged with constructive notice unless the circumstances are such that the Court can say that it was his duty to acquire the knowledge in question, and that his failure to obtain it was the result of culpable negligence (De Voss v. City of Richmond, 18 Grat. 338, 98 Am. Dec. 647, and authorities cited). And a party put upon inquiry is not bound to do more than apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer receives suggests it, or reveals the existence of other sources of information. Converse v. Blumrich, Cooley, J., 14 Mich. 107, 90 Am. Dec. 231 et seq.; Holmes v. Stout, 10 N. J. Eq. 419; Williamson v. Brown, 15 N. Y. 354."—National Corporation Reporter.

CONFUSING THE JURY.

In a Missouri murder trial, twenty-two instructions were given by the trial Court, of which practice Judge Sherwood, of the Supreme Court (Div. 2), spoke as follows.

"The vain repetitions in which the heathen indulge when making their prayers find a full equal, if not a superior, in the instructions given in this case, 22 in number, and covering nearly 8 printed pages. There is in the old arithmetics a chapter entitled 'Permutations,' in which is taught how often the changes can be rung on the location of a given number of objects. This chapter would appear to have been consulted before the foregoing instructions on self-defense were drawn. But 'what can't be cured, must be endured;' and so we have to travel over the superficial area of these instructions, as did the traverse jury in the Court below. * * *

"As to the multiplicity of instructions given in this instance, of which counsel for defendant complain, we can only say that we have remonstrated in vain with the trial Courts on this subject, and that we are powerless to correct the evil. So long as the instructions do not palpably conflict as above explained, it will be no cause for reversal, though they be 'as the sand by the seaside for multitude.' As the evidence is abundant in the record to authorize a conviction, and as we have discovered no substantial error, we shall affirm the judgment."

ULTERIOR PURPOSES IN A CONSTITUTION.

A covert intent does not add to the dignity of a state Constitution. Constitutional construction does not usually proceed on the theory of an ulterior purpose. Yet it does so, for once at least, in the recent Mississippi case of Ratcliff v. Beale, 20 So. 865, 34 L. R. A. 472. A constitutional provision imposing a poll tax is held to be best effectuated by nonpayment of the tax. Its intent is declared to be, not to raise revenue, but to make nonpayment of the tax effectual to exclude negroes from voting. So the collection of the tax out of exempt or nontaxable property is denied.

The court, with all the frankness which the Constitution lacks, says: "Within the field of permissible action, under the limitations of the Federal Constitution the (constitutional) convention swept the circle of expedients to obstruct the exercise of the franchise for the negro-race." Not only by the poll-tax clause, but also by the disqualification for crime, does the same covert purpose appear. The list of crimes which disqualify for voting include such furtive offenses as burglary, theft, arson, and obtaining money under false pretences, which are regarded as more characteristic of negro criminals, but does not include robbery, murder, and other "robust crimes" which are practised chiefly by white men. "Restrained by the Federal Constitution from discriminating against the negro race," says the court, "the convention discriminated against its characteristics and the offenses to which its weaker members are prone."

This interpretation of the Mississippi Constitution is in accordance with its evident aim. The anomaly is not in the rules of interpretation which the court has followed to reach the constitutional intent, but in the fact that this intent is disguised

The frank and bold utterance of the court in this case and its evident disregard of any political or other extra-judicial considerations, recall several other constitutional cases in this court growing out of the negro problem of sixty years ago. The court decided in Green v. Robinson, 5 How. (Miss.) 80, and Glidewell v. Hite, 5 How. (Miss.) 110, that the Constitution of 1832, declaring that the importation of slaves "shall be prohibited" after May 1, 1833, was self-executing and needed no aid of legislation. The Supreme Court of the United States decided to the contrary, in cases which stand as an unpleasant obstruction against the whole current of authorities respecting the effect of a prohibitory clause in the Constitution. But the Mississippi court, in the later case of Brien v. Williamson, 7 How. (Miss.) 14, stood by the correct doctrine of its own decisions, and refused to follow the surprising decision of the Federal court. The lapse of a half century more seems to have left the judicial temper of the court unchanged.

Some interesting queries are suggest-

ed as to the conformity of the present Mississippi Constitution to the Constitution of the United States. Discrimination against negroes in respect to voting, if avowed or direct, would be plainly condemned by the Federal Constitution, but the fact that such discrimination is aimed at by indirect means is so perfectly apparent that it is explicitly declared by the court. Is an evident attempt to evade the Federal Constitution lawful because it is indirect? Disguised discrimination against the Chinese under an ordinance was held unconstitutional by the Supreme Court of the United States in Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, saying: "No reason for it exists except hostility to the race. * * * The discrimination is therefore illegal." But there the ordinance gave a discretion as to granting permits for laundry business which was arbitrarily exercised against the Chinese. In the present case no such arbitrary element exists. The conditions of suffrage are alike for all persons, without any discrimination against negroes. Even if their supposed shiftlessness and proneness to certain crimes influenced the choice of the conditions of suffrage, they are not denied the equal privileges or immunities of citizenship by requiring them and all other citizens to pay the same poll tax and refrain from the same crimes. The wisdom or public policy of these conditions is distinct from their constitutionality. A system which regards murder as more trivial than chicken stealing may not be approved everywhere, but it does not necessarily violate the Federal Constitution.—Case and Coment.

VALUE OF A DAY LABOROR'S LIFE.

While Vincenzo Felice and other men, under the charge of a foreman, were engaged in digging a ditch along the West Shore tracks through the Weehawken tunnel, a train came from the south, of which they had notice, and they left their work to get out of the way. As that train was passing a light engine, running backward, came from the north. The tunnel was dark, and it was not perceived until it was almost upon the men, and Felice, not being able to get out of the way, was struck by it and killed. The Appellate Division yesterday affirmed a judgment for $5,000 for plaintiff in a suit by Rosa Felice, as administrator, against the New York Central & Hudson River Railroad Company. It was held, Justice Rumsey giving the opinion, that it was quite clear that the facts warranted the conclusion which the jury reached, that there was a grave failure on the part of the defendant to use proper care to warn the plaintiff's intestate of the approach of the engine which struck him. In reference to the claim by the defendant that the damages were excessive, the court said that the question was one exclusively for the jury. The intestate was of temperate habits, and received $1.25 per day wages. "There is no actual money value of the life of a man," Justice Rumsey said, "and the court cannot say in any given case that a verdict is greater than it should be unless the amount of it is such that by no possible means of computation would it be justified. Certainly, it cannot be said as a matter of law that the life of a man in the prime of years and in good health is not worth $5,000 to his widow and minor children. His yearly earnings at the time when he was killed were greater than the interest on the amount of the verdict. But that is not the only thing to be considered. Even as a pecuniary proposition, a man's life is worth something more to his family than the mere amount of money which he brings into it. While in these cases nothing can be given for the loss of society and for mere sentimental damages, as they may be called, yet the benefit of the counsel of the husband and father is worth something pecuniarily, even though he may be a day laborer, and it cannot be said as a matter of law that $5,000 is too much to compensate the family for the loss of the head of it, even if it should be supposed that, being a day laborer, he would always continue in that particular employment and never get beyond it."—The Law Student's Helper.

DEATH OF WILLIAM F. DICKINSON.

At the opening of the district court of Ramsey County on the morning of April 24th all the judges except Judge

Brill, who was out of the city, were present in Court Room No. 3, when the committee of the bar association presented a memorial for the late William F. Dickinson, who died on the 20th inst. Thomas D. O'Brien, the chairman of the committee, offered the following memorial, which was spread on the minutes of the court:

"Death having taken from our midst William Ford Dickinson, while upon the threshold of a most promising career in the practice of his chosen profession, the members of the Ramsey county bar desire to express their sense of the loss sustained by this community in his early decease.

"Although one of the junior members of the bar of this county he had shown himself possessed of sterling qualities of mind and character, and in the practice of the profession it was his fortune to make friends of all with whom he came in contact. His gentlemanly bearing and frank, open disposition, combined with excellent legal talent, caused him to leave a lasting impression of his personality on those who were within the circle of his acquaintance. Knowing that the honorable judges of this court share with us the sentiments we have expressed, we ask that this memorial be spread upon the minutes of the court, and that a copy be furnished to the bereaved family of the deceased."

Following the reading of the memorial, Mr. O'Brien said that, while Mr. Dickinson died before he had arrived at an age where it was posible for him to achieve marked distinction in his profession, yet his life, attainments and method of doing business gave promise of his future. "While we are inclined to regard death in youth as being particularly lamentable," concluded Mr. O'Brien, "it often seems to me that, as men grow older, they lose some of the most beautiful qualities they possess. They become more selfish, suspicious and indifferent. The memory that the friends of Mr. Dickinson will have of him will be that of a high-minded, pure young man, unsullied by contact with the world, of high intelligence and beautiful character."

T. R. Palmer spoke in the highest terms of the many good qualities of his deceased partner, whom he had known intimately from his earliest boyhood, and referred to his business association with him as follows: "For ten years he has been closely identified with me, my family and my office. He has grown up with my business. The office is filled with evidences of his fidelity, energy, learning and ability. Open any book, record or file in the office, and there you will find his work. I have never seen him angry, have never heard him utter a cross word to any person at any time. As for blasphemy or obscenity he could not give utterance to it. He had no bad habit. He was always courteous and obliging. He attended the law department of the state university evenings for three years, and graduated with honors in June, 1895, at which time the firm became Palmer & Dickinson. Dickinson was not cut out for a trial lawyer, but his office work in drawing pleadings, decrees, contracts, and in his briefing, would equal that of many a much older lawyer."

Other addresses were delivered by John L. Townley, A. R. Moore and A. W. Wickwire.

Judge Kelly, speaking for the bench, in the absence of Judge Brill, reiterated the words of commendation expressed by the members of the bar. "He did his duty, his whole duty, well before the bar of the earthly judge," said Judge Kelly, "and we feel assured that when his soul stood before the bar of the Judge of all judges, it received that consolation which was pronounced by the Master when on this earth: 'Blessed are the pure in heart, for they shall see God."

BOOK REVIEW.

"The Federal Courts.—Their Organization, Jurisdiction and Procedure. Lectures before the Richmond Law School, Richmond College, Virginia. By Charles H. Simonton, U. S. Circuit Judge." B. F. Johnson Publishing Co., Richmond, Va., 1896. Price, $1.50.

This work, recently published, as its title indicates, is a course of lectures delivered before the law class of Richmond College, Va. The author has for many years been a United States Judge, and is by experience and study well qualified for the task he has undertaken. He first gives a clear out-

line of the various Federal Courts and their origin, and then proceeds more in detail to treat of the jurisdiction and procedure of each court. While the work is intended primarily for students, it is so thorough in its treatment of the subjects covered that it will prove a valuable addition to the library of the practicing attorney.

DISTRICT COURT DECISIONS.

A. W. Dimond v. The Minnesota Savings Bank, doing business under the common name of The Minnesota Savings Bank.

(District Court, Ramsey County.)

Action Against Associates Doing Business Under Common Name—Naming Defendants.

In an action under section 5177 of the General Statutes of 1894 against supposed members of an association doing business under a common name, the summons must name or identify, and the complaint by proper allegations connect with the subject matter of the action, each associate whom it is sought to hold individually liable.

This action was brought under the above title, against the associates composing The Minnesota Savings Bank to recover monies deposited by plaintiff in said bank before it became insolvent, and was based on section 5177 of the General Statutes of 1894, which is as follows: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the process in such case being served on one or more of the associates; the judgment in the action shall bind the joint property of all of the associates in the same manner as if all had been named as defendants."

The complaint in effect alleged that The Minnesota Savings Bank had never in fact become a corporation, but had for many years been doing a banking business for the mutual gain and profit of its members under the common name of "The Minnesota Savings Bank." It further alleged that said Bank or association was composed of numerous members or associates, the names of whom were unknown to the plaintiff, and asked that the names of such members might be added to the summons and complaint as defendants when they had been duly served

Service was duly made upon certain persons supposed to be stockholders in said bank, among whom was Max Toltz. Several of the persons so served answered, but Toltz demurred to the complaint on two grounds.

First, Because the complaint did not state facts sufficient to constitute a cause of action.

Second. Because there was a defect of parties defendant, in that the complaint did not name Toltz or any other person as a defendant. Demurrer sustained.

E. D. Tittmann, for defendant.

The plaintiff proceeds on the theory that The Minnesota Savings Bank is a partnership, but the complaint contains no allegation that it is a co-partnership, nor does it name any persons as partners. Defendant Toltz is nowhere mentioned in the complaint as a partner or otherwise, and there is nothing to connect him in any way with the bank, or any of the acts referred to in the complaint. Foerster v. Kirkpatrick, 2 Minn. 173.

Alva R. Hunt, for plaintiff.

Foerster v. Kirkpatrick has been overruled in Jaeger v. Hartman, 13 Minn. 52.

This action is brought under Gen. St. 1894, sec 5177, and it was not necessary in the first instance to set out the names of the associates in the summons and complaint. When it is discovered who the associates are each one may be served and afterwards his name inserted in the summons and complaint by leave of the court. Gale v. Townsend, 45 Minn. 360.

The individual associates in this case may be held liable either on the ground of agency, or of partnership. The partnership, if they are held liable on that theory, is one that results from the acts of the bank and its members in doing business without becoming incorporated, and to plead it in terms would be merely pleading a conclusion of law. Roberts Mfg. Co. v. Schlick, 62 Minn. 332.

Kelly, J. This action is evidently begun upon the theory that the Minnesota Savings Bank never became a body corporate, and that those persons who were connected with it as

supposed stockholders, were in law merely associated and doing business together under a common name, and liable under the law of agency.

The pleader's idea seems to be that a suit begun against the common name would bind all the parties so interested whenever he can serve the summons upon whom he suspects. And that after he has served all he may choose in this way, he can then ask the court for an order amending his summons and complaint so as to name the parties served as defendants in the one, and insert proper allegations of fact to support the summons in the other.

He has evidently not read carefully the receipt for cooking fish in the old book, which began with the sage counsel "first catch your fish." If he wishes to "griddle" a defendant, he should at least name him, or identify him in some way, in his summons; and by proper allegations in his complaint connect him with the subject matter of his action. This, Mr. Toltz insists, has not been done with reference to himself, and I think he is right.

Sections 5177 and 5268, Stat. Minn., 1894, do not help plaintiff in his dilemma. His pleading may be good as against the association, but it is not as against individual members not named.

Leave to amend either sumons or complaint was not asked by plaintiff on the hearing.

I am not sure that Mr. Toltz's proper remedy was not by motion to set aside as to himself, the service of the summons. That question was not raised, however, and as to Mr. Toltz, the complaint clearly fails to state facts sufficient to constitute a cause of action.

State of Minnesota, ex rel., Theodore G. Walther et al. v. The Common Council of the City of St. Paul.

(District Court, Ramsey County.)

Liquor Licenses—City of St. Paul—Objections to Application—Mandamus.

It is the duty of both the assembly and the board of aldermen constituting the common council of the City of St. Paul, where objections are properly made to the issuance of a license to sell intoxicating liquors, to afford reasonable opportunity for persons objecting to be heard before each body, and to that end to hear, within bounds, testimony to sustain or rebut the charges made against the applicant.

Such charges should be sufficiently specific to apprise the party accused of the grounds on which the issue of a license to him is opposed.

The common council is charged by law with the duty of determining to whom a license shall be issued, and after such final determination, upon a hearing of the charges and testimony, the district court has no jurisdiction to review its decision.

Where one branch of the council has passed upon the question of issuing a license, but the other branch has not acted thereon, a writ of mandamus will not be issued against the joint body commanding it to hear charges and testimony thereon.

This matter came before the court upon an order to show cause why a writ of mandamus should not be issued commanding the common council to hear certain evidence offered by relators in opposition to the application of Mrs. Tankenhoff for a liquor license, or to show cause why it should not hear such evidence. Writ denied.

D. W. Doty, for Relators; Carl Taylor for Respondents.

Kelly, J. In view of the fact that it appears that the assembly, one constituent part of what is known as the common council of the city of St. Paul, has passed upon the question of issuing the license referred to in these proceedings, and that question is no longer before the assembly, and that the board of aldermen have yet to act thereon, and it appearing that the writ by the moving paper is prayed to issue against the joint body known as the common council, and not against either of its constituent parts, I am constrained to deny the writ.

But in doing so, it is proper to say that, in my opinion, it is clearly the legal duty of both the assembly and the board of aldermen, where objections are properly made to the issuance of the license to sell intoxicating liquors, to afford reasonable opportunity for the objectors to be heard before each body; and to that end to hear, within bounds, testimony tending to sustain or rebut the charges.

I think these charges should be fairly specific. Not so particular as a pleading, but sufficiently so that the person accused may be reasonably apprised of what they consist. To hold that either body of the common council can arbitrarily refuse to hear the charges and evidence to sustain them would be to deny to the citizen the

right given by the statute to object.

In making this ruling I desire to be distinctly understood that with the final determination of any question as to the issuance or refusal to issue a license after hearing the charges and testimony this court has no jurisdiction to interfere. The common council is charged by the law with the duty to determine these questions, and with the exercise of the discretion vested in the council by the law this court will never interfere.

DIGEST OF MINNESOTA DECISIONS.

ACTION—BOND OF INDEMNITY. A bond in which the maker agrees to guaranty the obligee therein named against certain liability, construed to be merely an agreement to indemnify the obligee, and save him harmless from such liability, and not an agreement for the benefit of the third party in whose favor such liability was incurred; and the latter cannot maintain an action on the bond.—Walsh v. Featerstone, 69 N. W. Rep. 811.

APPEAL—ERROR IN ENTRY OF JUDGMENT. A variance between the judgment entered by the clerk and that ordered by the court cannot be raised for the first time on appeal, but an application should be made to the court to correct the judgment. Harper v. Carroll, 69 N. W. Rep. 610.

BANKS. — INDORSEMENT OF NOTE.—LOAN OR DEPOSIT. The plaintiffs assignor indorsed and delivered certain notes of its customers to the defendant, and was credited on the books of the defendant with the amount thereof as a general deposit. The assignor thereafter made an assignment for the benefit of its creditors to the plaintiff, who brought this action to recover the balance of the deposit. The trial court found as a fact that the transaction was a loan, secured by the indorsed notes, and as a conclusion of law that the defendant had the right to an equitable set-off of the loan against the deposit, although the loan was not due when the assignment was made. Held, correct. Stolze v. Bank of Illinois, 69 N. W. Rep. 813.

—INSOLVENCY — TRANSFER OF STOCK.—Under section 2501, Gen. St. 1894, the stockholder of a banking corpopration is liable to double the amount of his stock in an action under chapter 76, if the bank becomes insolvent, and suspends payment within one year after he transfers his stock. But, held, such transferror is only secondarily liable, and execution should not issue against him until his transferee fails to respond to execution against him for his liability for the same stock; and in such a case it is error to enter a judgment which permits the creditors to collect twice for the same block of stock, once from the transferee, and again from the transferor. (Harper v. Carroll, 69 N. W. Rep. 610).

—LIABILITY OF TRANSFERERS. The liability of such transferror is secondary only to the liability of the succeeding holders of the same block of stock, and not, as held by the court below, secondary to the liability of all subsequent transferrors of the same or any other stock Id.

—EXTENT OF LIABILITY. While such transferror is liable only for his proper share of the indebtedness still existing, which existed at the time he transferred his stock, still he should not escape liability because this amount has already been collected from others reached before him in the order of liability adopted by the court. Id.

—DIVIDENDS. Such transferror should, as well as the present stockholders, be allowed the benefit of any dividend realized from the corporate assets. Id.

—ESTIMATING LIABILITY. The manner of determining the portion which the transferror should pay of such indebtedness existing at the time of his transfer stated.

—DISTRIBUTION AMONG CREDITORS. The amounts collected from each transferror must be put into the common fund, and distributed ratably among all the creditors. Id.

—DEBTS AFTER TRANSFER. Such transferror cannot be made to contribute either directly or indirectly on account of debts incurred after he made his transfer, or debts which existed at that time, and have since been paid. Id.

—EXTENSION OF TIME. Held, it is not necessary to consider whether, after the transfer of stock, an extension of the time of payment of corporate debts without the consent of the transferror releases him from liability as to the debts so extended, because even if such transferror becomes a mere surety for the payment of corporate debts, it does not appear in this case that he did not consent to the extension, and the burden is on him to prove that he did not. Id.

—TRANSFER NOT REGISTERED. Where a transfer of stock was never registered on the books of the bank until after the bank failed and made an assignment, when it was registered as a transfer from him to the bank itself, held, it was error to charge such assignor as liable only as transferror on the amount of indebtedness existing at the time he assigned his stock, but he should be held liable as a present stockholder. Id.

—PLEDGE OF STOCK. Where a pledgee of stock registered it on the books of the bank as transferred to himself absolutely, held, he voluntarily made himself a stockholder, is liable as such, and the court cannot relieve him from any part of his liability. Id.

—CONTRIBUTION. Where an assignee of stock failed to register the transfer on the books of the bank, so that the assignor continued to be liable as a present stockholder, and he filed a cross bill against the assignee (already a party to the suit), who is in default for want of an answer thereto, held, the creditors need not undertake to enforce any liability against such assignee, or accept the benefit of such attempted enforcement by the assignor; but, under the circumstances, the latter may retain his present hold on the former for the purpose of compelling contribution by him in this action for any sum which the latter may be compelled to pay herein. Id.

—STOCKHOLDER ALSO A CREDITOR. When a stockholder is also a creditor, it is proper to order judgment against him for the full amount of his statutory liability, the same as against other stockholders, to declare the judgment against him a lien on the amount due him, and to order him to pay all assessments on such judgment until the court is fully satisfied that the dividend coming to him will fully pay the balance due from him on any further assessments on the judgment against him, when the collection of such further assessment may be stayed, and on distribution the dividend due him may be set off against such assessments. Id.

—DELAYING ENTRY OF JUDGMENT. Four days before the trial, plaintiff discovered that nonresident stockholders, over whose persons the court did not and could not acquire jurisdiction, had property within this state. On the trial, the defendant stockholders objected to entry of judgment until the court should acquire jurisdiction over this property by attachment. Held, at that late day, these defendants were not entitled to delay the trial or other proceedings in order to make this property contribute to the payment of the corporate debts; but the court might, in its discretion, compel the plaintiff or other creditors to attach and proceed to condemn the property, and, if condemned too late to contribute directly, it or its proceeds might, after the creditors were paid in full, be applied to reimburse those stockholders who had paid more than their share. Id.

—RECEIVER'S EXPENSES. Held, the creditors are entitled to recover the receiver's expenses in addition to their debts and statutory costs and disbursements, not exceeding the amount of the stockholders' statutory liability. Id.

—STOCKHOLDERS' LIABILITY SEVERAL—RELEASE. The stockholders' liability is several, not joint; and a judgment against only a part of the stockholders, within the jurisdiction, does not have the effect of releasing the others. While such liability is several, it produces only a limited fund, which belongs to all the creditors as tenants in common, and must be neforced in equity. Id.

—JUDGMENT PROVIDING FOR CONTRIBUTION. It is proper to provide in the judgment that, after the receiver has collected in full or has exhausted all the collectible liability, a judgment of contribution may be entered in favor of those who have paid

more than their share, and against those who have paid less. Id.

—DEATH OF STOCKHOLDER. After the commencement of this action, a stockholder who had been served with summons died, leaving no property within the jurisdiction of the court. Held, her transferror should, on the first assessment on the judgment against the stockholders, be made to contribute on the amount of indebtedness existing at the time of the transfer. Id.

CONSTITUTIONAL LAW — PASSAGE OF AMENDMENT TO STATUTE OF LIMITATIONS.

Chapter 91 of Laws of 1889 reducing time of bringing action for recovery of real estate was properly passed. Kelly v. Gallup, 69 N. W. Rep. 812.

—STOCKHOLDERS IN BANKS. Following Allen v. Walsh, 25 Minn. 551, held, section 2501 of Gen. Stat. 1894, imposing the double liability on the stockholders of banking corporations, is constitutional. Harper v. Carroll, 69 N. W. Rep. 610.

CORPORATION—DE FACTO CORPORATION—ESTOPPEL.

In an action to recover the balance of an unpaid subscription for stock, held, the defendant recognized, dealt with, and became a stockholder in a de facto corporation, and is now estopped from questioning its existence, or asserting that it never was legally organized by reason of a failure to comply with the statute in filing with the secretary of state proof of the publication of its articles of incorporation, as required by section 2594, Gen. St. 1894. Hause v. Mannheimer, 69 N. W. Rep. 810.

—ENFORCING LIABILITY OF STOCKHOLDERS. In an action under chapter 76, Gen. St. 1894, to enforce the double liability of the stockholders of an insolvent corporation, held, the creditors are entitled to a judgment against each stockholder for the full amount of his statutory liability, even though the aggregate amount of this judgment exceeds the aggregate amount of all the corporate indebtedness and costs and expenses of the action to be satisfied by such judgment. Clark v. Opera House Co. 59 N. W. 632, 58 Minn. 16 distinguished. But where the aggregate amount of the judgment so exceeds the aggregate amount to be satisfied by the same, execution should not be issued against some or all of the stockholders for the full amount of the judgment agaist each,—but the judgment should, by its terms, provide for issuing successive executions on the order of the court, at first for each stockholder's pro rata share of such indebtedness and expenses, and then for subsequent successive executions for such additional pro rata amounts or assessments as may be found necessary by reason of the failure to collect from stockholders found to be insolvent in attempting to satisfy the prior execution; and, when such indebtedness and expenses are paid in full, the balance of the judgment against those stockholders paying their full share of the same shall be satisfied. Execution should be issued on the judgment accordingly. Harper v. Carroll, 69 N. W. Rep. 610.

—STAYING DOCKETING OF JUDGMENT. The court may, in its discretion, on application on notice, stay the docketing of the judgment against any particular stockholder on the giving of a bond to pay each and every assessment on the judgment due from such stockholder, whenever ordered by the court. Harper v. Carroll, 69 N. W. Rep. 610.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS.

Refusal of probate court to allow claim of nonresident after expiration of time to file claims held error. State v. Probate Court, 69 N. W. Rep. 609.

FORGERY — INDICTMENT — UTTERING FALSE ENTRIES.

The uttering of a false or forged instrument, and the making of such instrument, are distinct offenses; and an indictment for the former need not set out who made the false instrument, or how it was made, or the intent of the maker. State v. Goodrich, 69 N. W. Rep. 815.

Gen. St. 1894, Sec. 6696, makes it forgery in the third degree for a person to make false entries, with intent to defraud in accounts or books which he is employed to keep; and knowingly uttering such false entries with such intent is also made forgery in the same degree by Id. sec. 6702. Id.

The indictments herein, purporting to charge the defendants with uttering as true certain false entries in an account of a survey of logs, considered, and held, to state facts constituting a public offense. Id.

FRAUDULENT CONVEYANCE—MORTGAGOR TO RUN BUSINESS.

A chattel mortgage on a retail stock of goods provided that the mortgagor should sell the goods in the regular course of business, and apply the proceeds in keeping up the stock and defraying the expenses of running the business, and that all of the balance of the proceeds should be paid to the mortgagee to be applied on the mortgage indebtedness. Held, the mortgage was, on its face, fraudulent and void as to the creditors of the mortgagor. Pabst Brewing Co. v. Butchart, 69 N. W. Rep. 809.

GRAND JURY — WASHINGTON COUNTY.

The defendants moved to quash the indictments herein on the grounds (1) that the jury list, from which the grand jury returned the indictments were drawn, was not made by the board authorized to make the same; (2) that such jury list was not made as required by the Washington county jury law (Gen. St. 1894, Secs. 5629-5633); (3) that the grand jury was illegally reconvened for an adjourned term of court at which the indictments were returned. Held, that the trial court rightly denied the motion to quash. State v. Goodrich, 69 N. W. Rep. 815.

INSANITY—EVIDENCE.

Evidence held to show that party was not insane when he took adverse possesion of certain land. Kelly v. Gallup, 69 N. W. Rep. 812.

PROMISSORY NOTES—EFFECT OF INDORSEMENT — QUESTION OF FACT.

Held, following Becker's Inv. Ag. v. Rea (Minn.), 65 N. W. 928, that whether the discounting of a bill or note, with the general indorsement of the holder, is a sale of the paper, or a loan to the holder, secured by the paper and indorsement as collateral, is ordinarily a question of fact. Stolze v. Bank of Minnesota, 69 N. W. Rep. 813.

STATUTE OF LIMITATIONS—DISABILITY—INSANITY.

Disability which will arrest running of the statute must exist at the time the cause of action accrues. No subsequent disability, not even insanity, will impede it. Kelly v. Gallup, 69 N. W. Rep. 812.

VENDOR AND VENDEE—INTEREST OF WIFE AS INCUMBRANCE.

A contingent right of dower is an incumbrance on land previously conveyed by the husband alone, within the covenant against incumbrances; and this rule has not been changed by the fact that estates in dower eo nomine have been abolished, and there has been substituted in this state, in lieu thereof, a life estate in the homestead of the husband, and title in fee to an undivided one-third of other lands. Crowly v. C. N. Nelson Lumber Co., 69 N. W. Rep. 321.

—DUTY OF HUSBAND.

The obligation to remove this incumbrance remains upon a husband who has sold, and by deed with full covenants of warranty has conveyed lands, without having his wife join in the execution of such conveyance. Crowly v. C. N. Nelson Lumber Co., 69 N. W. Rep. 321.

—FRAUD.

When a party to whom such lands have been subsequently conveyed secures the execution and delivery of another deed from the husband, in which his wife joins, the transaction is not to be treated as a purchase of the land; and the rules of law respecting fraudulent representations or concealments in such a purchase have only a limited application to it. Held, in this action, which was brought by a husband and wife to set aside a quit-claim deed made by them to one of the defendants, upon the ground of fraudulent representaitons and concealments, that findings of fact to the effect that the husband had previously sold, and by deed containing full covenants of warranty (in which deed the wife did not join) had conveyed the land in question to a third party, who subsequently sold and conveyed the same to such defendant; and, further, that no reason had been shown for setting aside the quit-claim deed—were war-

ranted by the evidence. Crowly v. C. N. Nelson Lumber Co., 69 N. W. Rep. 321.

ABSTRACTS OF RECENT CASES.

ATTACHMENT —FRAUDULENTLY OBTAINING CREDIT.

A strict construction of the statute authorizing a warrant of attachment against one who makes a false statement in writing to obtain credit is adopted in Penoyar v. Kelsey (N. Y.) 34 L. R. A. 248, where it is held that such a statement will not be ground of attachment in favor of a creditor who had no knowledge of it until after he had given the credit. S. C. 44 N. E. 788.

CONFLICT OF LAWS—INJURY TO EMPLOYE.

The Mississippi Constitution, which precludes the defense to an action for an employee's injury that he knew of the defective or unsafe character of the machinery or appliances by which he was injured, is enforced by the Federal court in Tennessee in the case of Illinois Cent. R. Co. v. Ihlenberg (C. C. App. 6th C.) 34 L. R. A. 393, when the injury was received in Mississippi, since the provision is simply a variation from, and not repugnant to, the law of Tennessee. S. C. 75 Fed. 873.

CONSTITUTIONAL LAW — LEGISLATIVE POWER—OFFICERS.

The power to designate the local authority who shall appoint local officers, given to the legislature by the New York Constitution when their election or appointment is not otherwise provided for by the Constitution, is held, in Rathbone v. Wirth (N. Y.) 34 L. R. A. 408, not to justify a statute providing that the police board of the city of Albany shall consist of four commissioners, of whom two shall belong to the political party having the highest representation in the common council, and the other two to the party having the next highest representation therein, and that each member of the council shall be entitled to vote for only two of such officers. The minority which is thus given power to appoint two of the commissioners is held not to constitute city authority within the meaning of the Constiution. S. C. 45 N. E. 15.

—EX POST FACTO LAW.

A satute denying to convicts under sentence for a second offense the same deductions from their sentence for good behavior that are allowed to other convicts is held, in Re Miller (Mich.) 34 L. R. A. 398, not to be ex post facto as applied to the punishment of an offense subsequently committed, although the offender had been convicted of his first offense before the passage of the act. With the case are collected the numerous authorities on the subject of the enhancement of the penalty of crimes when committed by habitual criminals or prior offenders. S. C. 68 N. W. 990.

—PASSAGE OF LAW — CLAIM AGAINST STATE.

A mere concurrent resolution of the legislature to which the executive approval is not affixed as in case of a statute, although it is passed upon the governor's recommendation to ratify his appointment of an agent for the state, and expressly directs him to allow a certain compensation, is held, in Mullan v. State (Cal.) 34 L. R. A. 262, not to constitute an "express authority of law" within the meaning of a constitutional provision requiring such authority as the basis for a claim against the state, and also providing that "no law shall be passed except by bill." S. C. 46 Pac. 670.

—EMINENT DOMAIN—RAILROAD.

A railroad charter to extend from a certain town past a sawmill, through rough, mountainous, timbered, and sparsely settled country, to the middle of a certain section of lands of the United States, without going near any other town, city, or settlement or other railroad, but which has been built only from the sawmill, about 2 miles from the town, for 5½ miles into the timbered region, and has no freight or passenger depots, passenger coaches, or other cars except trucks, and has never charged passengers any fare—is held, in Bridal Veil Lumbering Co. v. Johnson (Or.) 34 L. R. A. 368, to be a public way for which eminent domain may be exercised, where it is not shown that it was intended simply as a logging road, but every one

having occasion to use it as a passenger or for the transportation of freight has a right to require the service. S. C. 46 Pac. 790.

—COMPENSATION—PAYMENT INTO COURT.

Payment into court of an award of viewers from which an appeal is taken by the property owners is held, in Harrisburg, C. & C. T. R. Co. v. Harrisburg & M. E. R. Co. (Pa.) 34 L. R. A. 439, to be insufficient to satisfy a constitutional provision for just compensation to be "paid or secured before the taking, injury, or destruction" of property in eminent domain cases. S. C. 35 Atl. 850.

DAMAGES—PROVINCE OF JURY.

An instruction that plaintiff is "entitled" to exemplary or punitory damages if the injury for which the action was brought was malicious is held, in Robinson v. Superior Rapid Transit R. Co. (Wis.) 34 L. R. A. 205, to be erroneous on the ground that such damages cannot be claimed as matter of law, but only in the discretion of the jury. S. C. 68 N. W. 961.

ELECTIONS—CONVENTIONS.

An assemblage of twenty-one persons representing only one-fourth of the precincts of a single county, who met without any call for a convention, or any notices except by word of mouth, or any election as delegates, or any credentials, and immediately assumed to form a new party and organize themselves into a county convention was denied recognition in State, ex rel. Metcalf, v. Johnson (Mont.) 34 L. R. A. 313, either as a state convention or as a county convention whose nominees could be allowed to apear on the official ballot. S. C. 46 Pac. 440.

INSANITY — DISPOSITION OF PROPERTY.

The lunacy of a man which begins after he has placed his daughter and her husband in possession of land, stating they are to hold it during his life, and telling them of the fact that he has devised it to her, is held, in Potter v. Barry (N. J.) 34 L. R. A. 297, to be insufficient to defeat the right of the daughter to continue in the possession of the premises, although the lunatic's guardian notifies her and her husband to surrender them; but their possession will be protected in a court of equity so as to give effect to the purpose of the father as expressed during his sanity. A note to this case reviews the decisions on the use of a lunatic's property to carry out his presumed wishes, or to fulfill his equitable obligations in the absence of a legal liability. S. C. 33 Atl. 455.

JUDGMENT—PRIVITY—SURETY.

The payment of a judgment against a railroad company for damages, after its affirmance on appeal, by the surety on a supersedeas bond who signed it when there was a mortgage in existence on which no default had been made and when the railroad company was apparently solvent, is held, in Whitely v. Central Trust Co. (C. C. App. 6th C.) 34 L. R. A. 303, to give him no preference over the mortgage, although the bond may have benefitted the mortgagees by preventing a levy on the railroad, which might have been detrimental to them. S. C. 76 Fed. 74.

MORTGAGE—TAXES.

A stipulation in a mortgage that the mortgagor shall pay within the time prescribed by law all taxes upon the premises is held, in Fuller v. Kane (Mich.) 34 L. R. A. 308, insufficient to make the mortgagor liable for all taxes in case of the subsequent passage of a law requiring the mortgagee to pay those which are properly leviable against his interest. S. C. 68 N. W. 267.

NEGLIGENCE — EXPLOSION OF BOILER—REPAIRS.

No time for repairs after knowledge of the unsafe condition of a locomotive boiler is allowed in Louisville, N. A. & C. R. Co. v. Lynch (Ind.) 34 L. R. A. 293, in order to excuse a railroad company for injury to a person near the railroad, caused by the explosion of the boiler, if the explosion could have been avoided by discontinuing the use of the locomotive. S. C. 44 N. E. 997.

NUISANCE — STATUTORY AUTHORITY.

A dam authorized by statute to raise water in a river for a public canal, and, if necessary, to use private property to require such right of way therefor in the manner provided by

law, is held, in Leitzsey v. Columbia Water Co. (S. C.) 34 L. R. A. 215, not to constitute a nuisance; but the settlement of damages for flooding lands is to be made under the eminent domain law. S. C. 25 S. E. 744.

PRINCIPAL AND SURETY—SURRENDER OF NOTE.

A surety on a note which is surrendered for a renewal note secured by a mortgage which proves to be invalid as an illegal preference under the insolvency law is held to be released by such surrender, notwithstanding the invalidity of the mortgage, at least if the holder knew of the maker's insolvency when the transaction occurred. Fredericktown Sav. Institution v. Michael (Md.) 33 L. R. A. 628. The authorities on the liability of obligors as affected by a renewal or substitution of the obligation are found in a note to this case. S. C. 32 Atl. 340.

PROMISSORY NOTE—BONA FIDE HOLDER.

The fact that the president of a corporation presents its negotiable note signed by him as security for a loan to himself or to a firm to which he belongs is held, in Cheever v. Pittsburg, C. & L. E. R. Co. (N. Y.) 34 L. R. A. 69, not to be sufficient to prevent the person who takes it from him from claiming as a bona fide holder, where the note was payable to a third person who had indorsed it. S. C. 44 N. E. 701.

RAILROADS — JUDGMENT FOR PERSONAL INJURIES — MORTGAGE—PRIORITY.

The most important, if not indeed the first, case to decide that judgment for personal injuries on account of the negligence of a railroad company will be given preference over a pre-existing mortgage when the road goes into the hands of a receiver is that of Green v. Coast Line R. Co., (Ga.) 33 L. R. A. 806. A case on the other side of the question is St. Louis Trust Co. v. Riley (C. C. App. 8th C.) 30 L. R. A. 456, which denied such preference to a claim for damages caused by negligence of a street-railway company. S. C. 24 S. E. 814. 70 Fed. 32.

—FIRES—JURISDICTION.

An action for damages alleged to have been occasioned by the negligence of a railway company in setting fire to and burning fences and causing damages to pasture land and to a crop of unmatured cotton was held, in Bagley v. Columbus Southern R. Co. (Ga.) 34 L. R. A. 286, to be outside of the jurisdiction of a justice's court because it was an action for damages to realty. S. C. 25 S. E. 638.

STREET RAILWAY — RIDING BICYCLE BETWEEN TRACKS.

A person riding between the rails of an electric street railway upon a bicycle is held, in Everett v. Los Angeles Consol. Elec. R. Co. (Cal.) 34 L. R. A. 350, to be chargeable with the duty of looking out for and endeavoring to avoid danger from the electric cars; and the motorman seeing him is held entitled to assume up to the last moment that the rider will turn out of the way by increasing his speed or turning aside to avoid the danger. S. C. 46 Pac. 889.

TAXATION — CATTLE FOR EXPORT.

The intent of dealers in cattle to export part of them, and the fact that they do export about two-thirds of all which they handle, are held, in Myers v. Baltimore County Comrs. (Md.) 34 L. R. A. 309, insufficient to prevent the taxation of the cattle to the average amount that the dealers have on hand. S. C. 35 Atl. 963.

—MONEY OF NON-RESIDENT ON DEPOSIT.

Money of a non-resident deposited by him in a bank in the state, although mingled in a trust fund in an account opened by him as trustee is held, in Re Houdayer's Estate (N. Y.) 34 L. R. A. 235, to constitute "property within the state" within the meaning of the New York transfer tax act, which includes property of a non-resident decedent if within the state. S. C. 44 N. E. 718.

TRIAL — PERSONAL INJURY — MEASURING LEG.

The measurement in the presence of the jury of a woman's foot and her leg 6 inches above the ankle, is held, in Hall v. Manson (Iowa) 34 L. R. A. 207, to be a right which the court must allow, when there is a direct conflict as to such measurement by the medical men called by the respective parties, at least if the witness herself does not object. S. C. 68 N. W. 823.

...THE..

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COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

THE JOURNAL'S NEW HOME.

The publisher of the Minnesota Law Journal, Frank P. Dufresne, in order to accommodate his growing publishing and law book business has removed his store and office from 85 East Fourth street to 34 and 35 National German American Bank Building.

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In the future all communications concerning the Journal should be sent to the last mentioned address.

THE MONTHLY MINNESOTA DIGEST.

In the next number of the Journal the cases filed during the present term of the Supreme Court will be reached in our monthly digest. So far some one hundred and twenty-five cases have been digested in the January, February, March, April and May issues, and the work has progressed far enough for our subscribers to test its usefulness. In a recent number of the National Corporation Reporter it asked its subscribers if they were "reading the corporation digest" that

appeared weekly in that publication, but we do not think it necessary to address such a question to our readers as to the "Digest of Minnesota Decisions" we are furnishing them. We would, however, be pleased to learn from them what they think of this feature of the Journal.

POWER OF CONGRESSIONAL INVESTIGATING COMMITTEE TO PUNISH RECALCITRANT WITNESS.

The Supreme Court of the United States, on Monday, April 21, denied the application of Elverton R. Chapman, the New York stock broker, convicted under an indictment charging him with refusing to answer questions propounded by the Senate investigating committee, for a writ of habeas corpus and for a writ of certiorari. The opinion is by Mr. Chief Justice Fuller, and holds that the Senate, under its constitutional right to censure and expel members, had the right to investigate any alleged misconduct on the part of Senators, and to compel witnesses to give testimony in aid of such investigation. "The subject-matter, as affecting the Senate," says the court, "was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizens; they do not seek to ascertain any facts as to the conduct, methods, extent, or details of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, was employed by any Senator to buy or sell for him any of that stock whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions and as investigations of this sort are within the power of the two houses, they cannot be defeated on purely sentimental grounds." The questions propounded were entirely pertinent to the matter under investigation; and no question as to what the Senate might do as the result of the investigation was involved. It is plain that negative answers would have tended to clear the Senate of what were regarded as offensive imputations, while affirmative answers might have led to further action by the Senate within its constitutional powers.

The investigation, the court holds, was entirely within the constitutional powers of the Senate. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member, and the resolutions under which the inquiry was conducted indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The court held also that the refusal to answer questions was not only a contempt of that body, but that it was also an offense against the United States. Congress possessed the constitutional power to enact a statute to compel the attendance of witnesses, and to compel them to make disclosures of evidence to enable the respective bodies to discharge their legitimate functions; and it was to effect this that the act of 1857 was passed; but this act did not constitute a delegation of the power to punish for contempt. While it was true that two offenses might be involved it was improbable that in any case accumulative penalties would be imposed, whether by imposing penalties merely, or of eliciting the answers desired. But, added the court, "it was quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also against another; and indictable statutory offenses may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being capable of standing together."—Washington Law Reporter.

MODIFICATIONS OF THE RULE IN MUNN v. ILLINOIS.

Many text-writers speak of the modifications, made by the Supreme Court of the United States, to the rule laid down in the pioneer case of Munn v. Illinois, 94 U. S., 113, which asserted the power of legislative bodies to regulate and fix prices.

A judicial expression on the subject

will be found in Southern Pacific Co. v. Board of Railroad Commissioners, 78 Fed. Rep., 236, opinion by Circuit Judge McKenna. He considers that Stone v. Wisconsin, 94 U. S., 181; Ruggles v. Illinois, 108 U. S. 526, followed the rule in Munn v. Illinois, and were affected by its error, to-wit: that the power of regulation of rates was unlimited in the legislature and hence it could be exercised, although not expressed in the charter of the corporation under the reserved right of amendment.

The assertion of this power was limited first, by cautious expressions, such as in Waterworks v. Schottler, 110 U. S., 347, and the Railroad Commission Cases, 116 U. S., 307, then by confident contrary annunciations, as in the Minnesota case, 134 U. S. 114. Finally in the Minnesota case the Supreme Court definitely modified Munn v. Illinois, and confined the power of regulation to that, which is just and reasonable, giving to the courts the ultimate power of review, and holding that any enactment which takes away this, offends the Constitution of the United States, by depriving the corporation of its property without due process of law, and of the equal protection of the laws. By many decisions, rendered since, this view has become the settled law.

It will be remembered that Munn v. Illinois was a case concerning the reduction of warehouse rates, and two propositions were established therein; (1) that of the power of the State to regualte property devoted to a public use; (2) that the exercise of this power was a legislative and not a judicial prerogative, without review by the judiciary; (3) that the settled rates of charges could remain fixed, although unreasonable, and that the only relief is in justice of the people, expressed through another legislature.

The controversy over the extent of the overruled doctrine of Munn v. Illinois is still undecided. The first proposition as to the power of the State has not been overruled; the second, as to its right of exercise, without judicial review, has been overruled, and the relation of common carriers and the State established in excellent equipoise. The power of the State stops at injustice, just as do the rights of the railroad. The State may not fix an unreasonably low rate, but it may prevent a railroad from fixing one unreasonably high, for if the law gives a railroad privileges, it also exacts from it duties to serve all faithfully, at reasonable charges, and without favor or discrimination.

The assertion of power in the State, even with the creations of its own will, was restricted by Mr. Justice Field, in the Railroad Tax Cases, 13 Fed., 722, wherein he said that the power must be exercised in subordination to the inhibitions of the National Constitution, a doctrine held by Judge McKenna to be "rational, consistent, safe, giving to property, and all interests in it, protection against an arbitrary will and not denying or dissipating the safeguards of the Constitution by refined and metaphysical distinctions."

Mr. Justice Waite in the Railroad Commission Cases, clinched the argument by holding that the power of regulation is itself not without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent to confiscation. "Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can they do that which, in law, amounts to the taking of private property for public use, without just compensation, or without due process of law."—National Corporation Reporter.

COERCION THROUGH PROCURING DISCHARGE FROM EMPLOYMENT.

We believe that the quite decided weight of opinion, in the profession and outside of it, has approved of the decision of the Supreme Court of Massachusetts in Vegelahn v. Guntner, 44 N. E. R., 1077. It was therein held that the maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidation or by persuasion and social pressure, any workman from entering into, or continuing in his employment, would be enjoined.

There has, however, been some adverse comment upon that decision in

periodicals of excellent standing. The theory of hostile criticism, as stated in the dissenting opinion of Judge Holmes, and amplified by editorial comment, is that a controversy of the kind involved was outside of the legitimate purview of the law courts; that such controversy represented one phase of a great industrial evolution, or revolution, now in progress; and that it was the duty of the courts to keep hands off when novel questions arose, in order that economic and social forces might adjust themselves. While the courts, of course, should not officiously interpose in matters of individual or confederate concern, in our judgment it would be shirking an essential function of tribunals of justice to decline jurisdiction in labor controversies simply because novel phases of fact arise.

It is in the highest degree important that the courts protect fundamental rights and impartially enforce them as to all parties and classes. The courts have, therefore, quite unanimously condemned boycotts of many and various kinds, because they tend to do away with freedom of competition and personal liberty and security in general. Attempts by one person or an organization of persons to coerce another person, by affecting his standing or relations with a third person, are held unlawful. If the boycott principle were countenanced by the courts and permitted to grow into a regular rule of procedure, there could be no safety for individual liberty of conduct and contract against the despotism of industrial associations and cliques.

The decision of the New York Court of Appeals in Curran v. Galen (46 N. E. Rep. 297, March 9, 1897), is very consistently in line with the Massachusetts case above referred to, and the general judicial attitude toward industrial controversies. It appeared that plaintiff, who had been discharged from employment by a brewing company, brought an action for damages against the defendants for conspiring and confederating together to procure his discharge and prevent him from obtaining employment. The defendants in their answer alleged as a defence that they were members of a Workingman's Assembly, Knights of Labor, which had an agreement with a Brewing Association, composed of the brewing companies, that all their employees should be members of the assembly, and that no employe should work for a longer period than four weeks without becoming a member; that what the defendants did in obtaining the plaintiff's discharge was as members of the assembly and in pursuance of this agreement upon his refusing to become a member.

Plaintiff demurred to this defence, and it was held that the same was insufficient in law, and that the demurrer should be sustained. The Massachusetts case above referred to concerned a controversy between an employer and employees. The New York case affects the right of an employee himself as against a Workingman's Assembly; but the same fundamental principle underlies both decisions. The following language from the opinion of the New York Court of Appeals felicitiously presents the claim of individual liberty, which, as above intimated, everything in the nature of a boycott tends to subvert:

"Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community.

"The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against

the general public interest, if its powers are directed toward the repression of individual freedom, upon what principle shall it be justified?"—N. Y. Law Journal.

POWER OF APPELLATE COURT TO SET ASIDE VERDICT ON GROUND OF EXCESSIVE DAMAGES.

The case of Smith v. Times Publishing Co. et al., 178 Pa. 481 (decided Jan. 4, 1897), was the occasion of the first exercise by the Supreme Court of Pennsylvania of the authority vested in it by the Act of May 20, 1891, Sec. 2, to "order a verdict and judgment set aside, and a new trial had." The plaintiff had obtained a verdict of $45,000 in an action of trespass for an alleged libel published in the Times, and on a refusal to grant a rule for a new trial, the defendants had appealed assigning for error, inter alia, that the verdict was excessive. The judges were unanimous for reversal but differed considerably in their views.

Mr. Justice Mitchell rested the right of the Supreme Court to review the action of the jury directly upon the above mentioned Act, and as it was attacked as being in violation of the constitution of Pennsylvania, that "trial by jury shall be as heretofore and the right theroef remain inviolate," he examined the jury system to determine what are its essential features. He decided that "the Act of 1891 makes no change in the trial itself, nor does it deny the right. All that it does is to provide for another step between verdict and final judgment, of exactly the same nature and the same effect as the long-establishd power of the lower courts. The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. * * * The Act of 1891 vests a further power of revision, of the same nature, in this court. * * * It is a power of review only, before final judgment, and does not violate the right to a jury trial or even interfere with it in the particular case more than was or might have been done by the court below."

Mr. Justice Williams also reviewed the history of trial by jury and came to the conclusion that the appellate court as well as the tria. court possessed the power of setting aside an erroneous verdict. He said that this method of granting a new trial had superseded the more summary process by way of fine and imprisonment of the jury, which itself was the successor of a direct proceeding against the members of the jury to attaint them for their false verdict. "The exercise of this power was then thought to be in aid of trial by jury." "This practice, with which the colonies were familiar, has continued in the courts of the states and of the United States in some form down to the present time, and is as indispensable to the proper administration of justice now as it was in the days of Lord Mansfield." His Honor then stated that the tendency of modern times had been to restrict the exercise of this power of review on the part of the Supreme Court to cases where it was alleged that the trial court had abused its discretion as to granting or refusing a new trial, and it would not exercise this right upon an appeal without such allegation; that as suitors were disinclined to allege such abuse on the part of the trial court, this power was not often invoked, but that "the Legislature of this state seems to have been of the opinion that the power of revising the exercise of discretion is not only constitutional but desirable." He further said that "in the Supreme Court of the United States the power of an appellate court to reverse and order a new trial for excessive damages is recognized." In support of this positon he cited Kennon v. Gilmer, 131 U. S. 22 (1888); Hopkins v. Orr, 124 U. S. 510 (1887); Arkansas Cattle Co. v. Mann, 130 U. S. 69 (1888). A careful examination of these cases will, it is believed, show that they do not sustain this statement. In Kennon v. Gilmer, 131 U. S. 22 (1888), the only question before the court was whether the Supreme Court of the territory of Montana acted correctly in ordering a judgment to be reduced by almost one half and then affirming it for that amount. Mr. Justice Gray said that the Seventh Amendment of the Constitution of the United Sates

was in force in the territory; that in accordance therewith the Code of Civil Procedure of Montana provides that "an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered by consent of the parties;" and that that code authorized the court in which a trial is had, or the Supreme Court of the territory on appeal, to set aside a verdict and grant a new trial "for excessive damages appearing to have been given under the influence of passion or prejudice." He then expressed himself as follows: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest: Hopkins v. Orr, 124 U. S. 510; Arkansas Cattle Co. v. Mann, 130 U. S. 69."

This statement as to the powers which the court of the Territory might exercise under the Code was clearly obiter dictum, and further, the cases which the learned Justice cites in support of his views are not at all in point. Hopkins v. Orr, supra, decided that the Supreme Court of New Mexico was authorized to affirm the judgment rendered by the District Court upon the general verdict for the plaintiffs, and to make its affirmance conditional upon the plaintiffs' remitting part of the interest awarded below, since it appeared from the record that the computation of interest had been usurious. Arkansas Cattle Co. v. Mann, supra, decided that if the trial court makes the decision of a motion for a new trial depend upon a remission of the larger part of the verdict, this is not a re-examination by the court of facts tried by the jury in a mode not known at the common law; and is not a violation of the Seventh Amendment.

Since the Seventh Amendment is in force in the Territories, their statutes would be pronounced unconstitutional if they really purported to confer the power on their appellate courts which they are said to do in the obiter remarks of Mr. Justice Gray, quoted supra, for the federal Supreme Court has always consistently declined to exercise the power to re-examine the findings of the jury as opposed to the Seventh Amendment: see Parsons v. Bedford, 3 Pet. 433 (1830); The Justices v. Murray, 9 Wall. 274 (1869); Insurance Co. v. Comstock, 16 Wall. 258 (1872); R. R. Co. v. Fraloff, 100 U. S. 24 (1879); Wabash R. R. Co. v. McDaniels, 107 U. S. 454 (1882); Wilson v. Everett, 139 U. S. 616 (1890); Aetna Life Ins. Co. v. Ward, 140 U. S. 76 (1890); Erie R. R. Co. v. Winter, 143 U. S. 60 (1891). Those statutes are open, however, to a narrower construction, namely, that they only declare the power of the appellate court to reverse or modify the judgment of the lower court for errors appearing on the record. Mr. Justice Williams evidently considered the obiter dictum of Mr. Justice Gray to be the decision of the court in Kennon v. Gilmer, supra, and then followed the learned federal judge in citing the two cases relied on by him.

The narrower construction of the acts of the Territories, suggested above, was applied by Mr. Justice Sterrett to the Pennsylvania Act of 1891. He thought that the Supreme Court had never had the power to re-examine findings of fact and that the Legislature had indicated no intention in the Act of 1891 to confer it. He considered the Act merely declaratory of powers that could have been exercised without it, and, therefore, entirely constitutional. He was in favor of reversing on the ground that there had been a manifest abuse of discretion on the part of the court below.

Mr. Justice Dean was thoroughly opposed to tampering with the verdict of the jury. He urged the objection that an appellate court is not in a position to tell what the jury should have done since, unlike the trial court, it has not heard the testimony upon which the verdict is founded. He thought that at common law the power of revision of verdicts had been confined to the trial court, and was only rarely exercised, while in Pennsylvania it had never been claimed or used by the Supreme Court. In support of

the latter part of that statement he cited the following cases: Ross v. Rittenhouse, 2 Dallas, 160 (1792); Moser v. Mayberry, 7 Watts, 12 (1838); Gaskell v. Morris, 7 W. & S. 32 (1844); Hamet v. Dundass, 4 Pa. 178 (1846); Faunce v. Leslie, 6 Pa. 121 (1847); Pa. R. R. Co. v. Allen, 53 Pa. 276 (1866); Pa. R. R. Co. v. Goodman, 62 Pa. 329 (1869); Gray v. Commonwealth, 101 Pa. 380 (1882); R. R. Co. v. Spinker, 105 Pa. 142 (1884); McKenney v. Fawcett, 138 Pa. 344 (1890).

In the face of this line of authorities it would seem difficult to escape the conclusion that it was the settled opinion of the court, prior to 1891, that it did not have he power now in dispute. The learned Justice then said that when there have been several constitutions in a state, the nature and extent of the right of trial by jury must be determined by the practice before the last one, and he referred to Byers & Davis v. Com., 42 Pa. 89 (1862); Wynehamer v. The People, 13 N. Y. 378 (1856); Trigally v. Mayor, 6 Cold. (Tenn.) 382 (1869). If, then, this be the meaning of the words "trial by jury shall be as heretofore," and the Act of 1891 be construed to give this power to the Supreme Court, which is prohibited by the constitution, Mr. Justice Dean has made out a strong case against the statute. But, in the first place, it can be contended that the provision in the present constitution referred back to the state of things existing in England before any of the Pennsylvania constitutions were adopted, and the fact that the language of the constitution of 1776 was "trials by jury shall be as heretofore" and that of the constitutions of 1790 and 1838 was identical with that in the present constitution, lends plausibility, to say the least, to the argument. If this position be admitted it becomes important to find out what was the rule at common law, and on this point Story, J., says in Parsons v. Bedford, 3 Pet. 433 (1830): "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings." See, also, Miller, Constitutional Law, 495, and cases cited. In the second place, there remains the narrower construction of the Act, already referred to, and towards which Mr. Justice Dean himself inclined, by which the Act is regarded as merely declaratory and, therefore, constitutional.

In the following states there are statutory provisions similar to the Pennsylvania Act of 1891: Wisconsin, Minnesota, Misosuri, Kansas, Arkansas, Indiana, Nebraska, Iowa; and their courts have all exercised without coment or discussion the power of revision conferred on them,—see: Waterman v. Chicago & Alton R. R., 82 Wis. 613 (1892); Gunderson v. Northwestern Elevator Co., 47 Minn. 161 (1891); Haynes v. Trenton, 108 Mo. 123 (1891); Upcher v. Oberlender, 50 Kan. 315 (1893); Fordyce v. Jackson, 56 Ark. 594 (1892); R. R. Co. v. Sponier, 85 Ind. 165 (1882); Orleans Village v. Perry, 24 Neb. 831 (1888); Cooper v. Mills Co., 69 Iowa, 35 (1886).

It remains to be noted that the provision of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law" lays stress on the findings of the jury, while the provision of the Pennsylvania constitution only preserves the institution of trial by jury and the right to it; there is thus great force in the position of Mr. Justice Mitchell, supra. It need hardly be added that the Seventh Amendment only applies to courts of the United States so that the states can adopt any provisions that they see fit in regard to trial by jury in civil cases.

In view of this difference of opinion between the courts of the states and of the United States, it will probably be thought that the Supreme Court of Pennsylvania has assumed and exercised a dangerous power, and that Mr. Justice Dean was justified in recalling the familiar maxim that "Hard cases make bad precedents."—American Law Register and Review.

THE DEATH PENALTY IN THE UNITED STATES.

The bill introduced by Representative N. M. Curtis of New York, "to reduce the cases in which the penalty

of death may be inflicted," has now become a law. Roughly summarized, it abolishes the death penalty as to all crimes within the jurisdiction of the Federal Courts, except treason, murder, rape and capital offenses enumerated in the articles of war for army and navy, and even in murder and rape cases a jury is permitted to qualify its verdict of guilty by adding "without capital punishment," the penalty then being changed to life imprisonment at hard labor. The report of the House Judiciary Committee carries an appendix, in which are grouped the fruits of a painstaking inquiry of Mr. Curtis into the state of the law concerning capital punishment in all civilized countries, from which he concludes that the United States "have undoubtedly the bloodiest code in the world."

The Federal statutes covering this subject may be said to have been inherited from the English criminal code, and have undergone little change in their century of existence. They enumerated sixty offenses punishable by death. One of President Jackson's messages contains statistics which show that, during the first thirty-seven years of the Republic, conviction of a crime easily capable of proof was not hard to obtain, and that death was pretty sure to follow conviction of those crimes most revolting to public sentiment. Thus we find that of thirty-nine persons tried for murder thirty-five were convicted and twenty-two hanged; and of nine tried for treason six were convicted and five hanged, witnesses in such cases being presumptively abundant and public sentiment strong. On the other hand, of four persons tried for rape, only one was convicted, and he was hanged, conclusive evidence of such a crime being hard to get, but public sentiment very strong. In the cases of crimes committed on the high seas, we find the differentiation following the same lines yet more plainly; for murder, there were three trials and two convictions, both followed by death; for sinking a vessel at sea, there was one trial, the accused being convicted but pardoned; while for piracy there is the remarkable record of sixty-seven trials, sixty-six convictions and only eight executions—a contrast which may be explained by the fact that most of the acts of piracy committed in those days were phases of the slave trade, which, though formally condemned by statute, were winked at by the populace, and hence commonly pardoned.

Coming down to very recent times, we find, in a report from the Attorney-General, that in the years 1890, 1891, and 1892, of a total of 271 persons indicted in the United States courts for murder, only sixty-three were convicted, and only thirteen of the convicts put to death. In other words, taking for our index the commonest of capital offenses, and that which has preserved in all epochs the most constant measure of public abhorrence, we must be struck with the great change which had come over the operation of the law; for the ratio of convictions to trials had declined, in the course of sixty-five years, from about 90 per cent. to 23, while the ratio of executions to trials had declined during the same period more than 56 per cent. to less than 4.

It was the steadily increasing disproportion between trials, convictions and executions which convinced Mr. Curtis that public sentiment has been undergoing a marked change. A first hasty glance at the figures might lead one to infer a lowering of the value commonly set on human life, since the penalty for taking it has been of late so seldom enforced. Second thought, however, will suggest the inquiry whether the valuation has not risen, rather, since the life even of a person convicted of a heinous crime is considered too precious to be taken by organized justice itself, except in rare instances.

These considerations led naturally to the question whether a law which recived apparently so feeble a support from public sentiment was not worse in its effect on social morals than no law at all. The fling of a murderer arrested several years ago, that "hanging is played out in New York," is often quoted as proof that there ought to be no more mistrials or acquittals or pardons till the notion cheerished by this fellow has been rooted out of the minds of all his class. Some extrem-

ists have gone even to the point of urging the extension of the death penalty to a larger list of crimes. But the alternative suggestion is seldom broached—that a moderate law rigidly enforced may carry more terror to the heart of the criminal than a rigid law moderately enforced. Is it not the absolute certainty of punishment, of some sort rather than a mere possibility of extreme punishment, which takes the spirit of bravado out of him? To the discussion of this phase of the problem Mr. Curtis has made an interesting contribution in his collection of data concerning the abolition of the death penalty for common crimes in other countries and in several of the United States.

From Brazil comes the report that "capital punishment has been abolished for all crimes, and no increase has been noted in criminal statistics;" like reports come from Costa Rica, Italy and Russia; while from Portugal comes the statement that "the number of homicides formerly punishable by death has actually diminished since the abolition of the death penalty in 1867." No reports as to the effect of the change come from Guatemala, Venezuela, or the fifteen cantons of Switzerland, where the death penalty has been abolished. On the other hand, Colombia reports "a marked increase of atrocious crimes;" and a five years' experiment of abolition in Ecuador appears to have resulted in so considerable an increase of crime that the death penalty was restored for four offenses.

In only four of our States—Maine, Michigan, Rhode Island and Wisconsin—has the death penalty been wholly abolished. In the other forty-one States it ranges in application from one offense, as in Pennsylvania, to ten, as in Georgia. No statistics are given as to the resulting increase or decrease of crime, but a record of the number of legal executions of the death penalty, and the number of lynchings from 1890 to 1895, might be supposed to throw some light upon the general social influence of an ultra-rigid criminal code. For instance, we reduce these statistics to tabular form:

State.	Offenses punishable by death.	Legal Execution in 6 years.	Lynching in same 6 years.
Georgia	10	75	96
Alabama	7	47	116
Louisiana	7	32	104
Maryland	7	17	7
Arkansas	4	40	73
Missouri	4	29	21
North Carolina	4	20	14
South Carolina	4	47	34
Virginia	4	30	44

That too broad an inference must not be drawn from this comparison is evident from the fact that Mississippi, though recognizing only one offense as capital, has a record of thirty-two legal executions and ninety-eight lynchings, while Michigan, without power to inflict the death penalty lawfully, inflicted it lawlessly three times during the period under consideration. It is obvious that differences in social organization in the various sections of the country must be taken into account. Density and character of population, race antagonism, and, in the older communities, respect for tradition, are all important elements. A hard and fast code, well adapted to one part of the country, might prove a failure in another. The Federal statutes cannot, of course, recognize sectional lines in prescribing penalties for crime. Hence the wisdom of such an elastic system as the Curtis bill proposes, whereby, in all save a few instances, the degree of severity with which a crime should be punished for the best interest of society in any particular district is left to the discretion of a jury of the vicinage.—Harper's Weekly.

THE GREATER NEW YORK CHARTER.

The charter of Greater New York provides for a municipal chamber in two houses, constructed very much like a state legislature. It places at the head of the municipal government a mayor elected for four years, with a salary of $15,000 a year, who has the appointing power and the veto power. The mayor's appointing power, however, is complete only for the first six months of his term. The practical work of city government is divided among eighteen departments. At the

head of a number of these departments there are to be single commissioners, while others, as for instance the Park Department and the Health Department, are instructed to boards of several members. All these commissioners are appointed by the mayor, and his appointments require no ratification. The mayor cannot make summary removals, however, except in the first six months of his term. The boards and commissioners have almost unlimited authority over their respective departments of administration. The mayor's function, then, is to occupy himself during the first six months of his four-year term with winding up and regulating the machinery; after that, he can only look on and let it work as it will without practical power to intervene. The financial authority under the charter is vested in a Board of Estimate and Apportionment, and not in the municipal assembly. The mayor, the city attorney, the president of the council, the head of the tax board, and the city comptroller, constitute this Board of Estimate and Apportionment, which makes the annual appropriations and fixes the annual tax rate. Its work goes to the municipal assembly, where no change can be made except by way of disapproval; and any reluctance to grant the board's appropriations can be overcome by the mayor's check upon the action of the assembly. It is the most complex system ever seriously proposed anywhere.—From "The Progress of the World," in May Review of Reviws.

UNPAID SUBSCRIPTIONS.

The Reporter of the Supreme Court of Illinois publishes the advance sheets of all final decisions of the Supreme Court, under the title "Illinois Official Reporter," terms Four Dollars per year.

The publication is very creditable and useful, but the publisher suffers, like the rest of legal publications from unpaid subscriptions. He has repeatedly called attention to it, but, without much avail. He now retaliates on his free list, and he says that "it is Saxon truth" unless he does so, the publication must stop, although he is convinced that the interests of the whole bar and bench require that this publication be maintained. He satisfies his "dropped subscribers by telling an amusing story with much good humor:

"I once knew a popcorn vender who was accustomed to call out with a loud voice: 'This popcorn costs me six cents a sack; I sell it for five, and still I make a living; but, you know, I sell an awful sight of it.' I have been proceeding on the plan of this man thus far with the Illinois Official Reporter. I make a living, but I don't make it out of the Reporter; and I trust my good friends, including all the Circuit and Superior Judges of the State, whom I have thus far so gladly supplied free, will appreciate the force of the reasons which impel me to the course here announced."

We trust that our contemporaries will republish this item, and the following discussion is invited: "Why will lawyers read their weekly and monthly law journal without paying for it?" Every law publication in the country suffers from this state of things, and it is about time that public attention be called to it.

Is not the laborer worthy of his hire, even in the eyes of a subscriber to a law journal?—National Corporation Reporter.

PERSONAL ITEMS.

Minneapolis. Hon. H. C. Belden has resigned from the district bench to resume the practice of law, and Gov. Clough has appointed Hon. E. M. Johnson as his successor. Judge Belden has entered the firm of Hahn & Hawley, which will hereafter be known as Hahn, Belden & Hawley.

St. Paul. Hon. Stanford Newell has been appointed United States minister to the Hague.

Robertson Howard has moved into more commodious offices in rooms 626 to 630 Globe building.

Wells. R. M. Hayes has formed a partnership with Mr. Hall with offices at Wells and at Blue Earth City; Mr. Hayes having charge of the office at the latter place.

DISTRICT COURT DECISIONS.

The Union Bank of St. Paul v. The Lehigh Coal and Coke Company.

(District Court, Ramsey County.)

Banks——Certification of Check—Payment—Insolvency.

The defendant company gave to the Union Bank a check for $500 on the Bank of Minnesota on Dec. 21. The check was delivered after banking hours, but the Union Bank sent it to the Bank of Minnesota for certification, and it was certified. The Bank of Minnesota closed the following day and payment of the check was refused when it was presented on that day. The check was thereafter presented to the defendant, which refused payment on the ground that the certification of the check released it from the obligation to pay it. Held, that it was not released.

On demurrer to complaint. Demurrer overruled.

Stevens, O'Brien, Cole & Albrecht for plaintiff.

Morphy, Ewing & Gilbert for defendant.

BRILL, J.: Where a check is not paid on due presentation, the drawer is liable to the holder if seasonable notice is given, but the defendants invoke the rule that the drawer is discharged if the payee procures the check to be certified by the bank on which it is drawn when he might instead of certification receive payment. Acceptance of a check is not necessary, it being payable presently on demand and the drawer agrees only that it will be paid on presentation; and if, instead of payment the holder accepts certification, a state of affairs arises not contemplated by the parties, and for this reason it is held that the holder thereafter assumes the risks of payment and drawer is discharged.

The facts stated by the complaint present a case different from any cited, and the reason above referred to for discharging the drawer does not apply to this case. Here the check was received too late for collection on the day it was made. It was presented for payment in due course on the following day, and the fact that in the meantime it had been certified would not appear to affect the relation of the drawer to the holder. The holder did not accept the certification in place of payment, it being too late at that time to demand payment, and it was presented for payment according to the allegations of the complaint in due course upon the morning of the next day. The holder did not waive payment by procuring the check to be certified under the circumstances; and, while the question is not free from difficulty, I think the drawer was not discharged. There is nothing in the complaint to show why a payment was refused, nor does it appear that the amount of the check was charged up by the bank to the account of the drawer, but if we are to assume that such charge was made, that fact alone is not sufficient to release the drawer. Where the drawer procures the certification of a check, he is still held, although the amount of the check is thereupon charged to his account by the bank.

Langworthy, Receiver, et al v. The C. N. Nelson Lumer Company.

(District Court, Ramsey County.)

Judgment of Sister State—Insolvency of Mutual Insurance Company—Assessment of Non-resident Members Defenses — Jurisdiction -- Presumption--Pleading.

A decree rendered in an action brought in a court of record and of general jurisdiction in another state, against a mutual insurance company, incorporated therein, over which it acquires jurisdiction, declaring such company insolvent, winding up its affairs and levying assessments upon each of its members, is conclusive upon non-resident members who were not personally served in such state, as to the necessity for such assessments and the amounts thereof, in a proceeding against them, in the state of their residence, to collect such assessments, and the facts on which it was based need not be pleaded.

Such degree, however, will not preclude a non-resident member, who was not personally served in the former action, from pleading and proving any defense going to show that he is not liable, such as non est factum, a release, payment, the statute of limitations, and the like.

In a proceeding based upon a judgment or decree rendered by a court in another state, it is not necessary to plead the laws which define the jurisdiction of such court, when it is alleged that it is a court of record and of general jurisdiction. It will be presumed that it has the same powers that similar courts in this state exercise.

On demurrer to complaint. The facts are sufficiently stated in the opinion. Demurrer overruled.

F. G. Ingersoll and C. W. Greenfield for plaintiff.

Warner, Richardson & Lawrence for defendant.

KELLY, J.—The demurrer assigns three grounds for objection to the complaint:

First, plaintiff has not the legal capacity to sue; second, the complaint does not state that the Insurance Company, therein referred to, was licensed

to do business within the State of Minnesota when the policies were issued. The first ground was abandoned at the argument and the second disposed of by allowing, by consent, the complaint to be properly amended.

The third ground, that said complaint does not state facts sufficient to constitute a cause of acion, raises an important and not altogether easy question.

Substantially stated the facts, as alleged, are: That the Mutual Fire Insurance Company of Chicago, a corporation under the laws of Illinois, was, under different names, from 1869 to November 12th, 1890, conducting the business of mutual fire insurance in several states.

That defendant, a Minnesota corporation on the 25th day of August, 1887, became a member of said Mutual Fire Insurance Company, by having its property insured therein by a policy, and in consideration therefor executed to said Company a premium note for $250, payable in installments at such time as the directors of said Company may order and assess for the losses and expenses of said Company, pursuant to its charter and by-laws. By its terms, the note is non-negotiable and the liability limited to its face amount.

The policy delivered to the defendant provided that the insured defendant becomes a member of the Company and it agrees to pay the premium annually. * * * and in addition thereto such sums as might be assessed as aforesaid, * * * The charter and by-laws of the Company are declared to be a part of the policy, etc., and by the charter, etc., all persons holding policies in said Company become by the laws of Illinois, members of said Insurance Company. Said policy remained in force and defendant so continued to be a member of said Company from the date of said policy until the said Mutual Insurance Company became and was declared insolvent, and a Receiver appointed; and while such member, the defendant paid one assessment of 10 per cent and no more on said premium note, levied by the Company's board of directors.

On July 20th, 1887, the defendant took from the Company another policy of insurance and in consideration therefor, among other things, executed to the Company a premium note for $250 of like tenor as the first above described; upon which defendant paid one assessment of 10 per cent and no more, levied as before stated. By the Circuit Court of the County of Cook and State of Illinois, a Court of Record and of general jurisdiction, at the suit of the Auditor of Public Accounts of the State of Illinois, said Mutual Insurance Company was in 1891, upon issue joined and hearing had, adjudged insolvent, and a receiver appointed to collect its assets, wind up its affairs, and pay its debts as far as its assets would suffice. Said Mutual Fire Insurance Company was duly served with summons, appeared by counsel in said action and the Court had full jurisdiction over the said Company in all it did then and subsequently. Thereafter the cause was referred to a Master in Chancery to take an account; said accounting was had, testimony taken, etc., and the Master made report thereof to the Court showing the indebtedness of said Company and its assets including the said notes, and reporting the amount necessary to be assessed upon the makers of said notes. Said Company filed exceptions to said report which were on hearing overruled, and the Court thereupon by decree confirmed the Master's report and ordered to be assessed and by such decree did assess upon each of the members of said defendants, the Mutual Fire Insurance Company of Chicago, 65 per cent of the premium note and membership liability of such members.

That by said decree the amount so fixed as payable from defendant was on the first note the sum of $99.42; and the second $94.07, and after alleging demand, refusal, judgment is asked for $193.49 with interest.

The objection raised by defendant is that a citizen of the State of Minnesota, never served with process of or brought personally within the jurisdiction of the Circuit Court of Cook County of Illinois, is not bound by the judgment of that Court. On the other hand, plaintiff contends that the Circuit Court of Illinois, having jurisdiction of the Insurance Company thereby acquired jurisdiction of all its members

as well those non-resident, as resident in Illinois.

I am clearly of the opinion that plaintiff's contention is right, both upon principle and authority. When defendant insured in plaintiff's Company it became in law and in fact a member of the Company. It took that relation voluntarily and for a good consideration to it moving. It took it not alone with its advantages, but also with its burdens; among these burdens was the duty of responding for defendant's proportion of the losses and expenses of said Company up to the face amount of the premium notes, to be ascertained and assessed by the Company's board of directors. The Company represents in all matters pertaining to its business all and each member, for as it is in material things so should it be in law that the whole embraces every part. The Company having become insolvent and the business thereby ceasing, the Court intervenes and for the purpose of winding up the concern, paying its debts and distributing its assets, summons the corporation as representing all the members before it, makes its decree as the justice of things warrants. That decree, to the extent at least as hereinafter stated, bound the individual members of the corporation, though not personally served with summons.

It will be also observed that the assessment in suit is not made by the receiver on his own motion or by the receiver alone upon the order of the Court, but it is made by the Court and all the presumptions of verity that attach to the judgments and decrees of Courts of Record and of general jurisdiction upon the matters properly before them is rightfully invoked.

In Swing, Receiver, etc., v. H. C. Akeley Lumber Company, 64 N. W. 97 (cited by defendant's counsel) the Supreme Court of Minnesota recognized this when they say he "the plaintiff" was only authorized by the Court appointing him, to make a proper assessment and the amount thereof was never determined by the Court; and the supposed assessment was never confirmed by the Court, hence there are no presumptions in favor of it and the burden was upon plaintiff to prove that it was duly and equitably made.

That the decree of a Court of Equity in an action against a corporation, in enforcement of a corporate duty, is binding upon a stockholder although not a party as an individual, but only through representation of the Company, was settled by the Supreme Court of the United States in Hawkins v. Glenn, Trustee, etc., 131 U. S. 319.

And in Great Western Telegraph Company v. Purdy, 162 U. S. 329, the same Court says: "The order of assessment whether made by the directors as provided in the contract of subscription, or by the Court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder without personal notice to him." Therefore it follows that plaintiff in this cause is not bound to plead facts showing the necessity for this assessment, or, in other words, the facts upon which it is based. The Court having made it, it is conclusive on those questions.

But it may not preclude defendant from pleading and proving, if it can, any defense going to show that it is not liable, such as non est factum, a release, payment, the statute of limitation, and the like. The Telegraph Company v. Purdy, supra.

However, on this last question most respectable authority holds such a judicial assessment practically as conclusive as an individual judgment would be. Lycoming Fire Insurance Company v. Langley, 62 Md. 211. This I am not compelled to decide.

The Supreme Court of Wisconsin has recently, in Parker v. Stoughton Mill Company, 64 N. W. Rep. 751, upon an action based upon the identical assessment here involved, held that the action can be maintained in that State against a citizen thereof, not personally subjected to the jurisdiction of the Illinois Court, and that the Illinois Court decree is conclusive under the United States Constitution, Art. 4, Section 1, requiring full faith and credit to be given in each State to the judicial proceedings of every other State. Also to the same effect the Supreme Court of Michigan held in Mutual Fire

Insurance Company v. Phoenix Furniture Co., 66 N. W. 1095, construing same judicial assessment, McGrath, C. J., dissenting.

In Rand, McNally & Co. v. The Mutual Fire Insurance Co., 58 Ill. App., 528, the Appellate Court for the First District of Illinois, passing on this same decree, held that the plaintiff who occupied the same position as defendant does here, could not question the propriety of, nor the amount of the assessment ordered by the Court. And so in this case I hold that the judgment of the Illinois Court is conclusive upon the defendant as to the propriety of and the amount of the assessment necessary to be made as the accounts of the Company disclosed. Any other rule leads to confusion, inequality and injustice.

First it would be an intolerable burden and expense upon the public and the receiver by requiring him at each separate suit against an individual member to go into an accounting of all the affairs of the Company to determine whether and to what amount an assessment is required.

And second, there would be great danger of a multiplicity and conflicting decisions rendered by Courts in different jurisdictions and perhaps in the same jurisdiction, touching the same matter. This because constituted as we are, honest men will and do often reach different conclusions from the same evidence.

Counsel for defendant claimed that the laws of Illinois giving the Circuit Court jurisdiction in such matters are not sufficiently pleaded. I think they are, but if mistaken, then this Court will presume that the Circuit Court of Cook County, as a Court of Record and of general jurisdiction has the same powers that similar Courts in Minnesota exercise. Demurrer overruled with leave to defendant to serve his answer in 20 days.

DIGEST OF MINNESOTA DECISIONS.

APPEAL — ASSIGNMENTS OF ERROR—AMENDMENT.

An appellant has no right to amend his assignment of error after the time for serving them has passed, except by consent of the respondent or by leave of court. Greene v. Dwyer, 23 N. W. 546, 33 Minn. 403, followed. Carpenter v. Eastern Ry. Co. of Minn., 69 N. W. Rep. 720.

—ASSIGNMENTS TOO GENERAL.

An assignment of error, "that the court erred in its instructions to the jury, to which the defendant excepted," also one "that the court erred in refusing the instructions requested by the defendant," where there were several exceptions and requests, are each too general to be available. Carpenter v. Eastern Ry. Co. of Minn., 69 N. W. Rep. 720.

--REVIEW OF EVIDENCE.

Whether or not, when plaintiff rested at the close of his evidence, there was sufficient evidence to sustain a verdict in his favor, will not be reviewed if sufficient evidence for that purpose was afterwards introduced by either party. Mannahan v. Hallorau, 69 N. W. Rep. 619.

—EVIDENCE—RECORD.

Held, that the question, argued by counsel, as to the competency and admissibility in evidence of admissions tending to affect and bind the estate of a person under guardianship on account of habitual drunkenness, made after the inquisition and appointment of a guardian for the estate as well as the person, is not, on the present record, before us for determination. Johanson v. Hoff, 69 N. W. Rep. 705.

—OBJECTIONS NOT RULED ON.

In a trial before the court without a jury, and for the purpose of laying the foundation for the introduction of testimony given by a witness (who was unable to be present and whose deposition could not be taken on account of his severe illness) at a former trial of the same case, respondent offered in evidence the affidavits of two physicians, and appellant's counsel duly objected, whereupon the court stated, "Evidence received, subject to the objection." No further ruling was made, and the testimony of the absent witness, as taken by the official stenographer at the former trial, was then received in evidence without objection. Held, that the statement of the court, when objection was made to the affidavits, amounted to nothing more than taking the objection under advisement, and that, as there was no further ruling, the question argued by counsel,

and which would have been presented had the court overruled the objection, directly or indirectly, is not before us. Id.

—JUDGMENT ON FORMER APPEAL.

Held, that the decision and judgment of this court on a former appeal in this case constitute the law of the case on all points in judgment, and that no questions that might have been raised on such appeal can be considered on an appeal from a judgment entered pursuant to the mandate of this court on the former appeal. Bradley v. Norris, 69 N. W. Rep. 624; In re Kittson's Estate, Id. 625.

CARRIER OF LIVE STOCK — CONTRACT—NOTICE OF LOSS.

Held, following Engesether v. Railway Co. (Minn.) 68 N. W. 4, that a provision in a stock-shipping contract which requires the owner of the stock, as a condition precedent to his right to recover for any loss or injury to his stock, to give notice in writing of his claim to some officer of the carrier before the stock is removed from the place of its destination or delivery is unreasonable and void where the carrier has no officer or agent at such place. Carpenter v. Eastern Ry. Co. of Minn., 69 N. W. Rep. 720.

CORPORATION — ACTION BY STATE TO DISSOLVE.

Order and judgment declaring corporate franchises forfeited under Gen. St. 1894, sec. 359, affirmed. State v. Cannon River Mfg. Co., 69 N. W. Rep. 621.

COUNTIES—BOND OF DEPOSITARY OF FUNDS.

Section 730, Gen. St. 1894, provides that the bond of a depositary of county funds shall be made payable to the county. The bond in question was made payable to the "board of county commissioners." Held a mere irregularity, which did not invalidate the bond. Bd. Co. Comrs of St. Louis Co. v. American L. & T. Co., 69 N. W. Rep. 704.

—PLEADING.

In an action on such a bond, a complaint that does not allege that the principal in the bond had ever been designated as such a depositary, except as this can be inferred from a recital in a copy of the bond set out as an exhibit, by which it appears that the bond was approved by the board of county commissioners 18 days after its date is demurrable. Id.

DEPOSITIONS — NOTARIAL CERTIFICATE.

The certificate of a notary to a deposition taken outside of the state and returned by him that the testimony of the witness was carefully read over to him by the notary before it was signed by the witness is sufficient under Gen. St. 1894, sec. 5689. Beckett v. Gridley, 69 N. W. Rep. 622.

DISMISSAL OF ACTION — COUNTERCLAIM—JUDGMENT.

In an action for the recovery of money, where the answer does not set up a counterclaim, and plaintiff does not appear at the trial, the court may dismiss the action, but cannot try the case on the merits and award judgment for defendant. Diment v. Bloom, 69 N. W. Rep. 700.

ELECTION—INCONSISTENT REMEDIES.

Where an assignee in insolvency sues a party, to whom the insolvent has transfered property, ostensibly for a conversion thereof, and attaches defendant's property as a non-resident, and thus compels him to appear and defend the action to save it, he will be estopped from changing front and treating the action as one to set aside the transfer as a fraud on the insolvent's creditors and to recover it. Hay v. Tuttle, 69 N. W. Rep. 696.

ELECTIONS — ORGANIZATION OF PRECINCT OUT OF TWO COUNTIES.

An attempt to establish, under sections 10 and 11, Gen. St. 1894, an election precinct out of portions of two counties, is an absolute nullity; and the residents of the territory included in such alleged precinct have no more right to vote than if such precinct had never been established. Bratland v. Calkins, 69 N. W. Rep. 699.

—PETITION—PUBLISHING LISTS.

Section 10 requires the voters to petition the governor, at least eight weeks before election, to establish the precinct, and section 11 is construed to require the list of precincts established to be published at least six weeks before election. Held, these provisions are mandatory, and, when the petition

was presented not more than five weeks and five days before election, and the list of precincts established was not published earlier than the day before election, the precinct was not established at all for the purposes of such election. Id.

ESTOPPEL — JUDGMENT BY DEFAULT.

A judgment by default is attended with the same legal consequences, when considering the rules governing estoppel by judgment, as if there had been a verdict for plaintiff. Northern Trust Co. v. Crystal Lake Cemetery Assoc., 69 N. W. Rep. 708.

EVIDENCE—RES GESTAE—STATEMENTS TO PHYSICIAN.

On the trial of an action for the recovery of damages for personal injuries alleged to have been sustained by the plaintiff by reason of the collision of defendant's street cars while the plaintiff was a passenger on one of them, in which action the plaintiff's allegation of negligence resulting in such injuries was denied by the defendant, the plaintiff's attending physician was permitted, against objection, to testify that, four or five days after the time of such injury, the plaintiff stated to him "that he was sitting in the back part of the car, and did not see this other car that came in collision with this one until it was almost onto them; and that he rose, and grabbed hold of a window, or the side of a window, and just at that time the car struck and wrenched him around, and threw him partly on the floor and partly on the opposite side of the car." Held error. Webber v. St. Paul City Ry. Co., 69 N. W. Rep. 716.

— CONVERSATIONS WITH DECEASED.

Held, it was error, under section 5660, Gen. St. 1894, to permit a party interested in the result of the action to testify to conversations wih a deceased person. Mannahan v. Hallorau, 69 N. W. Rep. 619.

—MERE CONCLUSION.

The statement of a witness as to the existence of a fact, not presumptively within his knowledge, but the existence of which is susceptible of direct proof, held to be his mere conclusion, and not evidence on which a verdict can be sustained. Traders Ins. Co. v. Herber, 69 N. W. Rep. 701.

EXECUTORS AND ADMINISTRATORS—ACCOUNTING.

Retrial of particular issue and settlement of executor's account by district court held in accordance with mandate of Supreme Court on former appeal. In re Kittson's Estate, 69 N. W. Rep. 625.

FRAUD—EVIDENCE—FEAR.

Held, while evidence that at a certain time the deceased appeared to be afraid, may, under proper circumstances, be competent, the evidence given in this case, that he appeared to be afraid of a certain person, is not, under the circumstances, competent. Neither, under the circumstances, is evidence that he appeared to be under the influence of such person. Manahan v. Hallorau, 69 N. W. Rep. 619.

FRAUDULENT CONVEYANCE — EVIDENCE.

The issue in this action was whether the property in question was transferred to the plaintiff to defraud creditors. Held, under the circumstances, it was not error to refuse to receive in evidence the records in an action brought by another creditor of the alleged fraudulent vendor, in which action a writ of attachment (prior to that sued out by defendant) was issued, and levied on some of the same property, just after plaintiff had taken possession of it. Mix v. Egge, 69 N. W. Rep. 703.

—BILL OF SALE.

Under a claim that the property had been sold by the debtor to M., and by M. to plaintiff, held, it was not error to receive in evidence the bill of sale from the debtor to M. Id.

—REDIRECT EVIDENCE.

Certain evidence, given on redirect examination, held competent as explaining more fully a fact brought out on cross-examination, and as showing all the transactions of the plaintiff and his vendor in regard to the property purchased.

—REBUTAL.

Certain other evidence, given on redirect examination, held competent to rebut an inference which might be drawn from the cross-examination. Id.

—INSTRUCTION.

Held, defendant's first request to

charge ignores the fact that M. may have been an innocent purchaser, whose rights plaintiff may have acquired, and was therefore properly refused. Id.

INSANITY — RELEASE OF CLAIM FOR PERSONAL INJURIES—DISAFFIRMANCE.

Where an executed contract has been made in good faith, for a valuable consideration, and without notice of the insanity, with a person who is of unsound mind (but where there has been no inquisition and finding of lunacy), the latter must elect, within a reasonable time after regaining his mental capacity, whether he will affirm or disaffirm the contract; and, if he elects to do the latter, he must return the consideration which he has received. This rule is not changed by the fact that the contract was made and the consideration paid by a third person for the benefit of the other party. Rule applied to a settlement and release of a claim for personal injuries. Morris v. Great Northern Ry. Co., 69 N. W. Rep. 628.

INSOLVENCY — CONVERSION — PREFERENCE.

The acceptance by a creditor from his debtor of a preferential security, voidable under the insolvent law, does not constitute a wrongful conversion. Hay v. Tuttle, 69 N. W. Rep. 696.

—ELECTION BY ASSIGNEE.

In the absence of a prior wrongful conversion, the assignee in insolvency has no election to sue for the value of the property. Clerihew v. Bank, 52 N. W. 967, 50 Minn. 538, followed. Id.

JUDGMENT — SETTING ASIDE — PERJURY.

The construction given of Gen. St. 1894, sec. 5434, in Hass v. Billings, 43 N. W. 797, 42 Minn. 63, followed, and applied to the allegations of the complaint herein. Watkins v. Laudon, 69 N. W. Rep. 711.

MASTER AND SERVANT — DANGEROUS MACHINERY—ASSUMPTION OF RISK.

A servant who neglects to use ordinary care for his own safety against open and patent dangers in the operation of machinery, discoverable by the use of his senses, is guilty of contributory negligence, although the statute imposes upon the master the duty of guarding against such dangers, and he cannot recover for injuries he may sustain. Anderson v. C. N. Nelson Lumber Co., 69 N. W. Rep. 631.

—FELLOW SERVANTS — NEGLIGENCE.

In an action brought to recover for personal injuries received by plaintiff while in defendant's employ, it is held that, on the evidence introduced by plaintiff, it was for the jury to determine whether another employe, the superintendent of defendant's plant, was a vice principal at the time of the accident, and whether such accident resulted from the negligence of such employe. Johnson v. Minneapolis General Electric Co., 69 N. W. Rep. 713.

—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—RELEASE.

Evidence considered, and held sufficient to justify the jury in finding (1) that defendant's servants were negligent; (2) that such negligence was the proximate cause of plaintiff's injury; (3) that plaintiff was not guilty of contributory negligence; (4) that he had not settled and released his claims against the defendant for damages. Christianson v. Chicago, St. P., M. & O. Ry. Co., 69 N. W. Rep. 640.

MORTGAGE — ABSOLUTE DEED — EVIDENCE.

Finding by district court that a deed was absolute and not a mortgage sustained. Shultes v. Stivers, 69 N. W. Rep. 639.

—PAYMENT—NEW NOTES AS.

Notes held to have been given and accepted in absolute payment and extinguishment of a mortgage indebtedness. Wiley v. Dean, 69 N. W. Rep. 629.

—FORECLOSURE JUDGMENT—ESTOPPEL.

A default judgment in an action to foreclose a mortgage, where the court has jurisdiction of the subject matter and the parties, is conclusive as between them upon the question as to the validity of the mortgage, and they are estopped to further litigate that matter. Northern Trust Co. v. Crystal Lake Cemetery Assoc., 69 N. W. Rep. 708.

— DEFAULT JUDGMENT SUSTAINED.

Held, upon the facts appearing on the hearing of a motion made by the defendant to set aside and vacate a de-

fault judgment entered in an action brought to foreclose a real-estate mortgage and for leave to answer, that the court below did not err when it denied the motion. Northern Trust Co. v. Crystal Lake Cemetery Assoc., 69 N. W. Rep. 708.

—RECEIVER—SECOND MORTGAGE —FORECLOSURE — TAXES — INSURANCE.

That the holder of a first mortgage has paid up all delinquent taxes and the insurance on the property, added the amount to the sum due on his mortgage, foreclosed and bid in the property, for the full amount, is no ground for discharging a receiver appointed at the instance of a second mortgagee prior to such foreclosure. Farmers' Nat. Bank of Owatonna v. Backus, 69 N. W. Rep. 638.

—RECOVERY BY MORTGAGEE OF SURPLUS BID.

Maudlin v. Association (Minn.) 65 N. W. 645, and Truesdale v. Sidle (Minn.) 67 N. W. 1004, followed. Babcock v. American Savings & Loan Assoc., 69 N. W. Rep. 718.

—REDEMPTION—RATE OF INTEREST.

Where a mortgage by its terms draws interest at the rate of 5½ per cent. per annum, and is foreclosed by advertisement, the real property thus sold may be legally redeemed by the mortgagor, his heirs, executors, administrators, or assigns, as the case may be, by paying the sum of money for which the same was sold, together with interest on the same from the time of sale at the rate of 7 per cent. per annum. Evans v. Rhode Island Hospital Trust Co., 69 N. W. Rep. 715.

—REDEMPTION AS ASSIGNMENT —FRAUD.

B., a married woman, whose husband had deserted her, owned a tract of land subject to a mortgage which had been foreclosed. Her agent, to whom she had intrusted all negotiations for the sale of her equity of redemption, represented to defendant that her husband was dead. Relying upon this representation, defendant accepted her sole deed, paid her $200 therefor, and subsequently redeemed from the mortgage sale by paying $764, which the purchaser at such sale accepted and retained without objection. Several years afterwards, it having been ascertained that B.'s husband was still living, plaintiff obtained a quit-claim deed from him and his wife, and also another quitclaim deed from the purchaser at the mortgage sale, both for nominal considerations, and upon these muniments of title brought ejectment against the defendant. Held, that while the deed from B. to defendant was void, and therefore defendant not a legal redemptioner, yet the redemption by him amounted to an equitable assignment of the interest of the purchaser acquired under the mortgage sale; and that, upon the expiration of the time of redemption, the defendant became the equitable owner of the premises, and the purchaser at the mortgage sale a trustee for him of the bare legal title; and that both B. and such purchaser, as well as plaintiff, their grantee, who bought with notice of defendant's rights, are estopped from asserting that the redemption by defendant did not thus operate as an assignment. Knight v. Schwandt, 69 N. W. Rep. 626.

LAGE OF ST. JAMES—CONTRACTOR'S BOND VOID.

The village of St. James is not expressly authorized by law to take a bond for the security or benefit of third persons. Therefore, held, that a bond voluntarily executed for such purpose is void. Park v. Sykes, 69 N. W. Rep. 712.

NEGLIGENCE — ANTICIPATING CHARACTER OF ACCIDENT.

Where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not have reasonably anticipated that injury would result in the form or way in which it did, in fact, happen. Christianson v. Chicago, St. P., M. & O. Ry. Co., 69 N. W. Rep. 640.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A party seeking a new trial on the ground of newly-discovered evidence must show that he could not have discovered the evidence, and produced it on the trial, by any reasonable diligence on his part. Strict proof must be made on this point, and facts, not and paying the expense thereof equally between them, and that such stipulations should apply to and bind the heirs and assigns, executors and administrators, of the respective parties. K. erected the party-wall, one-half upon his lot, and one-half upon the adjoining lot of S. Subsequently K. conveyed by warranty deed to M., and thereafter M. conveyed by warranty deed to G., who also purchased by deed of warranty the lot of S., and thereafter erected a two-story building on said lot, using said party wall the whole length for such purpose, and occupied the same. Held, that the covenants in the agreement ran with the land, and that a personal action by K. against G. was not enforceable. Kimm v. Griffin, 69 N. W. Rep. 634.

PRINCIPAL AND AGENT — AGENT SELLING ON CREDIT.

It is not within the apparent authority of a general agent, having the entire management of his principal's business, to bind him by a contract for conclusions, stated in the moving affidavits, from which the court may draw the conclusion that due diligence was used. Rule applied, and held, that

the trial court did not err in refusing a new trial. Bradley v. Norris, 69 N. W. Rep. 624.

PARTY WALLS—COVENANTS RUNNING WITH LAND — CONVEYANCE.

A party-wall agreement, under seal, between S. and K., adjoining lot owners, which was duly acknowledged and recorded, provided that whereas K. was about to erect a two-story brick building on his lot adjoining that of S., and in consideration that K. erect a good and substantial 12-inch wall, 80 feet long north and south, extending 6 inches on the adjoining lot of S., then said S. promised and agreed that whenever he should erect a building on his lot, and use that portion of said party wall built thereon, he would pay K. one-half the cost of said party wall, to the extent of his use of the same; and for their mutual benefit it was agreed that in all deeds and transfers, of whatever nature, said wall should be reserved as a partition wall, and that the same should be kept in good condition and repair at the expense of both parties, they dividing the sale of chattels belonging to such business, to be paid for by credit of the purchase price upon an indebtedness due from the agent to the purchaser. The burden is upon the purchaser to show that the agent had such authority. But where there is no question as to the good faith of either the agent or purchaser, and both the agent and principal are dead at the time of the trial, any circumstantial evidence fairly tending to establish the agent's authority is sufficient to make a prima facie case. Authority proved. Stewart v. Cowles, 69 N. W. Rep. 694.

--REAL ESTATE AGENT — VALUE OF SERVICES.

Held, it was not, under the circumstances, error to admit the expert evidence given as to the value of plaintiff's services, which evidence is complained of merely because the expert witness did not hear all of the testimony of plaintiff as to the character of the services rendered. Levanson v. Mellan, 69 N. W. Rep. 620.

PRINCIPAL AND SURETY — DISCHARGE—CONCEALMENT.

H. was the agent of plaintiff insurance company, and was short in his accounts. He formed a partnership with P. to carry on the agency business, and H. & P. as principals and the other defendants as sureties executed a bond to the company, conditioned for the faithful performance by H. & P. their duties such agents. At the time the bond was executed, the sureties did not know that H. was in default. In a suit on the bond, held, in such cases, it is ordinarily the duty of the obligee in the bond to disclose to the sureties the fact that the principal in the bond is already in default, and a failure to do so is evidence of bad faith, which will discharge the sureties; and whether, in this case, the company was guilty of bad faith in failing to disclose to the sureties that H. was short in his accounts, is a question for the jury. Traders Ins. Co. v. Herber, 69 N. W. Rep. 701.

-- WITHHOLDING COMMISSIONS.

Held, withholding the commission" of the insurance agents, while permitting them to perform their duties as such agents, did not have the effect, in this case, of releasing the sureties on their bond for the faithful performance of their duties. Traders Ins. Co. v. Herber, 69 N. W. Rep. 701.

PROMISSORY NOTES—CONSIDERATION.

Order granting plaintiff a new trial on the ground defense of want of consideration was not proved, sustained. Cooper v. Hayward, 69 N. W. Rep. 638.

—ACTION AGAINST GUARANTOR—NON-RESIDENT MAKER — EVIDENCE.

The defendant transferred to the plaintiff, and guarantied the collection of, a promissory note executed in Wisconsin, of which state the maker was a resident at the time the note was executed. Before the maturity of the note the maker removed from the state of Wisconsin, and became a resident of the state of Illinois. Held: 1. That, if the maker had continued to reside in Wisconsin, the plaintiff would have been required to proceed against him in that state, or prove that such proceedings would be wholly fruitless, before pursuing the defendant on his guaranty. The fact that the guaranty was made in Minnesota is not material. 2. But that plaintiff is not bound to follow the maker into the state of Illinois. 3. That the burden is on the defendant to prove that the maker has property in Wisconsin out of which the note might be collected, in whole or in part, and not upon plaintiff to prove that he has not. Fall v. Youmans, 69 N. W. Rep. 697.

RAILROADS — VIOLATION OF STATUTE — COLLISION — LIMITING LIABILITY.

The plaintiff, while engaged in the business of news agent on defendant's train, was injured by a collision caused by the negligence of defendant in not stopping its train before arriving at a railroad crossing, as required by Gen. St. 1894, sec. 2703. The statute referred to requires railroad companies to cause all their trains to entirely stop not more than 60 rods and not less than 10 rods before each arrival at the crossing of any other railroad, and provides that every corporation that violates the provisions of the statute is liable to a forfeiture of not more than $100 nor less than $20, to be recovered in a civil action, and is further liable in the full amount of damages done

to person or property in consequence of any neglect to comply with the requirements of the statute. Held, in view of the provisions and manifest object of this statute, that a contract between the defendant and plaintiff, exempting the former from liability for in juries caused by its negligence, is void, as against public policy, as respects negligence consisting of a violation of the statute, although defendant may not have borne to the plaintiff the relation of common carrier. Starr v. Great Northern Ry. Co., 69 N. W. Rep. 632.

SALE—WARRANTY—NOTICE.

Where a horse is sold with a warranty that such horse is capable of fulfilling certain conditions, and which, if not fulfilled, the vendor will replace the horse with another of equal value, or return the notes given for said horse, held, that the burden of showing that the conditons were not fulfilled rested upon the vendee, and the vendor was entitled to notice thereof, and an opportunity either to replace the horse with another of equal value, or return the notes given for the horse. Beckett v. Gridley, 69 N. W. Rep. 622.

STATUTE OF FRAUDS—INTEREST IN LAND—CONTRACT NOT TO BE PERFORMED IN ONE YEAR—PERFORMANCE ON ONE SIDE.

Defendant had guaranteed the collection of certain notes which he had transferred to the plaintiff, and which were secured by mortgage on real estate; the security, however, being worth only a part of the amount due on the notes. After the notes became due and were dishonored, the defendant orally promised plaintiff that, if he would foreclose the mortgage, and bid in the property for the full amount due, if such foreclosure did not result in the collection of the money by redemption of the premises, he would pay the plaintiff the amount due on the notes and costs of foreclosure, the property then to be deeded to the defendant. Held, that this oral agreement was within the statute of frauds, both as an agreement that by its terms was not to be performed within a year, and also as a contract for the sale of land or some interest therein. Also that it was not taken out of the statute by the fact that plaintiff proceeded and foreclosed and bid in he property in his own name for the full amount due on the mortgage. Veazie v. Morse, 69 N. W. Rep. 637.

STATUTE OF LIMITATIONS—PERSONAL INJURIES—AMENDMENT OF 1895.

Laws 1895, c. 30, amendatory of Gen. St. 1878, c. 66, sec. 8 (Gen. St. 1894, sec. 5138, subd. 1), did not operate as a repeal or amendment of section 5136, subd. 5, wherein it is provided that the six-year statute of limitations shall apply to actions for injuries to the person or rights of another, not arising on obligation, and not thereinafter enumerated. The amendment falls within the doctrine of ejusdem generis, and applies only to actions based upon wrongs of a like nature to those specifically mentioned in section 5138 as it stood originally. Brown v. Heron Lake 69 N. W. Rep. 710.

STRUCK JURY — WAIVER OF IRREGULARITIES.

1. Gen. Laws 1895, c. 328, sec. 1, providing for struck juries, requires the sheriff to attend at his office at a time designated for striking a jury, and in the presence of the parties or their attorneys, or such of them as attend for that purpose, select, from the number of persons qualified to serve as jurors in the county, 40 such persons as he shall think most indifferent between the parties and best qualified to try such issue; and then the party requiring such jury, his agent or attorney, shall first strike off one of the names, and the opposite party, his agent or attorney, another, and so on, alternately, until each has struck out 12 Held, that where a party appears at such time and place, and takes part in striking the names from a list previously prepared by the sheriff, without objection, he waives the right to raise an objection thereafter as to this irregularity, if any, in the manner of thus selecting a struck jury. Riley v. Chicago, St. P. & M. Ry. Co., 69 N. W. Rep. 718.

—DUTY OF COURT

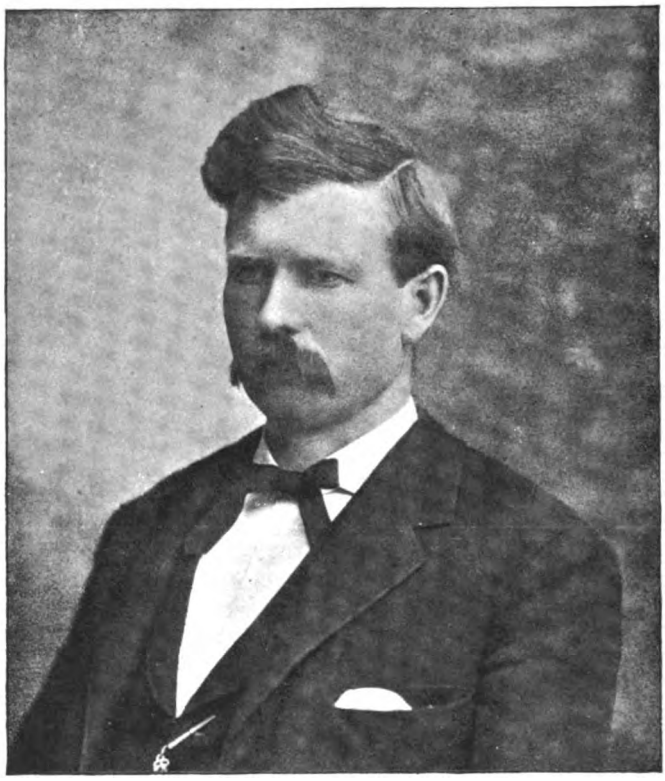
Held, also, that the trial court should have heard evidence as to the impartiality of the list selected by the sheriff, and then exercised his judgment as to whether it was impartial; and that it was error not to do so. Id.

—CALLING JURORS.

Held, further, that under Gen. Laws 1895, c. 328, sec. 1, a party is entitled to have the jurors called as they stand upon the panel. Id.

TITLE INSURANCE—POLICY—TENANCY OF PRESENT OCCUPANTS.

The phrase, "Tenancy of the present occupants," stated in a title insurance policy as a defect in or objection to the title against which the insurer does not insure, must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee against the title insured, is in actual adverse possession at the time the policy is issued. Place v. St. Paul Title Ins. & Trust Co., 69 N. W. Rep. 706.



HON. GAUTHE E. QVALE

District Judge Twelfth Judicial District

...THE...

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CONTENTS.

COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions. are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

ANNOUNCEMENT.

Commencing with the July number, the Journal will be published by the Minnesota Law Journal Publishing Company, under the management of Chas. S. Roberts, with offices at 36 Gilfillan Block, St. Paul, Minn.

The June issue has been delayed through the illness of the former editor.

The new management will bring the Journal down to some system as to its date of issue and the character and arrangement of its contents, believing that the interests of its patrons will best be conserved by adopting strict methods. The present intention is to adopt the 20th of each month as the date for going to press; as to the character and arrangement of contents, that which seems most useful and convenient will be adopted. The August issue will probably foreshadow the future course of the Journal. With the kindly co-operation of courts and attorneys in Minnesota, the Journal can be made a means of disseminating valuable knowledge concerning the judgments and decrees of inferior courts; and such co-operation is earnestly invoked.

OBJECTING TO INDICTMENT FOUND BY INCOMPETENT GRAND JURY. RIGHT OF CHALLENGE.

On June 8th, in the cases against Albert Scheffer, as President of the Allemannia Bank, and William F. Bickel and Alfred S. Kittson, as Trustees of the Minnesota Savings Bank, Judge Lewis, of the District Court of Ramsey county, sustained pleas in abatement interposed by them to indictments charging them with grand larceny, holding that, as one Lindquist, who was a member of the grand jury finding such indictments, was an alien and not a competent grand juror, they were void.

He further decided that, as the defendants had not been "held to answer a charge for a public offense" previous to the finding of the indictment, and had had no opportunity to challenge the jury, as provided in section 7188 of the General Statutes of 1894, they could, at the time of their arraignment, interpose pleas in abatement, and move to set the indictments aside on the ground that they had been found by an incompetent grand jury.

Before rendering this decision Judge Lewis had discharged the incompetent juror from the panel, and after deciding that defendants could not be prosecuted under the indictments found against them, he resubmitted their cases to the same grand jury, which was in the court room, and had not finally adjourned.

Counsel for the respective defenddants objected to such resubmission, and asked leave to interpose challenges to the panel of the grand jury, and to each member thereof, before they retired to their room, claiming that this was the first opportunity that had been afforded defendants to challenge, and that the jurors who had participated in finding the former indictments had expressed such opinions, and were so biased against the defendants, that they were incompetent to further consider the charges against them. The county attorney, Mr. Anderson, objected to any challenges being allowed at that stage of the proceedings, and the court sustained his lobjection.

RELIGION IN THE PUBLIC SCHOOLS.

The opinion of Judges Baxter and Searle, of the Seventh Judicial District,, in Rasnick v. Common School District N. 60, Stearns County, Minnesota, et al., published in this number, will be read with interest by our subscribers, irrespective of their religious persuasions.

The case was very ably argued by the counsel for the respective parties, and the opinion is a calm and dispassionate discussion of the constitutional principles involved, that reflects credit upon the court that delivered it.

The authorities cited by the court clearly sustain the conclusions reached by it, and it is to be hoped that this decision will be accepted as final by all of the parties directly interested.

CORPORATIONS AND MONEY IN POLITICS.

Mr. Chapman was not the only recalcitrant witness before the United States senatorial committee. Mr. Havemeyer and Mr. Searles, as the great men of the Sugar Trust, were asked to state the amounts of contributions made by the Trust for political purposes. They absolutely refused to answer the question. Their trial for this refusal has been postponed, but will probably begin in June. We have reached an exteremely unfortunate stage in our political life when great corporations can with impunity make secret gifts to the political funds of the opposing parties, and can defiantly refuse, when on oath before a committee of the United States Senate, to give the facts. It cannot be a right thing in public ethics, nor ought it to be possible under the law, for a corporation to contribute to the campaign funds of any political party. It is worse rather than better for a great corporation to contribute at the same time to the funds of opposing parties. Such conduct would seem to indicate a purpose to poison all political and public life at the very sources. When great corporations like the Sugar Trust stand ready to pour out vast sums of money for purposes of political influence, a premium is at once placed upon the control of politics and legislation by bosses and machines. The existence of these secret funds supplied by corporations that can afford to pay fabulous amounts for favorable legislation,

causes great uneasiness among honest men. Hardly another situation so fraught with danger has arisen since the foundation of the Republic. It cannot be that rich men who will thus promote their selfish interests at the expense of the dignity and honor of the State, are entitled to be considered good citizens.—From "The Progress of the World," in June Review of Reviews.

LINCOLN AS AN ITINERANT LAWYER.

When Lincoln returned to Springfield, Ill., from Congress, in 1849, he vigorously took up the practice of law.

Having accepted a case, Lincoln's first object seemed to be to reduce it to its simplest elements. 'If I can clean this case of technicalities, and get it properly swung to the jury, I'll win it,' he told his partner Herndon one day. He began by getting at what seemed to him the pivot on which it rested. Sure of that, he cared little for anything else. He trusted very little to books; a great deal to common sense and the sense of right and wrong.

"In the make of his character Mr. Lincoln had many elements essential to the successful circuit lawyer," says one of his fellow practitioners. "He knew much of the law as written in the books, and had that knowledge ready for use at all times That was a valuable possession in the absence of law-books, where none were obtainable on the circuit. But he had more than a knowledge of the law. He knew right and justice, and knew how to make their application to the affairs of everyday life. That was an element in his character that gave him power to prevail with the jury when arguing a case before them. Few lawyers ever had the influence with a jury that Mr. Lincoln had."

When a case was clear to him and he was satisfied of its justice, he trusted to taking advantage of the developments of the trial to win. For this reason he made few notes beforehand, rarely writing out his plan of argument. Those he left are amusingly brief; for instance, the notes made for a suit he had brought against a pension agent who had withheld as fee half of the pension he had obtained for the aged widow of a Revolutionary soldier. Lincoln was deeply indignant at the agent, and had resolved to win his suit. He read up the Revolutionary War afresh, and when he came to address the jury drew a harrowing picture of the private soldier's sufferings and of the trials of his separation from his wife. The notes for this argument ran as follows:

"No contract—Not Professional Services. Unreasonable charge. Money retained by Def't not given by Pl'ff.—Revolutionary War—Soldier's bleeding feet.—Pl'ff's husband.—Soldier leaving home for army.—Skin def't:—Close."

Lincoln's reason for not taking notes, as he told it to H. W. Beckwith, a student in the Danville office of Lincoln and Lamon, was: 'Notes are a bother, taking time to make, and more to hunt them up afterwards; lawyers who do so soon get the habit of referring to them so much that it confuses and tires the jury.' 'He relied on his well-trained memory,' says Mr. Beckwith, 'that recorded and indexed every passing detail. And by his skilful questions, a joke, or pat retort as the trial progressed, he steered his jury from bayous and eddies of side issues and kept them clear of the snags and sandbars, if any were put in the real channel of his case.'

Much of his strength lay in his skill in examining witnesses. 'He had a most remarkable talent for examining witnesses,' says an intimate associate; 'with him it was a rare gift. It was a power to compel a witness to disclose the whole truth. Even a witness at first unfriendly, under his kindly treatment would finally become friendly, and would wish to tell nothing he could honestly avoid against him, if he could state nothing for him.'

He could not endure an unfair use of testimony or the misrepresentation of his own position. 'In the Harrison murder case,' says Mr. T. W. S. Kidd, of Springfield, a crier of the court in Lincoln's day, 'the prosecuting attorney stated that such a witness made a certain statement, when Mr. Lincoln rose and made such a plaintive appeal to the attorney to correct the statement, that the attorney acually made the amende honorable, and afterward

remarked to a brother lawyer that he could deny his own child's appeal as quickly as he could Mr. Lincoln's.'

Sometimes under provocation he became violently angry. In the murder case referred to above, the judge ruled contrary to his expectations, and, as Mr. Lincoln said, contrary to the decision of the Supreme Court in a similar case. 'Both Mr. Lincoln and Judge Logan, who was with him in the case, says Mr. Kidd, 'rose to their feet quick as thought. I do think he was the most unearthly looking man I had ever seen. He roared like a lion suddenly aroused from his lair, and said and did more in ten minutes than I ever heard him say or saw him do before in an hour.'

He depended a great deal upon his stories in pleading, using them as illustrations, which demonstrated the case more conclusively than argument could have done. Judge H. W. Beckwith, of Danville, Ill., in his "Personal Recollections of Lincoln,' tells a story which is a good example of Lincoln's way of condensing the law and the facts of an issue in a story.

'A man, by vile words, first provoked and then made a bodily atack upon another. The latter in defending himself gave the other much the worst of the encounter. The aggressor, to get even, had the one who thrashed him tried in our Circuit Court upon a charge of an assault and battery. Mr. Lincoln defended, and told the jury that his client was in the fix of a man who, in going along the highway with a pitchfork on his shoulder, was attacked by a fierce dog that ran out at him from a farmer's dooryard. In parrying off the brute with the fork its prongs stuck into the brute and killed him.

"What made you kill my dog?" said the farmer. "What made him try to bite me?" "But why did you not go at him with the other end of the pitchfork?" "Why did he not come after me with his other end?" At this Mr. Lincoln whirled about in his long arms an imaginary dog and pushed its tail end toward the jury. This was the defensive plea of "son assault demesne" —loosely, that "the other fellow brought on the fight"—quickly told, and in a way the dullest mind would grasp and retain.

Mr. T. W. S. Kidd says that he once heard a lawyer opposed to Lincoln trying to convince a jury that precedent was superior to law, and that custom made things legal in all cases. When Lincoln arose to answer him he told the jury he would argue his case in the same way. Said he: "Old 'Squire Bagly, from Menard, came into my office and said, "Lincoln, I want your advice as a lawyer. Has a man's what's been elected justice of the peace a right to issue a marriage license?" I told him he had not; when the old 'squire threw himself back in his chair very indignantly, and said: "Lincoln, I thought you was a lawyer. Now Bob Thomas and me had a bet on this thing, and I bet him a 'squire could do it, and we agreed to let you decide; but if this is your opinion I don't want it, for I know a thunderin' sight better, for I have been 'squire now eight years and have done it all the time."—Miss Ida M. Tarbell, in McClure's Magazine.

BREACH OF PROMISE.

Does the liability arise with the promise or with the breach. An interesting and novel question was raised in the case of Minnie Hosmer vs. Edward Owens, in the Franklin county Common Pleas last week. Mrs. Hosmer secured a judgment against Owens for $4,000 for breach of promise. Some time before Mrs. Hosmer brought her suit Owens deeded his property to his children and then left for Canada. After Mrs. Hosmer got her judgment she brought suit to set aside these deeds. Then arose the question, as to when Mrs. Hosmer became a creditor. Counsel for plaintiff claim that she became a creditor of Owens from the very day that he made his promise to marry her. On the other hand, the attorneys for Owens claim that plaintiff was not a creditor until Owens broke his conrtact to marry her. The question raises the point whether when a man promises to marry a woman he makes her his creditor, or whether he makes her his creditor when he fails to carry out that promise.—Ohio Law Bulletin.

MY SHINGLE.

Irving Browne.

My shingle is battered and old,
No longer deciphered with ease,
So I've taken it in from the cold
And fastened it up on a frieze.

A long generation ago,
With feelings of singular pride,
I regarded its glittering show,
And pointed it out to my bride.

Companions of youth have grown few,
Its loves and aversions are faint;
No spirit to make friends anew.
An old enemy seems like a saint.

My clients have paid the last fee
For passage in Charon's sad boat,
Imposing no duty on me
Save to utter this querulous note.

And still as I toil in life's mills,
In loneliness growing profound,
To attend on the proof of their wills
And swear that their wits were quite sound!

So I work with the scissors and pen,
And to show of old courage a spark,
I must utter a jest now and then,
Like the whistling of boy in the dark.

I tack my old friend on the wall,
So that infantile grandson of mine
May not think, if my life he recall,
That I died without making a sign.

When at court on the great judgment day
With penitent suitors I mingle,
May my guilt be washed cleanly away,
Like that on my faded old shingle!

LAWYERS QUOTE SCRIPTURE.

Attorneys quoted scripture before Judge Woods in the United States Court of Appeals at Chicago the other day. The suit was an appeal from the Federal Court of Western Wisconsin, where a jury gave a verdict of $2,000 against the Minneapolis, St. Paul and Sault Ste. Marie Railroad for the burning of property in Lincoln County, the fire, it was alleged, being caused by sparks from a locomotive. Alfred H. Bright, of Minneapolis, in arguing for the railroad company to have the verdict set aside, asserted that sparks from a locomotive fly upward, and the probability of the fire having been caused by sparks was remote. "The universal effect of air currents on sparks of fire was discerned by the author of Job long prior to the birth of our jurisprudence when he said, 'Man is prone to trouble, as the sparks fly upward.'" William H. Flett, attorney for Emerson Bros., the firm securing the verdict, rejoined: "Counsel has seen fit to cite the Book of Job in support of his theory as to sparks. It is also recorded in holy writ, 'Behold how great a matter a little fire kindleth."

AN ORTHOGRAPHIC DEFENSE.

This happened in a police court in San Francisco recently; and the orthographical judgment then delivered will doubtless be of interest to those who are learning how to spell, as well as to lexicographers.

There is an ordinance of the city of San Francisco, it appears, which provides that when any householder shall conspicuously display a sign in the English language, on the front steps of his house, indicating that no peddlers are wanted inside, it shall be an offense, punishable by a fine of not less than $5, for a peddler to ring the doorbell or otherwise disturb the occupants.

Conspicuously displayed on the front steps of a boarding-school for girls in Vallejo street, in that city, was lately the sign:

: NO PEDDLARS. :

A Russian peddler paid no attention to this notice, and rang the bell. It happened that the mistress of the school herself answered the call. She was very angry when she saw the peddler, and called a policeman, who happened to be in sight. The peddler was taken to the police station, and was prosecuted under the ordinance.

He belonged to the Peddlers' Benevolent and Protective Association, and his case was defended by a smart lawyer employed by that society, who contended that the notice on the door being spelled "peddlars' was not in the English language, and consequently was not a lawful warning.

The court took this point into consideration at once. Dictionaries were sent for and examined. Then the court announced its judgment.

The question was, said the justice, "Did the prosecuting witness indicate by a notice in the English language

that no peddlers were wanted?" He had consulted all the authorities, and he found no English word spelled "peddlar." Webster says the word is spelled "peddler," but that it is also written "pedler" and "pedlar." Worcester gives his first choice to "pedler," with "padler" for second choice and "pedlar" for third. The Century Dictionary gives the real spelling as "peddler," though "pedlar" is also found; but no "peddlar" appears anywhere.

Of course, the court said, the defendant might reasonably have gathered from the sign that no peddlers were wanted, but statutes in restraint of personal liberty are to be construed strictly. The prosecuting witness had not complied strictly with the ordinace, and the defendant was therefore discharged.

The keeper of the boarding school was greatly astonished at this judgment, but it is to be presumed that she took steps at once to correct the spelling of the placard.

HON. G. E. QVALE.

On April 27th, 1897, Gov. Clough appointed Hon. G. E. Qvale of Willmar to the position of Associate Judge of the Twelfth Judicial District, created by the last legislature. Judge Qvale was born in Norway in 1860, and emigrated to Minnesota in 1878. He entered upon the study of law in the office of Hon. John W. Arctander at Willmar in 1880, and was admitted to the bar in 1882. He practiced with his former preceptor until 1884, when the firm was dissolved. He was Probate Judge of Kandiyohi county from 1884 to 1890, when he was elected county attorney, and served in that capacity until 1894. He was chairman of the republican committee of his county during the last political campaign. He is not married.

DISTRICT COURT DECISIONS.

Rasmick v. Common School District No. 60, Stearns County, Minnesota, et al.

(District Court, Stearns County.)

Public Schools—Religious Exercises and Instruction—Constitution Art. I, Sec. 16 and Art. VIII, Sec. 3.

A majority of the legal voters of a school district having petitioned the trustees of the district to permit and authorize a school house to be used for the purpose of divine worship and for religious instruction, the same not to interfere with the use of the school house for school purposes, such permission was granted, and the teacher, a member of the Roman Catholic church, four or five minutes before the opening of the regular school exercises at 9 A. M. each day required the pupils to stand and together repeat the Lord's prayer, and a Hail Mary, and four or five minutes before 1 P. M. to stand and together repeat the Angelus, the Lord's prayer and a Hail Mary, and at 4 P. M. announced "school is out and those who wish to go may go," immediately after which the same prayers were said by the children who remained, and on two days of the week one half hour's instruction in the Catholic catechism was given to such children. No pupil was required to be present at any of these exercises, but if present was required to stand, but not to repeat any of the prayers unless he so desired. Held (1) that allowing such devotional or religious exercises to be held in the school house violated the rights of conscience guaranteed by Article 1, Section 16 of the constitution of the state; (2) that such exercises constituted "worship," and made the school house where they were conducted, a "place of worship," within the meaning of said section 16, and, therefore, that an objecting tax payer was compelled to "aid in the support of a place of worship, against his consent"; (3) that such exercises being peculiar to the Roman Catholic church, allowing them to be conducted in the school house was the giving of a "preference to a religious establishment or mode of worship," as that term is used in said section 16; (4) that the money appropriated and used for the support of such school was used for the "support of schools wherein distinctive doctrines, creeds and tenets of a particular christian and religious sect are promulgated and taught," contrary to the amendment of 1877 to section 3 of article VIII of said constitution; and (5) that a tax payer in said school district could maintain an action to restrain the school board from permitting, and the teacher from conducting, such exercises, or any exercises of a similar character.

Action for injunction. The material findings of fact by the court were as follows:

VIII.—During all the period of the organization of said school district, it has been the custom of the teachers in the schools taught therein, without objection upon the part of the patrons thereof, to commence and close the sessions of said school with prayer and other devotional exercises, peculiar to the Catholic religion and faith; and until the commencement of the present school year, which was on or about September 1st, 1896, no objection had ever been made, taken or had to said religious or devotional exercises or practices, and there was not during any part of said period any provision in any teacher's contract requiring said teacher to give said religious instruction, or have any devotional exercises whatever.

IX.—The defendant, Mary Tschumperlin, was engaged to teach said school on or about January 12th, 1897; she succeeded as teacher one Joseph Heinen, who had been teacher from the beginning of the school year in 1896, until on or about that time. Said Joseph Heinen had refused from the commencement of said school year until the termination of his services as a teacher to say any prayers or practice any devotional exercises in said school, and while he so refused the attendance upon said school dropped from about seventy to from eight to thirty pupils. Upon the commencement of the term of school by said Mary Tschumperlin objection was made by the plaintiff herein and others to the saying of prayers and the practice of devotional exercises in such school house, and thereupon a majority of the legal voters of said school district petitioned the trustees thereof to permit and authorize the school house in said district to be used for the purpose of divine worship and for the purpose of instruction in religious matters and religion, the same not to interfere with the use of the school house for school purposes, which petition was granted and notice thereof was by the said trustees given to the defendant, Mary Tschumperlin.

XI.—Religious exercises and religious instructions were had and given in said school house and in the school taught therein at the time of the commencement of this action as follows:

Four or five minutes before nine o'clock in the forenoon the children were called together in the school room, the pupils required to stand and together repeat the following prayer: "Our Father who art in Heaven, hallowed be Thy name, Thy kingdom come, Thy will be done on earth, as it is in Heaven; give us this day our daily bread; and forgive us our trespasses as we forgive them that trespass against us; and lead us not into temptation, but deliver us from evil. Amen." And also the following: Hail Mary, full of grace; the Lord is with thee; blessed art thou amongst women, and blessed is the fruit of thy womb, Jesus. Holy Mary, Mother of God! pray for us sinners, now, and at the hour of our death, Amen." Then without any intermission or further calling the school to order, the school exercises proper were begun and continued to twelve o'clock. Then, without any dismissal of the school, or intermission, the said prayers were repeated; pupils desiring to do so, however, being permitted to retire before the saying of these prayers. The school was then formally dismissed for the noon hour. Four or five minutes before one o'clock the school was called and the pupils directed to stand and repeat the following prayers, viz: "The Angel of the Lord declared unto Mary, and she was conceived of the Holy Ghost. Hail Mary, full of grace, the Lord is with thee, blessed art thou amongst women, and blessed is the fruit of thy womb, Jesus. Holy Mary, Mother of God, pray for us sinners, now and at the hour of our death, Amen. Behold the handmaid of the Lord. May it be done unto me according to thy Word. Hail Mary," etc., as above, "And the word was made flesh and dwelt among us. Hail Mary," etc., as above, closing with the Lord's prayer as before stated. Immediately upon the conclusion of this prayer, and without any intermission or further calling of the school to order, the school exercises proper followed, and continued till four o'clock. At four o'clock the teacher announced "School is out, and those who wish to go may go." Then, without further dismissal or intermission, the same prayers were said and the same ceremony had which was followed, on two days of each week, by one half hour instruction in the Catholic catechism. There was no formal dismissal of the school, further than the teacher saying that those who wished to do so could go. No pupil was required to be present during any of the religious exercises, but if present was required to stand, but not required to repeat any of the prayers unless he so desired. The children were not allowed to move around the school house after the saying of prayers in the morning, and before one o'clock before beginning the school exercises proper. The foregoing prayers were repeated part of the time in German and part of the time in English.

XII.—Said prayers and catechism are peculiar to, and the distinctive teachings, practices, doctrines, creed, tenets and beliefs of the Roman Catholic church, and are not admitted or recognized as such by any other religious faith, church or denomination, excepting the Lord's Prayer, stated in defendant's answer.

Calhoun & Bennett, for Plaintiff.

J. D. Sullivan, for Defendants.

Baxter and Searle, J.J. This is an action brought by the plaintiff against the defndant, Common School District No. 60, Stearns County, Minnesota, and the defendant Mary Tschumperlin, as teacher of said district, to enjoin and restrain the defendants from instructing the pupils attending school now being held in said school district, in religious doctrines, beliefs, and church catechism, or allowing the same to be done. The facts are stated in full in the findings of fact, from which it appears that during all the period of the organization of said school district, it has been the custom of the teachers of the schools taught therein, to commence and close the sessions of said school with prayers, and other devotional exercises, peculiar to the Roman Catholic religion and faith; and that the present teacher of said school, continues the practice of instructing the pupils in such religious exercises.

That the prayers and devotional exercises had in said school, consist in repeating the prayers, and having the exercises, specified in the 11th and 12th foregoing findings of fact.

The importance of the questions involved in this case, are fully appreciated by this court, and they have received a most careful consideration.

The plaintiff's objections to the religious exercises and instructions allowed in the school are, first: that they violate the rights of the conscience; second: it compels him to aid in the support of a place of worship against his consent; and, third: that these exercises are in their nature sectarian, and, therefore, are prohibited by the provisions of the Constitution of this state, hereinafer referred to.

Sec. 16, Art. 1, of the Constitution, provides that, "the right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any religious or ecclesiastical ministry against his consent; nor shall any control of, or intereference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship."

Sec. 3, Art. 8, as amended provides that "The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the state. (But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creed or tenets of any particular christian or other religious sect are promulgated or taught.")

Sec. 1, Art. 8, reads: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools."

These provisions of our constitution are in full accord with the spirit and intention of the federal constitution; and show how completely this state, as a civil government, and all its civil institutions are divorced from all possible connection or alliance with any and all religion, religious creeds, forms of religious worship, and everything of a religious character; and to show how completely all persons are protected in their religious views and rights of conscience; and that no man can be compelled to support any place of worship against his consent, or taxed for such purpose; and more especially is it true, that our common schools, as one of the institutions of the state, created by the constitution, stands like any other institution of the state, completely excluded from all possible connection or alliance with, any distinctive religious creed or modes of worship, or with anything of such religious character; guarded particularly by the constitutional provisions above cited, prohibiting appropri-

ations "for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular christian or other religious sect are promulgated or taught."

The common school is also protected by the Constitution from all "Control of or nterference with the rigats of conscience, and in short from all preferences given by law to any religious establishments or modes of worship. They are, also, free to all alike, to all nationalities, to all sects of religious faith, to all ranks of society, and for these equal rights and privileges, all are taxed equally and proportionately." In commenting upon a similar clause in the constitution of the State of Pennsylvania, in the celebrated Gerrard Will case, Mr. Justice Story, speaking for the whole court observed: "Language more comprehensive for the complete protection of every variety of religious opinion, could scarcely be used; and it must have been intended to extend equally to all sects, whether they believe in Christianity or not. Under this clause no human authority can in any case whatever, control or interefere with the rights of conscience of any person. The relations of church and state have been the subject of discussion for many centuries; and at certain times, and in certain nations of Europe some one particular sect has been the established church of the state, and at other times, and in other nations, the belief of some other sect has been the established religion. These discriminations naturally engendered bitterness, emnities, and even caused war. There is no such source and cause of strife, quarrel, fights, opposition, and persecution as religion."

The early settlers of this state came chiefly from the New England and Middle States. They were a superior class of people, and represented the best elements of the people of the states from whence they came. They were largely believers in the Protestant religious faith, but with a "lively appreciation of the horrors of sectarian intolerance, and the priceless value of religious freedom, were instrumental in framing a constitution which invited all classes and nationalities, and representatives of all religions and religious faith, under which they could worship God according to the dictates of their own conscience." Emigrants from European nations sought homes with us. Those who had felt the oppression of kingdoms and empires, and suffered under the yoke of despotism and religious intolerence, came from nearly all the European nations. They too, were a superior class of people, and consisted largely of Germans, Scandinavians, French and Irish, representatives of different religious doctrines and church creeds. What more tempting inducement to cast their lot with us could have been held out to them, than the assurance that, in addition to the guaranties of the right of conscience and of worship in their own way, the free district school, in which their children were to be, or might be, educated, in relation to the rights and duties of citizenship, were absolutely common ground, where the people were equal and where sectarian instruction, and with it sectarian intolerance, under which they smarted in the old country, could never enter. These people of foreign birth, and their descendants, are as proud of their adopted state, and all its institutions, as if they had been American born. They are developing national traits of character, unsurpassed in intelligence, by any other class of people, and all races and nationalities, have contributed their share to our wonderful composit growth and character, and to the upbuilding and advancement of the material interests of the state. We believe that the great mass of our people of all religious doctrines, ranks and classes, are imbued with the spirit of our constitution, especially as regards the subject of this controversy, and that they are, as they ought to be, opposed to any violation of its provisions, by allowing the introduction in our common schools, or other state institutions of learning, which are supported by the public moneys, any devotional exercises peculiar to either the Catholic or Protestant religion or faith. In these schools there are, of course, a multitude of religious sects, and a diversity of opinion among them; and it was the evident intention of the Constitution, to keep the tender

minds of children, who are to derive advantages from and have the benefits of such institutions of learning, free from the excitement which clashing religious doctrines, and sectarian controversies are sure to produce.

The question presented in this case is not one of sectarian predeliction or religious belief, nor of theological conception or sentiment; but is one of fundamental law, and involves a construction of the provisions of the constitution heretofore referred to. It is no part of the duty of the court to make or unmake laws, but simply to construe this provision of the constitution, with reference to the facts in the case. All questions of political and governmental ethics, and all questions of policy, must be regared as having been fully considered and settled by the convention which framed the constitution, and conclusively determinoed by the people who adopted it. It is the duty of the court simply to interpret its meaning, and determine whether the facts in the case constitute a violation of its provisions. This is not a question, so far as the court is concerned, between Catholics and Protestants. The question is what is the law in the case? Not what are the religious opinions of those who demand its enforcement.

It is not only the plain duty of every citizen to support the constitution as it is framed, but it is the sworn duty of the judge who administers the law, to interpret the constitution as it is, and not as it might have been. To do so may in some cases lead to seeming individual hardship, but to do otherwise would be most portentous with evil. But should it work a seeming hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and the security in all his rights, in a large degree, depend upon the rigid adherence to the provisions of the constitution, and the laws, and their faithful execution. If courts may in individual cases, or for the benefit of any class or sect, disregard, or refuse to enforce their provisions, then the security of the citizen is imperilled, then the will of the judge would usurp the place of the constitution and the laws: and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights.

Nor are we justified in resorting to a strained construction, or astute interpretation, to avoid the intention of the framers of the Constitution or the statutes adopted under it-even to relieve against individual or local hardships, or for the benefit of any locality. If unwise or oppressive in their operation, the power that adopted can repeal or amend. The power to do so, however, has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted. It is a settled rule of construction that in construing constitutional or statutory provisions, the evident intention of the framers, and the legislature that adopted them, as well as the object to be sought, must govern; and we must presume that no superfluous words were used, and that meaning must be given to every word used; so as, if possible, to make every word operative; and the different provisions of the constitution must be so construed, as to be consistent with the objects of the whole instrument, and to secure effectiveness to all its parts (130 U. S. 672.)

We here refer to the case of the Board of School District No. 8, 44 N. W. Rep., 967, which contains some well established principles of law, which we have quoted as applicable to the case at bar. This was a proceeding by mandamus, brought by certain taxpayers, members of the Roman Catholic Church, against the School District, to compel the Board to cause the teachers in such school to discontinue the reading of the Bible in such school; and involved the construction of certain provisions of the constitution of the State of Wisconsin, similar to the clauses in our constitution heretofore referred to; and the court held in effect:

1st. That the reading of the Bible in the common schools is contrary to the rights of conscience;

2nd. That sectarian instruction, which is prohibited in the common schools, is instruction in the doctrines

held by one or other of the various religious sects, and not by the rest; and hence the reading of the Bible in such schools comes within this prohibition, since each sect, with few exceptions, bases its peculiar doctrines upon some portion of the Bible, the reading of which tends to inculcate those doctrines;

3rd. That the practice of reading the Bible in such schools can receive no sanction from the fact that the pupils are not compelled to remain in the school, while it is being read; for the withdrawal of a portion of them at such time, would tend to destroy the equality and uniformity of treatment of the pupils sought to be established and protected by the constitution;

4th. That the reading of the Bible is an act of "worship" as that term is used in the constitution; and hence the taxpayers of any district, who are compelled to contribute to the erection and support of common schools, have the right to object to the reading of the Bible therein, under a clause of the constitution of Wisconsin, (which is the same as our constitution) declaring "that no man shall be compelled to erect or support any place of worship."

5th. That as the reading of the Bible, at stated times, in a common school, is religious instruction, the money drawn from the state treasury for the support of such school, is "for the benefit of a religious seminary," within the meaning of the constitution of Wisconsin, prohibiting such an appropriation of the funds of the state.

See also the case of State of Nevada vs. Halleck, 16 Nevada 373. This was an application for writ of mandamus to compel the defendant, the state controller, to audit and allow a certain account in favor of the Nevada Orphan Asylum, for the support and maintenance of orphans under a statute of the state, appropriating funds for the relief of several orphan asylums of the state. The respondent, the state controller, refused to allow the account or draw his warrant upon the state treasurer therefor, on the ground, that such asylum was a sectarian institution, and that under the constitution of the state, he was forbidden to audit any account, or draw any warrant upon the state treasurer, for the support of any institution of a sectarian character. The section of the constitution referred to in that case, reads as follows: "No public funds of any kind or character whatever, state, county or municipal, shall be used for sectarian purposes." (This is in effect the same as the last clause of Sec. 3, Art. 8, of our constitution above quoted, being amendment of 1877.)

It appears from the testimony reported that the devotional exercises claimed to be sectarian in that case, were very similar to the devotional exercises had in the Avon school in controversy, and the Court said: "From all the preceding facts, it seems to us, that but one conclusion can be arrived at, which is that the Nevada Orphan Asylum is a sectarian institution. The facts are that all the exercises of a religious nature are of one kind, exercises appertaining to the Catholic church, and they are regular, and form as much a part of the daily routine, as does the study of geography or arithmetic; and these exercises, although brief, are such as leave their impress upon the mind of the child. It does not matter that Catholic parents desire their children taught the Catholic doctrine, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any public funds for such purposes, whether the parents wish it or not. If all the children at the asylum were Catholics, and all their parents or friends wished them taught Catholic dogmas, those facts would not make the institution non-sectarian, or allow the use of public moneys for the support of such institution. If the instruction is of a sectarian character, whether Catholic or Protestant, the school is sectarian; and it was intended that public funds should not be used directly or indirectly for the benefit of such institution. People of nearly all nationalities and many religious belief established our state. They met on common ground and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds. It is a wise provision and must be upheld."

In the above case the court held, that the Nevada Orphan Asylum was a sectarian institution, and as such, was

prohibited by the constitution, from drawing any moneys from the state treasury to be used for the purpose of the institution.

As bearing upon the question whether the devotional exercises complained of in the case at bar, made the schoolhouse a "place of worship" within the meaning of Sec. 16, Art. 1, of the constitution, heretofore referred to, we again refer to the case of State vs. Dist. Board School Dist. No. 8, 44 N. W. Rep. 967, in which the court held, in effect, that as the reading of the Bible in the common schools is "worship," there is no doubt but what the school room in which it is so statedly read, is a "place of worship" within the meaning of the constitution. "Worship," as defined by Webster, is "the act of paying Divine honors to the supreme Being; religious reverence and homage; adoration paid to God or a Being viewed as God. To pay Divine honors to; to perform religious service; to adore, etc., etc. The worship of God is an eminent part of religion, and prayer is a chief part of religious worship."

"The place of worship need not be confined to a church edifice or place where the members of a church statedly worship. Manifestly the words place of worship were advisedly used in the constitution, as applicable to any place or structure where worship is statedly held, and which the citizen is compelled to attend, or the tax payers are compelled to erect or support. The mere fact that only a small fraction of the school hours is devoted to such worship, in no way justifies such use, as against an objecting tax payer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If the right does not exist, then any length of time, however short, is forbidden. The plaintiff as a tax payer of the district was compelled to aid in the erection of the school building in question, and also to aid in the support of the school held therein. Being thus compelled to aid in such erection and support, he has a legal right to object to its being used as a place of worship. As the state can have nothing to do with religion except to protect every person in the enjoyment of his own, so common schools or other state institutions of learning, supported by public funds, can have nothing to do with religion or religious worship, in any form or respect whatever. They are as completely secular as any other institution of the state, in which all the people alike, have equal rights and privileges. The people cannot be taxed for religion or religious worship, in schools, any more than anywhere else. Religous instruction, in the common school, is as clearly prohibited by these general clauses of our constitution, as is religious instruction or worship, in any other department of the state, supported by the revenues derived from taxation."

In the case of Scofield vs. 8th school Dist., 27th Conn. 498, the court held: "That the inhabitants of a school district have no right to use the schoolhouse of the district for religious meetings and Sunday schools, against the objection of a tax payer of the district, even though the district may have voted to allow such use; and that injunction will be granted against such use, on the application of such taxpaper, although the injury to him may be very slight, as he has no other remedy." In the case last cited, the defendants insisted, as do the defendants in the case at bar, that the plaintiff had no such pecuniary or other interest in the subject matter, as would entitle him to bring the action, or to the relief sought; but the court held, in effect, "that as the plaintiff can not sue the district at law for any injury to the building, his interest in it can only be protected by this kind of an action. To deny him his remedy, therefore, in a case where his rights have been threatened or violated, seems to amount to a denial of any remedy for an admitted and acknowledged infringement of his constitutional rights. This is as much opposed to the dictates of natural equity and justice, as it is to the principle that the law will always furnish a remedy for every innovation of another's rights. However beneficial and important such religious instruction may be, and however desirous we may be individually to promote it, it cannot be denied that such a Sunday-school, under the supervision and control of religious

teachers of an ecclesiastical society, is an entirely different institution from our statutory common schools; and moreover, the value of the right of the district, and of its inhabitants, to the exclusive use of the school-house for school purposes, cannot be measured by the mere pecuniary injury resulting from an infringement of the right."

If we apply this rule to the case at bar, the plaintiff has a direct pecuniary interest in the subject matter of this controversy. If the law is being violated, as he claims, if school funds are being used for purposes not intended by the constitution, that is, for the support of a place of worship, or for the support of schools wherein distinctive religious doctrines and creeds are taught, the plaintiff has a right, as a tax-payer, to interfere, and prevent an illegal disposition or use of the funds of the schol district. If the plaintiff as such tax-payer could maintain an action for such purpose, and our courts have repeatedly so held, he may in like manner maintain an action to restrain illegal acts, which necessarily involve such illegal appropriation, or use of the school funds, in which he has a pecuniary interest.

The facts as found by the court, bring this case within the constitutional amendment of 1877, prohibiting appropriations for the support of schools wherein distinctive religious doctrines, creeds or tenets are taught.

Moreover the appropriation or use of the school moneys belonging to said school district, for such purpose, would not only be a violation of our constitution, but is contrary to the purpose and intention of the laws of the United States, granting certain public lands within each township in this state, for the use and benefit of our common schools, the proceeds of which constitute a perpetual school fund for such purpose. Every common school district in the state, every tax payer of the school district, and every person residing therein, having children to be educated in such school, is directly interested in such school fund, and in the preservation thereof. It was not intended that such funds should be used or appropriated for the support of schools for the inculcation of some particular religious doctrine, but must have been intended for the equal benefit of all, of every religious sect, and and whether they believed in Christianity or not, and whether they were Jews or infidels. The use of the school or school house, which is supported in part by this school fund, for the purpose of teaching some distinctive religious creed, might deprive the school of its right to participate in such fund, within the rule laid down in 16 Nev. 373; and any person having an interest in such fund, may maintain an action to prevent illegal acts, which might deprive the school of its share thereof.

In the case of Weir vs. Day, 35 Ohio, 145, the court held "that a lease of a public school house for the purpose of having a private select school taught therein, for a term of weeks, is in violation of the trust; and such use of the school-house may be restrained at the suit of a resident tax payer." In this case the court says, "All public school-houses are vested in the boards of education in trust for the use of the public or common schools, and the appropriation of them to any other use is unauthorized and unlawful; being acquired and maintained by general taxation, for the use of public schools, to which all the youth of the district are entitled to admission. It would be a violation of the trust, to devote it to any educational purpose, to the benefits of which, each youth within the district, of school age, might not of right, demand admission upon equal terms with others in like condition." And the court further said, that "as a resident tax payer in the district, and hence a quasi corporator, he has a legal right to have the corporate property used solely for corporate purposes; and any diversion of the property to other use is an injury to him in law, which will allow him to maintain the action." This rule applies with equal force to the case at bar. In this state the board of trustees hold the school-house and property in trust for common school purposes only.

We have not overlooked the contention of the defendant's counsel, that the devotional exercises referred to in this case, do not violate or affect the plaintiff's constitutional rights, be-

cause of the fact, that they are conducted a few minutes before nine o'clock in the forenoon and after four o'clock in the afternoon, and during the noon hour, at the close of the forenoon session, and just before the beginning of the afternoon session. These religious exercises referred to in the 11th finding of fact, consist in teaching "distinctive doctrines, creeds and tenets of a particular Christian and religious sect," namely the Roman Catholic church, as admitted by the defendant, and found in the 12th finding of fact herein, and are expressly prohibited by Sec. 3, Art. 8 of the Constitution as amended, hereto referred to.

The object and purpose of these constitutional provisions, have already been fully discussed. To say that it is no violation of their provisions for the teacher to use the school-house outside of what the defendants are pleased to term "school hours," is to practically nullify and defeat the very object, spirit, and intention of the constitution. If the will of the people, and the object to be sought by this provision, can be thawarted by any device of this nature, then it might as well be repealed. The subject demands a much more liberal and sensible view; and in this connection we should consider, what seems to us ought to be, the relation between the teacher and pupil. The successful teacher is one who gains the love, respect and confidence of the pupil. The teacher who fails to accomplish this fails in his calling, and cannot accomplish what he ought to. In order to make progress, the child must rely on what the teacher tells him, and therefore must have his confidence. The purpose of the teacher is to guide and direct the mind of the child; and the most successful teacher, assuming that he or she has the proper qualifications, will be the one who gains the most love, respect and confidence of the pupil. The child believes what it is told, and is not expected to discriminate between school hours prop er, so-called, and five minutes before or after such hours. The relation between teacher and scholar ought to be the same at all times, while in the school-room. The better fitted the teacher is to win the love and respect of the pupil, the more reason there is for prohibiting such teacher from exercising any religious influence, as regards sectarian doctrine, over such child. To allow the teacher to use the school-room, during all hours except from nine to twelve o'clock, and from one to four o'clock for the purpose of teaching the pupil in religious doctrines, of some particular church, is manifestly as plain a violation of the intention of the constitution, as if such services were actually had during school hours proper. The child whose parents agree with the teacher upon religious matter, will be taught to believe the teacher is right all the time, while the child, whose parents do not agree with the teacher, upon such matters, will be taught that the teacher is right during school hours proper, and wrong the rest of the day.

It is of the greatest importance, it seems to us that the influence of a teacher over the child, in order to accomplish much, must be continuous and equal; and the influence that is exerted on part of the day canot be separated from that exerted during another part of the day; and children cannot be taught to distinguish between what the teacher teaches one part of the day, from nine to twelve, and one to four o'clock, from what the teacher teaches during part of the day, immediately befor, and after such school hours.

It is further contended by the defendants that the plaintiff has no cause for complaint, for the reason that his children are not compelled to remain in the schoolroom while those religious exercises are being conducted, but are at liberty to withdraw therefrom during such time. We cannot sanction this proposition. When, as in this case, a small minority of the pupils in a public school is excluded for any cause, from any exercises conducted by the teacher in the school room, or when such children are practically prevented from taking part in such exercises, because religious in their character, and contrary to their own belief, from that moment the excluded pupil loses caste with his fellow students, and is liable to be regarded with aversion, and subject to reproach and insult. This practice would tend to destroy

the equality of the pupils which the constitution seeks to establish, and puts a portion of them to serious disadvantage in many ways with respect to others.

The permitting of instruction in religious matters in our common schools will tend to keep apart the children of the parents of different religious creeds, as well as the parents themselves, and engender continual strife and quarrel in the neighborhood where harmony might otherwise exist. If we allow such feelings to be engendered in such communities, our common schools will prove a curse instead of a blessing, as they should be, to all mankind.

The statute relied upon by the defendants, being section 3682 of the Statutes of Minnesota of 1894, authorizing the trustees of any common school district to permit the school house to be used for purposes of divine worship and other purposes, has we think, no application in this case.

This statute was evidently intended to cover cases where the school house was actually rented to some person or society, which had no connection with the school, or its management. It was never intended to be used as a cloak or subterfuge to enable the school trustees to use the school-house, and the teacher employed therein with public school moneys, to conduct religious worship in connection with such school. If this act could be construed as granting such authority, as is claimed by the defendants, it would be clearly unconstitutional, within the rule laid down in the cases above cited. However, it never was so intended, has no application to the question involved herein, and it is not necessary, for the purpose of this case, to determine its consttutionality.

The public schools are intended to be purely secular institutions. It is expected that what is taught therein will be subjects upon which all educated men are agreed, and that nothing shall be taught which tends to excite the passions or religious prejudices of the people. In order that the public schools may fill the place intended they must be free from anything that has any tendency to excite the passions or prejudices of any of the patrons.

The common school is one of the most indispensible, useful, and valuable civil institutions this state has. It is democratic, and free to all alike, in perfect equality, where all children of our people stand on a common platform, and may enjoy the benefits of an equal and common education. Every parent must be allowed to feel that the school, to which the state compels him to contribute his money, teaches nothing to which he can rightfully object, and he is entitled to insist that it shall not be so used, either directly or indirectly, either in, or out of so-called school hours proper, as to defeat this purpose.

When the constitution prohibits the use of public money to further any religion, it should be so construed as to carry out this purpose to the fullest extent. It is impossible to give it effect, without an entire prohibition of the use of the school-house by the teacher, at any time, for the purpose of teaching any particular religious doctrine.

No state constitution was ever framed that we have been able to find, that so completely excludes, and precludes the possibility of religious strife in civil affairs of state, as ours; and yet, so fully protects all alike in the enjoyment of their own religion. All sects and denominations may teach the people their own doctrines, in proper places. Our constittution protects all and favors none.

We fully appreciate the value and importance of religious instruction of some kind, for it inculcates good morals. No more complete code of morals exists than is contained in the New Testament, which re-affirms and emphasizes the moral obligations laid down in the Ten Commandments.

However, the priceless truths of the Bible and religions are best taught to our youth in the church, the Sunday and parochial schools, the social religious meetings, and above all, by the parents of the home circle. There these truths may be explained, and enforced, the spiritual welfare of the child guarded, and protected, and this spiritual nature directed and cultivated in accordance with the dic-

tates of parental conscience. The constitution does not interfere with such teachers and culture. It only banishes theological teachings from the common schools, and institutions of learning supported by public funds. It does this not from any hostility to religion but because the people who adopted it, believed that the public good would be thereby promoted. 44 N. W. Rep. 967.

Fully appreciating the importance of the case, we have carefuly examined all authorities bearing upon the questions involved, that we have been able to find. In view of the fact too, that the case has excited much public interest, and that there has not been, so far as we are aware, any judicial determination of the precise questions involved herein, we have deemed it proper, to make this somewhat extended explanation of our reasons for the conclusions we have reached. In many respects, the case involves questions of first impression, and they must be determined upon general principles of law established in other cases, and from, what seems to us to have been, the evident intention and purpose of the framers of our constitution. These provisions, as herein construed, apply to all alike, to all classes, to the people of all religious creeds and sects, and to all schools and institutions of learning in this state, supported by public money or appropriations.

In the light, therefore, of these well established principles of law, as expressed in the authorities above cited, and applying the same to the facts in this case, our conclusions may be summarized as follows:

That the devotional or religious exercises referred to in the foregoing findings of fact, are prohibited by the provisions of the constitution of this state, heretofore referred to, because:

1st, They violate the rights of conscience; (Sec. 16, Art. 1.)

2nd, That such exercises constitute "worship," and that the school room where the same are conducted, is a "place of worship," within the meaning of such constitutional provision; and therefore the plaintiff is compelled to "aid in the support of a place of worship, against his consent."

3rd, That the confining of such religious exercises, to acts of worship, prayers and catechism peculiar to the Roman Catholic church, as stated in the 12th finding of fact, is the giving of "preference," as that term is used in the constitution; (Sec. 16, Art. 1.)

4th, That the money appropriated and used for the support of such common school, is used for the "support of schools wherein distinctive doctrines, creeds and tenets of a particular Christian and religious sect, are promulgated and taught," contrary to the provision of Sec. 3, Art. 8, of the constitution as amended in 1877.

5th. That the plaintiff, a tax payer in said school district, having an interest in the subject matter, may maintain this action, to restrain the commission of such unlawful act; and,

6th, That he is, therefore, entitled to the relief demanded in the complaint, restraining the school board from permitting, and the teacher from conducting, the religious exercises complained of, or any exercises whatever of a similar character.

DIGEST OF MINNESOTA DECISIONS.

APPEAL — MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

Quaere: Whether an order denying a motion for judgment notwithstanding verdict is appealable.—Eckman v. Lauer, 69 N. 893.

—REARGUMENT AFTER REMITTITUR.

After the supreme court has rendered judgment, and remitted it to the court below, and the remittitur has been there filed, the jurisdiction of the supreme court is divested, and the case cannot be recalled for reargument.—Rud v. B'd of Comrs. of Pope Co., 69 N. 886

BUILDING ASSOCIATIONS — MEMBERS HOW AFFECTED BY INSOLVENCY.

When, by reason of losses, there was such a deficiency in the assets of a building and loan association that it could not mature its stock, the purposes for which it was organized could not be carried out, and the court proceeded to wind it up, held, this put an end to the contract between it and its

members, at least so far as future performance was concerned.—Knutson v. N. W. Loan & Building Ass., 69 N. 889.

—ADJUSTMENT OF RIGHT.

Held, further, in adjusting matters between it and its members, the court should proceed on the principle of rescission, as far as the same can be equitably and justly applied, and each member should, to that extent, receive back what he paid, and pay back what he received. But it is the duty of each member to bear his share of the losses and expenses of the association, and the expenses of the receiver appointed by the court. Therefore the borrowing member is not entitled to set off all that he has paid against the loan or advancement which he has received; but a sufficient portion of what he has so paid should be held until final distribution, to cover such losses and expenses, and only the rest of what he has so paid should be set off against such loan or advancement, and the remainder of such loan or advancement should be collected from him.—Id.

—ADJUSTMENT SUSTAINED.

Held, it does not appear that the court below ordered an unreasonable amount of what each borrowing member so paid in to be so held to cover such losses and expenses.—Id.

CORPORATIONS — ISSUE OF STOCK.

Under the provisions of Gen. St. 1894, sec. 3415, an agreement entered into by the subscribers for stock shares in a corporation that, for each share paid for, a certificate for two or more shares shall be issued to the shareholders, is void.

No equitable rights of the creditors of an insolvent corporation can be based upon the bare fact that such an agreement has been entered into, in an action to enforce the double liability of stockholders. Nor have stockholders who have accepted certificates issued in accordance with such an agreement any equitable rights, as against other subscribers who have paid for their stock, but have not applied for or received certificates, which may be enforced in such an action.—Rogers v. Gross, 69 N. 894.

—INSOLVENCY — LIABILITY OF STOCKHOLDERS.

It was verbally agreed between all of the subscribers, except one, for stock shares in a corporation that, for each share paid for, a certificate for five shares should be issued and delivered to the subscribers. Some of the subscribers paid for shares, and received certificates in accordance with this agreement, which certificates were signed by G., as president of the corporation. G. paid for the shares he had subscribed for, but did not take a certificate. The corporation subsequently became insolvent, and, in an action to enforce the double liability against the stockholders, it is held that G. is only liable in an amount equal to the par value of his shares actually subscribed for, and is not liable to an amount equal to five times their par value. —Id.

EVIDENCE — LAND OFFICE RECORDS.

Certain certificates and letters of the register of the local land office and the commissioner of the general land office held to be each the mere legal conclusion of the officer as to the legal effect of records in his office, and of no weight as evidence.—Preiner v. Meyer, 69 N. 887.

FRAUD — RESCISSION — EVIDENCE.

Held, in an action for rescission of a contract upon the ground of fraud, that the verdict in favor of plaintiff was supported by the evidence.—Riggs v. Thorpe, 69 N. 891.

—RULINGS OF COURT.

Assignments or errors relating to the ruling trial court upon the admission of evidence and also to its refusal to charge as requested by defendant's counsel, considered and disposed of.—Id.

MASTER AND SERVANT — NEGLIGENCE—EVIDENCE.

Held that a verdict in favor of an employee for personal injuries caused by the negligence of a subcontractor was sustained by the evidence.—Eckman v. Lauer, 69 N. 893.

MORTGAGE — ESTOPPEL OF GRANTEE OF MORTGAGOR.

On the facts, held, a grantee of a mortgagor is not, as against the mortgagee in an action to recover possession of the premises after the expiration of the time for redemption from foreclosure estopped from asserting a

paramount title.—Preiner v. Meyer, 69 N. 887.

PROMISSORY NOTE — ACCOMMODATION MAKER—FRAUD—COLLATERALS.

Held, upon a consideration of the pleadings and evidence, that there was no competent evidence in this case to show that the defendant was an accommodation maker of the note sued on, or that the note was given for an uniawful and fraudulent purpose, or that the holder thereof diverted and misapplied the collaterals pledged as security for the payment of the note, and that a verdict for plaintiff was properly directed.—Mahoney v. Barber, 69 N. 886.

PUBLIC LANDS — PRESUMPTION AS TO TITLE.

The plaintiff mortgagee, in an action to recover possession of the mortgaged land after foreclosure, proved that the mortgagor was in possession of the land at the time he made the mortgage It appeared that he subsequently conveyed to and delivered possession to the defendant, who applied to the officers of the United States land office to enter the land as a homestead, and his application was pending at the time of trial. Under these circumstances, held, it cannot be presumed that the title to the land is in the United States.—Preiner v. Myer, 69 N. 887.

TITLE INSURANCE—LOSS OF TITLE—ADVERSE POSSESSION.

A condition precedent to a right of action upon a policy, which prohibits a recovery unless the insured has contracted to sell the estate or interest covered by the policy, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy, has no application where the land is held by another party in actnal adverse possession, and the insured has lost it absolutely by reason of a defect in the insured title.—Place v. St. Paul Title Ins. & Trust Co., 69 N. 706.

BUILDING OPERATIONS — INSOLVENCY—USURY.

The payment of dues upon stock in a building and loan association which has become insolvent is held, in Post v. Mechanics' Building & L. Asso. (Tenn.) 34 L. R. A. 201, to be unavailable to the stockholder for credit upon an usurious loan, when the affairs of the company are being wound up, since such credit would relieve him from his share of the losses.—S. C. 37 S. W. 216.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—STATUTE OF LIMITATIONS.

A statute excluding nonresidents of the state from the benefit of a statute of limitations when the cause of action arose in the state and the defendant subsequently ceased to be a resident thereof is held, in Bates v. Cullum (Pa.) 34 L. R. A. 440, to be valid even as applied to a pre-existing obligation against which the bar of the statute had previously become complete. This is directly in conflict with the decision in Normal School Dist. v. Blodgett (Ill.) 31 L. R. A. 70, which decides that a perfected defense under the statute of limitations is properly within the protection of the constitution guaranty as to due process of law.—S. C. 35 Atl. 861.

—FRAUDULENT TRANSFERS.

The right to transfer property in payment of a debt when the debtor is solvent is held, in Third Nat. Bank v. Divine Grocery Co. (Tenn.) 34 L. R. A. 445, to be within the constitutional protection of property rights; and therefore a Tennessee statute declaring that every transfer of property to preferred creditors, or which "would have that effect," shall be void, without limiting it to cases of insolvency, is held unconstitutional.—S. C. 37 S. W. 390.

CONTRACT—BREACH.

Taking stock in or helping to organize or manage a corporation formed to carry on a business after one has agreed on the sale of such a business not to continue it in that locality is held, in Kramer v. Old (N. C.) 34 L. R. A. 389, to constitute a breach of the contract.—S. C. 25 S. E. 813.

DEATH BY NEGLIGENCE — DAMAGES.

The damages for the death of a married woman, in an action brought by her husband under the Tennessee statutes, are held, in Chattanooga Elec. R. Co. v. Johnson (Tenn.) 34 L. R. A. 442, not to include the loss to her minor child, as the statute, which pro-

vides that a right of action for injuries causing death shall not abate by reason of her death, but shall pass to widow, children, or personal representatives, fails to make any express provisions as to the beneficiary in case of the death of a married woman, but leaves the recovery to go to the husband jure mariti as it would have gone at common law but for the rule of abatement.—S. C. 37 S. W. 558.

LIFE INSURANCE—FORFEITURE —NOTICE.

The beneficiary of a certificate of insurance on the life of her father, who is insane or incapable of attending to business, is held, in Buchanan v. Supreme Conclave I. O. of H. (Pa.) 34 L. R. A. 436, to be entitled to notice of his default in paying assessments before a forfeiture can be declared therefor after she has given the company notice of his condition and requested a notice of any default on his part so that she might make an effort to pay the assessment if he does not.—S. C. 35 Atl. 873.

—CONFLICT OF LAWS—HUSBAND AND WIFE.

The right of a wife to assign a policy of insurance on the life of her husband, under the New York statute, when the policy is issued for her benefit and her husband gives his written consent, is sustained in Spencer v. Myers (N. Y.) 34 L. R. A. 175, although the policy was issued by a foreign company in another state.—S. C. 44 N. E. 942.

MUNICIPAL CORPORATION — ISSUE OF BONDS—ELECTION.

Two thirds of the voters voting at an election to be held for the purpose of issued bonds are held, in Belknap v. Louisville (Ky.) 34 L. R. A. 256, to mean two thirds of all the votes cast for any purpose at that election, although this was one of the questions voted upon at a general election.—S. C. 36 S. W. 1118.

GARBAGE ORDINANCE.

An ordinance prohibiting the collection or transportation of garbage without a license is sustained in State v. Orr (Conn.) 34 L. R. A. 279, as an exercise of the police power; and a provision against the transportation of "such refuse matter as accumulates in the preparation of food for the table" is construed to apply only to that which is abandoned as worthless, and, so long as it can be properly utilized for other purposes and does not constitute a nuisance, it is said to be property which may be sold or otherwise disposed of at the will of the owner.—S. C. 35 Atl. 770.

RELIGIOUS CORPORATIONS—REMOVAL OF OFFICERS.

A majority of the members of an absolutely independent congregation are held, in Long v. Harvey (Pa.) 34 L. R. A. 109, to have no authority to remove officers whose terms are indefinite except by acting in compliance with the rules and discipline of the church.—S. C. 35 Atl. 869.

TAXATION—BONDS OF DOMESTIC CORPORATION.

Bonds of a domestic corporation, which are in another state in possession of a nonresident owner, are held, on the other hand, in Re Bronson's Estate (N. Y.) 34 L. R. A. 238, not to constitute "property within the state," within the meaning of the New York transfer tax act; but shares of capital stock of a domestic corporation, although the certificates are in another state, in possession of a nonresident owner, are held to constitute "property within the state."—S. C. 44 N. E. 718.

—BONDS OF FOREIGN CORPORATION.

Bonds of a foreign corporation, as well as bonds and certificates of stock of domestic corporations, when deposited within a safety vault within a state, although owned by a nonresident, are held, in Re Whiting's Estate (N. Y.) 34 L. R. A. 232, to be "property within the state," within the meaning of the New York transfer tax act.—S. C. 44 N. E. 715.

CHICAGO'S LADY ASSISTANT CORPORATION COUNSEL.

Corporation Counsel Thornton has shown excellent judgment in selecting Miss Cora B. Hirtzel as one of his official assistants. He will find her as efficient and her services as valuable to him as any assistant in his office. She was not appointed by Mr. Thornton because she was a woman, but because she is an able lawyer and capable of rendering him as much assistance in the preparation of cases for court, and making briefs and arguments, as any lawyer he could select for that position.

Miss Hirtzel was born in Ottawa, Ill., read law at Oakland, Wis., in the offices of Jackson & Thompson, and ex-Judge George Gary, a brother of our distinguished judge, Joseph E. Gary, of this city. She came to Chicago ten years ago and went into the employ of the late Hon. W. C. Goudy, then one of the ablest lawyers at the Chicago bar. She took the regular course at the Chicago College of Law and graduated therefrom in 1890. Five years ago she left Mr. Goudy's employ to make a specialty of briefing. Some probate and other practice came to her without her really seeking it, but she rather preferred the study and working out of legal propositions to actual practice in court.

This is the first time a woman has ever been appointed to the position of Assistant Corporation Counsel in the great city of Chicago, and it affords us pleasure, knowing Miss Hirtzel, to be able to say that she is eminently qualified for the position.

To show how Miss Hirtzel is regarded by her brethren of the bar it is only necessary to say that she has prepared briefs for such lawyers as C. S. Darrow, E. B. Felsenthal, Edm. Furthman, Wm. W. Gurley, Wm. B. Keep, C. A. Knight, Wm. E. Mason, Ewd. Maher, John Woodbridge, J. S. Runnells, M. Starr, A. A. Thomas and C. S. Thornton.

Miss Hirtzel lives at 521 Belden avenue, with her sister, Miss Louise Hirtzel, who is head bookkeeper for a large iron firm.—Chicago Legal News.

LAWYERS OF OLD TIMES.

The Hon. James B. Bradwell, editor of the Chicago Legal News, is publishing a series of papers in that most excellent journal entitled "Lawyers, Judges and Some of My Clients and Friends at Rest in Rose Hill Cemetery." The papers are beautifully illustrated with half-tone engravings understood to have been made by Judge Bradwell himself, and the sketches of deceased lawyers, clients, etc., are replete with interest. Many of them contain gracious and tender tributes to departed friends. Among the engravings we find tombs, monuments, etc., some of which are so beautiful as to remind one of the marble glories of the Campo Santo at Genoa. Among the most beautiful of these is the tomb which affords the last resting-place of Myra Bradwell, the lamented consort of Judge Bradwell, a distinguished, strongly intellectual and most excellent woman, who in the state of Illinois fought and won the battle for the right of woman to be admitted to the bar, and having been admitted, refused to be enrolled and declined practice, but founded a great legal journal, which still at the head of its editorial page bears the legend, "Myra Bradwell, founder and editor for twenty-five years." On the facade of this tomb in niches are busts of Judge Bradwell and Mrs. Bradwell.

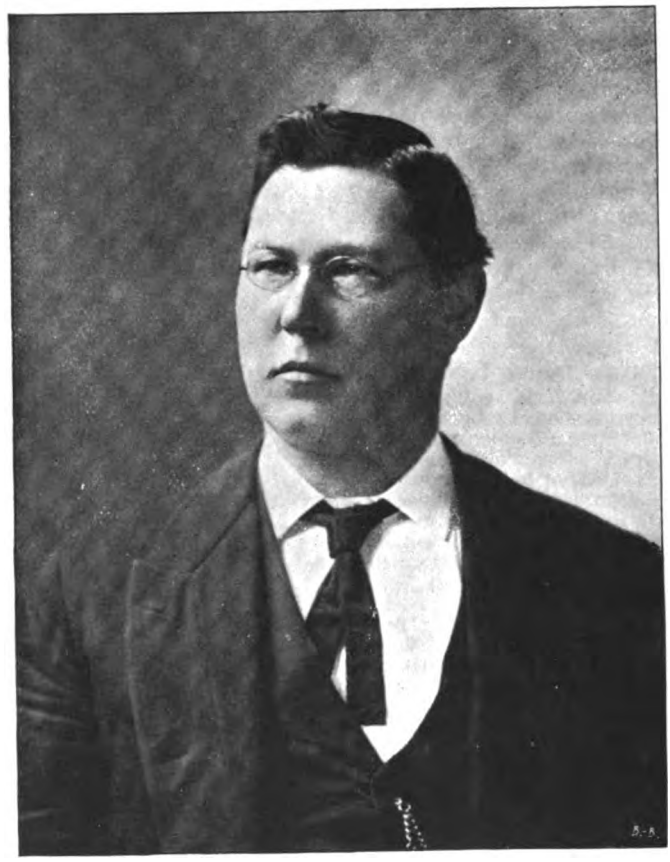
After all, do not these sketches, embodying, as they do, attempts to resist the effacing hand of death,

"And vanquish time and fate,"

carry with them a depressing rather than an enlivening moral? A song, a story, a tradition, prattled even on the lips of children, seems to have in it more of immortality than marble or bronze.

"Pride, bend thine eye from heaven to thine estate,
See how the mighty shrink into a song!
Can volume, pillar, pile, preserve the great,
Or must thou trust tradition's simple tongue,
When flattery sleeps with thee and history does thee wrong?"

Among other curiosities, we learn from these papers that John Wentworth, the great politician, familiarly known as "Long John," was admitted to the Illinois bar in 1841. But Judge Bradwell is somewhat in error when he says, referring to Long John's popularity with the farmers, that "there was hardly a farmer in his district to whom he did not annually send an installment of seeds under his frank as a member of congress." He was continually sending seeds and political documents to Ed. Bump, who was a Democrat, and omitting to send anything to old Ben. Butterfield and old Seymour Thompson, who were Whigs. —Judge Seymour D. Thompson in American Law Review.



HON. JAMES C. TARBOX

District Judge Seventeenth Judicial District.

...THE...

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COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the District Courts of Minnesota are urgently solicited.

HON. JAMES C. TARBOX.

On May 4th, 1897, Gov. Clough appointed Hon. James C. Tarbox, of Monticello, Judge for the Seventeenth Judicial District, created by the last legislature.

Judge Tarbox was born in Phillips, Maine, on April 10th, 1857. At the age of eighteen he entered Bowdoin College, from which he was graduated with high honors. Later he took a course at Columbia Law School. For a time he held a government position in one of the departments at Washington. There it was that he formed his first acquaintance with practical politics; and the selfish greed and dishonesty of this new acquaintance so contrasted with the purity of college life that he soon began to experience a disgust for politics, and shortly gave up his position to engage in the practice of his chosen profession.

In 1881 he came to Minnesota, and opened a law office in Monticello, a place on the Mississippi forty miles above Minneapolis. In the fall of 1896 he was elected on the Republican ticket to the office of county attorney for Wright county, but owing to his elevation to the bench his official life as county attorney was of short duration.

No men know so well as lawyers do

the qualifications necessary for a judge, and the unanimous endorsement of the attorneys in his district is, for Judge Tarbox, a recommendation that needs no comment. He is married and has two children.

THE LEGISLATURE'S POWER TO TAX.

The legislature has no power to tax, but that conferred by the constitution in article nine, sections two, five, six, seven, eight; and this power is expressly limited, although all legislatures have made appropriations on the assumption that they had unlimited power to tax and expend, except in the incurrence of a public debt which has caused the unconstitutional expenditure of millions of dollars for every conceivable object which selfishness or improper motives could secure. Hence it is about time for the people to assert and enforce the rules laid down in the constitution limiting the legislature in its power to tax and appropriate the public money.

The constitution, article 9, sec. 2, provides "The legislature shall provide for an annual tax sufficient to defray the estimated ordinary expenses of the state for each year. Whenever it shall happen that such ordinary expenses of the state for one year shall exceed the income of the state for such year, the legislature shall provide for levying a tax for the ensuing year sufficient with other sources of income to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year." The other sections provide that "for the purpose of defraying extraordinary expenditures, the state may contract public debts, but such debts shall never in the aggregate exceed two hundred and fifty thousand dollars," which shall be authorized by law, for some single object, distinctly specified, passed by two thirds vote; which law shall levy a tax annually to pay the annual interest and a tax to pay the principal within ten years, and especially appropriate such taxes to the payment of such principal and interest, and which debt shall be contracted by loan on state bonds and the money arising therefrom shall be applied to the object specified and to no other purpose whatever. And except as thus provided, the state shall never contract any public debt, but in time of war, to repel invasion or suppress insurrection.

This power requires: (1) An annual tax to defray the annual ordinary expenses. (2) An extra tax to defray extraordinary expenditures. (3) No other er tax or expenses in time of peace. It therefore follows that the power is limited to: (1) An annual ordinary tax to defray annual ordinary expenses, and. (2) An annual extra tax to defray annual extraordinary expenditures. And the question is, "Is the annual tax limited to ordinary expenses" or are the words "to defray ordinary expenses" a limitation of the taxing power so as to limit and confine the annual tax in section two, to annual ordinary expenses exclusively.

The words "sufficient to defray the estimated ordinary expenses of the state for each year" is or is not a limitation; and the first point is to prove that it is a limitation, or that the annual tax is limited to the annual ordinary expenses and cannot be applied to any other expense whatever.

By sections two and five, article nine, the constitution provides for ordinary and extraordinary expenses and for ordinary and extraordinary taxes, which covers all kinds of expenses and all kinds of taxes. The extraordinary taxes and expenses are confined to public debts. All other taxes and expenses are ordinary. Section two commands that (1) The legislature shall provide the tax; (2) The tax shall be annual; (3) It shall be sufficient according to the estimate; (4) It shall defray the ordinary expenses of the state for each year; (5) If the ordinary expenses for any year exceed the income for such year, a deficiency tax shall be levied the ensuing year to pay the deficiency of the preceding year. The words "shall provide" is mandatory per se, covers the whole section and commands that it shall be "an annual tax" which shall be "sufficient" and shall "defray" the "ordinary expenses of the state for each year," which per se excludes all other expenses. The tax is limited to an amount "sufficient" "to defray" the "ordinary expenses," no more and no less, because the power to tax "sufficient" to pay "ordinary expenses" prohibits

a tax for more or less than "sufficient." The sufficiency is to be measured by the "estimated" ordinary expenses, because it can only be "estimated" in advance. If the estimate is not "sufficient" a tax must be levied the "ensuing year" to "defray the deficiency of the preceding year" and if more than "sufficient" the tax is unconstitutional because the command is to tax "sufficient" and not to tax more than "sufficient" or less than "sufficient." The second clause providing for a deficiency tax when the levy is less than "sufficient" assumes and expresses that the "estimate" for the tax might be less than "sufficient," but cannot in any case be more than "sufficient" to pay ordinary expenses, because the ordinary expenses are the current and usual expenses for carrying on the Government and are known and can be "estimated" in advance for which the tax "shall" be levied. The current expenses can be known and "estimated," but the payments cannot be estimated; hence a deficiency tax can be levied the ensuing year to meet the deficiency, if the payments or collection of the tax becomes less than the "estimated" "sufficient" annual tax; but the tax cannot be more than "sufficient" for the estimated ordinary expenses, because the command of the constitution is to make the tax "sufficient." The "annual tax" is limited to annual "ordinary expenses" because the power to tax for ordinary expenses per se excludes every other expense. It is a tax for ordinary expenses and for no other purpose; hence the tax must be, (1) annual; (2) sufficient, and, (3) pay ordinary expenses exclusively. The word "tax" is the subject, and the word "ordinary" the predicate. A tax for ordinary expenses. A tax for current expenses. A tax for the usual common and current expenses of the state government "for each year." Hence it is, (1) An annual tax; (2) A sufficient annual tax; (3) To defray the estimated ordinary expenses; (4), For each year; and therefore "an annual tax for annual ordinary expenses" and for no other purpose whatever.

The discussions in the constitutional convention prove that the framers of this constitutional limitation intended the annual tax to be limited to ordinary expenses and the specific thought expressed by Mr. Gorman was that, as the annual tax was limited to the annual current expenses the amount provided in section five for extraordinary expenses in the establishing of asylums for the deaf and dumb, for the blind and others, was entirely inadequate, and moved its increase to one million; but upon Mr. Sitzer's statement that if more than the amount named was required at any one time for such institutions, it could be obtained by amendment to the constitution. Const. Deb. 385, 386, 394, 395, 418-421, 463. In pursuance with this meaning the constitution was amended Nov. 5th, 1872, providing that for the purpose of erecting and completing buildings for a hospital for the insane, a deaf, dumb and blind asylum and state prison, the legislature may by law, increase the public debt of the state to an amount not exceeding $250,000 in addition to the public debt already authorized by the constitution. Const. art. 9 sec. 14; Laws 1871, ch. 19; 1872, ch. 11.

The South Carolina Constitution, art. 9, sections 3, 7, are the same as the Minnesota Constitution, art. 9, sections 2, 5, except the Minnesota amendment of 1860, which inserted the word "ordinary" after the word "estimated" in section 2. In the Bond Debt Cases, 12 S. C. 280, one question was whether or not an act authorizing a loan to redeem outstanding obligations was constitutional as an ordinary or extraordinary expense. By eliminating inapplicable expressions, it will be found that the court said: The word "ordinary" is used in the constitution in the sense of current or usual expenditures and the word "extraordinary" is used in contradistinction to the word ordinary. After thus providing for the expenses of the state government designated as ordinary in the sense of current annual expenses, the constitution provides for extraordinary expenditures by contracting public debts, which is for all expenditures as do not fall within the class of ordinary current annual expenses. Hence ordinary expenses are limited to current annual expenses for administering the state government, and all other expenses come within the class of extraordinary. Chief Justice Willard said that, ordinary expenses were

limited to the current annual expenses of the state and extraordinary expenses are those which do not in their nature constitute ordinary. The legislature cannot create a debt by borrowing in anticipation of taxes or other current revenue, because the constitution provides for meeting such deficiency, which must be followed. The provision for extraordinary expenditures prohibits the creation of public debts by the state or any agent of the state except as therein provided. The power to tax is limited. Prohibitory language is not necessary, because when a power is granted for the purpose of bringing into existence specific rights, the mode in which that power is required to be exercised is material to the creation of such rights and the provisions are mandatory. Haskell, J., said, the constitution carefully defines the ordinary expenses and leaves to extraordinary expenditure every expense which does not come within the word ordinary. If it is current expenses for the support of the government, it is ordinary, and if any other expense it is extraordinary.

In State v. Leaphart, 11 S. C. 459, the question involved was whether or not appropriations to pay interest on public debts were ordinary or extraordinary expenses. The court said: The constitution provides for ordinary and extraordinary expenses. The ordinary expenses means the current expenses of the state government and confines the annual tax to this purpose "to the exclusion of objects which cannot come under the term ordinary expenses," and the extraordinary expenses are all those which are not ordinary. And on page 473, it is stated, the plan of the constitution is to raise money for the current expenses of the state which is the ordinary expenses and next to raise money for all expenses which are not current expenses and which are the extraordinary expenditures. The first is by an annual tax and the second by loan on state bonds. The annual tax is limited to the annual current expenses. "This is plain, positive and mandatory." "The tax levy is annual, the appropriation is annual and the winding up of the accounts in the treasury is annual."

The constitutional provisions for an annual tax for ordinary expenses and an extra tax for all other expenses is only found in Wisconsin, Minnesota, South Carolina and Nevada, and there is no judicial construction but in South Carolina, except the dictum in Klein v. Kinkead, 16 Nev. 204, that the building of an insane asylum is an extraordinary expense. But in South Carolina these provisions have been construed to be, (1) plain, positive and mandatory; (2) that the annual tax is limited to ordinary expense, because power to tax is given for the specific purpose to pay ordinary expenses; (3) that ordinary expenses means current expenses and all other expenses are extraordinary.

The Colorado Constitution, art. 10, sections 2, 11, 16, and art. 11, sec. 3, provides "an annual tax with other resources to defray the estimated expenses of the state government for each year," which shall not exceed a certain number of mills on the dollar, and no debt shall be created except as therein provided. This asserts the same principle as the Minnesota constitution, namely, an annual tax for annual expenses with the power to go beyond this by levying an extra tax and incurring a debt, except that the Colorado limit is a certain number of mills on the dollar and the Minnesota limit is "ordinary expenses." Hence both states provide an annual tax to defray the expenses for each year, limited in Colorado to a certain number of mills and in Minnesota to ordinary expenses. The Minnesota is an annual tax for annual ordinary expenses and the Colorado an annual tax for annual expenses not exceeding the limit. In Re App. 13 Col. 321, the Supreme Court stated that the constitution provided for two classes of expenses, ordinary and extraordinary. The ordinary is limited to expenses necessary and proper for the support of the state government, and the extraordinary covers all other expenses. The ordinary is to be paid by the annual tax which is imperative, and the tax cannot be diverted to any other object but current expenses of the state government. It would be trifling with the constitution to hold that the obligation to provide a tax for a given purpose is imperative, but that the appropriation of the fund arising from such tax is optional. The ordinary ex-

penses of the legislative, executive and judicial departments of the state are the expenses intended to be provided for, by the constitutional provision of an annual tax for annual state expenses, and all other expenditures, including public improvements, are under and to be provided for by other provisions of the constitution. If the legislature make appropriations or authorize expenditures in excess of the constitutional limits, such acts are void, and every department of the state should refuse to execute the same. Citing Cooley Const. Lim. 69, 70; People v. May, 9 Col. 85; Lake v. Rollins, 9 Sup. Ct. Rep. 652; People v. Johnson, 6 Col. 499; People v. Supervisors, 52 N. Y. 563. It was previously held in this state that the annual tax is limited to the current annual expenses and that a separate annual tax for state institutions was unconstitutional, because such a tax must be included in the annual tax for the expenses of the state for each fiscal year. People v. May, 9 Col. 92; People v. Scott, 9 Col. 430; Davis v. Brace, 82 Ill. 542; 1 Dest. Tax. 468.

If the Colorado court construes the words "to defray the expenses of the state for each fiscal year" to be a limitation confining the annual tax to the annual current expenses; then the Minnesota provision, "to defray the estimated ordinary expenses of the state for each year," must also be a limitation; because, "ordinary expenses of the state for each year," is stronger than "expenses of the state for each fiscal year"; inasmuch as the expenses are limited, to "ordinary expenses" and the other is without this limiting word "ordinary." The pivot is the limitation. In Minnesota the limitation is "ordinary expenses" for each year, and in Colorado "expenses of the state for each year." Hence "ordinary expenses" limits the tax to that which is ordinary—that is current and usual—, and "expenses of the state" limits the tax to current expenses; and therefore if "expenses of the state" means current expenses, "ordinary expenses of the state" means current expenses—and in both cases "the obligation to provide a tax for a given purpose is imperative and cannot be diverted from that purpose." In Re App. 13 Col. 321.

The Kansas constitution directs the legislature to "provide each year for revenue sufficient to defray the current expenses of the state" and "for the purpose of defraying extraordinary expenses and making public improvements the state may contract public debts," Art. 11, Secs. 3, 5. By substituting "ordinary" for "current" and excluding "and making public improvements," these provisions are the same in principle as the Minnesota constitution, namely, (1) an annual tax (each year revenue) sufficient to defray the ordinary (current) expenses of the state; and (2) for the purpose of defraying extraordinary expenses (which includes public improvements) the state may contract public debts.

In State v. School Fund, 4 Kan. 267, these provisions were construed to mean, (1) that the annual tax ("each year revenue") is limited and confined to annual current expenses; (2) that current expenses are ordinary expenses which must "be met by annual taxation." The court said, the constitution "prescribes the duty of the legislature and a rule to guide them in the discharge of that duty." "It provides for the common and ordinary expenses of the state accruing necessarily each year and are precisely what the constitution declares shall be met by annual taxation." The same principle was announced in Graham v. Horton, 6 Kan. 343. In State v. Comrs., 21 Kan. 419, the question of ordinary and extraordinary expenses arose under a law, which is the same as if it arose under the constitution, because the constitution is a law. The court said that the ordinary expenses were such as are necessary in conducting ordinary business and did not cover the erection of public buildings and a tax for ordinary expenses cannot be diverted to any other purpose. This is true, ordinary expenses means the usual current expenses, Hine v. Wooding, 37 Conn., 126; Livingston v. Pippin, 31 Ala. 550; Mills v. Richland, 72 Mich. 100. And a tax for ordinary expenses cannot be used for any other purpose; the rule being that "taxes cannot be diverted from the object for which they were levied." Nat. Bank v. Barber, 24 Kan. 534; Doty v. Ellsbree, 11 Kan. 213; State v. Leavenworth, 2 Kan. 61; R. R. v.

Woodcock, 18 Kan. 20; Sleight v. People, 74 Ill. 47; Truett v. Justice, 20 Ga. 102; State v. Haben, 22 Wis. 629; Cooley Tax, 766.

The constitutional power to tax for the expenses of the state for each year has always been juridically held to be a limitation, because it is a tax for a specific purpose and cannot be diverted; hence "to defray the expenses of the state" means the annual current expenses and nothing else. State v. Medberry, 7 Ohio St. 522. "To defray the current expenses of the state," means the comon and ordinary expenses. State v. School Fund, 4 Kan. 267. "To defray the estimated expenses of the state government for each fiscal year," means the necessary and proper expenses of the state government and nothing else. In Re App. 13 Col. 321. "To defray the ordinary expenses of the state for each year," means current expenses and excludes every expense not ordinary. Bond Debt Cases, 12 S. C. 280 and "to defray current expenses" means, what it says. Peo. v. Suprs. 52 N. Y. 563; Rodman v. Munson, 13 Barb. 68, 188.

The Louisiana constitution provides that the annual tax be "devoted solely to the expenses of the year for which it shall be raised," the surplus to sinking the public debt and all appropriations in excess of revenue shall be void. This requires the annual tax to be devoted to the expenses of the year for which it shall be raised—that is the annual tax must pay the annual expenses—but there is no limitation on the tax or on the expense. The only limitation is that the annual tax must pay the annual expense in the same year. The tax and expense must be annual and the tax must be big enough to pay the expense. The tax is not limited to any certain amount, nor in any other way except that it must be annual. The expenses are not limited to "current" expenses as in Kansas or "ordinary expenses" as in South Carolina and Minnesota or "expenses of the state government" as in Colorado but may cover any expense, and the only requirement is that the expenses of each year shall be paid by the taxes of each year, so that there will be no debt. In Harris v. Dubuclet, 30 La. An. 662, the question involved was, whether or not, a law appropriating one half of a mill "of the general funds" for a number of years to pay the purchase price of a capitol building, was devoting the "revenue of each year" "solely to the expenses of the year" for which it is raised. Justice Egan held the law was unconstitutional, because the tax and expenses must be yearly and raised and expended yearly by the same legislature, otherwise the "revenue of each year" would not defray "the expenses of the year for which the revenue was raised," hence the revenue must be "each year," the expense must be "each year" and "each years" tax must defray the expenses of the year for which it is raised. Chief Justice Manning said that the law was constitutional, because, although the tax and expense was provided for years in advance, yet it was devoting the revenue of each year to the expenses of each year—the tax and expense arising the same year—and the time of levy and appropriation was immaterial; hence the tax and expense can be anticipated; the only limitation is to raise the tax and spend it during the same year.

Here is asserted two opposite principles. The Manning rule, that, a tax levy in presenti to mature in futuro and to meet an expense maturing at the same time is, devoting the revenue of each year to the expenses of that year, because, the tax and expense accrue or mature within the same year. If this were true, one legislature could bind all future legislatures by fixing the tax and expenses in presenti to take effect annually in futuro, and thus destroy the rule that one legislature cannot bind a subsequent legislature. The principle asserted by Justice Egan, that the tax must be levied and the expense accrue within the same year and that each legislature must do all the taxing and appropriating, is the correct and settled rule, carefully reviewed and asserted in Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; People v. Stuart, 97 Ill. 125.

This Louisiana case mixes these fundamental constitutional rules (1) An annual tax for annual expenses. (2) Each legislature must do its own taxing and appropriating, which cannot extend beyond its own life. (3) An expense or appropriation to mature in fu-

turo not bottomed on a lawful tax levy is a debt. And cannot be harmonized with the principles in Kein v. Johnson, 33 La. An. 587; State v. Clinton, 28 La. An. 400; State v. Johnson, 28 La. An. 511; State v. Atkinson, 32 La. An. 89.

The California constitution empowered the legislature to levy taxes for any expense but prohibited any debt or liability except as therein provided. The power to tax was not limited to ordinary expenses or current expenses, or expenses of the state, but extended to any expense so long as a public debt was not incurred. The case of People v. Johnson, 6 Cal. 499, held that the power to tax was limited to current expenses. This was affirmed in Nongues v. Douglass, 7 Cal. 65. In Koppikus v. Comrs. 16 Cal. 249, the court held that the constitution allowed any kind of an expense so long as a debt was not contracted, hence the former cases were repudiated, because it was held that the tax law was not limited to current or ordinary expenses, but that it was a power to tax without limitation so long as a debt was not created. In People v. Pacheo, 27 Cal. 208, the court extended this rule to the anticipation of the taxes the same as if the money was in the treasury; holding that a law which creates obligations to pay money extending over a series of years, but at the same time provides for raising the money by taxation to meet the payments as they mature and apropriates the money in advance to that purpose, does not create a debt hence, the legislature could appropriate for an authorized expense in presenti as in Koppikus v. Comrs. and contract for future payments as in State v. McCauley, 15 Cal. 455; and McCauley v. Brooks, 16 Cal. 24 or Chapman v. Morris, 28 Cal. 395, and contract any expense by levying a tax for that expense and anticipate that tax and expense—that is tax and expend in presenti to take effect in futuro—which is the Louisiana ruling. This ruling and the reasons upon which it is grounded has been demonstrated to be vicious and untenable in the following cases: Springfield v. Edwards, 84 Ill. 626; Caulson v. Portland, Deady 481; where Judge Deady denounces the ruling in strong language. Law v. People, 87 Ill. 385; State v. Medberry, 7 O. St. 526; Lake Co. v. Rollins, 130 U. S. 662; State v. Hickman, 11 Mont. 550; Council Bluffs v. Stewart, 51 Ia. 385; Dunsmoor v. Furstenfeldt, 88 Cal. 522; Salem v. Salem, 5 Or. 27; Scott v. Davenport, 34 Ia. 208; People v. Stuart, 97 Ill. 125; Grant v. Davenport, 36 Ia. 401.

Some states limit the power of taxation by confining the annual tax to ordinary expenses as in Minnesota, South Carolina, Nevada, or to current expenses as in Kansas; or to expenses of the state government as in Colorado and Ohio. And other states do not limit the power as in Louisiana and California. But when the power is limited as in Minnesota, it is a correct syllogism to say "Nothing but ordinary expenses are payable with the annual tax." Current expenses, not public buildings, are alone ordinary expenses; hence public buildings or anything not current expenses cannot be paid by the annual tax.

JNO. F. KELLY.

HAWAIIAN ANNEXATION.

Every one will admit that no obstacles to the annexation of Hawaii are any longer to be found in the history of the establishment of the present republic. Nor are any obstacles to be found in the larger international situation, inasmuch as the great European powers have for many years well understood the intimate nature of the relationship existing between the Hawaiian group and the United States, and had become accustomed decades ago to the view that the future political status of Hawaii was a matter merely to be determined between Honolulu and Washington. As for the claim by Japan of a right to interfere or to be consulted, it is without foundation. There are, it is true, many coolie laborers of Japanese birth in the Sandwich Islands, but these are very recent comers, and their importation has been an industrial incident in which the government of Japan until lately has had no part. The sugar crop has grown sixfold within a very few years, and Asiatic field laborers, without their families and under no conditions of permanent settlement, have been employed in great numbers. In the minds of many thoughtful Americans the really difficult question is how

to reconcile a suitable administration of the Hawaiian Islands with the principles that generally prevail in the administration of our American States. It is feared by some of these men that Hawaii may at an early day seek and obtain admission as a State if now admitted as a territory; and such a thing might eventually be possible as a national presidential election turning upon the prejudices of the Portuguese vote in the island of Oahu, while the policy of this great country might at some fateful moment be decided by the action of a senator whose predilections were derived from an ancestral strain of Polynesian blood. Undoubtedly the time has come when we must face the question whether or not the American flag may float over an outlying region like Hawaii, without the necessary consequence of the reciprocal participation of such a region in the business of governing this country. The Senate will do well to face all such questions with the utmost frankness. The assured benefit of perpetual free trade with the United States would be a most adequate compensation to Hawaii for all that it can possibly give up; and it could not reasonably expect,—at least for a long time,—to be allowed to send representatives to Washington.—From "The Progress of the World," in American Monthly Review of Reviews for July.

JAPAN AND HAWAII.

It is, of course, not strange that the Japanese have become somewhat intoxicated by the ease with which they defeated the Chinese. As a matter of fact, the United States has always been Japan's best friend. The people of this country have had for Japan the most intense feelings of interest and sympathy. If any European Machiavelli has been encouraging Japan to take an attitude of aggression in matters concerning the United States and Hawaii, Japan should be warned in time against evil advisers. It is only an enemy of Japan that could give such advice. Certain London newspapers have asserted that the Japanese navy could readily overpower that of the United States, and lay waste San Francisco and the whole Pacific slope. But this merely illustrates once more the invincible ignorance of London journalism. Our vessels already in the Pacific and adjacent waters are more than a match for the whole Japanese navy, and would need no assistance from that larger half of our naval armament that is stationed in the Atlantic. This same element of malevolent European journalism has hinted that it would be an admirable thing for Japan to attack the United States, with Hawaii for an excuse, while Spain should declare war simultaneously on the score of Cuba. It is probably hard for some Europeans to believe that no sane person in the United States would for a moment have the slightest doubt about the outcome under these circumstances. But the Japanese know something of the resources of America, and they will not exchange American friendship for a Spanish alliance. Happily there is not the slightest speck of a war-cloud hovering over the Pacific, nor is there any lurking hint of unfriendliness in the Japanese Government's arguments on the annexation question. The correspondence will doubtless proceed with courtesy on both sides. Assuredly it will not exercise any determining influence upon the fate of the annexation treaty. The only thing to be really decided is what would be best for the United States.—From "The Progress of the World," in American Monthly Review of Reviews for August.

DIGEST MINNESOTA SUPREME COURT DECISIONS.

—1—

Rulings of the court below on the trial together of these actions, upon objections made to certain offers to introduce testimony of the same general character, considered and disposed of. Held, that the rulings were correct.—69 N. W. 895.

—2—

Gen. St. 1894, § 2685, which requires that all railway companies shall build, or cause to be built, and kept in repair, good and sufficient crossings at all points where public highways may be intersected by railway lines, is applicable to a case where, in the course of construction of a railway, a stream of water has been turned from its natural channel into an artificial one, wholly upon the right of way, and has, by reason thereof, made it necessary for the company to build a bridge over the stream, as a part of an approach or highway crossing of the railway tracks. If the bridge is necessarily a part of the approach or crossing, it must be built and kept in repair by the railway company.—69 N. W. 898.

—3—

In action for damages resulting from acts of another, alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegations of the pleading. Rolseth v. Smith, 35 N. W. 565, 38 Minn. 14, followed.—69 N. W. 899.

—4—

1. Held, that the evidence justified the jury in finding that plaintiff's injury was caused by the negligence of those in charge of defendant's car.

2. Also, that there was no evidence to submit to the jury on the question of

plaintiff's contributory negligence. Canty, J., dissenting.

3. Also, that the damages awarded were excessive, and that a new trial should be granted unless plaintiff will consent to a reduction of the verdict.—69 N. W. 900.

—5—

1. Under Gen. St. 1894, § 5204, the filing of the return of the sheriff is not a jurisdictional prerequisite to the publication of the summons. Corson v. Shoemaker, 57 N. W. 134, 55 Minn. 386, overruled.

2. Under the statute, the office of a return of the sheriff that the defendant cannot be found is, not to authorize the publication, but to support it after it is made, being prima facie evidence that the case was one where service by publication was authorized, to-wit, where the defendant could not be found in the state.—69 N. W. 903.

—6—

Held, following Dunn v. Bank, 61 N. W. 27, 59 Minn. 221 (1) that where the stockholders of a banking corporation voted to increase its stock, having authority to do so under the articles of association, and part of such stock was purchased by its president, who was also city treasurer, and paid for with city funds unlawfully used by him for that purpose, and the stock then sold by him to third parties, the stock was not ultra vires and void, but at most only voidable; (2) that, in view of the lapse of time after the stock was issued before the bank failed, the want of diligence on part of the holders in not sooner discovering the insolvency of the bank, and the large amount of corporate indebtedness still outstanding which has been incurred since the stock was issued, the holders of the stock have no right to rescind, as against creditors whose rights have become vested by insolvency of the bank.—69 N. W. 904.

—7—

Pursuant to the order directing the issuing of a writ of certiorari to the probate court, a citation was served upon the opposite party in interest to show cause why the action of that court should not be reversed. The relator prevailed. Held, that he was entitled to costs and disbursements against the opposite party in interest, although the writ was directed only to the probate court.—69 N. W. 908.

—8—

"The "disclosure" of the garnishee is competent evidence in favor of a "claimant," and against the plaintiff, for the purpose of showing what property had been impounded by the garnishee proceedings, and thus identifying it as the same property to which the claimant is asserting a right.—69 N. W. 909.

—9—

An overdue and unpaid installment of interest, known to the indorsee at the time of purchase, dishonors negotiable paper, and renders it subject, in the hands of the purchaser, to existing defenses between the original parties, the same as an overdue and unpaid installment of principal. Bank v. Scott Co., 14 Minn. 77 (Gil. 59), followed.—69 N. W. 909.

—10—

Action against the sureties on a bond, given by an agent to buy grain, conditioned that he would, on demand, deliver or account for all grain purchased by him for his principal, and pay over all moneys in his hands belonging to him; the breach alleged being that he had failed, on demand, to deliver or account for the grain purchased by him, or to pay over the money in his hands furnished him by the principal for the purpose of buying grain. Held, that the fact that the principal, in the conduct of the business, used and furnished for the use of his agent scales which had not been tested and sealed, as required by Gen. St. 1894, § 2205, constituted no defnse in favor of the sureties. The illegal act alleged—the use of unsealed scales in weighing grain—constituted no link in the plaintiff's chain of title to the grain or the money, or any part of his cause of action. Neither was the plaintiff dependant upon it for the purpose of establishing his claim.—69 N. W. 910.

—11—

A bank which had been depositary of county funds for one term, about to expire, and which was indebted to the county for money deposited with it during that term, was designated depositary for a recond term, and gave to the county a bond, with sureties, conditioned that it would pay on demand all funds "which shall be deposited in said bank pursuant to said designation." The account between the bank and the county was kept in the form of one open current account. During the second term, from time to time, deposits were made to the credit of the county, and payments made generally to the county on its checks; the amount of these payments during the second term exceeding the amount of the deposits during the same time, leaving a balance still due the county, when the bank failed during the second term. Held, that the sureties were only liable for money deposited during the second term for which their bond was given, but that the relation between the bank and the county was that of debtor and creditor, and that the money deposited with the bank became its property, and all payments made by it to the county were made with its own funds; and, having been paid generally on a single continuous account,

the law will appropriate them according to the general rule, viz., the first item on the credit side to discharge or reduce the first item on the debit side; that the sureties have no right to have the payment first applied to discharge the debits created by deposits made during the second term. The case distinguished from those on official bonds where the officer was merely the custodian of public funds, which remained the property of the public, and where he used the public funds which came into his custody during one term to discharge his liability on account of an embezzlement committed by him during a previous term.—69 N. W. 912.

—12—

1. In determining whether the doctrine of respondent superior applies, the test is whether, with reference to the matter out of which the alleged wrong sprung, the person sought to be charged had the right, under the contract of employment, to control, in the given particular complained of, the action of the person doing the wrong. Rait v. Carpet Co. (Minn.) 68 N. W. 729, followed.

2. Held that, in this case, this was, under the evidence, a question for the jury.

3. The injury to a boy aged between eight and nine years consisted of the mangling of the ends of the ring and middle fingers of the left hand, so as to require their amputation at or near the first joint. Held that, in the absence of any evidence of special or peculiar damages, a verdict in favor of the minor for $1,800 was excessive.—69 N. W. 914.

—13—

1. An insurance company assigned to and deposited with the insurance commissioner certain securities in trust for the benefit of its policy holders, pursuant to Gen. St. 1894, § 3332. Subsequently the insurance company and the defendant trust company made an arrangement by which the former assigned to the latter these securities in exchange for other securities. The two companies then procured from the insurance commissioner a retransfer and surrender of the securities deposited with him, the insurance company substituting in place of them (but of much less value) part of the securities which it had received from the trust company, and the trust company depositing with the state auditor, in trust for itself, the securities thus surrendered by the insurance commissioner. The surrender by the insurance commissioner of the securities deposited with him, and the substitution of others in their place, was without the knowledge of the policy holders, and without the knowledge or approval of the state treasurer. The trust company had notice of these facts. In an action brought in behalf of all the policy holders of the insurance company for the purpose of administering and distributing the proceeds of all securities deposited with the insurance commissioner in trust for their benefit, the plaintiff was appointed receiver, with power to take possession of all such securities, and to bring such actions as might be necessary for that purpose. He then brought his action against the trust company and the state auditor to compel the delivery to him of the securities withdrawn from the insurance commissioner, and tendering a return of all the securities given by the trust company in exchange for them, which had been deposited by the insurance company with the insurance commissioner, but not those not thus deposited, but retained, by the insurance company. Held, that the insurance commissioner has no authority to transfer, surrender, or exchange securities deposited with him in trust for policy holders without the approval of the state treasurer in the cases and in the manner provided by Gen. St. 1894, § 3155; and that the attempted transfer and surrender by him was not merely voidable, but absolutely void. Hence, that this action by the receiver is not one for a rescission, and that the rules governing such actions have no application. He is not required to make good to the trust company that part of the securities given by it in exchange which was retained by the insurance company, and has never come into his hands. All that is required of him is to do equity by returning those which have come into his possession from the insurance commissioner.

2. The fact that the amount of the securities deposited by the insurance company in trust for the benefit of policy holders exceeded the minimum deposit required by statute, is not material. The excess was as fully bound by the trust as the balance.

3. Gen. Laws 1881, c. 123 (Gen. St. 1894, § 3331 et seq.), authorizes the business of insurance against losses resulting from the insolvency of those to whom goods are sold on credit.

4. The court had jurisdiction of the state auditor as respects the control and disposition of this trust fund for the benefit of policy holders in which the state, as such, has no interest. Former decisions as to the control of the courts over the official acts of executive officers of the state government distinguished.—69 N. W. 916.

—14—

Held that, under the form of ballot submitted to the electors of the city of Duluth upon the subject of issuing water and light bonds, and expending the proceeds, propositions 2 and 3 were competing propositions, and that an elector could vote against both, but not in favor of both.—69 N. W. 919.

—15—

1. Held, a chattel mortgage executed before, but not filed of record until after, the mortgagor makes an assignment under the insolvency law for the benefit of his creditors, is void as to such creditors.

2. Held, the purchaser of the mortgaged property from the assignee has the same right as the assignee himself to avoid the chattel mortgage on the ground that it is fraudulent as to such creditors.

3. Held, such an assignee is presumed to represent creditors of the assignor, and the burden is on the party asserting the contrary to prove it.

4. Held, the burden is also on the party asserting it to prove that the creditors of the assignor had such notice of such unrecorded mortgage that they are not in position to take advantage of the failure to file it of record.—69 N. W. 920.

—16—

1. Held, the district court has power to set aside an order granting a new trial on the ground that such order was erroneously granted, at least, if set aside before the time to appeal from it expires.

2. The complaint duly alleged that the probate court appointed G. B. guardian of the infant plaintiff, A. B. The plaintiffs were named in the title of the complaint as "G. B., in Her Own Behalf, and as Guardian of A. B." Held, the court might, after verdict, grant leave to amend such title, so as to read "G. B., in Her Own Behalf, and A. B., by G. B., His Guardian."

3. Held, the widow and beneficiary of the insured could not, on cross-examination, in an action brought by her on the life insurance policy, be questioned as to statements made to her by her deceased husband in his lifetime.

4. The insured was found dead, with a bullet hole in the back of his head, and a revolver in his hand. The defense to the action was that he committed suicide. There was evidence tending to prove that there were no powder marks around the wound. Held, for the purpose of rebutting the theory of suicide, it was competent to prove experiments made in discharging the same revolver with similar cartridges, and noting at what distance from the muzzle of the revolver the object fired at was found to be singed or powder-burned.

5. Held, whether a witness is sufficiently qualified as an expert is a question of fact for the trial court, and an appellate court will not hold the ruling thereon erroneous unless it is clearly so.

6. The policy required proofs of death to be furnished to the insurer, but did not state what such proofs should contain. Held, plaintiff could, on the trial, explain and contradict statements made in such proofs as to the manner of death.

7. Held, the verdict is sustained by the evidence.—69 N. W. 923.

—17—

1. An information in the nature of quo warranto, brought by the attorney general, will lie against a county to oust it from adjoining territory illegally annexed to the county, and over which the county has assumed jurisdiction.

2. Held, every presumption is in favor of the finding of the commission, acting under chapter 298, Laws 1895, that the petitions presented are conformable to law, and of the proclamation of the governor made pursuant thereto, annexing such territory to the adjoining county; but such presumption may be rebutted by showing that such finding is not supported either by the actual existing facts, or by any competent or proper evidence of such facts.

3. Held, the writ and information, having admitted such finding and proclamation, is insufficient, because it does not sufficiently allege any facts to rebut such presumption.—69 N. W. 925.

—18—

1. A long course of dealing by an agent for his principal, during which his acts had never in any manner been repudiated by the latter, held to raise a presumption that the agent had actual authority to do what was done by him in line with such course of dealing.

2. The principal is dead. The agent is the husband of plaintiff, and, under the statute, cannot, without her consent, be called by defendant to testify, but can be called by her. There was no direct testimony in the case that the agent had authority to bind his principal by the acts in question. Plaintiff failed to call said agent, and failed to offer any evidence to show want of authority in the agent. Held, under all the circumstances, it must be presumed that the agent had authority, or that the principal subsequently ratified his acts, and the court below erred in finding against this presumption.—69 N. W. 927.

—19—

Plaintiff made a contract with M. to furnish all materials and labor and build for plaintiff a house for a stipulated sum, to be paid as the work progressed, not exceeding 85 per cent. of the total amount of materials and labor furnished, the balance to be withheld until completion of the contract. M., as required by the contract, gave the plaintiff a bond, with E. as surety, indemnifying him against liens. Held in an action against E. for a breach of the conditions of the bond,

that the fact that the plaintiff, during the progress of the work, made payments to the contractor exceeding 85 per cent. of the contract price, without proof that such payments exceeded 85 per cent. of the total amount of the materials and labor already furnished for the construction of the house, did not constitute a defense. Buck, J., dissenting.—70 N. W. 562.

—20—

That a landlord has violated a covenant in his lease to keep the demised premises in good repair, and that thereby damages have resulted to the tenant, is no defense in an action brought by the former, under the forcible entry and detainer act (Gen. St. 1894, § 6118, to have restitution of the premises for nonpayment of rent.—70 N. W. 567.

—21—

1. An order affecting a substantial right, and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact, and deciding a point actually litigated, is an adjudication binding upon the parties, and conclusive upon the point passed upon.

2. In proceedings to foreclose a trust deed covering certain railway property, a trustee named in another deed (a prior lien) was made a party defendant. It appeared by counsel, who attended to its rights and protected its interests to the end of this litigation. Upon a petition made by its counsel, which set out in detail the nature and value of all services rendered by them in connecting with the litigation, the court, when rendering its final decree in the foreclosure proceedings, made an allowance out of the trust funds for the services rendered by counsel, said allowance being made, after a full hearing upon the merits, at less than the amount claimed. Later, counsel procured an order directing the receiver to pay over the amount so allowed to the petitioner, or to its counsel. The money was then paid to the plaintiff in this action, one of the counsel. The court then set apart out of the trust funds a sum of money sufficient to pay certain interest due upon bond coupons held by the parties whose interests counsel had represented in the litigation, and also directed that this money be placed in thec ustody of defendant the Minneapolis Trust Company. The plaintiff then commenced this action in equity to recover judgment for a balance alleged to be due for legal services, and for money expended in and about the litigation, and to impress a lien for the amount of said judgment upon the money still in the custody of the trust company. Held, that this money is a part of the trust funds, and, applying by analogy the rule as to motions before stated to the order of the court allowing fees in the original litigation, that the present action cannot be maintained.

3. Held, further, that the present action does not come within the exception or proviso in the order directing the receiver to pay over the amount of the allowance, to the effect that such payment shall not proclude the petitioner or its counsel from recovering compensation for services from the parties or persons represented by them.—70 N. W. 568.

—22—

A jury was directed, in addition to returning a general verdict, to answer certain specific questions submitted to them. An affirmative answer to both of these questions was absolutely necessary in order to sustain a general verdict in plaintiffs' favor. After being out 36 hours, without reaching an agreement as to the answers to the specific questions, the court, of its own motion, and in the absence of defendant's attorneys, withdrew these special questions from further consideration by the jury, and then received a general verdict against the defendant. Held, that the court erred in withdrawing these questions.—70 N. W. 572.

—23—

Section 5197, Gen. St. 1894, which provides that "the summons may be served by the sheriff of the county where the defendant is found, or by any other person, not a party to the action." construed, and held, that it does not prohibit the plaintiff's attorney from serving the summons.—70 N. W. 775.

—24—

The answer herein alleged that the defendant had been garnished for the same demand claimed by the plaintiff in an action by a third party against the husband of the plaintiff, that she appeared as claimant in the garnishee action, and judgment was entered therein in favor of the defendant, discharging him as garnishee, "from which judgment an appeal has been commenced by the plaintiff (in the garnishee action), as provided by law." Held, that the answer did not state a defense.—70 N. W. 775.

—25—

1. Where issue is joined in a divorce suit, like procedings should be had as a civil action; and though a party waives a jury, by failing to appear, he does not thereby waive the making of findings of fact by the trial court.

2. Held, that the findings of the trial court, that "said court finds that said plaintiff owes to said defendant the sum of four hundred and fifty dollars," is a mere conclusion of law, and insufficient to support for $450.

3. Where the issues are made by the pleadings, and the plaintiff's claim or

defendant's counterclaim is denied, and the opposite party fails to appear at the trial, the issue remains to be tried by the court, if the party appearing waives a jury. The trial court cannot, in such case, direct judgment for the latter without hearing evidence to prove his cause of action.—70 N. W. 776.

—26—

1. T. commenced an action in the district court of St. Louis county against A. and others. A. demanded that the place of trial be changed to Carlton county, and plaintiff's attorneys consented in writing to such change. Neither party caused the papers filed in the action in the office of the clerk of the district court of St. Louis county to be transmitted to the clerk of the district court of Carlton county. After service of the demand for change of venue, A. served his answer, admitted service upon T.'s reply, and upon his notice of trial to be had in the district court of St. Louis county, all of which papers were entitled and filed in the district court of St. Louis county. The answer of A. was subsequently filed in the district court of the latter county, and by fair inference so filed by A. After trial by jury, and verdict in favor of T., he served notice of taxation of costs and entry of judgment upon A., entitled in the district court of St. Louis county. All papers served on A. were kept by him, and he made no objections to the proceeding in the district court of St. Louis county, save the demand for change of venue. Judgment was duly entered in the last-named court upon the verdict, and the real property of A. sold upon execution to satisfy the judgment. Held, that A., by his conduct, had waived his right to have the place of trial changed to the county of Carlton.

2. The case of Pinney v. Russell & Co., 54 N. W. 484, 52 Minn. 443, followed, as to the effect of the record of judgment against one whose Christian name is indicated only by an initial letter.—70 N. W. 777.

—27—

1. Where a portion of a building is let, and the tenant has the right of the use of the elevator in common with the landlord and the other tenants, such elevator to be operated by the tenant when required by his business necessities, and the landlord expressly covenants in the lease that he will keep the elevator and approaches in constant repair and in perfect condition for the lessee's use, and the landlord retains the general control over the elevator and its approaches, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of the elevator.

2. Evidence considered, and held that the lessee's agent did not have sufficient notice of the unsafe condition of the elevator to crate a liability on the part of the lessee as being guilty of contributory negligence.

Canty, J., disenting.—70 N. W. 779.

—28—

1. A married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them.

2. Evidence considered, and held sufficient to justify a verdict for the plaintiff, and that the amount of the verdict is not excessive.—70 N. W. 784.

—29—

Rule laid down in Du Toit v. Fergestad, 57 N. W. 204, 55 Minn. 462, as to the sufficiency of a return on appeal, applied, and the order appealed from affirmed.—70 N. W. 791.

—30—

1. The statute requiring the locomotive bell to be rung or the whistle sounded 80 rods from the place where a railway crosses a traveled road or street does not aply to private farm crossings.

2. But it does not follow that a railway company never, under any circumstances, owes to the adjacent landowner the duty of giving a warning signal that a train is approaching his crossing. The question is to be determined on general legal principles, whether, under all the circumstances, reasonable care required the giving of such a signal.

3. While, as a general rule, and under ordinary circumstances, a railway company owes no such duty, yet the crossing may be so peculiarly dangerous, and the speed of the train so great, that reasonable care would require the giving of such a signal.

4. Held, that under the facts of this case, in view of the peculiarly dangerous nature of the crossing and the unusually high speed of the train, it was a question for the jury whether it was negligence on the part of the defendant not to give a signal of the approach of the train.—70 N. W. 791.

—31—

Evidence in an action for the recovery of damages on account of fire alleged to have been negligently set by the defendants considered, and held, that it was sufficient to require the trial court to submit to the jury the question whether the person who set the fire was the servant of his co-defendants, or an independent contractor. —70 N. W. 793.

—32—

Held, that the trial judge in this case did not abuse his discretion in granting a new trial for the alleged misconduct of the jury. Mitchell, J., dissenting.—70 N. W. 795.

—33—

Evidence considered, and held that, upon the most favorable view of it for the plaintiff, it conclusively shows that he voluntarily and knowingly assumed the risk of using a certain box, handed to him by the defendant's superintendent, to stand upon in order to reach a wire which they were repairing.—70 N. W. 796.

—34—

Plaintiff is the assignee of notes and a mortgage made to "John L. Merriam." The mortgaged premises were conveyed to defendant Ryan, who, in the deed to her, assumed and agreed to pay a mortgage thereon, given by the same mortgagor to "John L. Merriam and wife," securing a like sum. The complaint alleges these facts, and further alleges that the words "and wife," above quoted, "are surplusage, and were inserted in the deed by mistake." Held, in the absence of allegations showing that no mortgage had existed to which these words could apply, the statement that they are surplusage, and were inserted by mistake, is a mere conclusion of law, and the complaint does not show that defendant assumed plaintiff's mortgage.—70 N. W. 798.

—35—

1. In an action between plaintiff, the borrower, and defendant, the lender of money, the isue on the trial was whether or not the loan was usurious. The court permitted the defendant, against objection and exception, to be asked on cross-examination whether he had not made certain other usurious loans to other persons at other times. Held, it is in the discretion of the trial court whether or not it will allow cross-examination as to such collateral matters, and this court is unable to say that in this case the trial court abused its discretion.

2. A witness for defendant denied on cross-examination that he had stated at a certain time and place that he had borrowed money of defendant at a certain usurious rate of interest, and thereupon the court, against objection and exception, permitted the witness to be contradicted by proof that he had made such statement. Held, as the question related to a collateral matter, the party asking it was bound by the answer; and it was error to allow the answer to be contradicted, when the evidence given to contradict the same was prejudicial to defendant.—70 N. W. 799.

—36—

Gen. St. 1894, § 5165, provides that "when a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had." Held, that this law is constitutional. Held, further, that the complaint in this case states a good cause of action. —70 N. W. 800.

—37—

Pursuant to section 4598, Gen. St. 1894, a license to sell the real estate of a deceased person for the payment of debts was granted by the probate court, and subsequently extended for two years after the year therein named as the time in which the real estate should be sold, but said real estate was not sold under said license. Held, said license having expired at the end of said three years, the probate court has power to grant a new or second license.—70 N. W. 802.

—38—

1. The attorney general brought this action to forfeit the charter of a bank organized under the laws of this state, for failing to comply with the laws of this state, as required by sections 2525, 2528, Gen. St. 1894. Thereafter, and before judgment therein, a creditor, with the consent of the attorney general, and with leave of court, intervened in the action, filed a complaint in intervention, and brought in the stockholders as defendants, for the purpose of enforcing their double liability. Held, the original action was brought under sections 5900-5902 (contained in chapter 76) Gen. St. 1894, as well as under section 2525, and the provisions of chapter 76 apply to the action.

2. Held, further, the legislative intent, as expresed in section 5903 and 5904, is to permit the attorney general to proceed to judgment of forfeiture in his action without being embarrassed or delayed by the additional litigation necessary to enforce the stockholders' liability; but this does not entitle the stockholders to immunity from such litigation during the pendency of the attorney general's action, and a creditor may, during such pendency, proceed by a separate action to enforce such liability under section 5905, or he may, with the consent of the attorney general, and by leave of the court, intervene in the attorney general's action, and proceed therein to enforce such liability, as was done in this case. —70 N. W. 803.

—39—

Plaintiff, in building upon his lot, by mistake as to its boundaries built the house so that it stood 20 feet on the street and 2 feet on the adjoining lot, in which he had no right, title or interest. The defendant insured the house against los by fire by a policy containing the following provisions: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a

building on ground not owned by the insured in fee simple." The house was burned. In an action on the policy:

(1) Held, the condition avoiding the policy, "if the subject of insurance be a building on ground not owned by the insured," was not broken, as long as some part of the building stood on land owned by the insured in fee simple.

(2) Held, further, the condition avoiding the policy, "if the interest of the insured be other than unconditional and sole ownership," was not broken by erecting the building partly on the street, because, if for no other reason, the public had no right, title, or interest in the building, and, as between him and the public, he had a right to remove the same.

(3) Plaintiff did not know that he had erected the building two feet, or at all, beyond the line of his lot until after the insurance policy was issued (though he discovered it before the loss). He apparently acted in good faith, and, as far as appears, no one had ever asserted any adverse claim to the two feet in question. Held, under these circumstances, the insurer cannot assert that the condition last above quoted was broken by the building having been erected two feet beyond the line of plaintiff's lot.—70 N. W. 805.

—40—

The defendant having a claim for unliquidated damages against a railway company, he and plaintiff entered into a contract by which the plaintiff, who was a stranger to both defendant and the claim, was to employ an attorney, and institute a suit in the name of the defendant for the collection of the claim, but wholly at his own cost. As compensation for his services, plaintiff was to have an amount equal to one-half of what was collected; but, if nothing was collected, he was not to charge anything for his services. Plaintiff might cancel and annul the contract whenever he became satisfied that the claim was not valid for a sufficient sum to warrant his proceeding further. The contract further provided that the defendant should not settle the claim without plaintiff's written consent, and if he did, he was to pay the plaintiff $75. Defendant did settle the claim without plaintiff's consent. Held, in an action to recover the $75 stipulated for, that the contract was against public policy, and void.—70 N. W. 806.

—41—

Evidence considered, and held sufficient to justify the finding of the trial court.—70 N. W. 850.

—42—

1. In the absence of any express statutory or constitutional authority, an action will not lie in this state against a municipal corporation for consequential injuries to property caused by a change of the legally established grade, where such grading is done in a proper manner. Held, however, that Sp. Laws 1885, c. 5, is applicable to property situate in the city of Minneapolis, and authorizes the assessment of damages in such case in the manner therein provided.

2. Where a statute gives a right and creates a liability which did not exist at common law, and the statute at the same time provides a specific mode in which such right may be asserted and liability ascertained, the injured party is confined to the statutory remedy.

3. Where commissioners are appointed to assess damages by reason of a change in the grade of a street, under Sp. Laws 1885, c. 5, they are authorized to view the premises and hear the evidence offered, and may use such evidence as a guide and aid, and the presumption is that they proceeded rightly and according to the statute until the contrary appears. Held, also, that, assuming, without deciding, that the evidence in proceedings of this nature is properly before us, the award was justified by the evidence bearing upon the question of damages to the buildings, which, under the terms of the staute, are the only damages to which the relator was entitled.—70 N. W. 851.

—43—

1. Upon the second trial of an action brought to recover damages for an alleged breach of an agreement fully set out in a former opinion of this court (65 N. W. 254, 63 Minn. 94), the court charged the jury that, if plaintiff was entitled to recover, the measure of damages was the difference between the value of the separator as it was when the agreement was entered into and what it would have been had defendant complied with the terms and conditions of such agreement. Held that, as an abstract proposition, this part of the charge was correct, and that the court did not err, in the absence of any request that it be explained or enlarged upon, and in the absence of any suggestion by counsel as to any other rule applicable to the facts. Held, also, that the correctness of the charge upon this point cannot be questioned under an assignment that the court erred when instructing the jury that the measure of damages was "what the machine would have been worth if it had been as warranted."

2. Certain other unimportant assignments of error considered, and disposed of.—70 N. W. 853.

—44—

1. In an action brought by an assignee in insolvency, under the laws of this state, to set aside a sheriff's certificate of sale of real property on execution, and the lien of the judgment under which this execution was issued, on the ground that the judgment, ob-

tained by default for want of answer, was an unlawful preference, under the statute, the court found that when the creditors commenced the original action the debtor knew he was insolvent, that the creditor knew him to be insolvent, and that the debtor well knew that the action was commenced against him for the express purpose of enabling the creditors to obtain an unlawful preference; and that, for such purpose, he willfully permitted the judgment to be obtained and docketed against him. Held, that there was no evidence upon which to base the finding that the debtor well knew that the action was commenced to obtain an unlawful preference, or that he willfully suffered the judgment to be obtained for such purpose.

2. This case, upon the facts, distinguished from Yanish v. Fuel Co., 62 N. W. 387, 60 Minn. 321.

3. It cannot be held, as a matter of law, that because a technically insolvent merchant or trader suffers an action to be commenced against him upon a claim against which he has no defense, by creditors who know him to be technically insolvent, and allows a judgment to be entered and docketed against him for want of answer, which judgment becomes a lien upon real property, the debtor intended to permit the judgment creditors to obtain an unlawful preference.—70 N. W. 854.

—45—

By denying, in an answer, any liability for loss under an insurance policy, the insurer does not waive its right to plead in abatement that under the terms and conditions of the policy as to payment the action has been prematurely brought.—70 N. W. 856.

—46—

In an action to recover for personal injuries received by plaintiff, and for damages done to his property, in a collision between his horses and wagon and one of the defendant's locomotives, it is held, that the evidence as to defendant's negligence was insufficient to support the verdict in plaintiff's favor. —70 N. W. 857.

—47—

Held, that the court below erred in submitting to the jury, as a question of fact, the construction to be placed on a certain written conract.—70 N. W. 860.

—48—

1. Whenever bodily suffering is material to be proved, expressions or complaints, made at the time, which are the natural and instinctive manifestations of pain and suffering, are competent evidence as part of the res gesta, and may be testified to and described by any person in whose presence they were uttered. Distinction noted between such complaints and the mere narration of past symptoms or simple descriptive statements, which furnish no evidence of the existence of suffering except the assertion of the party.

2. Former decisions of this court on the question when the statements and representations of a sick person to his medical attendant, for the purposes of treatment, as to the nature, symptoms, and effects of his injury or malady, are admissible as original evidence in his own favor, considered and construed as not going further than to decide that they are admissible when they relate to existing pain or other symptoms from which the patient is suffering at the time. Held that, even if this rule should be adheredto, it should not be extended so as to apply to decriptions of past symptoms or to statements based on past experience.

3. A statement by a party to his physician that he had lost his sexual powers is not admissible as original evidence in his own favor, being mere hearsay.

4. On the cross-examination of a witness, testifying as an expert, counsel may be permitted, for the purpose of testing his kill and accuracy, to ask him hypothetical questions, pertinent to the inquiry, assuming facts having no foundation in the evidence.—70 N. W. 860.

—49—

In action for divorce on the ground of desertion, the defendant, by way of counter-claim, asked for a divorce on the ground of plaintiff's cruel and inhuman treatment; alleging, among other things, that she had brought a prior action against him for a divorce on the same ground, which was determined against her solely on the ground that she had condoned his conduct, but that, subsequent to such condonation and the determination of that action, plaintiff had repeated and continued his cruel and inhuman treatment. After defendant had introduced evidence tending to prove cruel and inhuman treatment subsequent to the determination of the other action, she offered evidence of the alleged prior cruel and inhuman treatment, which had been litigated in the first action, the sole ground upon which it was offered being that plaintiff's breach of the implied condition of the condonation revived the original right of action for a divorce; but no evidence was offered to show that condonation was an issue in the former action, or that its determination against the defendant was on that ground. Held, that the exclusion of the offered evidence was not error.—70 N. W. 865.

—50—

1. In an action by a landlord against a tenant to recover rent, there is no inconsistency between an admission in

the answer that the defendant is indebted for rent, and a counter-claim for repairs made by the defendant for which the plaintiff agreed to pay him.

2. Complaint held good as against an objection raised for the first time on the trial.

3. The reasonable value of the repairs being in issue, it was not error to permit the defendant to testify what he paid for them, and that the prices paid were fair and reasonable.—70 N. W. 866.

—51—

New trial ordered for the reason that the court instructed the jury incorrectly as to the effect of the evidence.—70 N. W. 866.

—52—

1. In order to prevent the running of the statute of limitations, partial payment must have been made by the debtor himself, or for him by his authority, or subsequently ratified, if made in his name, without his authority.

2. Where one of two joint and several debtors makes a payment in his own behalf, the mere fact that the other debtor, after knowledge of such payments verbally promises to pay the balance, will not constitute a ratification of the payments as having been made for him or in his behalf.—70 N. W. 867.

—53—

1. More than 90 days before making an assignment under the insolvency law, the insolvent borrowed a sum of money, and agreed that, if he did not repay it at a certain time, he would secure it by a chattel mortgage on certain personal property. (It does not appear that he was then insolvent.) Thereafter, and within such 90 days, he executed such mortgage pursuant to said agreement. He was then insolvent, which he and the lender then knew, and the mortgage was given and received for the purpose of giving the lender a preference over the insolvent's other creditors. Thereafter, and before the assignment, the insolvent paid the mortgage. Held, such payment was an unlawful preference, and the assignee is entitled to recover back the amount so paid.

2. Within such 90 days, and while so insolvent, said assignor sold certain property, and the purchaser, as part of the purchase price, agreed to pay another antecedent debt due from the assignor to defendant, but has not done so. Held, the defendant cannot be required to refund, as an unlawful preference, what he has never received.—70 N. W. 868.

—54—

1. An insolvent corporation made an assignment for the benefit of its creditors under the insolvency laws. While the proceedings were pending, a judgment creditor commenced an action under chapter 76, Gen. St. 1894, to enforce the stockholder's individual liability, and thereafter another judgment creditor, by leave of the court, intervened in this action, and filed a cross complaint, in which it is alleged that the corporation fraudulently issued to a certain stockholder defendant, and he fraudulently accepted, a certain grossly inadequate consideration, and praying judgment for the sum equitably due the creditors by reason of such fraud. On demurrer to the cross complaint, held, two causes of action are not improperly united in the same action, but the uniting of the same is authorized by said chapter 76.

2. The cross complaint was demurred to on two grounds: (1) That several causes of action are improperly united; and (2) that it does not state a cause of action. The court erroneously sustained the demurrer on the first ground, but made no mention of the second ground. Held, judgment sustaining the demurrer on the first ground would be in abatement, while judgment sustaining the demurrer on the second ground would be on the merits, and might be a bar to a second action; and, even though the demurrer should have been sustained on the second ground, this court cannot on appeal, for the purpose of affirmance, shift the ground on which the demurrer is sustained. The court below failed to dispose of one of the issues of law raised by the demurrer, and this court cannot pass on that issue.—70 N. W. 869.

—55—

Held, the evidence is sufficient to support a finding that the property in question was transferred to plaintiff by the judgment debtor with intent to defraud the creditors of the latter; that what was done by the former, including the purchase of new goods, was done for the purpose of permitting the latter to continue business for his own use and benefit in the name of the former; and the verdict is sustained by the evidence.—70 N. W. 871.

—56—

Gen. St. 1894, sec. 5751, in part reads as follows: "Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit." Held, following Machine Co. v. Doucette, 63 N. W. 95, 61 Minn. 40, that this is a rule of evidence, and not of pleading. Held, further, that a special denial in the answer that the defendant signed the note sued upon, which answer was verified upon information and belief by the defendant's attorney, is not such a denial under oath of the signature or exe-

cution of the instrument as is contemplated by the statute, so as to put the plaintiff in the first instance to the proof of the execution of such instrument. Held, also, following Tarbox v. Gorman, 16 N. W. 466, 31 Minn. 62, that the fact of the signing and execution of a note purporting to be made by the hand of an agent did not render it necessary to prove the authority of the agent in order to make a prima facie case.—70 N. W. 872.

—57—

Held, the decision of the court below is sustained by the evidence, and the court did not abuse its discretion in denying a motion for a new trial on the grounds of surprise and newly discovered evidence.—70 N. W. 872.

—58—

Held, following Avery v. Creigh, 29 N. W. 154, 35 Minn. 456, that a promissory note not originally usurious cannot be made so by an agreement for an extension, subsequently entered into, in consideration of a payment of, or a promise to pay, usurious interest.—70 N. W. 978.

—59—

1. The rule that a servant, while performing his duties, is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly, applied to the allegations of a complaint in a personal injury action.

2. Held, that a general demurrer to said complaint should have been sustained.—70 N. W. 978.

—60—

1. Where a policy of fire insurance insuring the mortgagor, loss, if any, payable to the mortgagee, was issued, and it provided that, if the property is sold, or any change takes place in the title, use, or occupation without written permission in the policy, the same shall be void; and also provided that as to the mortgagee the insurance shall not be invalidated by any act or neglect of the mortgagor nor any change in title or possession, provided the mortgagee shall notify the insurer of any change of ownership which shall come to the mortgagee's knowledge, and have permission therefor indorsed on the policy; during the term of the policy, the mortgagee foreclosed the mortgage, and acquired title to the property; thereafter, and during such term, a loss occurred,—held, the provisions of the policy as to a change of title which should come to the mortgagee's knowledge have reference to a change of transfer of title or possession to a third person, not to one from the mortgagor to the mortgagee by a foreclosure.

2. Depositions were taken on a stipulation which waived all objections except to the competency, relevancy, and materiality of the testimony. The parties appeared, examined and cross-examined the witnesses, and took and had noted certain objections to the testimony. Held, a party could not, on the trial, take other objecions to other parts of the testimony.—70 N. W. 979.

—61—

A certain lease construed, and held not to be a lease merely for the term of five years, but for such length of time as the lessee shall personally perform the conditions specified.—70 N. W. 980.

—62—

Held, that a draft for the whole of a specified debt amounts to an assignment of such debt to the payee, even without acceptance. Held, further, that it was error for the trial court in this case, which was an action upon a claim against the defendant so assigned, to instruct the jury, in effect, that the plaintiff could not recover unless the defendant accepted the draft for some amount.—70 N. W. 981.

—63—

Held that, as against the defendant trustees in this action, the conclusions of law were more favorable, upon the facts found, than the appellant, an intervenor, was entitled to; and that if, as claimed by the intervenor's counsel, the conclusions of law in respect to the rights of another defendant were erroneous as against the trustees, the intervenor was not prejudiced, and cannot complain on an appeal.—70 N. W. 1075.

—64—

In an action by the vendor to have an excavatory contract for the sale of real estate declared forfeited, held, even though time is made the essence of the contract, the vendor cannot, after he has waived strict performance, enforce a forfeiture, without giving such notice of his intention to do so as will give the vendee reasonable opportunity to perform.—70 N. W. 1076.

—65—

On an issue of whether or not a certain loan was usurious, held, the decision is sustained by the evidence.—70 N. W. 1077.

—66—

Pleadings in justice court should be construed liberally, and after judgment therein every reasonable intendment is in favor of the regularity and validity of the proceedings.—70 N. W. 1078.

—67—

1. That portion of Gen. Laws 1895, c. 173, defining the duties of master and employer to employes in certain cases, which reads in part as follows, viz. "to use reasonable care to direct and supervise the performance of the work in a reasonably safe and prudent manner," is merely declaratory of the common law. Soutar v. Electric Co. (April Term, 1897; Minn.) 70 N. W. 796,

and Hess v. Manufacturing Co. (Minn.) 68 N. W. 774, followed.

2. Evidence considered, and held, that plaintiff and certain other employes of defendant were fellow servants, and that the trial court was justified in dismissing the action.—70 N. W. 1078.

—68—

1. An owner of stock in a corporation, issued under Gen. St. 1894, sec. 2799, is not incapacitated from transferring it, even if the transfer thereof is not entered upon the books of the corporation. An assignee of such stock without a transfer upon the books of the corporation has an equitable title which will be protected as against all parties not showing a superior right.

2. If a corporation formed under Gen. St. 1894, sec, 2799, has no lien upon the stock or property of its members invested therein for debts due from them to such corporation, the transfer of such stock would be so far effectual that a complete transfer upon the books might be compelled by the equitable owner of the stock, although until the transfer is properly and legally made on the books of the corporation the transferrer may be regarded by it as still the holder of such stock for the purpose of voting and receiving dividends.

3. Corporations are bound equally as individuals by actual notice of the rights of others. Hence the lien which a corporation has upon the stock or property of its members invested therein due from them to the corporation is such as it has acquired in good faith.

4. Held, also, that the evidence warranted the trial court in finding that the plaintiff corporation was chargeable with notice of the prior claim and rights of the defendant corporation in and to the corporate stock in controversy before the creation of the debts for which it claimed a lien upon the corporate stock.—70 N. W. 1079.

—69—

Gen. St. 1894, sec. 5534, in part reads as follows: "No contract between a husband and wife, the one with the other, relative to the real estate of either or any interest therein shall be valid." Held that, although B. and her husband had separated, a mortgage executed by him to her on his real estate was invalid, and constituted no lien upon such estate.—70 N. W. 1082.

—70—

1. Plaintiff, as indorsee of a promissory note, brought suit thereon against the maker, who admitted its execution, but alleged usury as a defense. Upon the trial in justice court, the plaintiff introduced the note and indorsements thereon in evidence, and rested, and thereupon the defendant also rested. The justice rendered judgment in favor of the defendant. Held error under Gen. St. 1894, sec. 5751.

2. Plaintiff then appealed to the district court upon questions of law alone, where all the evidence taken in justice court was returned. The district court held that the justice of the peace erred in not rendering judgment for the plaintiff, but that, in view of the fact that the issue tendered by the defendant's answer had not been litigated in the district court, it would not be proper for such court to order judgment for plaintiff, and therefore merely reversed the judgment rendered in justice court. Held error, and that the district court should have ordered judgment thereon upon the merits in favor of the plaintiff.—70 N. W. 1083.

—71—

An allegation in a complaint is sufficient which alleges an indebtedness and part payments thereon at such times as would prevent the statute from operating as a bar to the cause of action. Words or acts indicating that the debtor acknowledged that more was due and would be paid need not be alleged. The rule that part payment of a debt will not take the case out of the statute unless the payment be made under circumstances which will warrant the jury in interfering therefrom a promise to pay the residue is one of evidence, and not of pleading. It is not necessary to plead implied promises.—70 N. W. 1084.

—72—

1. While a corporation has no power to make accommodation paper, yet a bone fide purchaser for value of such paper of a corporation having general power to deal in mercantile paper in the course of its business, made by an officer having apparent power to issue it, may recover thereon from the corporation.

2. The rights of a bona fide holder for value of a bill of exchange are the same whether he acquired the bill before or after its acceptance.

3. Evidence considered, and held, that it sustains the finding and conclusion of the trial court to the effect that the plaintiff is a bona fide purchaser for value of the bills here in question, and entitled to recover thereon against an accommodation drawee accepting the bills after the plaintiff purchased them.—70 N. W. 1085.

—73—

1. Where the obligation of a party to a contract is to pay only upon the happening of a contingency, its occurrence must be alleged in the complaint in an action for the recovery of the money. But, if payment is not to be made if a certain contingency happens, it is not necessary to allege in the complaint the nonhappening of the contingency.

2. Held, that the complaint herein complies with this rule, and that it states a cause of action.—70 N. W. 1087.

—74—

Evidence considered, and held, that the trial court had the power, and it was its duty, to determine whether the assessment in question was excessive, and, if it was not, confirm it, but, if it was, to reduce it accordingly, or order a new one.—70 N. W. 1088.

—75—

Held that, upon the evidence, the court was justified in finding that plaintiff's wife had no authority to exchange his sewing machine for another one, and that he had never ratified her act in doing so.—70 N. W. 1126.

—76—

The defendant took one of its employes, who had been seriously injured, to plaintiff hospital, and at its request and upon its promise to pay for his care and treatment the plaintiff accepted and received him as a patient for an indefinite period, no length of time being mentioned. Subsequently, and while the patient was yet incapable of being removed or discharged from the hospital without great danger to his life or health, the defendant gave notice that thereafter it would not be responsible for his care or treatment. Held, that defendant had no right to thus terminate its liability; that, under the circumstances, it was an implied condition of the contract that defendant could only terminate it by removing the patient or when he could be dismissed by the plaintiff without serious danger to his life or health. In order to relieve itself from liability for care and treatment, furnished after the notice, on the ground that the patient had means of his own to pay for it, the burden was on defendant to prove that he had means out of which the plaintiff could and should have collected its pay.—70 N. W. 1126.

—77—

1. Held, that it conclusively appeared from the evidence that the insolvent "had not kept books of account or records from which his true condition could be ascertained," and, therefore, that the court erred in refusing to direct his property to be distributed among his creditors without their filing releases.

2. The rule that "where the settled case shows that documentary evidence was introduced which might have a bearing on the findings of fact, but which is not made a part of the case, this court will not review the findings," has no application where the "case" negatives any presumption that the missing documents contained anything which could have effected the findings.—70 N. W. 1126.

DIGEST MINNESOTA DISTRICT COURT DECISIONS.

—1—

1ST DISTRICT WASHINGTON CO.
Wells vs. Westphal, et. al.

Crosby, J. Penal code, sec 225, prohibiting labor on Sunday, does not invalidate a promissory note made and delivered on that day, the act of making and delivering being business, not "labor."

—2—

1ST DISTRICT WASHINGTON CO.
Northern Hydraulic Pressed Brick Co. vs. Carroll, et. al.

Crosby, J. Under G.S. 1878,sec. 217, which provides that in the trial of an equitable action the court may order "any specific issue involved therein to be tried by a jury," the following questions were sought to be submitted to

the jury: "Is the defendant entitled to recover anything by reason of the matters alleged in the first 15 folios and the first two lines of the 16th folio of the answer of defendants to the amended complaint, and if he is, how much?" Held, that the questions were too general.

—3—

1ST DISTRICT GOODHUE CO.

In re Application for a Receiver of E. O. Anderson.

Williston, J. Under G. S. 1894, sec. 4244, which provides that all proceedings under the insolvent law of 1881 shall be instituted in the county where the debtor resides, if a resident of this state, a petition for a receiver may be heard in a county other than that where the debtor resides unless a change of venue is taken. Following 30 Minn. 512.

—4—

2ND DISTRICT RAMSEY CO.

State vs. Albert Scheffer.

Lewis, J. The disqualification of a grand juror, he being an alien and not a qualified elector of the state of Minnesota, may by plea in abatement interposed after indictment, before issue joined, by a person not under prosecution for an offense, in avoidance of the indictment found by the grand jury of which the alien was a member.

—5—

2ND DISTRICT RAMSEY CO.

Hodges vs. Potter.

OTIS, J.—

This is an application to enjoin the foreclosure of a mortgage by advertisement upon the ground that the mortgage debt has been fully paid. It appears that the St. Anthony Park company in 1891, then owning the property in question, borrowed from one Kendall, through Cochran & Walsh, the sum of $2,300 and gave a note due in five years, secured by this mortgage.

Afterwards in 1892 the company sold the property, subject to the mortgage, to one Wheeler, of New York, who desired to pay the mortgage at once before maturity, and through his agent, one Pratt, applied to Cochran & Walsh to ascertain if this could be done. Kendall had meantime died and one Eaton had been appointed his executor and had authorized Cochran & Walsh to collect matured and delinquent interest on this and certain other mortgages, but without any other authority in the premises.

Cochran & Walsh without first consulting Eaton and obtaining his consent to accept payment before due, notified Pratt that it would be so accepted, and thereupon, at Pratt's instance, Wheeler sent the whole amount of principal and interest to Cochran & Walsh, who immediately deposited it in the bank to their own personal credit. They then wrote Eaton, who held the mortgage as executor, not that they had received the money, but that if he would consent to receive it they could at once collect and remit it, thus leading him to suppose that its payment depended on some future act on their part.

In due time Eaton forwarded the note, mortgage and satisfaction, authorizing Cochran & Walsh to make the collection and remittance. They claim to have had sufficient money in bank to their credit at the time of receiving this authority to have made this remittance, but they never did make the same, nor did they ever surrender to Wheeler the notes, mortgage and satisfaction, and Eaton does not seem to have known of this payment for a considerable time thereafter, as it appears from his letters that he was for several months urging collection and remittance and was apparently ignorant of the true condition of affairs.

Plaintiff, who claims under Wheeler, insists that Eaton by so forwarding the notes, mortgage and satisfaction thereby ratified the payment so without authority received by Cochran & Walsh. I cannot so hold. Cochran & Walsh by receiving the money and depositing it to their personal credit in their general bank account thereby converted the same to their own use.

It matters not that at the time they were authorized to collect and receive the money they had sufficient in bank or elsewhere to meet this demand; it was not the money paid to them nor is it claimed that it formed any part of the money so in the bank.

There can be no ratification except it be with the knowledge of all the material facts and this Eaton did not have. Had he known that the money had been so paid and converted by Cochran & Walsh to their own use and that he must look to them personally for its payment he might well have adopted an entirely different course.

From their letter he had a right to expect that on receipt of the note and mortgage satisfaction they would at once collect and remit to him direct the proceeds of the collection, and not that the same would be deposited in bank in their own name, subject to their own control for personal uses to the hazards of their business, and to the claims of their creditors.

I feel very clear that the principal of this mortgage debt has never been paid.

There was, however, an interest coupon amounting to about $80 past due at the time of this payment.

I think Cochran & Walsh were authorized to receive this interest, and this coupon note must accordingly be considered to have been paid, and to this extent the amount claimed to be due in the foreclosure of sale is excessive.

—6—

2ND DISTRICT RAMSEY CO.
State vs. Bickel.

Lewis, J. Where a referee to take disclosures in a garnishee proceeding omits being sworn before entering on his duties, but the parties thereto appear and proceed without objection, such omission is thereby waived; and the referee being an officer de facto, a witness falsely testifying before him is guilty of perjury.

—7—

2ND DISTRICT RAMSEY CO.
Wheaton vs. Mead.

Kelly, J. 1. Where conclusions of law were as prayed for in the complaint, and plaintiff caused judgment to be entered in accordance therewith, a motion made several days thereafter to have the findings amended will not be granted.

2. A real estate agent, where he merely testifies as to values, is not an expert under the rule allowing expert witness fees.

—8—

2ND DISTRICT RAMSEY CO.
In re Guardianship of Patrick Kelly.

Kelly, J. Appeal by a guardian will not lie from an order of the probate court restoring a ward to capacity, there being no statute authorizing such appeal.

—9—

2ND DISTRICT RAMSEY CO.
In re Application of Hull to Set aside A Conviction.

Kelly, Otis and Bunn, JJ. 1. The court has no jurisdiction to set aside a conviction after the expiration of the term at which judgment was pronounced and sentence passed.

2. G. S. 1894, § 5267, relative to relief against mistakes, opening judgments, etc., applies to civil actions, and in on way contravenes the common law rule above mentioned.

—10—

2ND DISTRICT RAMSEY CO.
Union Bank vs. Lehigh Coal & Coke Co., et. al.

Bunn, J. December 17, 1896, the coal company owed L. R. Doty $500. On that day, in Chicago, Doty drew his draft on the coal company payable at sight to the order of the American Trust & Savings Bank of Chicago, of which bank the Union bank was the correspondent. The Union bank received the draft and obtained the acceptance of the coal company. Dec. 21 the draft was presented to the coal company for payment, and the company drew its check payable to Cohenour, drawn on the Bank of Minnesota for $500. The check was delivered to plaintiff at about 11 o'clock on the day mentioned. Before 3 o'clock on the same day the plaintiff presented the check to the Bank of Minnesota and had it certified, when the check was returned to the plaintiff. The amount of the check was at once charged to the account of the coal company. At about 12 o'clock on the 22d the check was presented for payment and payment refused because the bank had closed its doors, and the Union bank, after protesting the check in the customary manner, brought its action.

In his conclusion of law Judge Bunn says:

The presentation of said check for certification by the plaintiff and the certification thereof, without a demand being made for the payment thereof at the same time, as hereinbefore described, operated to discharge and release the defendant from all liability upon said check.

The rule adopted by the members of said Clearing House association to the effect that payment of checks held by a member thereof when drawn against another member thereof should not be demanded or made except through the clearing house, as hereinbefore described, is void as against the defendants in this action.

MISCELLANEOUS NOTE ANE COMMENT.

Attorneys have inquired as to the motive of the 1897 legislature in re-enacting § 6109 G. S. 1894. The re-enactment is ch. 241, Laws 1897. Any information relative to this question will be gladly received, and will be noted under this title in the next issue of the Journal.

Since 30 M. 512 practically annihilates §4244 G. S. 1894, the compilers of those statutes should have made some reference to that decision.

Laws 1885, c. 145, § 37 (G. S. 1894, § 1254) provides that in prosecution by villages under ordinances appeals may be taken in the same manner as from judgments in civil actions by justices of the peace. A correspondent wants to know how a village can protect its rights on an appeal from a judgment of a justice discharging a defendant charged with violating an ordinance, since by the time the appeal can be heard the appellee may be down picking coffee for Louis F. Menage.

Some one kindly suggest a way of holding defendant pending an appeal.

The English Bar figured in a remarkable way in the Jubilee proceedings, the representatives of the profession, headed by the law officers, attending in state at St. Paul's Cathedral on Sunday, the 20th June. The Bar marched in procession from the Chapter House, around St. Paul's Churchyard, up the rows of steps in front of the Cathedral, and then to their allotted places. This is said to be the first occasion on record when there was a state attendance of the Bar at the Cathedral.—The Legal News (Montreal).

The Twentieth Annual Meeting of the American Bar Association will be held at Cleveland, Ohio, on Wednesday, Thursday and Friday, August 25, 26, and 27, 1897.

The sessions of the Association will be at 10 o'clock a. m. and 8 o'clock p. m. on Wednesday and Thursday, and at 10 o'clock a. m. on Friday, at the Y. M. C. A. building.

The sessions of the Section of Legal Education will be held on Thursday and Friday afternoons at 3 o'clock at the same place. There is a separate programme for this section.

The members of the Section of Legal Education will hold a conference with delegates from state and local bar associations on the subject of Legal Education and Admission to the Bar, at the same place, on Tuesday, August 24th, 1897, at 8 o'clock p. m.

The sessions of the Section of Patent Law will be held on Thursday and Friday afternoons at 3 o'clock at the same place. An address will be made by Edmund Wetmore, of New York, chairman of the section, and a paper will be read by Frank F. Reed, of Illinois, on "Trade Censorship by Equity."

The General Digest, American and English, published by The Co-Operative Publishing Company, of Rochester, N. Y., is a credit to its aggressive and wide awake publishers, and is at the same time an indispensable aid to the bench and bar. No other law publishing house has ever attempted to make it possible for courts and lawyers to have before them, at intervals of three months, a complete and well arranged digest of all the American and English case law brought down to date, such as is found in the "quarterly advance sheets" of the above mentioned digest.

We are glad to note that the state printer is acting on the suggestion of Frank P. Dufresne, and that when the 1897 laws are bound they will contain valuable improvements in indexing.

With five delightful stories in the August Cosmopolitan, one might judge that it was intended solely for light reading in midsummer; but a second glance shows that it contains as well much of serious interest. The second paper by the special commissioner sent by The Cosmopolitan to India tells a tale, the like of which has never before appeared in any periodical. We have in histories second-hand accounts of great famines, but they lack that startling distinctness which comes from beholding at first hand the sights described. Twenty millions of people slowly starving to death, many of them in sight of the railways! No American can form any idea of the state of affairs now existing in India. Mr. Hawthorne has gone into the interior and stood amongst the dead and dying. It is the first time that we have had an American investigation of the condition of affairs in India. The report will open the eyes not only of the civilized world, but of the English Parliament and the Queen herself to the necessity of extraordinary exertion in behalf of these unfortunate millions.

President Dwight, of Yale, furnishes this months consideration of the question, "Does Modern College Education Educate in the Broadest and Most Liberal Sense of the Term?"

A charmingly illustrated and charmingly written article on "Japan's Stage and Greatest Actor," by Robert P. Porter; the second part of Le Gallienne's "New Rendering of the Rubaiyat;" a sketch of that most wonderful crusader Godfrey de Bouillon, and a new poem by Bret Harte are also part of the contents of this August Cosmopolitan.

EXTRACT FROM LE GALLIENNE'S RENDERING OF OMAR KHAYYAM'S RUBAIYAT.

'Tis a great fuss, all this of Thee and Me;
Important folk are we—to Thee and Me;
Yet, what if we mean nothing after all?
And what if Heaven cares naught for —Thee and Me?

All those who in their graves unheeded lie
Were just as pompous once as You and I;
Complacent spake their little arrogant names,
And wagged their heads, and never thought to die.

A beauty sleeps beneath yon quiet grass
Who dreamed her face the world might not surpass;
Strength is her neighbor, but he boasts no more—
And over them the wind cries out "Alas!"

Would you seek beauty, seek it underground;
Would you find strength—the strong are underground;
And would you next year seek my love and me,
Who knows but you must seek us—underground.

* * * * *

O Saki! when at last is run my race,
Will you remember my accustomed place.

When through the garden, all the summer night,
The moon goes seeking my forgotten face?

Beginning with the July number of the Review of Reviews the name of that successful and widely read periodical is expanded, and has now become the American Monthly Review of Reviews. The magazine continues under the able editorship of Albert Shaw, and its readers are informed that the expanded title "implies not the slightest degree of change in its plans, methods, aims, scope, editorship, management, or control of the magazine."

(Attorney Thygeson and his Canine controversy.)

WHITE BEAR TORN UP.

For the time being, anyhow, A. E. Taylor, of the Village of White Bear, (Minnesota) may keep his pet dog on the Taylor domains, without affixing a tag to the canine's neck.

The case promises to become as famous as the celebrated Vermont calf case, in which the calf grew to be a cow, with calves of her own, and grandchildren calves, and who died of old age before the litigation ended.

Taylor, who is a groceryman, owns a dog, whose age is great enough to entitle it to a pension. The dog was born about 1863. It is said to be the oldest dog in the West. It is so old that its teeth are gone, and not having been provided with a false set, the canine lives on mock turtle soup and oysters in season. Recently the Village of White Bear adopted a stringent dog ordinance. All dogs caught on the streets on and after a certain day, were to be electrocuted. Taylor did not provide his animal with a tag, for the simple reason that the dog was too feeble to walk down the front steps, and had to content itself with looking out of the front window at the white winged yachts. One day the dog catcher caught sight of it, on the front steps and discovered the absence of a tag.

The dog was not arrested, but the owner was. The case came up before Justice of the Peace Lonegren. Taylor retained Attorney Thygeson to defend him.

An affidavit was filed charging prejudice, and claiming that the justice was hostile to the defendant, and a great breeze was created, as the justice swore by all that was hot and sulphory that he would not give up the case.

A transfer was made, however, and the hearing came up a day or two ago before Justice Clark. On motion of the defendant's counsel, the case against Taylor was dismissed, and the dog is no longer in jeopardy.

As a test case of the ordinance is to be made, the case may come up again in another form.—St. Paul Dispatch.

THOMAS H. FELIS.

The little village of Clinton, Oneida county, New York, where Grover Cleveland's father preached and the noted ex-President attended grammar school, is all excitement over a law-suit about a cat.

In this work cats have formed an important part. Not far from the college for many years has lived a very respectable and amiable maiden lady named Annie Q. Moore, who was the possessor of a well-proportioned male cat, for whom its owner had great affection. But like other cats he was prone to wander, and in his perambulations about a neighbor's barn, while making such music as did not "the morning stars when first they sang together," he was caught in a trap which had been set there.

Miss Moore was indignant and consulted Louis M. Martin, a lawyer of Clinton, who commenced suit in her behalf before Judge E. S. Williams.

The answer follows:

JUSTICE'S COURT, ONEIDA CO.
Annie Q. Moore
against
Joseph Searle and Albro D. Morrill.
(Before E. S. Williams, J. P.)

DEFENDANT'S ANSWER.

For answer to complaint herein
Defendants most respectfully
Deny the same, dispute the claim,
Appearing here regretfully.

This maiden plaintiff's Thomas cat
Was filled with bad propensity
To prowl and fight, and scratch and bite,
And howl with great intensity.

This feline ferae naturae
Would go with great velocity,
Not after rats but neighbor's cats,
And claw them with ferocity.

Felis damage-feasant was,
Sic scripsit magna curia;
To stop his breath and cause his death
Demnum absque injuria.

We tried to rid us of this pest,
"The cat came back" and squalled defiance;
Not knowing that 'twas plaintiff's cat
We thought we'd offer him to science.

And now we ask this learned Court
For judgment in this cause unholy,
In justice's name dismiss the claim
With costs and soothe our melancholy.

D. F. SEARLE.
Attorney for Defendants.

The Judge adjourned the case.—The World (New York).

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COMMUNICATIONS SOLICITED.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the district Courts of Minnesota are urgently solicited.

THE CONTINGENT FEE.

(By J. A. Murphy, of the West Superior, Wis.. Bar.)

The contingent fee as defined by Webster is remuneration that is dependent on an uncertainty. The Irishman, when asked his definition, said: "If you lose your case, the lawyer don't get anything; if you win, you don't get anything."

The contingent fee has been defined by P. H. O'Brien as the anticipated and conspired result of industry, conscience and intrigue; by Heber McHugh as the ne-plus-ultra of the lawyer in desperation.

The contingent fee is difficult in discussion, analysis or definition; although nothing is better known, realized and comprehended in its practical phase among the profession. The contingent contract is necessarily somewhat shrouded and an object of concealment and suspicion, being an essential ingredient in and descendant of the champerty of the olden days. The bar for generations was hampered, annoyed and terrorized by this champertous vision ever recurring in practice—this barrier to progress, this embargo on the exercise of thrift, this menace to the only speculation within the compass of the lawyer's life. The culmination of this was the

enactment of chapter 204, Laws of Wisconsin, 1901, with the singular title, "An act to aid impecunious litigants." As usual, the client appears in this enactment the beneficiary and the lawyer the philanthropist. By the terms of this statute the client may in effect contract to place uncontrollably his destiny, his support, his hope, his conscience and his future in the hands of the thrifty lawyer.

When the plaintiff in the prospective damage suit signs the contingent contract and delegates to the lawyer one-half of the recovery, he fancies and assumes that in consideration thereof he and all his kin will be supported by the contracting barrister. In most cases he lays down all his burdens, his moral and legal duty to support himself and his family is merged, buried, absolved in the solemnity and compass of this contingent contract. He no longer is concerned with the petty, drastic details which burden life, but his vision rests in serenity on the spectacle of numberless easy thousands. Though not his good fortune to sustain injury in defense of his country and draw stipends therefor, he yet mentally readily reconciles himself to the role of a manufacturing or railway company pensioner. To his creditors he will say: "I have a damage suit and a lawyer." To his lawyer he says: "I am looking to you." This contingent client upon making of his contract almost invariably renounces toil and adopts ease and simulation.

"He limps along the streets,
And he looks at all he meets—
So forlorn;
And he shakes his weary head,
And it seems as if he said:
'I am done.'

He says that in his prime,
Before the box car hit his spine,
And cut him down,
Not a better man was found
By the crier on his round
Through the town.

But now his nose is thin
And it rests upon his chin
Like a staff;
And a crook is in his back,
And a melancholy crack
In his laugh."

His mission on earth during the months pending trial is to court sympathy, to develop a malady and to feed in comfort on his contingent contract. His lawyer may grumble at his exactions, but what can he do? Will not the client say: "You explicitly agreed with me, in terms all under the contract, that you would pay all costs and expenses, and all you would expect of me was to keep my mouth closed on that subject. Now, don't kick, or I will talk." So, in mute, inglorious anguish, the poor contingent fee lawyer struggles on, and multitudinous are his struggles, and adept, subtle, varied must be his methods.

To make this contingency a reality, to convert theory and speculation into money, three things must exist. An accident has happened. the facts must fit the law, and a malady must exist primarily or by development. He and his client have contracted and in terms conspired to wreck the fortunes of their corporation foe. How shall this be done? There must first be conducted an examination of the client's conscience, and if one is found to exist, here is the first impediment. There is molding to be done. Client may have had a Christian education; hence the necessity of adroitness. Singularly the easiest conscience to subdue is the one that is in the best state of preservation; the reason being that it was never used. But vital spots may be touched even in the moral composition of the personal injury litigant; for conscience is the place wherein there may dwell a few holy emotions. It is the battlefield of contending passions, but it is also the pandemonium of sophistry. And the lawyer whom the populace pronounces a success comprehends this.

The successful plaintiff's attorney in a personal injury case to-day must be an actor, lawyer, physician, surgeon, machinist, oculist, aurist and an intense metaphysician. The essentials of the knowledge of these various professions must be crystallized in the brain of the myriad-minded lawyer. All the depths and shallows, all the chimerical mysteries of these learned callings must be luminous and kaleidoscopic in the cometary sweep of this lawyer's illimitable mind. He must be an actor: must study and must know the manifestations of pain. When his client takes the witness-stand, fresh from the hand of his lawyer, the result

of his training and coaching for the ordeal is almost equivalent to a second birth. When this client mounts the witness-chair, if he acts wisely, he will but reflect the training of his actor-lawyer. He should have that tired feeling in his face; the tremor of sadly impending dissolution in his frame; the deep, painful sigh as he places his crutches by the side of his chair. And then he should turn upon the jury an eye in whose melancholy recesses lurk the shadow of God's eternal frown—a hopeless gaze conveying to the jury by unvarying intuition the thought, "There is nothing left for me but heaven and prayer." And a composite facial picture such as to leave no doubt of the truth and the application of Gray's epic:

"Lone dweller by the dusty way,
Fair saint within a mossy shrine,
The tribute of a heart to-day,
Weary and worn, is thine."

His gaze should be hopeful, radiant, celestial; suggestive to the jury that, "I am not long for the toils of earth—I need but little here below, nor need that little long—but be bountiful, merciful to my loved ones at home."

If your client with whom you have contracted, and on whose words and actions hang the destiny of your contingent fee, happens to be a Finlander with a teaspoonful of brains your task will be more difficult—but this is your task.

This Finlander's husky, piping voice must be reduced and trained down to the utterance of a low, sweet, wailing speech, as if he had never in his life heard a harsher tone than a flute note. If client is kept on the stand for a long time he should manifest paroxysms of pain; and in this his work should never be coarse, for jurors sometimes possess a terrific prescience and probity of insight. He should never lose sight of his infirmity.

Theodore Thorson once said to a man with a small limp in his gait, "You have ankolosus." and the Swede said, "Yes, by Gad, I tank so." Surgery, anatomy and physiology should be mastered. Pat O'Brien was questioning a badly injured man with whom he contemplated entering into contractual relations of a contingent character, and every question Pat asked the man contained, by way of innuendo, a suggestion of the disarrangement of almost all of this poor man's functional organs. This man was tough; there seemed to be no limitations on his conscience; his language was sometimes shocking, but the liability was certain, and if a malady could be established the defendant corporation would have to jump.

No such physiological blunders as this should be made.

The lawyer should only be oratorical on the question of damages. And at this time he must, if possible, lead his mind away from a contemplation of his contingent fee. This is the only time when this should occur. The actor and the orator in the man should conspire to moisten a few jurors' eyes, and here consummate tact should be used by both lawyer and client. A quietly, softly sobbing female client is usually adequate, but if this condition is not present, then slight throat gastritis and short emotional croaking, with plenty of handkerchief application, will do the business. But your client should weep at the proper time. I once knew a lady who burst into violent sobbing when her attorney read the Northampton tables.

It is better to have the contingent fee than no fee at all. It is inciting to ambition, it suggests and develops generalship and strategy, it reveals all the moral freaks and mental acrobats. When the lawyer serves notice of his attorney's lien on the corporation, that imports that he is his brother's keeper. He is the sole repository of his client's mental and moral being. All things are by the compact referred to him. I knew a discharged brakeman who made a contingent contract with an attorney to develop an ordinary spine into a railway spine and institute a resulting damage suit. During the period of the spinal incubation and the pendency of the suit, the railway superintendent met the brakeman on the street, and said: "Good morning, James; it's a fine morning." James, a trifle overtrained, replied: "I neither deny it or affirm it, sir."

Clients' conception of contingent fee vary wonderfully. Some of them struggle for a compound contingent—a reversion in fee—a remainder over.

A tax-title shark once consulted me about foreclosing a mortgage. After informing me that by reason of long prac-

tical experience he was amply competent to foreclose it himself, the only countervailing consideration with him being a desire not to rob the profession, and after remarking parenthetically—falsetto like—that, of course, I would be willing to foreclose it for the taxable costs, he wound up with the stupendous proposition that, in the event that Judge Downer did not return in a certain time, in which event the judge was to foreclose the mortgage, and in the event that should I foreclose the mortgage by any accident, and if it should happen that the real estate should be bid in to him—then, in that event, he desired me to guarantee him that I would, within six months after the vesting of the title in him, and without additional compensation, sell the property for him at a sum in cash far in advance of the mortgage value of the premises. Then my heart sank and "hope for a season bade the world farewell."

If they will only give a man a fairly robust contingency to operate on, well and good; but when they present to you as their ultimatum the ghostly remnant of a frayed-out possibility, then the heart falters and one thinks of the ministry.

Many are the pitfalls in the way of the contingent fee lawyer. He may get past the court and get to the jury with a well-developed comminuted fracture, and this fratricidal jury by its verdict may pronounce it a comminuted fraud. He may be struggling boldly up the stony path carrying with him as a collision product a well-degenerated spinal cord, with the attendant dullness on percussion on the abdominal wall, and have with apparent safety reached the goal, and is about to the sympathetic lap of the jury, this time place his burden tenderly, confidingly in dead sure—when he will hear from the bench the metallic, dirge-like intonation, "The doctrine resipsa loquitor applies not here; the defendant's motion is granted."

Then comes the leaving the court room with heavy heart, the task of convincing your client that the court is an idiot, that the court's finding and decision in his case is the confirmation of the court's paresis, to gradually observe client's admiration for you wane and fade, to read in client's disappointed look a settled doubt as to your probity and merit, and the struggle to land an appeal, to stand off clerk's, stenographer's fees, the wearisome brief, and on the eve of the argument to learn by a terse notice from the defendant corporation that your client, being in distress, had applied to said corporation for relief; that said corporation had taken on an eleemosynary function and extended relief; in fact, had settled (of course without the knowledge or acquiescence of said corporation's local and trial counsel). In short, you are informed that should you wish to take a justice court fee for a wrecked medulla oblongata valued at $40,000, then, indeed, the said corporation will freeze over its eleemosynary donation pond and you must seek fees from your absconded client, or solace in the mysteries and charms of contemplation. 'Tis then in this purgatorial ordeal the contingent lawyer can console himself with the benign reflection: "I should not give way to these trifling things. My mind to me a kingdom is; I am an honored member of a learned and liberal profession; this is but an incident; my client is but a man. My profession's mission spreads out into the illimitable field of righting all humanity's wrongs. My comfort is that my principle was right, and it is for the principle I struggle. My client was false, but the individual is nothing. Men are but agencies of to-day and to-morrow cast into the oven, but within the scope and limitations of the grand principles which my profession are gradually advancing, the struggle I am making with its contingent success or failure is involved the weal or woe of generations yet to come."

There is some consolation in the fact that the profession is ever liberal in its award as to the sum to be paid when the contingency is removed—when the case is won.

And so time runs on in sunshine and in shadow, and the aggregated years have garnered up a heavy load of disappointment for the contingent lawyer as he treads the shadowy afternoon of life, still struggling. The disappointments, wrongs, misfortunes of a stormy, toiling past have placed him within the walls and limitations of a life of poverty. For him there is no resting place near life's drear close. No thoughtful, prayerful contemplation of the eternity beyond, no serenity of mind and conscience wherein faint dreams, like cool and shadowy vales, divide the billowy hours of love.

The contingent lawyer must die in the harness.

And so with ambition buried away for years, with only the regrets of life remaining, with the darkening pall of gloom of old age pressing down upon him, he struggles and journeys on to where the dusk is waiting for the night, and mutters in his last expiring accents: "Life and all its problems are contingent. I tried it through the medium and instrumentality of the law. I failed."—The Albany Law Journal.

DIGEST MINNESOTA SUPREME COURT DECISIONS.

—78—

A renewal affidavit of a chattle mortgage was taken before a person who signed the jurat as W. F. Cooley, "Recorder." The record showed the existence of the village of Morris, in Stevens county, Minn.; that in said village there was an office designated as office of "village recorder"; that there was in fact such an officer therein as village recorder; that said affidavit was in fact filed in said office, where the original mortgage was filed; that said Cooley certified upon said affidavit with proper venue thereon indorsed; that said affidavit was filed in his office, and affixed to his signature there the word "Recorder." *Held*, in connecnection with all the facts in this case, a sufficient designation of his office, and that the affidavit was valid.—71 N. W. 1.

—79—

1. *Held*, that the complaint herein states a cause of action under the provisions of Gen. St. 1894, c 75, § 5817, to determine adverse claims to real estate, and that this is not an action to remove a specified cloud upon the title to real estate.

2. Evidence considered, and *Held*, that it sustains the findings and decision of the trial court.—71 N. W. 2.

—80—

Evidence considered, and *held*, that it is not so manifestly and palpably in favor of the verdict as to justify the setting

aside of the trial court's order granting a new trial.—71 N. W. 3.

—81—

1. Where a trespass is admitted or proven, the presumption, in the absence of evidence to the contrary, is that it was willful, and the burden is on the trespasser to show that it was not.

2. Evidence considered, and *held*, that it does not sustain a finding to the effect that the defendants were not guilty of a willful trespass in cutting and carrying away the standing timber of the plaintiff.—71 N. W. 4.

—82—

1. *Held*, that an allegation in the complaint herein to the effect that the defendent negligently ran certain cars against a tender with such force as to injure the plaintiff is sustained by proof that it negligently omitted to do an act from which such result followed.

2. *Held*, that a request to instruct the jury that they could not infer negligence from the mere happening of the accident in this case was rightly refused as misleading, for the reason that the accident was of such a nature as to raise, in connection with the other evidence, an inference of negligence.

3. Evidence considered, and *held*, that it is sufficient to sustain the verdict, and that the award of damages is not so excessive as to justify the conclusion that it was induced by passion or prejudice. —71 N. W. 5.

—83—

1. Where an assignee in insolvency has acted upon a claim filed by a creditor, and has allowed or disallowed the same, his power and authority in respect to the allowance or disallowance of such claim are functus officio.

2. An assignee disallowed certain claims presented against the estate, and the claimant appealed to the district court. Pending the appeal the claimant dismissed the same, and sold and assigned the claims to a third party; and, as part of the same transaction, the assignee reconsidered his action, and allowed the claims in full in favor of the original claimant. Other creditors, through an appeal from such allowance by the assignee, sought and obtained a judicial inquiry as to the regularity of the act, and the right of the third party to participate in the dividends. *Held*, that the appealing creditors did not waive their right to question the power of the assignee to again consider the claims, after he had disallowed them, by litigating on the merits the right of the third party to share in the proceeds of the estate.—71 N. W. 7.

—84—

1. The power of the court to grant relief in a judgment by default is limited to that demanded in the complaint.

2. Where a default judgment is not justified by the complaint and its prayer for relief, the error may be reviewed and corrected by an appeal from the judgment.

3. *Held*, that the default judgment in this case granted material relief to the plaintiff in excess of that prayed in the complaint.

Canty, J., dissenting.—71 N. W. 9.

—85—

1. Accommodation paper represents and is a loan of credit to the party accommodated, and it is not necessary that he should be a party to the paper.

2. An accommodation maker or indorser of a bill or note cannot make the defense of a want of consideration, as against a person who, in the regular course of business and for value, has taken it before maturity, although the latter knew when he received the instrument that it was accommodation paper.

3. At the request of B., who was the president and general manager of a bank, defendants executed and delivered to him a promissory note, due in four months,—in which the bank was named as payee,—for his accommodation, and with the express understanding that he was to receive the proceeds of such note. B. immediately delivered the note to the payee bank, and caused the proceeds to be credited to his personal deposit account. He had previously directed another bank to charge to the account of his own bank the amount of his personal note held by the former, and, on the day he was credited with the proceeds of the accommodation note, he gave his check to his own bank to balance the amount so charged. *Held*, that the accommodation note was received in good faith by the payee bank, and that a good consideration passed, as between it and defendants.—71 N. W. 11.

—86—

1. *Held*, the verdict is sustained by the evidence.

2. The statements of a third person in possession of property, as to whom he holds it for, or as to who is the owner of it, are not hearsay, but competent evidence to prove the facts stated. They are a part of the res gestæ, and characterize the possession.

3. Where an issue in the case has been submitted to the jury, and they have made a special finding on the same, which is conclusive of the rights of the parties, if that finding must stand, it is immaterial that the court may have erred in its manner of submitting to the jury another separate and distinct issue. —71 N. W. 13.

—87—

Evidence considered, and *held*, that it sustains the verdict herein, to the effect that the defendants were guilty of negligence, which was the proximate cause of the death of plaintiff's interstate, in leaving a ditch made by them in a public alley unguarded and unlighted, and that the deceased was not guilty of contributory negligence.—71 N. W. 14.

—88—

1. A creditor not guilty of the fraud may ignore and repudiate a general composition setttlement with a debtor, where another creditor with the debtor's connivance, has secretly obtained the undue advantage and a preference in the settlement, and may recover of the debtor on the original claim.

2. A security given by a surety is voidable on the ground of fraud if there is, with the knowledge or assent of the creditor, such a misrepresentation to or concealment from the surety of the transaction between the creditor and his debtor that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased.

3. H. Bros., being insolvent, entered into a composition agreement with all of their creditors, among whom was P., a corporation, on the basis of 33 1-3 per cent. In accordance with the terms of the composition, other creditors were paid the agreed percentage in cash, while P. accepted and received promissory notes for the amount agreed upon,—three in number,—each secured by a surety. As a condition to concurring in the composition, and without the knowledge of the other creditors, P. demanded and received from the debtors a promissory note for the balance of its claim, giving back an agreement to surrender such note on being paid 25 per cent. of its face value. This secret agreement was concealed from the sureties, and they were induced to sign the composition notes in the belief that by the composition H. Bros. were released and discharged from all indebtedness. *Held*, that payment of the notes could not be enforced as against the sureties.—71 N. W. 16.

—89.—

Held (overruling Fitzgerald v. Railway Co., 13 N. W. 168. 29 Minn. 336), that the statute requiring railway companies to fence their roads is not exclusively designed to prevent domestic animals from straying upon the track; that where a young child, which is non sui juris, strays upon the track, in consequence of the failure of a railroad company to erect a fence as required by the statute, and is injured by a train, the company is liable to it for the injury.—71 N. W. 20.

—90 —

Held, that the evidence justified the finding that a certain deed had never been delivered. The mere recording of a deed by the grantor, without the knowledge of the grantee, in the absence of other circumstances, will not, as a general rule, amount to a delivery.—71 N. W. 22.

—91—

1. Mixed trains, made up in part of a passenger equipment and in part of freight cars, used for the transportation of passengers, are "passenger trains," within the meaning of defendant's articles of association and of its "lease contract" with the plaintiff; and the defendant is required to furnish such trains reasonable passenger depot facilites and service.

2. But it does not follow that such trains should be furnished the same facilities, and permitted to use the same tracks in a passenger depot, as are generally used by trains composed exclusively of a passenger equipment.

3. The plaintiff failed to make out any case for an injunction to prevent the defendant from enforcing a by-law excluding mixed trains from the use of those tracks situated north of the iron posts supporting the south side of the roof or shed of its depot, and confining such trains to the use of the track immediately south of such posts, commonly called the "transfer track," because it was not made to appear that the latter track does not furnish reasonable "passenger depot" facilities for such trains.

4. The defendant corporation has the right to establish and enforce reasonable rules and regulations as to the use of its depot and tracks by its tenant members, and what rules and regulations are necessary and proper must be left to the judgment and discretion of its board of directors, subject only to the condition that they shall not be in conflict with its articles of association and in the statutes defining its powers and duties, or violation of the terms of its contracts with its tenant members.—71 N. W. 23.

—92—

1 *Held* that, upon the admissions in the answer and upon the evidence, the jury was justified in finding that one R. had authority to make, in behalf of the defendant, the contract alleged in the complaint; also that he did make such a contract.

2. *Held*, also, that the plaintiff failed to make out any case for the recovery of damages resulting from the defendant's preventing him from completing the work under the contract.—71 N. W. 26.

—93—

Upon certiorari to review the action of the district court overruling relator's objections, and ordering judgment against its property in the city of St. Paul for a reassessment of benefits for grading Prior avenue, *held*: (1) That the description of the property assessed was sufficient. (2) That the evidence did not show that the assessment was fraudulent, or made upon a demonstrable mistake of fact, or upon an illegal principle or erroneous rule of law. (3) That the evidence justified the trial court in holding that the real estate in question was not held and used for "railroad purposes," so as to render it exempt from such assessments. (4) That there is no statute expressly limiting the time within which the city of St. Paul may make new assessments for local improvements when judgment on the original assessment has been denied, and that, in view of the special provisions of the city charter, it would not be permissable to adopt by analogy the statute relating to civil actions; that the only limitation as to time within which the city can make a reassessment is where the lapse of time is so long, and the laches of the city so great, that the right has become stale, and the city must be deemed to have waived or abandoned it. (5) That the facts do not bring the case within any such rule.—71 N. W. 27.

—94—

1. To render a conveyance or security voidable under the fourth section of the insolvency act of 1881 (section 4243 Gen. St. 1894), an intent on part of the debtor to give or allow a preference to one creditor over others is essential, whether the preference is secured by the active conduct of the debtor or by his passive conduct in suffering judgment to be obtained against him without making an assignment for the benefit of all his creditors.

2. Such intent does not necessarily follow as a conclusion of law or inference of fact merely from the fact that one who is technically insolvent within the meaning of the statute allows judgment to be obtained against him without his making such an assignment.

3. Former decisions reviewed and explained.

4. A conveyance of or lien upon land cannot be avoided by a purchaser of the property from the assignee in insolvency merely on the ground that it constituted a preference in violation of the provisions of the insolvent law. This can only be done by the assignee or receiver himself, by legal proceedings instituted for that purpose.

5. Distinction noted between conveyances merely voidable as preferential under the insolvent law and conveyances made by a debtor with intent to hinder and defraud his creditors.—71 N. W. 29.

—95—

1. The mere act of proving a secured demand as a claim against the estate of an insolvent does not work a release or surrender of the collateral security.

2. Where a party claiming under a title junior in point of time is resisting a prior unrecorded title from the same source, the burden is upon him (at least where he is a party to the original instrument creating such junior title) to prove that he purchased or acquired such title in good faith.

3. Rule applied where a judgment creditor claimed a lien on the real estate of an insolvent debtor paramount to a prior assignment by the debtor for the benefit of creditors, on the ground that the judgment was docketed in the county where the land was situated before the assignment was recorded in that county.

4. Evidence considered and *held* insufficient to justify a finding that the creditor had no notice of the assignment when the judgment was docketed.—71 N. W. 31.

—96—

1. Although a railway company possesses the right to the use of its track across a public highway, the public still retains its right to use such crossing as a highway, and in the proper use thereof the traveler is not a trespasser.

2. When a railroad car and engine are being pushed backward over a highway crossing, extra precautions should be used by the railroad company to avoid injury to travelers lawfully upon the track, and this rule is especially applicable where the crossing is used so infrequently at irregular times as a side track for switching purposes.

3. As a general rlue, a railroad company is required to take greater precautions at a dangerous crossing in a city than at the ordinary highway crossing in the open country.

4. *Held*, upon the facts in this case it was a question for the jury whether the railroad company was guilty of negligence in operating its cars over the public highway crossing in the manner it did at the time of the accident, and also whether the plaintiff's intestate was then guilty of contributory negligence.—71 N. W. 257.

—97—

1. Where the admissions of the principal are made in the course of the performance of the business for which the surety is bound, so as to become a part of the res gestæ, they are evidence against the surety.

2. Where there is a continuing suretyship for the faithful discharge of his duties by a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and continues him in such service, without the consent of the surety, express or implied, the latter is not liable for any losses arising from the dishonesty of the servant during his subsequent service. But this rule has no application to cases of mere breaches of duty or contract obligations on the part of the servant, not involving dishonesty on his part, or fraud or concealment on the part of the master.

3. Evidence considered, and *held*, that it was not sufficient to support a proposed finding to the effect that the plaintiff continued its agent, for whose fidelity the defendant's testator was surety in its service, after it was discovered that he was dishonest in such services.—71 N. W. 261.

—98.—

1. In pleading the defense of res judicata, it is sufficient to state, without giving details, that the facts alleged in the complaint in the former action were the same facts set forth in the complaint in the pending action.

2. The objection that a prior adjudication, pleaded as an estoppel, was between other and additional parties, is not well taken if both the person making the objection and the one pleading the former judgment were parties to the former action. But a party to the pending action, who was not a party to the former one and bound by the adjudication therein, is not entitled to plead such adjudication as an estoppel against one who was and is a party to both actions.

3. A joint answer must be good as to all of the defendants. If it does not state a defense as to all of them, it is bad as to all —71 N. W. 26

—99.—

Gen. Laws 1893, c. 151, provides for the taxation of property undervalued or unlawfully ommitted from assessment, and for reassessment where there has been a gross undervaluation of such property. *Held*, that such law is unconstitutional. —71 N. W. 265.

—100.—

An insuarnce company duly insured certain property, which was afterwards damaged by fire, and the extent of such damage was adjusted by it and the insured, but there was no adjustment by the parties of any liability on the part of the insurer, and no promise to pay the damage. The policy provided that no suit or action on said policy should be sustained in any court of law or equity unless commenced within twelve months after the fire. More than a year elapsed before an action was brought by the insured. *Held*, that the mere adjustment of the amount of the loss by the parties was not of itself an admission on the part of the insurance company that any liability existed against it on such policy, or raised an implied promise to pay it, and that the action was barred by the statute of limitations.

Canty, J., dissenting.—71 N. W. 272.

—101—

1. In the absence of a return to this court from which the contrary is made to appear, it must be presumed, on appeal from a judgment, that it was duly authorized and regularly entered. That the judgment was irregularly entered, or was unauthorized and unwarrented, cannot be made to appear by a return which does not purport to contain a copy of the judgment roll, or of all the papers and files which should be made a part of such role.

2. Where, in an action in claim and delivery, the property in controversy has been delivered to the plaintiff, and upon the trial the action is dismissed on the ground that he has failed to substantiate his cause of action and right to recover, the defendant is entitled to a judgment. under Gen. St. 1894, § 5420, for a return of the property, or for its value in case a return cannot be had, if in his answer he has demanded such a return.—71 N. W. 273.

— 102—

A judgment entered against a corporation on default for want of answer in an action brought to recover on a contract for the payment of money only, which action was instituted after the corporate property, effects, and assets had been sequestrated, and a receiver appointed under the provisions of Gen. St. 1894, c. 76, for the benefit of all its creditors, is not entitled to be exhibited and allowed as a claim against the estate, without any further proof of the existence and bona fide character of the claim on which such judgment was predicated. A complaint in intervention, made by an alleged creditor in proceedings under chapter 76, based solely upon such a judgment, states no claim, or cause of action.—71 N. W. 274.

—103—

Held, in a personal injury case, that the evidence was sufficient as to defendant's negligence, aud that this negligence was the cause of the injury, to support the verdict in plaintiff's favor. And, further, that on the evidence the question as to plaintiff's contributory negligence was for the jury.—71 N. W. 276.

—104—

Held, in an action, tried by the court without a jury, brought to recover for injuries received by plaintiff, and for damages done to his proporty, in a collision with a street car, that the evidence supported a finding that the motoneer was negligent in the operation of the car, and also that it was not conclusively shown that plaintiff was guilty of contributory negligence which would preclude a recovery.—71 N. W. 379.

—105—

There was an agreement to purchase a certain quantity of wheat out of a greater quantity, all of the same uniform kind and quality. The price was paid, but the quantity sold was not segregated. *Held*, it was a question of fact for the jury whether or not it was the intention of the parties that title should pass before delivery, and it was error to hold as a question of law that title had passed.—71 N. W. 380.

—106—

1. A certificate of sale, required to be issued by a county to a purchaser at a sale of lands forfeited to the state, and under the provisions of Gen. Laws 1881, c. 135, is not valid unless executed at the time of the sale, or within a reasonable time thereafter.

2. It must be *held* as a matter of law, that such a certificate was not executed or issued within a reasonable time, where it simply appears that the county auditor, of his own motion, or at the request of the purchaser, executed the same more than 2½ years after the sale, and more than 2½ years after he had issued a certificate

—invalid on its face—which had been accepted by the purchaser.—71 N. W. 381.

—107—

1 . A person who has made an entry of government land under the provisions of the United States homestead act, at the proper land office, has received a receiver's receipt for the fees required upon such entry, and resides upon the land conveyed by such entry when county commissioners lay out and establish a public road across the same as authorized by Gen. St. 1894 §1838, must be treated and considered as the owner of the land for all purposes connected with the laying and establishment of such road. He is therefore entitled to have the damages he has sustained assessed and awarded by the commissioners.

2. On an appeal, under the provisions of Gen. Laws 1895, c. 54, from the decision and detetmination of the commissioners laying out and establishing a public road, the appellant has the right, if his notice of appeal be sufficient, to contest the regularity of the proceedings on which the decision and determination of the commissioners is founded, as well as the validity of the decision and determination itself; and, if unsuccessful, he may have a reassessment of the dan ages he has sustained by reason of the laying out and establishment of the road.—71 N. W. 382.

—108—

1. Where the garnishee discloses a fund which belongs to the defendant, unless before the service of the garnishee summons the same has been assigned to the intervening claimant, the burden is on such claimant, under section 5318, Gen. St. 1894, to show that the fund belongs to him as against the plaintiff, a creditor of the defendant.

2. When the claimant pleaded and proved an order drawn in his favor by defendant on this particular fund, and accepted by the garnishee before the garnishee summons was served on them, but the claimant failed to prove any consideration for such order, *held*, the order, being drawn on a particular fund, was non-negotiable, though drawn to defendant's order, did not import consideration, was merely an equitable assignment of the fund, and the claimant failed to "maintain his right" to the fund.—71 N. W. 383.

—109.—

1. To prove an indebtedness on the part af a judgment debtor, and as of the day of its rendition, the judgment of a court of competent jurisdiction is admissible in evidence in a subsequent action between other parties. It is competent evidence of its own existence and of its legal effects for and against strangers as well as for and against parties and privies. Of course, it may be impeached by strangers on the ground of fraud and collusion, and perhaps on other grounds.

2 Several questions raised on this appeal, but of no special consequence, disposed of.—71 N. W. 384.

—110—

1. In an action to foreclose a mechanic's lien, the commencement of the action against the owner of the property does not preserve the lien as against other lienholders or incumbrances beyond the statuatory period for bringing such an action. Smith v. Hurd, 52 N. W. 922, 50 Minn. 503, followed.

2. Rule followed that a judgment is not evidence against those not parties or privies to it of the sxistence, prior to its rendition, of any of the facts upon which it was founded.—71 N. W. 386.

—111.—

Held, that there was no evidence of negligence on part of the city; that if there was any negligence proven, it was that of plaintiff's fellow servant.—71 N. W. 387.

—112.—

1. Plaintiff's evidence on the trial, and his examination before a notary, taken after a loss, pursuant to the terms of the insurance policy, related to the same matters, and most of the statements made on the one occasion are mere repetitions of those made on the other, but there were several material contradictions and discrepancies. Defendant offered in evidence the whole written examination, which was very long, and, when the offer was refused, proceeded to offer separately each question and answer, which was refused. *Held* no error; it was the duty of counsel to pick out and offer only those portions which contradicted in some degree the evidence so given on the trial.

2. Expert evidence as to whether a certain quantity of goods in a certain room could have burned up without destroying the floor, *held* incompetent.

3. Evidence *held* sufficient to sustain the verdict.

4. A provision in an insurance policy, providing for submitting the amount of loss to arbitration, is valid; but *held*, the insurer waived this provision by denying its liability, and telling the insured, in substance, that if he got any insurance money he would have to recover it in court.

5. The policy provided that it should be void if the insured misrepresented material facts, or was guilty of fraud. *Held*, the court properly refused defendant's request to charge in effect, that the slightest possible exaggeration of the amount or value of the property destroyed, made knowingly and willfully in the proofs of loss avoided the policy.

6. The policy provided that it shall be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, or the subject thereof, whether before or after loss. *Held*, such willful false swearing as to a material matter, on such examination of the insured after the loss, forfeited the whole sum due, and not merely the amount due on the particular item of damage, or for the loss of the particular article to which the false statement related.

7. The defendant pleaded, and gave evidence tending to prove, certain complete defenses. *Held*, the court erred in charging the jury that the plaintiff was, in any event, entitled to recover a certain sum.—71. N. W. 388.

—113—

1. A written instrument for the sale of standing timber, to be severed and carried away from the land and manufactured into lumber by the vendee, in which it was provided that the title to the timber and its manufactured products should remain in the vendor until the entire purchase price was paid, and for a release from time to time of the vendor's claim upon blocks of not less than 1,000,000 feet of the lumber, upon the payment of an agreed price per 1,000 feet, *held* to be either a conditional sale contract or a chattel mortgage to take effect as the timber was severed from the land, and that in either case it should have been filed in the proper office.

2. Such instrument was not filed until two months before the vendee made an assignment in insolvency. *Held*, that the assignee could not avoid the contract solely on the ground that he represented creditors whose debts were contracted intervening the making and filling of it, but if the instrument was withheld from record pursuant to an agreement of the parties thereto, in order that the credit of the vendee might not be impaired, it would be a fraud as to creditors of the vendee who became such relying upon his apparent absolute ownership of the property in his possession, and as to such creditors the vendor would be estopped, and they would be entitled to have his claim upon the property subordinated to their equity to have their respective debts first paid out of the property. *Held*, further, that the assignee can enforce such equity.

3. *Held*, that the trial court erred in refusing to find upon issues herein as to such alleged agreement.

Mitchell J. dissenting.—71 N. W. 389.

—114—

1. Where a husband and wife had resided on the wife's property as their property, and he had thereby acquired a homestead right in the property, *held*, a judgment of absolute divorce obtained by her against him, terminated his said homestead right.

2. Thurston v. Thurston, 59 N. W. 1017, 58 Minn., 279, followed, to the effect that where a party goes from this state to another, and actually acquires a bona fide residence therein before commencing in its courts an action of divorce, the judgment of divorce though irregular, is not void merely because the action was commenced before he had resided in that state the length of time required by its laws before commencing the action.

3. *Held*, the repeated trespasses and other acts of defendant, and other facts found by the court, were sufficient to warrant a judgment permanently enjoining him from interfering with the property of plaintiff and the business carried on by her on the same.—71 N. W. 393.

—115—

Where, after the execution of a mortgage, the mortgagor became insane, and while in that condition the mortgage was foreclosed under the power, the foreclosure proceedings are regular in form, and comply with the letter of the statute, but the mortgagee and the purchaser at the sale (who instigated the foreclosure),

believing that the mortgagor, by reason of his insanity, would not be able to redeem, did, for the purpose of defrauding him, sell and bid off the property for a grossly inadequate price, the year to redeem expired, and no redemption was made by reason of the continuance of such insanity—*held*, the sale is not absolutely void, but voidable in a court of equity, which, under such circumstances, requires from the mortgagor and such a purchaser a higher degree of fidelity toward the helpless mortgagor than does a court of law; that the only remedy of the mortgagor is an action in equity to set aside the foreclosure sale, and for leave to redeem, and he could not set up such cause of action as an equitable defense to an action of forcible entry and detainer, brought against him by the purchaser in the municipal court of Duluth, for restitution after the year to redeem had expired, though the statute authorizes that court to try such an action where the title to real estate is involved; and the judgment in that action is not a bar to this action.—71 N. W. 395.

—116—

Held, subchapter 14, of chapter 46, Gen. Laws 1889, did not authorize the probate court to proceed to find a person insane without bringing him into court, or giving him notice of the proceedings being taken against him, or an opportunity to defend, and is not for any such reason unconstitutional because not providing for due process of law.

2. *Held*, the record of proceedings in the probate court to commit an alleged insane person to the hospital for the insane does not impeach itself, and show want of jurisdiction, by its own silence, but, in order to impeach the judgment of the court collaterally, the want of jurisdiction must affirmatively appear to the record itself. The fact that it does not appear that any warrant had been issued for the arrest of the alleged insane person, or that he was present in court at any time during the proceedings, is not sufficient to impeach the judgment or show want of jurisdiction.

3. Section 267 of said subchapter 14, provided that the court shall appoint two others, who, with the judge himself, shall constitute a jury to examine the person, and find whether or not he is insane. The court appointed three others, who, with the judge, held the examination, and found the person insane. *Held*, the proceedings are not void by reason of such irregularity, and cannot be impeached collaterally on habeas corpus.—71 N. W. 396.

—117—

1. When a master furnishes his servant appliances to do the work in hand, and directs him how to use them, and warns him of the danger of using them in a different manner, and the servant, in disregard of such direction and warning, and without any necessity for so doing, uses the appliances in the manner in which he was told not to use them, and he is thereby injured, he cannot recover.

2. *Held*, that the court correctly instructed the jury to the effect that if, from the evidence, they found certain facts, such facts would amount to contributory negligence on part of plaintiff's intestate.—71 N. W. 398.

—118—

1. A written instrument signed "S. Holdridge" does not "purport" to be signed or executed by "C. S. Holdridge," so as to be admissable in evidence against the latter, under Gen. St. 1894, § 5751, without proof of its execution by him.

2. *Held*, also that the parol evidence in this case was insufficient to identify the defendant as the person who executed the instrument under the name of "S. Holdridge."—71 N. W. 399.

—119—

The proviso in section 11, Gen. Laws, 1895, c. 149, requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after notice of its arrival, is unconstitutional and void, not being a lawful exercise of the police power of the state. —71 N. W. 400.

—120—

A ward failed for 22 years after she attained her majority to take any steps to compel her former guardian to render and settle his account in the probate court, or turn over the property in his possession. This delay was not explained or excused. During all this time there was nothing done on part of either the ward, the guardian, or the surities on his bond by way of a recognition or admission

of the guardianship as a subsisting or undischarged trust. In the meantime one of the sureties on the guardian's bond had died (nine years before suit on the bond), and from the facts disclosed by the evidence presumely the guardian had become insolvent. *Held*, in an action on the guardian's bond against the surviving surety, brought by the ward over 22 years after she came of age, that her laches, irrespective of any statute of limitation, was a bar to her recovery.—71 N. W 402.

—121—

Held, that the appellant having failed to make any assignment of errors as required by rule 9 of this court, the order appealed from is affirmed.—71 N. W. 615.

—122—

Evidence considered, and *held*, that the findings of the referee herein are sustained by the evidence.—7I F. W. 615.

—123—

1. Evidence considered, and *held* that it sustains the verdict.

Held, that the affidavit of a juror, offered for the purpose of impeaching the verdict herein by showing misconduct on the part of the jury, was neither sufficient nor admissible for such purpose.

3. *Held*, that the trial court did not abuse its discretion in denying a motion for a new trial on the ground that the defendants were surprised by the testimony of a witness called by them.—71 N. W. 616.

—124—

1. An agreement for the cultivation of land on shares construed, and *held* to create the relation of tenants in common in the crops, as between the owner and the occupier of the land; that, in view of all the other terms of the agreement, the only effect that can be given to a provision "that, until division of the crops, the title and possession shall be and remain in the owner of the land," is that he shall hold the same as security for the performance of the contract by the occupier.

2. Hence, so long as the occupier performs all the terms of the agreement the owner of the land has no right to take possession from him, but the occupier has a right to the possession of the crops for the purpose of performing thereon the work which he is required to do under the contract.—71 N. W. 617.

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An appellant court has the inherent power to dismiss an appeal which is manifestly and palpably frivolous and without merit; but this will only be done where it is perfectly apparent, without argument, that the appeal is frivolous. 71 N. W. 619.

—126—

1. Where the affidavit and complaint, in replevin, in justice court, state the value of the property at $100 or less. the justice acquires jurisdiction to proceed and dispose of the case on the merits, though the value is in fact more than $100, unless the defendant, as he may do, pleads and proves, in bar to the jurisdiction, the fact that the value exceeds the jurisdictional limit. But pleading the fact alone does not oust the justice of jurisdiction. The fact must also be proven and determined in favor of the defendant. When this is done, the jurisdiction thenceforth, and not before, ceases for all purposes, except the entry of the statutory judgment of dismissal in replevin cases.

2. Evidence herein considered, and *held* to be substantially conclusive that the value of the house in question exceeds $100.—71 N. W. 619.

—127—

A banking corporation organized under the general laws of this state has the power to make interest-bearing time certificates of deposit. 71 N. W. 621,

—128—

1. Where the performance of a special contract involves the furnishing of both material and labor, and the contract is entire, and the breach total, loss of such profits as would have accrued from the contract as the direct result of its fulfillment may be recovered in an action for a breach thereof.

2. Such profits may be proven by showing the difference between the contract price and what it would have cost to have performed; but no inflexible rule as to how such cost is to be ascertained can be laid down, for the profits must be determined according to the circumstances of each case and the subject-matter of the contract.

3. The plaintiffs herein agreed to furnish wire, and set up for the defendant a secondhand arc motor, to be as good as new, for a stipulated price. They purchased, to enable them to perform the contract, in an outside market, a second-

hand motor, changed and refitted it to make it conform to the terms of the contract, and were ready to set it up when the defendant repudiated the contract. *Held*, that the trial court did not err in receiving evidence of the actual amount paid by them for the motor, and the materials and labor necessary to refit and set it up, as a basis for ascertaining the profits they would have made, except for defendant's breach of the contract.—71 N. W. 622.

—129—

1. It is a general rule that a surety cannot direct the application of payments made by his principal, and that he is bound by any application made by the principal and the creditor, or either.

2. This rule applies only to cases where the principal makes the payment from funds which are his own, free from any equity in favor of the surety to have the money applied in payment of the debt for which he is liable.

3. Where the specific money paid to the creditor, and applied on a debt of the principal for which the surety is not bound, is the very money for the collection and payment of which he is surety, he is not bound by such application; and he is equitably entitled to have the money applied to the payment of the debt for which he is liable, unless the creditor shows a superior equity to have the application, as made, stand.

4. Where payments have been applied by the agreement, express or implied, by the creditor and the principal, the burden is upon the surety to show that the application is inequitable as to him.

5. Evidence considered, and *held*, that it was not sufficient to support the verdict therein.—71 N. W. 624.

—130—

1. The defendant railroad had in its general yards at St. Paul a large, heavy transfer table, built upon wheels, which rested upon rails, and was movable, the whole machinery being placed in a large pit, and used for transferring heavy material from its shops to its railroad cars. Iron braces connected different parts of this machinery a few inches from the ground. This table was operated either by compressed air, cranks, or by employes pushing it by hand; some of the employes, while doing so, standing inside the braces. Plaintiff, while in this position, and pushing the table with his shoulder, came in contact with a block 2 feet 10 inches long, 8½ inches wide, and 4½ inches thick, which was lying between the rails, and, being unable to stop the moving of the table, plaintiff was forced into the angle of the braces, and caught by the block, whereby his leg was broken. Plaintiff had on two or three previous occasions shortly before this accident, and only a few hours before, on the day of the accident, pushed this table in the same manner. The block was no part of the table, and no part of the instrumentalities by which it was moved, and it was not shown by what means it was placed between the rails, whether by accident, a wrongdoer, or an employe. No one had ever seen it there before, and the length of time it had been in that position was not proven. The transfer table, with its appurtenances, had no defects, and was suitable for the purpose for which it was constructed, and the defendant's other emyloyes assisting in moving the table were competent for the work in which they were engaged.

2. In actions of this kind the negligence of either party is to be measured by the conditions of things existing at the place where the injury took place, and then known to exist by each party.

3. The defendant having furnished suitable instrumentalities for the work to be performed, competent workmen to assist in the work, and being without notice in fact of the dangerous obstruction, and as its existence for so short a time did not imply notice, there is no presumption that the accident happened in consequence of a failure of duty on the part of defendant towards plaintiff.

4. The mere happening of an injury to the servant was not evidence of negligence on the part of the master, and under the circumstances the burden of proving negligence on the part of the defendant rested upon the plaintiff.

5. *Held*, that the defendant was not guilty of negligence in the matter, and the action is not maintainable.—71 N. W. 662.

—131—

Within the city of St. Paul, and on the premises of the plaintiff, is a natural water course, used by him in the tanning business. The city graded a public street

which adjoins his premises, and in doing so erected a large, solid embankment across this water course, except that it built a wood culvert under the embankment, and across said street, for the purpose of carrying off said water. By reason of an unusually heavy rainstorm this culvert was unable to carry off the large volume of water which there accumulated, and it flowed back upon and damaged the plaintiff's personal property situated in his tannery. Plaintiff brought an action against the defendant to recover damages for such injury, and the facts proven warranted the court in giving to the jury, as part of its charge, the defendant's request, as follows. "The city of St. Paul cannot be held liable in this case unless the damage complained of was caused by a lack of reasonable care or skill on its part. It was not an insurer of the sufficiency of the means adopted to carry of the water of the creek. It was not apsolutely bound to provide an adequate outlet for this water. If it employed competent engineers or other agents to construct the work. and they, in the exercise of an honest judgment, constructed a box of such capacity that they were reasonably justified in believing, and did believe, in view of all the circumstances, it would be sufficient to carry off this water, the city would not be liable, although it did, on the occasion when plaintiffs premises were flooded, prove insufficient. Nor was it required to anticipate extraordinary and unusual storms, which would not be expected to occur in view of the past history of the country." The court refused to give this request. *Held* error. —71 N. W. 664.

—132—

1. *Held*, upon the facts found (the tenth finding being a mere conclusion of law), that, as between the mortgagors and the second mortgagee, the latter continued to be mortgagee in possession until the expiration of the period of redemption from the foreclosure of the first mortgage, and that as such he was entitled (subject to the rights of the first mortgagee under the agreement of July, 1894), to apply the rents and profits to the satisfaction of his mortgage until it was reduced to $40,000.

2. Inasmuch as under no circumstances would the rents and profits be sufficient to reduce the second mortgage to that sum, and as the plaintiff (the assignee of the mortgagor's interest in the rents and profits) has no interest in the mortgaged premises, and is not liable for any of the incumbrances on them, she is not in position to object to the terms of the accounting for the rents and profits as allowed and adjusted by the trial court.

3. The second mortgagee obtained a judgment and decree of foreclosure, which, however, was void, by reason of want of due service of the summons. He assigned as collateral security to the intervening bank this judgment and decree, and all right, title and interest which he had therein, and in and to the debts therein described, and in and to the mortgaged premises which might be acquired by said decree, and in and to the proceeds of any sale thereunder. *Held*. upon the facts found (the ity of the judgment of foreclosure, this operated as an assignment of the mortgage and debt secured thereby, and of the rents and profits to which he was entitled, as mortgagee in possession, as security for the payment of his mortgage.

4. Also, that the bank did not waive or release this assignment by subsequently bringing suit on the debt as security for which the assignment was made, and serving a garnishee summons on the party in possession of the rents and profits.—71 N. W. 665.

—133—

1. In an action to establish and foreclose a mechanic's lien it is *held* that the trial court erred when admitting in evidence a certain exhibit, which tended to alter, vary, and contradict the terms and conditions of the contract between the parties under which the materials were furnished and the labor performed.

2. *Held*, further that certain findings of fact were not warranted by the evidence.—71 N. W. 667.

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The plaintiff became a member of the defendant association, and received a policy issued by it, conditioned that if he complied with all the rules and regulations, and paid certain annual dues, and fixed bimonthly assessments, there should be paid to a certain named person the sum of $2,500 at his decease. If he failed to comply with these conditions, the policy, by express terms, lapsed, became

void, and all of the plaintiff's rights thereunder became forfeited. It was also provided in the policy that, in the event plaintiff became totally and permanently disabled (such disability to be determined in a certain way), surrendered his policy for cancellation, and made a request therefor in writing, the association would pay him $1,250 in full discharge and settlement of all claims. *Held*, although plaintiff became disabled while the policy was in force, that he could not recover under this indemnity clause, unless he exercised the option conferred by its terms before the policy lapsed, became void, and his rights thereunder were forfeited for nonpayment of assessments. The right of action under such a clause arises upon the exercise of the option, not upon the happening of the disability.—71 N. W. 668.

—135—

1. By answering after his demurrer to the complaint is overruled a defendant waives an exception to the decision on the demurrer.

2. By stipulation between counsel the trial of an action was postponed for several weeks for the sole purpose of taking the testimony of two of defendant's witnesses, whose names were mentioned in the stipulation. One of these witnesses failed to appear, and when defendant undertook to substitute another person as witness in his place the court sustained an objection made by plaintiff's counsel and refused to permit him to testify.

Held, whether the plaintiff had a strict legal right to exclude the testimony, or whether the admission of the evidence was discretionary with the court, that there was no error in the ruling.

3. Certain assignments of error *held* to be uncertain, indefinite, and insufficient.—71 N. W. 670.

—136—

The court below made an order directing the receiver of an insolvent banking institution to sell all of the assets of said insolvent remaining in his hands at public auction, but subject to the approval of the court. Upon a report of the sale, the court refused to confirm, on the ground that the prices for which the assets sold were inadequate. *Held*, on an appeal taken by purchasers at the sale from the order of refusal—and this being the only question presented—that the court did not abuse its discretion when making the order.—71 N. W. 671.

—137

1. As to judgments entered and docketed while that part of Gen. St. 1878, c. 68, sec. 1 (Gen. St. 1894, sec. 5521), which provided for a homestead exemption of one "lot," if within the laid-out or platted portion of an incorporated city, town, or village having more than 5,000 inhabitants was in force, and prior to the amendment (Laws 1891, c. 81), the extent of the judgment lien upon real property in such laid-out or platted portion must be determined by construing the language used in section 1, and not by chapter 81, supra; it being conceded that the amendatory act did not decrease the size of the homestead, and also that by such an amendment any lien rights theretofore acquired by a judgment creditor could not be diminished or injuriously affected.

2. The word "lot," as used in that part of Gen. St. 1878, c. 68, sec. 1 (Gen. St. 1894, sec. 5521), above referred to, must be construed in accordance with the following rules: First, the mere fact that a tract of land is designated as a "lot" upon the plat is not conclusive; second that, to be practical, we must be governed and the homestead must be measured by the ordinary, prevailing, or standard size of lots in the plat in which the particular tract may be located; and, third, that the tract designated as a lot upon the plat must be materially substantially larger than the ordinary, prevailing, or standard lots in the same plat, in order to justify a court in holding that it is not all within the spirit and intent of the exemption statute, and wholly exempt.

3. What are the ordinary, prevailing, or standard lots in size, in any particular plat, is not to be determined by ascertaining the average size of all lots, but by taking into consideration such lots as fairly represent, in area, a majority of the entire number; thus excluding fractions or small lots, as well as lots excessively and unreasonably large when compared with the great bulk.

4. *Held*, applying the rules above stated to the facts in this case, that the court below did not err when it determined that the tract of land in contro-

versy, 50 feet in width from front to rear, the same being part of a "lot" over 111 feet wide by more than 147 feet in depth, as platted, was not exempt as a homestead, under Gen. St. 1878, c. 68, sec. 1 (Gen. St. 1894, sec. 5521).—71 N. W. 672.

DIGEST MINNESOTA DISTRICT COURT DECISIONS.

—1—

2ND DISTRICT RAMSEY CO.

Hull vs. Chapel.

Kelly, J. 1. Money paid to a sheriff to redeem from a mortgage foreclosure comes into his hands by virtue of his office, under G. S. 1894, sec. 788. 53 Minn. 346.—55 N. W. 557.

2. Where a sheriff so holding money tendered it to the duly authorized attorney of the party entitled thereto, and such tender was refused, the sureties on the sheriff's bond were thereby released. 53 Minn. 350.

3. The application papers do not disclose a default on the part of the defendant warranting an application of the powers of the court under sec. 788. 53 Minn. 350.

—2—

2ND DISTRICT RAMSEY CO.

Starkey vs. Sweeney et al.

Bunn, J. Plaintiff held a note against one of the defendants, and as security for the payment thereof claimed under an agreement whereby the maker purported to give a lien on his interest in his father's estate. The plaintiff brought this action to enjoin defendants from proceeding with final settlement of said estate pending a determination of plaintiff's interests in the share descending to the maker of the note. *Held*, that if such agreement was sufficient to operate as a transfer, or to give a lien on the maker's share of the estate, the plaintiff should appear in the probate court and take part in the proceedings therein, and that injunction will not lie.

—3—

2ND DISTRICT RAMSEY CO.

Wallace et al. vs. Forrestal et al.

Kelly, J. 1. Defendants gave a bond to the City of St. Paul for the use of all persons who might "do work or furnish material" for the execution of a contract to construct sewers. *Held*. that there was no liability on the bond for "potatoes," "hay," "oats" and "butter," furnished by a grocer to a boarding boss to feed men and teams engaged on the work.

—4—

2ND DISTRICT RAMSEY CO.

In re Estate of Norman W. Kittson, Deceased, the St. Paul Trust Co. as Trustee of the estate of Alfred S. Kittson, under the Last Will and Testament of Norman W. Kittton.

Kelly, J. 1. There being no such proceeding as above entitled properly pending in this court, it has no jurisdiction over the trustee on a mere motion to compel such trustee to pay over moneys for attorneys' fees for services rendered and contemplated on behalf of a spendthrift under guardianship.

2. Nor is this changed simply because the trustee assumes to answer the citations, where such answer is merely an objection to the granting of the relief prayed for.

3. Such answer does not constitute a voluntary submission of a question of law upon an agreed statement of facts under G. S. 1894, secs. 6083-6084.

—5—

2ND DISTRICT RAMSEY CO.

State ex. rel., Sisters of the Order of St. Benedict and Aloysia Bath, executrix of the estate of M. Julia Will, Deceased.

vs.

Gebhard Willrich, as Judge of Probate for Ramsey Co.

Otis, J. 1. While the Constitution vests the supreme court with original jurisdiction to issue writs of certiorari, such jurisdiction is not exclusive. There is no limitation on the power of the legislature to vest the district court with like jurisdiction, as it has done. The district court is a court of appeals from the probate court, and to this court only from such probate court can appeals be taken. It is, therefore, a proper court to review the actions and proceedings of the probate court, and for such purposes it is a court of superior jurisdiction, and may correct the errors of the probate court when such correction is proper and

2. Under G. S. 1894, sec. 5388, the district court is always open for the transaction of business, and for the hearing of all matters brought before it, or a judge thereof, except the trial of issues of fact, and a judge may allow a writ of certiorari when the court is not in session.

—6—

2ND DISTRICT RAMSEY CO.

Nettleton vs. Ramsey Co. Land and Loan Co.

Otis, J. The liability of stockholders is not a trust fund, and, in an action under G. S. 1894, chap. 76, to enforce double liability, attorney fees for bringing and prosecuting the action will not be allowed and entered in the judgment against the stockholders.

—7—

5TH DISTRICT CROW WING CO.

Vinton Minors by A. Vinton, Guardian, vs. First National Bank of Brainerd.

Bank not bound to refuse a depositor his money even if it has notice that it is held by him in trust as a guardian, and that he intends to lend it without security, if the bank makes no profit by the transaction.

Searle, J., Seventh District, acting for Holland, J., Fifteenth District.

McClenahan & Mantor for plaintiffs, W. A. Fleming and Leon E. Lum for defendant.

A guardian deposited to his individual credit five years ago, pension checks, one payable "to the order of Alonzo Vinton," with the following words in one corner: "Gdn of M. of Marcus M. Vinton." The guardian endorsed this check "Alonzo Vinton, Guardian Minor Children of Marcus M. Vinton," and the deposit was taken by the bank's cashier. It does not appear how the other checks were drawn or endorsed. Numerous sums were drawn by the guardian to tradesmen and others, and among them was $1,000, paid to a partnership of which one of the members was then the bank's president, who personally had no knowledge of the trust character of the fund. Vinton gave no check for this money, but authorized the president to charge it to his account, and it was so charged and credited to the firm's account, and a note for the amount was deposited for collection to Vinton's credit, and payments made upon it which were credited to Vinton—all in the usual course of business. The minors by this same guardian now sue to recover an amount equal to the amount due upon the note without interest, claiming that the bank was affected with notice of the trust character of the fund by the check, and should not have allowed its president to borrow, or the guardian to lend, the money without real estate security. It appears that the firm to whom the money was lent is financially responsible, but one member denies that he knew of the loan. The bank made no profit by the transaction.

Judgment for defendant.

Syllabus and statement by Mr. Lum.

ABSTRACT OF RECENT CASES.

Possession of land under a parol promise of a gift is held, in Schafer v. Hauser (Mich.) 35 L. R.A. 835, to be sufficient foundation for adverse possession on the part of the donee, and this is upheld as against a subsequent mortgage by the donor. The annotation to this case reviews the authorities on adverse possession under parol gift.

The right of an alien corporation to acquire lands "under mortgage" is held, in Oregon Mortgage Co. v. Carstens (Wash.) 35 L. R. A. 841, to include an acquisition of the land by deed from the mortgagor, where this was done in good faith to satisfy the mortgage debt, and the original purpose was to make a mortgage and not to transfer the title.

The reversal of a judgment on a verdict for excessive damages is held, in Smith v. Times Pub. Co. (Pa.) 35 L. R. A. 819, to be properly authorized by statute, and not to infringe the constitutional right of trial by jury.

The right of an attachment creditor to have a prior attachment set aside because it was without legal grounds, and based on a false affidavit, and was permitted by the debtor to give a preference, was denied in Blaser Bros. v. First Nat. Bank (Ark.) 35 L. R. A. 765.

But an attachment issued upon a debt not due was held, in Davis v. H. B. Claflin Co. (Ark.) 35 L. R. A. 776, to be subject to attack by a junior attaching creditor, where the statute did not authorize attachment for debts not due under the circumstances of that case. With these cases is a very extensive note reviewing the decisions on the right of creditors to question the validity of attachment.

The right to file a supplemental affidavit of other material facts to show a ground of attachment, given by W. Va. Code, chap. 106, sec. 1, is held, in Goodman Bros. & Co. v. Henry (W. Va.) 35 L. R. A. 847, to be one which the court should construe liberally. On the question whether an amendment could be made to prejudice a second lien the court was equally divided.

A corporate seal on a note which is negotiable in form is held, in Chase Nat. Bank v. Faurot (N. Y.) 35 L. R. A. 605, not to destroy the negotiability of the instrument. A note to the case reviews the previous authorities in the effect of a seal on negotiability.

The addition ofthe word "trustee" to the name of the payee of a note is held, in Fox v. Citizens' Bank & T. Co. (Tenn.) 35 L. R. A. 678, not to destroy its negotiability. The other authorities on this question are reviewed in the annotation to the case.

The holder of a note who takes it entirely on the security of a policy of life insurance, although it is technically delivered prior to maturity, is held, in Hays v. Lapeyre (La.) 35 L. R. A. 647, to be entitled to hold the note only for the amount advanced upon it, with interest. The annotation to this case considers the negotiability of a note payable out of a particular fund.

The indorsement by the maker of a note which is payable to his own order is held, in Ewan v. Brooks-Waterfield Co. (Ohio) 35 L. R. A. 786, not to be an indorser in the legal sense of the term, but only a maker, and the note is held to be in legal effect payable to the holder or bearer. In such a case an indorsement in blank by another party before the note is delivered is held to make the latter a prima facie surety of the maker.

A railroad company selling coupon tickets over connecting roads is held, in Chicago & A. R. Co. v. Mulford (Ill.) 35 L. R. A. 599, to be presumably a mere agent for the connecting companies, and not liable for the failure of the latter to honor the tickets.

A person at a flag station at which there is no ticket office, who has signified an intent to get upon a passenger train that has actually stopped there, is held, in Western & A. R. Co. v. Voils (Ga.) 35 L. R. A. 655, to be entitled to the rights of a passenger.

The negligence of a passenger in stepping on a train when it is going 2 or 3 miles an hour is held, in Distler v. Long Island R. Co. (N.Y.) 35 L. R. A. 762, to be a question for the jury.

The annexation of territory to a county is held, in State, ex rel. Childs, v. Crow Wing County (Minn.) 35 L. R. A. 745, to be subject to attack by quo warranto, and the findings of the commission in favor of the annexation, although followed by the governor's proclamation making the annexation, are not conclusive.

A statute exempting the proceeds of life insurance policies from liability for debts is held, in Re Heilbron (Wash.) 35 L. R. A. 602, to be unconstitutional if given a retroactive effect by applying it to previously existing debts and policies.

A statute authorizing the killing of animals found neglected or abandoned, or which have become useless because of injuries, disease, or age, is held, in Loesch v. Koehler (Ind.) 35 L. R. A. 682, to be unconstitutional as depriving the owner of property without due process of law so far as it permits such killing without notice to him.

A patrol of strikers in front of a factory is held, in Vegelahn v. Guntner (Mass.) 35 L. R. A. 722, to be a private nuisance when instituted for the purpose of interfering with the business, and it is no justification that the motive or purpose of the strikers is to secure better wages.

The law as to contracts against public policy is held, in Doane v. Chicago City R.Co. (Ill.) 35 L. R. A. 588, to be applicable to a contract by which a street railway company purchases the consent of a majority of the owners of the frontage

on a street in order to secure from the common council permission to lay railway tracks therein.

A contract extending the monopoly of a patent to an unpatented and unpatentable article necessary to the operation of a patented machine by a provision that this article shall be bought exclusively from the patentee is sustained, in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. (C. C. App. 6th C.) 35 L.R. A. 728.

The legal capacity of a corporation to take property by will in excess of the amount prescribed by its charter is held, in Congregational Church Bldg. Soc. v. Everit (Md.) 35 L. R. A. 693, to be a matter which cannot be questioned by heirs at law or next of kin but only by the state.

Imprisonment for more than 2,160 days in default of paying fines aggregating $720, for the violation of an ordinance respecting trespass upon public parks, is held, in State, ex rel. Garvey, v. Whitaker (La.) 35 L. R. A. 561, to constitute unusual and unreasonable punishment, where it appears that the accused upon what was essentially one complaint was found guilty of seventy-two distinct violations of the ordinance within one hour and forty minutes. In the annotation to this case a very great number of decisions on cruel and unusual punishment are reviewed.

The power of a district attorney to enter a nolle prosequi after the conviction of the accused is completed is denied, in State, ex rel. Butler, v. Moise (La.) 35 L. R. A. 701. The annotation carefully analyzes the authorities as to the power of a public prosecutor to dismiss a prosecution.

The damage in an eminent domain case are held, in Becker v. Philadelphia & R. T. R. Co. (Pa.) 35 L. R. A. 583, not to include the diminished value of merchandise or injury to business in consequence of a removal of its location compelled by the taking of the premises.

The measure of damages for fraud in a contract for the exchange of property is held, in Rockefeller v. Merritt (C. C. App. 8th C.) 35 L. R. A. 633, to be limited to the difference between the actual value of the property which the plaintiff parted with and that which he received.

An adverse use which is not continuous, but which consists in the use of a dam during certain months of every year for the purpose of sluicing logs, is held, in Swan v. Munch (Minn.) 35 L. R. A. 743, to be sufficient to create an easement by prescription.

Consequential damages for changing the grade of a street after it has been opened and used on the natural surface as a grade line is held, in Blair v. Charleston (W. Va.) 35 L. R. A. 852, to be recoverable under a constitutional provision allowing compensation for property damaged.

General reputation in a family as to the death of a member, if not derived from declarations of any deceased member of the family, is held, in Re Hurlburt (Vt.) 35 L. R. A. 794, to be inadmisible to show the fact of his death prior to the death of his father.

A photograph of the scene of an accident is held, in Dederichs v. Salt Lake City R. Co. (Utah) 35 L. R. A 802, to be admissible in evidence to aid the understanding of the facts.

But in Hampton v. Norfolk & W R. Co. (N. C.) 35 L. R. A. 808, a photograph of a place is held inadmissible on the question of the existence or nonexistence of a path that a certain time if the picture was taken two years later, after the situation had changed, and a map made near the time was already in evidence. With these cases are reviewed the other authorities on the use of photographs in evidence.

A statute making it unlawful to manufacture or offer for sale any oleomargarine, artificial or adulterated butter, whether manufactured in or out of the state, unless it is colored pink, is held, in State v. Myers (W. Va.) 35 L. R. A. 844, to be constitutional.

For thefts by hotel employees from guests while asleep in rooms assigned them at a hotel, even if they are intoxicated, it is held, in Cunningham v. Buckey (W. Va.) 35 L. R. A. 850, that the innkeeper is liable.

An assignment for creditors by lessees of a coal mine is held, in Potter v. Gilbert (Pa.) 35 L. R. A. 580, to be ineffectual to defeat the right of the lessor to proceed for a forfeiture for existing defaults and take fixtures at an appraised value in satisfaction of claims for breaches of covenants in the lease.

A temporary breach of an insurance policy by increasing the hazard is held, in Trades' Ins. Co. v. Catlin (Ill.) 35 L. R. A. 595, to leave the policy in force after the extra risk ceased, if this did not contribute to a subsequent loss.

The right to reinstatement after forfeiture of membership in a mutual benefit society for default of payments is held, in Carlson v. Supreme Council American Legion of Honor (Cal.) 35 L. R. A. 643, to be terminated by the death of the member without payment during the time allowed for reinstatement, and a subsequent tender by the beneficiary within that period is unavailing.

So long as the remnant of a building which is left standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before injury it is held, in Royal Ins. Co. v. McIntyre (Tex.) 35 L. R. A. 672, that there is no total loss.

An insurable interest in the life of a son-in-law is held, in Adams v. Reed (Ky.) 35 L. R. A. 692, to exist in favor of a woman who with him as one family keeps a boarding house, dividing the profits between them.

Total blindness resulting from accident is held, in Moge v. Societe de Bienfaisance (Mass.) 35 L. R. A. 736, to be within the provisions of a policy providing for weekly benefits when one is "incapable of working" by reason of accident.

The exemption of the books of a lawyer from execution is held, in Equitable Life Assur. Soc. v. Goode (Iowa) 35 L. R. A. 690, to exist in favor of a lawyer who gives some time to the work of his profession which contributes to his support, even if he does not appear in court, advertise as a lawyer, or earn his living by services as a lawyer.

A libelous publication concerning a family in its collective capacity is held actionable in favor of any member of the family in Fenstermaker v. Tribune Pub. Co. (Utah) 35 L. R. A. 611. The case holds that a newspaper article which relates wholly to the private acts of a family with respect to cruel treatment of a child is not privileged.

Thegeneral or managing editor of a newspaper which publishes a libel is held, in Smith v. Utley (Wis.) 35 L. R. A. 620, to be responsible for the libel, whether he knows of the publication or not.

An apportionment between life tenants and remaindermen is allowed in Greene v. Greene (R. I.) 35 L. R. A. 790, where a portion of a trust fund is recovered after the loss of a part of it, so as to make an allowance to the life tenants for the loss of income during the time the estate was in course of settlement. The amount apportionable to the life tenants for such loss of income is held to be the interest on the sum which at interest will produce the amount recovered.

The right of a tenant for life to operate for oil or gas, or to make an oil or gas lease, is denied in Marshall v. Mellon (Pa.) 35 L. R. A. 816, except where operations for oil or gas have been commenced before the life estate accrues.

Moneys paid into court and deposited in a bank or trust company are held, in Jones v. Merchants' Nat. Bank (C. C. App. 1st C.) 35 L. R. A. 698, to be exempt from the process of a litigant without first obtaining consent of the court, and cannot be reached without leave of the court by bills filed against the depositors, the clerk, or other persons who have been decreed to have an interest in the funds.

A personal liability for pavement assessments is upheld, in Storrie v. Cortes (Tex.) 35 L. R. A. 606, where the city charter makes it a lien on property and provides also for suit against the owner.

The time when a municipal debt comes into existence, and not the time when it is due, is held, in La Porte v. Gamewell Fire Alarm Teleg. Co. (Ind.) 35 L. R. A. 686, to be the time which must be considered in applying the rule of limitation of indebtedness. If the city has already reached the limit a contract payable in instalments must be one which the current revenues will pay as fast as the indebtedness comes into existence, together with other expenses to which the city is liable.

The right of a municipal corporation to be a part owner of property is denied, in Ampt v. Cincinnati (Ohio) 35 L. R. A. 737, by virtue of the constitutional prohibition against loaning aid or credit to any company, corporation, or association. Other authorities on this question are found in a note to the case.

A poll tax on every male resident over twenty-one years of age is held, in Kansas City v. Whipple (Mo.) 35 L. R. A. 747, to be unconstitutional for lack of uniformity, when those who voted at the general city election are exempted.

An ordinance to compel a railroad company at its own expense to keep a watchman and maintain gates where the tracks cross a street under penalty for failure to do so is held, in Pittsburg, C. C. & St. L. R. Co. v. Crown Point (Ind.) 35 L. R. A. 684, to be invalid under a general grant of power to regulate travel on the streets, and enact ordinances for the protection of life, health, and property.

The duty of furnishing a separate passenger train for passengers only, and not for freight and passengers together, is held, in People, ex rel. Cantrell, v. St. Louis, A. & T. H. R. Co. (Ill.) 35 L. R. A. 656, to be implied in the duty of a railroad company to furnish necessary rolling stock and equipment for the suitable operation of the road. The sufficiency of earnings to justify the expense of such a train is held to depend on the earnings of the entire system, and not of the mere branch over which the train is to run.

Miscellaneous Note and Commennt.

G. S. 1894, Sec. 5459, ninth subdivision, was amended by Ch. 37, Laws 1895, so as to read as follows: "One sewing machine and one bicycle." By Ch. 6, Laws 1897, the section was again amended, and now reads: "One sewing machine and one typewriting machine." Who will contend that bicycles are exempt? Why was the exemption abolished?

In the July number of the Journal, inquiry was made as to the reason for the re-enactment of Sec. 6109, G. S. 1894, by Ch. 241, Laws 1897. Senator E. B. Collester, of Waseca County, answers the inquiry as follows: " * * * The justice courts of Ramsey County had no jurisdiction in unlawful detainer proceedings prior to the 1897 amendment. By virtue of this amendment all justice courts now have such jurisdiction. To accomplish this was the purpose of the amendment, as explained to the senate at the time of its introduction there.

The courtesy of Senator Collester in answering the inquiry will probably result in illuminating a little dark spot in more than one legal mind.

The new Eastern injunction is a very energetic institution. It prevents half-paid miners from traveling on the highways, assembling in public places, or complaining of their hardships. It operates entirely regardless of whether there is a complete and adequate remedy at law. If those experts in the East will now modify their mandamus so that the striking miners may be compelled to return to work and behave themselves, what a blessing will be conferred on that infant industry, the Coal Trust. It might be well, while the experts are working under that order of business, to reconstruct their quo warranto, so as to enquire of laborers not employed by the Trust why they are not so employed.

In the case of Rasmick v. Common School District No. 60, Stearns County, Minnesota, et al., reported in the June (1897) issue of this Journal, on page 106, we desire to call the attention of our readers to the following correction to be made with reference to the attorneys who appeared in that important case. We are advised that D. W. Bruckhart and Calhoun & Bennett appeared for plaintiff, and that Geo. H. Stewart appeared for defendant; J. D. Sullivan not being connected with the case.

The present management of the Journal deny any responsibility for the error, but are willing to make the correction. The case was a very important one, and how it happened that the names of Attorneys Bruckhart and Stewart were omitted and the name of Mr. Sullivan added in the report of that case, we, of course, have no knowledge.

For Lawyers to Laugh at.

How the Mix-Up Began.—"It was thisa way, jedge. Ye see, I doled de cards, and Jib Brown he had a pah of aces and a pah o' kings" "What did you have?" "Three aces, jedge, and—" "What did Jib do?" "Jib, he drew." "What did he draw?" "He drew a razzer, jedge!"—Cleveland Plain Dealer.

"Do you know Mr. O'Flaherty's character for morality?" asked the judge.

"Excuse me, yer anner, but would yer moind sayin' thot question over agin?"

"Is he a man of good moral character?"

"O'im not afther understhandin' yer anner."

Then the court asks impatiently, "Is he a good man?"

"Good man, is it? Shure he is thot. It's mesilf has seen him thumping the faces aff two orangemin t' wanst."

When the late Judge Thompson, of Boston, was a practicing attorney he was called upon to defend a man named Phelan who was charged with selling liquor in violation of the law. Phelan was a hard drinker and had a face pretty nearly on the shade of a boiled lobster. The case was opened, the prosecution put in evidence that was simply incontrovertible, and every one thought Phelan was as good as convicted. When the defense came to put in its side, Mr. Thompson said: "Phelan, stand up!" Phelan stood up, and Mr. Thompson then said: "Gentlemen of the jury, I want you to look at the prisoner carefully, and then I want you to say whether in your opinion a man with such a face as that would ever be guilty of selling a glass of

liquor." The point was clearly apparent and Phelan was acquitted.

Judge Clark was a rapid talker. In this instance it was very important that every word he spoke should be correctly recorded, and he so cautioned the stenographer.

Then the judge began. As he warmed up to his charge he was speaking at the rate of 250 words a minute. Once he glanced toward the stenographer. That worthy official seemed to be half sleeping over his work, and apparently writing very slowly.

"Mr. ——, are you getting my words down correctly?" asked the judge.

At this the stenographer seemed to wake up. With little concern he replied:

"That's all right, judge; fire away. I am about fifteen words ahead of you now!"

It is related that a Montana legislator, when some corrections in spelling and grammar in his bill were called to his attention by the committee, said: "Why, you fellows have mucilated it!' It was the same statesman who said, in addressing a committee of which he was a member: "The muddy slough of politics was the bowlder upon which the law was split in twain, and fell in a thousand pieces from the pedro of justice. Let us, then, gear up our lions, that we can go forth with a clear head."

Once Bit, Twice Shy.—American Investments tells a story of a Swede, who went into a lawyer's office at Sigourney, Indiana, the other day, to get him to make out a conveyance for some land which he had purchased. He said he wanted a mortgage, but the lawyer said he should have a warranty deed. "No," replied the Swede, "I once had a warranty deed to a farm, but another man held a mortgage and got the land. I want a mortgage."—Monetary Times.

A rather laughable incident in the justice court practice of Lac qui Parle county took place not very long ago. It might be interesting reading for some of the legal fraternity and a matter of information of value as a guide for the conduct of city attorneys in practicing before country justices.

About six months ago two farmers became involved in a dispute over money matters, and being unable to come to an amicable settlement the claimant took his case to one Doc, who resides at the Village of B. and who had been shortly before elected by a "vast majority" to the office of Village Justice. Doc had never had any experience in justice court work, but was a man of good business sense. Mr. J. related his tale of woe to Doc, and had a summons issued out of Doc's court commanding Mr. K. to appear on a certain day and answer the complaint of Mr. J. On the return day Mr. J. appeared in person, there being no attorney that he knew of in the village or within twelve miles of it. It happened that a certain young Minneapolis lawyer was visiting some friends at B. that day, and the defendant promptly employed him to attend to his interests in the case. The lawyer appeared, and having read the summons and found it defective in form, objected to the jurisdiction of the court, and argued his point to such an extent that Doc began to get uneasy and feared that he might have to dismiss the case if the attorney were allowed to go any farther.

Finally, after considerable valuable time had been spent, Doc called a halt on the counsel, brought forth his "corncob," and, after having lighted it and settled himself in a comfortable position, said: "Young man, you may think you know something about the technicalities of the law; perhaps you do; but I want you to distinctly understand that this court drew those papers itself, and this court knows its business. No technical advantage shall be taken in this case. The case will have to be tried on its merits, and in consideration of the position taken by defendant's counsel in questioning the ability of this court to draw its own papers, judgment is hereby rendered for plaintiff." Judgment was entered accordingly, and the defendant having despaired of ever getting any standing in court, refused to appeal, and the judgment was final.

It was in a local damage suit against a railroad, and the medical experts were having their innings. Indeed, if the whole truth is to be told, some of them

were having their "outings," for the counsel for the railroad company, an uncommonly astute and keen lawyer, who, in fact, knew more anatomy and physiology than some, if not most, of the expert witnesses for the plaintiff, handled them without gloves and without mercy, either for their feelings or their professional reputation. In this way several of the doctors who had taken the stand with a self-satisfied, nonchalant, know-it-all sort of air left it crestfallen and mad all the way through, like a feline whose fur had been stroked the wrong way. Then the plaintiff's lawyer called their leading expert, a well-known young Albany physician who was not only well up in his anatomy and kindred subjects, but had been "up against" railroad attorneys before in similar cases, and was not easily unhorsed. Being thus on his mettle, and in a measure prepared for rough handling, he was not the easiest man in the world to "rattle." The all-important question at issue was as to the extent and nature of the injuries sustained by the plaintiff, a woman, and when the witness was turned over to the tender mercies of the railroad attorney's astute counsel, for cross-examination, there was a wicked gleam in that lawyer's eye and an air of confidence which said, as plainly as words could do: "Here's another victim; watch me tangle him up!" The defense had an anatomical manikin, which had been brought into requisition, playing an important part in the plan of the attorney to show how little the medical experts really knew.

"You have made a study of the human anatomy, I presume?" asked the railroad's attorney, insinuatingly.

"Yes, somewhat," mildly replied the young but alert disciple of Aesculapius.

"What do you think of this model?" was the next question shot at the physician.

"I don't think much of it," was the reply, not quite so meekly given.

"Ah! You don't, eh?" roared the attorney, licking his chops, figuratively speaking, of course, over the meal he had already enjoyed, and preparing for another choice morsel, for his appetite for doctors seemed to be insatiable, growing with what it fed upon.

"Well, really, doctor," he went on, in his most insinuating tone, and sheathing his claws for the nonce, while he prepared to make the final and fatal spring upon his supposedly unwary victim, "won't you be kind enough to tell the court and jury what is the matter with this model?"

"Merely that its maker has taken too many liberties with nature," meekly replied the young surgeon. "It's out of proportion, has too many sins of omission and commission, and is faulty all the way through."

"Ah, that's your opinion as an expert, is it? Well, doctor, do you think you could produce a better one?" demanded the attorney, as he glared over the top of his gold-bowed eye-glasses at the witness for whom he was preparing such a neat little trap.

"Most certainly I do," was the quiet but positive reply of the surgeon-witness.

"Have you ever made a model which was better than this one?" was the next query which the lawyer snapped at him.

"I have."

"How many of them?"

"Two."

At this point the judge, who had been an interested listener, took a hand in the examination.

"Will you kindly bring your models into court to-morrow morning, doctor, in order that we may have the benefit of them in the further trial of this cause?" asked the judge.

"Certainly, your honor," was the reply of the witness, with a merry twinkle in his mild, blue eyes. "With the greatest of pleasure, if their mother will consent to their remaining out of school long enough."

There was a momentary silence. Then as the full import of the doctor's reply dawned upon the court, lawyers and spectators, every face broke into a smile, which in most cases became audible. The court, too, joined unrestrainedly in the general merriment, while the railroad company's attorney, himself unable to entirely restrain his facial muscles, remarked sotto voce to the witness who had so cleverly turned the tables upon him:

"That will do; you are excused."—The Washington Law Reporter.

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COMMUNICATIONS SOLICITED.

Contributions, items of news about court, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the district Courts of Minnesota are urgently solicited.

ANNOUNCEMENT.

The Minnesota Law Journal, having more than doubled its circulation within the last ninety days, and now being on a basis which guarantees a permanent and healthy growth, the publishers have decided to reduce the subscription price to one dollar per year, thereby bestowing on its many patrons a share in the prosperity it enjoys. Wishing to deal fairly with all parties, the publishers offer to those indebted on subscription beginning after April, 1897, and under the old price of two dollars, to cancel such indebtedness on receipt of the sum of one dollar. Those who have paid their subscription on the two dollar basis will have their subscriptions extended to a period corresponding with the new price.

It is the desire of the publisher to extend the usefulness of the Journal, and to that end it may be thought advisable to publish it twice a month, or even oftener, and to publish in full the Minnesota Supreme Court decisions.

Supreme Court vs. Logic.

In January of this year the district court of Ramsey county made a decision through Kelly, J., in the case of William H. Allen by Anna S. Allen, his deserted wife, vs. The Minnesota Loan & Trust Co. The action was brought under G. S. 1894, § 5165, to recover money alleged to be due plaintiff. The decision was in favor of defendant on its motion for judgment on the pleadings. The case was promptly appealed.

This is the first time the question has

come directly before the supreme court, and the decisions of the upper and lower courts are interesting when compared. The order appealed from can be found in file number 66582. It is not given here for the reason that the argument of the supreme court is fully answered in a memorandum to a later decision by Judge Kelly in the same case.

The supreme court reversed the lower court, (Start, C. J. and Collins, J., dissenting,) and enough of this decision follows to show the reasoning of the appellate court. After a statement of the case the court in part says:

"The grounds on which defendant challenges the right of the deserted wife to maintain this action are as follows: (1) If this action is an action by and through which the wife seeks to collect the amount claimed of defendant by simply prosecuting the suit in the name of the husband, and it can be maintained that that is what the section under consideration authorizes, then the act in question is unconstitutional, as depriving the husband of his property without due process of law (2) That if that is not what this section means then it can only mean what it was construed to mean by the court below viz: That the action must concern the property right of some remaining member of the family, and that it is only in such cases where it is necessary to enforce or defend such rights that an action of this kind can be prosecuted; that it does appear on the face of the complaint that this action does not involve the enforcement of any such right. (3) The complaint is bad in that it fails to show facts necessary to constitute a desertion within the meaning of the law.

"We do not assent to the proposition that the law is unconstitutional. There is no attempt to deprive the husband of his property without due process of law. The statute does not authorize the taking of the private property of the husband and transferring it to the wife. It simply authorizes her to maintain his rights by an affirmative proceeding in his name, or defend them in the same manner. If she succeeds, the fruits reof does not belong to her, but to him. The language of the statute does not in the slightest degree authorize any other construction In all actions orproceedings he is the principal named, and she is the legally authorized agent to save his rights or property * * *

"Gen. St. 1894, § 5165, makes her the statutory agent of the husband for certain purposes, and the fact that she must, proceed in his name directly and irresistibly repels the idea that the fruits of any affirmative or defensive action is to belong to any person other than the husband. His desertion strengthens or adds to the power of the wife to act in his behalf, and protect and preserve the property left in her implied care; and hence with the right to prosecute or defend actions relating thereto. And by analogy she would have the right to prosecute an action of the character of the one at bar While several of the states have statutory enactments substantially the same as our own, we have not been able to find any decision bearing directly upon such laws, nor have we been cited to any by either of the respective counsel In Bishop on Marriage and Divorce (volume 1, c. 28, 6th Ed) the general rule is laid down that commonly the presumption is that the wife may protect and preserve the property left in her implied care, but neither sell nor destroy it; yet in some circumstances even the power of preservation implies some power of disposition. * * * "

The following is the later memorandum by Judge Kelly, last above referred to:

"Motion for judgment for defendant upon stipulation entered into by defendant and Wm. H Allen through his regularly appointed attorneys.

"The peculiar state under which this action is prosecuted is construed by the Supreme Court in this case, reported in 70 N. W. Rep. 890.

"While still adhering to the inexorable logic of the situation as expressed in my former opinion, I bow to the mandate of the superior tribunal; and I will enforce the law as thus laid down, though the reason given by the majority of the Court may seem unsatisfactory when confronted with the recent facts.

"For example, to avoid the logical conclusion that W. H Allen, (the involentary plaintiff) is here deprived of his lawful control over property "of which he is the absolute owner," or that the debtor to Wm. H. Allen may be subjected to the payment of the same debt twice, the Supreme Court say, referring to this statute; "There is no attempt to deprive the husband of his property without due process of law. The statute does not authorize the taking of the private property of the husband and transferring it to the wife. It simply authorizes her to maintain *his* rights by an affirma-

ative proceeding in his name, or defend them in the same manner. If she succeeds the fruit thereof does not belong to her but to him * * *.
In name and as Plaintiff he is the real party in interest * * *.

"If this action can be maintained in its present form *solely* because it is for the benefit of the absconding husband, William H Allen, it would seem to follow that William H. Allen, the beneficiary, should be permitted to settle it without consulting his wife.

"But to give any effect to the opinion of the court it must mean this, that by deserting his family the absconding husband constitutes his wife his agent, (irrevocable during the desertion because coupled with an interest (to prosecute or defend such actions as he could. And in such case he will not be heard to object, or be permitted to intermeddle as long as he remains apart from his family.

"It is clearly apparent, however, that Mrs. Anna L. Allen is not troubling herself to maintain this action in order that the fruits thereof, if she is successful, shall belong to William H. Allen, her husband. Because in an action for divorce, instituted by her in the District Court for St. Louis county she obtained an exparta order appointing Arthur G. Otis, Esq., a receiver to sequester for her personal use and benefit this very claim, among others. Deeming Anna abundantly able to look after William's interests in this case. I have no difficulty in denying the receiver's motion to come in as party plaintiff.

"And it is equally plain that the attorney for Anna L. Allen has little real faith in the position she occupies in this suit. Because the only objection he makes to the motion of defendant for judgment as per the stipulation with William H. Allen, is that there has been made no proper substitution in the attorney of plaintiff. In his affidavit Mr. Barton says: "That affiant as such attorney objects to any other attorney or attorneys being substituted or acting for the plaintiff in said action until affiant is paid for his services rendered in said action, and objects to said action being dismissed until the same are paid,"—which means, of course, if William H. Allen shall pay Mr. Barton's fees, then William H. Allen can have a substitution of attorneys and dismiss the case. Now I will not place this decision on any such narrow ground. The Supreme Court has said William H. Allen is in this case, and that the case from the facts is under the irrevocable control of his wife, Anna L. Allen. That decision is law for this court, though I shall cheerfully submit to a reversal of this order which enforces it, if the main case be in consequence overruled. I know of no higher honor than when one suffers for a duty performed."

The weight of reasoning seems so greatly in favor of the lower court that one is almost inclined to the belief that the distinction between supreme and inferior courts is in name and not in merit.

Our supreme court is great on "vigorous" constructions, and probably, if pressed for a better reason for its ruling in the above case, would say, as it did in *In* re Jerome W. Barnard and another, 30 Minn 512, that it was a case demanding a "vigorous construction."

What we like in the conduct of courts is consistency. Vigorous decisions are always commendable for that quality alone, though wanting in right reasoning. But where courts in their decisions alternate between vigor and *ennui* the specticle is not pleasing.

In the case of *In re* Jerome W. Barnard et al., above cited, the court repealed a statute which was so plain that no possible doubt could exist as to its meaning. The statute is now 4244 G. S. 1894, and why it is included in the late compilation can not be imagined, unless it be on the theory that its untimely death entitled it to some notice. The statute was capable of but one construction, and that was told in its wording. The court was not satisfied with it and gave it a "vigorous" dose of "construction." The probable intention of the court was to rid our insolvent law of the technical jurisdictional question involved and thereby save the rights of the creditor class. The principle was good if applied in a case where the meaning of a statute was in doubt: but as applied, it was judicial legislation, pure and simple.

The same court, in another and later case, that of Chauncey v. Wass, 35 Minn., 6, says in the majority opinion, on page 29, reaffirming its former opinion in the same case and oblivions of what was done in *In in* Jerome W Barnard, *supra*; "This feature of the tax law now under consideration is, in our opinion, both harsh and dangerous; but the remedy is with the legislature, which makes the laws, and not with the courts, whose only power is to apply them."

The case was one where plaintiff sought to remove a cloud on his title to lands in St. Louis county, and the facts were undisputed that defendant had gotten interests, adverse to plaintiff, through a tax sale where the taxes were, long prior to the sale, actually paid by plaintiff and receipted for, but record of which fact was by some means omitted in the tax books of the county. The result was that plaintiff lost his land by the application of the policy above quoted of noninterference by the court in a case where the law was "both harsh and dangerous."

By reading the opinions in this tax case, especially the powerful dissenting opinions, one can readily see there was good and valid reasons for deciding differently. There was sufficient reason for doubt, taking together all the statutes applying in the case, to warrant the court in dealing, (with the assistance of a slight application of "vigor," properly applied,) equal and exact justice.

By subsequent legislation the case of Chauncy v. Wass is dead law, but this fact is not to be credited to the court. The case has not been "expunged from the record," but stands as a stone in the monument to judicial inconsistency.

MISCELLANEOUS.

The address of Judge Gorham Powers is Granite Falls, and that of Judge Gauthe E. Qvale is Wilmar, as heretofore. Notwithstanding this fact the compilers of the 1897 laws give Winona as the address of these judges of the Twelfth judicial district.

The absence of a goodly number of district court cases in this issue is due to the fact (as attorneys will understand) that few cases are being decided at this time. In our next issue we hope to have a large number.

One of our esteemed contemporaries, the "Barrister" (Toronto), speaking of statements made by a Toronto alderman, and evidently having in mind those injunctions issued during the Eastern coal strike, says: "* * * Happily government by injunction in furtherance of criminal law, or of municipal police powers, has not invaded Canada."

It ought never to have invaded any state. If there is any excuse for injunction "in furtherance of criminal law" or "municipal police power," it would seem that courts could better justify injunctions restraining threatened libel. As a matter of jurisprudence no respectable precedent can be found warranting injunction in either case.

Elsewhere in this issue we publish in full the opinion of Judge Charles B. Elliott, of Minneapolis, in the injunction suit of the American Book Co. vs. Kingdom Publishing Co., to restrain an alleged threatened libel.

The decision holds that equity jurisdiction cannot be extended to restrain libel, even though defendant is insolvent; but that plaintiff must wait until such libel is committed, when there will be the remedy at law.

Judge Elliott rises to the fullest dignity in this decision, and renders an opinion well founded on law as lawyers understand it. He does not intend to drift away from well established principles and follow the bent of his imagination as we too often find courts doing of late, and if all courts would operate within their proper sphere, as Judge Elliott is inclined to do, there would be no occasion for such criticisms as we have recently heard concerning the corruption of this department of our government.

We in Minnesota can say that government by injunction has not yet invaded all the states.

DIGEST MINNESOTA SUPREME COURT DECISIONS.

—138.—

1. Where the property of a bank is in the hands of an assignee or receiver in insolvency proceedings, it is not necessary that a time certificate of deposit payable on return thereof properly endorsed should be presented for payment to the bank, or to its assignee or receiver, in order to mature a right of action upon a bond given to the payee named in the certificate, conditioned that the bank shall safely keep and account for all moneys deposited by said payee, and on demand pay over, upon a proper warrant, check, or other proper direction, all moneys so deposited.

2. The recitals and conditions contained in the bond construed. *Held* to include and cover a deposit of public funds made by a board of commissioners, whose authority for so doing, if existing at all, was in Laws 1893, c. 243, § 5, and for which the bank, incorporated under the state laws, issued, and the commissioners accepted, a time certificate of deposit.—71 N. W. 674

—139.—

1. In an action tried by the court without a jury, a finding of fact that all the material allegations contained in the complaint are true is insufficient to support a judgment for plaintiff.

2. As a general rule, where the vendor of land on an executory contract wrongfully keeps the vendee out of possession, the latter is entitled to recover damages for the withholding of the premises from him, or for use and occupation for the time he is so kept out of posessions; and, if he does recover any such damage, the vendor is entitled to recover interest on the unpaid purchase money for the same time. Where, in a former action, the court awarded such damages, but set off the same against the vendor's claim for improvements made while so wrongfully in possession, *held*, although the vendor had no right to claim for such improvements, the vendee's claim for such damages is res adjudicata, and he cannot now recoup the same against the vendor's claim for such interest. Where, in an action for the recovery of possession of land, damages are awarded for the withholding of the same, such damages should be assessed up to the time of trial, and such damages up to such time are res adjudicata and merged in the judgment in the former action. *Held*, the evidence did not warrant the judgment ordered.

3. While the vendor was so wrongfully in possession, he committed waste by removing from the premises certain buildings, and made improvements by erecting other and somewhat different buildings. The court in the former action found that he had made improvements of the value of about $1,000, without finding what the character of the improvements was, and set off this claim for improvements as aforesaid. *Held*, this amounts to a finding that the value of the improvements exceeds the damages for waste by about $1,000, and the vendee's claim for such waste is res adjudicata.—71 N. W. 676.

—140.—

In an action for damages for personal injury to a traveler, claimed to have been caused by the negligence of the defendant city in failing to keep its sidewalks in repair, *held*, it conclusively appears from the evidence that plaintiff was guilty of contributory negligence, and therefore cannot recover.—71 N. W. 678.

—141.—

An assignment for the benefit of creditors by a debtor, as authorized by the insolvency law of the state (Gen. St. 1894. § 4240), must be his personal act. He cannot delegate to an agent, by power of an attorney or otherwise, authority to decide for him the question of his insolvency, and to select an assignee and make such assignment for him, at the pleasure of such agent. The debtor must exercise his personal judgment as to such matters. Canty, J., dissenting.—71 N. W. 679.

—142.—

Section 7402, Gen. St. 1894. provides: "In every case in which punishment in the state prison is awarded against any convict, the form of the sentence shall be that he be punished by confinement at hard labor." The relator was duly indicted, pleaded guilty, and was sentenced as follows: "The sentence of the court is that you, James C. Hull, be confined and restrained in the state prison at Stillwater conformable to the rules and regulations of that institution, in the state of Minnesota, for the period of six years."

1. *Held*, the judgment of the court is defective and irregular in omitting to sentence relator to hard labor, but is not absolutely void, and cannot be impeached collaterally on habeas corpus.

2 *Held*, further, such judgment is merely defective in form, not in substance, as section 7492 and following sections provide that every person convicted and sentenced to the state prison shall be compelled to perform a reasonable amount of hard labor, and the sentence provides that relator shall be confined in such prison conformable to such rules and regulations.—71 N. W. 681.

—143.—

A testator devised and bequeathed his real and personal property to his wife on condition that in no case shall she give or bequeath one cent of said estate to any member of his family or any relation of her own. *Held*, the condition is against public policy, and void, for being in restraint of alienation.—71 N. W. 682.

—144.—

1 Plaintiff purchased from defendant's agent a mileage ticket or book, containing 2,000 miles of transportation, for which he paid $50. The date of issue was stamped on the ticket, and it was, by the mistake of the agent, punched on the margin to expire on the day it was issued, instead of a year later. Plaintiff signed a contract printed on the cover, which stated that the ticket was "void for passage after date punched in margin." He offered this ticket and the mileage thereon for his fare on defendant's train. It was refused. He refused to pay other fare, and was ejected by the conductor. *Held*, proof of these facts was sufficient evidence to sustain a verdict for plaintiff, and the court erred in dismissing the action.

2. *Held*, as to the date on which the contract was limited to expire, the plaintiff was not bound by the contract as written until it was reformed in a court of equity. It appearing that the price charged him was an unreasonable and extortionate price for all the transportation he could use on the day the ticket was issued, the provision limiting the ticket to expire on that day was void. Whether or not it would not be contrary to public policy to require a mistake in a written contract for transportation, entered into between a passenger and a common carrier, to be corrected in a court of equity before the former can insist that the latter shall perform or respect the contract actually agreed upon, quære.

3. Rule as to measure of damages laid down where the ticket presented to the conductor appears on its face to be void. *Held*, in such a case, the passenger cannot increase the amount of his damages by refusing to leave the train, and compelling the conductor to eject him by force, unless, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger.—71 N. W. 683.

—145.—

Held, the decision is supported by the evidence.—71 N. W. 685.

—146.—

Section 13, subc, 3 c. 2, Sp. Laws 1887 (the charter of Duluth), provides that "no alderman or other officer or employe shall be a party to, or interested in, any job or contract with the city," that any such contract shall be null and void, and any money paid thereon may be recovered back. *Held*. under this section, a city employe, a poundmaster, cannot recover from the city on an implied contract for use and occupation of premises furnished by him to the city for use as a public pound —71 N. W. 687.

—147.—

1. Where a sheriff has in his hands for service several writs against different persons, for different causes, and makes service of two or more writs in the course of one trip, he is entitled to charge full mileage on each writ so served.

2. Gen. St. 1894, § 6021, reads as follows: "Any officer or other person refusing to deliver a copy of any order, warrant, process or other authority by which he detains any person, to any one who demands such copy, and tenders the fees thereof, shall forfeit two hundred dollars to the person so detained." *Held*, that a sheriff's fees for serving copies of bench warrants upon persons named as defendants therein were not legally chargeable against the county. under this provision of the statute.—71 N. W. 687.

—148.—

1. The city of Tower, through its common council, granted to a street railway, its successors and assigns, the right and privilege of constructing, maintaining and operating a line of street railways on any and all of its streets and public highways for a period of 20 years, the cars on said railway to be propelled by horses, mules, steam, electric, or other motor, for the purpose of transporting passengers and freight. The grant was made upon various conditions. The twelfth section of the ordinance reads as follows: "This franchise is granted upon condition that the company faithfully fulfill the requrements herein expressed, and should the company fail therein or willfully abandon such road, and neglect or refuse to operate it, then this franchise to become null and void. Said company agree that they will forfeit said road to the city of Tower in one year after said company cease to operate said road." The railway company became insolvent, and neglected and ceased to operate the road for more than one year. *Held*, that the word "road" as used in said section of the ordiance, has the same import as if it read "railroad."

2. *Held*, also, that the word "forfeiture," as used in said ordinance did not signify a nonenforceable penalty nor liquidated damages, but authorized the court upon default of the conditions of the grant, to declare, in a proper action, an absolute forfeiture of the railway franchise, including rails, ties, roadbed,and things granted.

3. Railway franchises and grants are usually made for the benefit of the public and where public interests are involved in the things and conditions granted, and it is impossible or impracticable to recover compensation when the conditions are broken by the grantee, and the facts clearly appear, the grantor has the right to resume, through the declarations of the courts, the corporate franchise and things forfeited, if the grant so provides.

Canty, J. dissenting.—71 N. W. 691.

—149.—

One S. executed a motrgage to plaintiff on an unplatted 10-acre tract in the city of Duluth. Subsequent to the execution and record of this mortgage the city of Duluth obtained from the mortgagor a deed of a strip 60 feet wide across the tract, and opened and improved it as a public street, the only right which the city acquired being under this deed. Sub-

sequently the plaintiff sold the premises under a power of sale, and bid in the entire tract for the amount due on the mortgage; this sale, although valid as to the mortgagor, was invalid as to the city, because no notice of the time and place of the sale was served on it, as required by statute, the city being then in the occupancy and actual possession of the 60-foot strip. *Held*, that the plaintiff was entitled to a second foreclosure as to the city and any other omitted parties; that such second foreclosure would not effect the rights of the mortgagor under the first foreclosure; and that he need not be made a party to the suit. But *Held*, that under the facts a strict foreclosure without sale, barring the city of, all right in the premises unless it redeemed the entire tract by paying the whole amount due on the mortgage, would be neither "just nor equitable."

2. The fact that a party is not entitled to the specific relief prayed for is no ground of demurer if, upon the facts alleged, he is entitled to some relief.—71 N. W. 694.

—150—

The defendant insured the plaintiff against loss of time effected through external, violent, and accidental injuries "wholly and continuously disabling him from transacting any and every kind of business pertaining to his occupation or merchant." *Held*:

1. That the evidence justified the jury in finding that he was "wholly disabled" within the meaning of the policy.

2. Total disability does not mean absolute physical inability to transact any kind of business pertaining to the occupation of merchant. It is sufficient if his injuries were such that common care and prudence required him to desist from transacting any such business in order to effectuate a cure.

3. Inability to transact some kinds or branches of business pertaining to his occupation as merchant would not constitute total disability within the meaning of the policy, provided he was able to transact other kinds or branches of business pertaining to such occupation.

4. But ability to occasionally perform some trivial or unimportant act connected with some kind of business pertaining to such occupation would not render his disability partial, instead of total, provided he was unable to substantially, or to some material extent, transact any kind of business pertaining to such occupation.

5. The fact that he occasionally performed some act connected with his business as a merchant would not necessarily prove that he was not totally disabled within the meaning of the policy. The frequency and nature of these acts would ordinarily be for the consideration of the jury in determining whether he was totally disabled as above defined.—71 N. W. 696.

—151—

Gen. St. 1894 § 5460, provides that "the property hereinbefore mentioned is not exempt from any attachment issued in an action for the purchase money of the same property, or from an execution issued upon any judgment rendered there in." *Held*, that the transferee of a note given for the purchase money of property is entitled to levy on the property, though otherwise exempt, the same as the vendor himself might have done.—71 N. W. 697.

—152—

1. Both parties admitted that, upon the expiration of the term of a lease for years, there was a new and express contract between them for a new tenency, the only issue between them being whether the contract was for a tenancy for a year or for a tenancy from month to month.

2. *Held*, that evidence of collateral matters, such as that the tenants had a large trade in that part of the city, that it would have cost them a large sum to move, and that there was no vacant store in that part of the city which they could have secured, was too remote to have any natural or legal tendency to prove which party was correct as to the terms of the new tenancy.

3. There being, according to both parties, a reletting under an express agreement, and not a "holding over" by the tenant, requests to instruct the jury as to the effect of a tenant for years holding over after the expiration of his term were properly refused. For the same reason the burden was on the landlord to prove that the reletting was for a year.—71 N. W. 696.

—153—

1. *Held*, that certain parts of the answer were properly stricken out as irrelevant and redundant.

2. A covenant against incumbrances runs with the land, and, where a mortgage contains such a covenant, an action upon it may be maintained by a purchaser at a foreclosure sale under the mortgage. Following Bank v. Holmes (Minn.) 68 N. W. 113.

3. A married woman is under no disability to join in the covenants in her husband's deed, and, if she does so, she is liable. Following Manufacturing Co. v. Zellmer, 51 N. W. 379, 48 Minn. 408.

4. Her covenant cannot be contradicted or varied by parol evidence that she joined in the deed merely for the purpose of barring her inchoate right as wife in the land conveyed.—71 N. W. 699.

—154—

The plaintiff's intestate, M., and defendant were members of an unincorporated association the object of which was to provide relief for its members when disabled by accident or sickness, and at their deaths for their families. While a member of this association, M. was injured by an accident, and thereupon he was taken to defendant's hospital for medical treatment, pursuant to to the constitution and by-laws of the association, where, through neglect and maltreatment, he died. The administratrix of M., and as his sole heir and next of kin, brought suit against the association to recover damages suffered by reason of his death in the manner aforesaid. *Held*, that the action was not maintainable.—71 N. W. 701.

—155—

1. The record not purporting to contain all the evidence, and there being no assignments of error which raise the question of the sufficiency of the findings of fact to justify the order for judgment, the order denying a new trial is affirmed.

2. Certain special reasons suggested why a court ought not to pass upon the relative rights of so-called building socities and their borrowing members, under its scheme as contained in its articles and by-laws, unless put in possession of all material facts.—71 N. W. 703.

—156.

1. Ordinance No. 1894 of the city of St. Paul is a valid exercise of the power granted by the city charter "to license and regulate pownbrokers."

2. Even if the definition of "pawnbroker" contained in the first section is broader than the ordinary and proper meaning of the word, that fact would not invalidate the whole ordinance.

3. It is not necessary that a complaint charging a person with engaging in and conducting the business of pawnbroker without a license should state the particular instances where money was loaned on pledge or pawn.

4. The evidence was sufficient to justify a finding that defendant was engaged in and conducting the business of a pawnbroker.—71 N. W. 703.

—157—

1. Evidence considered, and *held* sufficient to justify the court in finding that one H. was the agent of the defendant, and acted within the scope of his authority.

2. The maxim, "De minimis," etc., applied.—71 N. W. 705.

—158—,

1. Under legislative authority (Gen. St. 1894, § 2714) the St. P. M. & M. Ry, Co leased its road between St. Paul and Hinckley to the G. N. Ry. Co., granting to the latter company the exclusive control and possession of the road. The G. N. R. Y. Co., also under legislative authority (Gen. St. 1894, § 2721), granted to the E. Ry. Co., (which owned and operated a road between Hinckley and West Superior) the right to run its train over the road between Hinckley and St. Paul; the G. N. Ry. Co., however, retaining possession and control of the road. The G. N. Ry. Co. negligently permitted to accumulate and remain on the right of way combustible material which was liable to be ignited by sparks and fire thrown from passing engines. The E. Ry. Co., negligently operated an engine attached to one of its trains, by reason whereof sparks and fire escaped from the engine, and fell upon and ignited the combustible material on the right of way. The fire spread, and destroyed a large amount of property on the premises of adjacent landowners. *Held*: (1) That the St. P., M. & M. Ry. Co. was not liable for the negligence of either the G. N. or the E. Ry. Co.: that the legislatve authority to lease the road included by implication exemption from liability for the negligence of the lessee in operating the road, and not involving a breach of

the public duties imposed upon the lessor by its charter or the general laws of the state. (2) But the G. N. Ry. Co. which retained control and possession of the road, was liable for the negligence of the E. Ry. Co. in the operation of its train. Authority to grant to another company the privilege of running its trains over the road (the granting company retaining control and possession of the road) does not include by implication exemption from liability for the negligence of the company to which the privilege is granted.

2. Even if the G. N. Ry. Co was not liable for the negligence of the E. Co in the operation of its train, it would nevertheless be liable on the ground that the injury was caused by the concurring negligence of the two companies,—of the E. in the operation of its trains, and of the G. N. in permitting combustible material to remain on the right of way.—71 N. W. 706.

—159—

1. In an action on a bond conditioned, among other things, that the principal, as agent for the plaintiff, would pay over all moneys received by him as such agent monthly, the court charged the jury, in substance, that if the agent failed at any time to comply with the conditions of the bond, in paying over monthly the moneys which he had collected, and the plaintiff had notice, actual or constructive, of the fact, it was its duty to revoke the agent's authority, and, if it permitted him to make further collections after such notice, the sureties on the bond would not be liable therefor. *Held*, that this did not correctly state the measure of plaintiff's duties to the sureties, because it would apply to any default, whether the result of dishonesty, or of mere negligence, oversight, or accident.

2. In the case of a continuing suretyship for the faithful discharge of his duties by his servant, the master owes the sureties no absolute and active duty, upon the discovery of mere breaches of contract obligations by his servant, to discharge the servant, or notify the sureties of the breach. Insurance Co. v. Callahan (April term. 1897) 71 N. W. 261, followed. —71 N. W. 709.

—160—

1. Oral evidence is incompetent, in aid of a petition and order for the laying out of a highway, to show that the petition was signed by the neccessary number of qualified petitioners.

2. The fact that a petition for a highway includes more than one proposed road does not affect the jurisdiction of the town supervisors to act upon the petition, and lay out one of the proposed highways.

3. A misrecital, in the order laying out the road, of the description of the proposed road, as contained in the petition, does not affect the validity of the order, where the road, as actually laid, is correctly described therein.

4. The failure of the town clerk to record the surveyor's plat of the road, with the road order, and its loss and nonproduction in evidence on the trial of this case, did not render the order invalid or inadmissible in evidence.

5. Where a public highway has been laid out and opened, and is in use as such by the public, but for any reason the landowner's damages for the taking of his land for the road have not been paid or secured, and he fails to apply, under the provisions of Gen. St. 1894, § 1856, to have his damages assessed and paid within the time therein limited, he will be deemed to have waived all claim for them Such statute, so construed, is constitutional.—71 N. W. 819.

—161—

Section 2236 Gen. St. 1894, construed and *held*, that a promissory note payable to the order of the maker is, when negotiated by him, without indorsement, the legal equivalent of a note payable to bearer.—71 N. W. 822.

—162—

1. Parties will be *held* prima facie to be partners as to creditors upon slighter proof than is necessary to establish that relation among themselves. In such cases, representations, conduct, and circumstances naturally calculated or likely to beget the belief that the parties were partners, as alleged, is sufficient to make the question one for the jury.

2. A member of a co partnership may testify who constitute the firm.

3. Entries in the account books of a firm are not evidence against a defendants to show that he was a member of the firm, unless accompanied by other evidence fairly tending to show that he had knowledge of such entries, and assented expressly or impliedly thereto.

4. Evidence considered, and *held*, that the trial court erred in instructing the jury that there was no evidence from which they could find that the defendant was in fact a partner with his co-defendants herein.—71 N. W. 823.

—163—

1. Section 5660, Gen. St. 1894, forbids a party to an action, or a person interested in the event thereof, from testifying indirectly to conversations with or admissions by a deceased or insane party or persons, by stating in the form of conclusions of fact the result of such conversations, or the effect of such admissions.

2. On the trial of this action, one of the main issues was whether the plaintiff made an oral contract for the purchase of certain land with the deceased owner thereof. *Held*, that it was error to permit him to testify that he bought the land for $10 per acre from the deceased, and was to have a deed for the land when he paid for it, and that he had done so. But *held*, further, that the wife of the plaintiff, who was not a party to the action, was a competent witness to testify to conversations with the deceased relative to the issue, she having no direct and certain pecuniary interest in the event of the action.

3. Where a married man sold land, but his wife his not join therein, she is not estopped to assert, after his death, her title to one-third of the land, by the mere fact that she knew of the sale, and that the purchaser was in possession of the land, and made no objection thereto, during covertures.—71 N. W. 824.

—164—

Section 5138, Gen. St. 1894, subsec. 1, as amended by Laws 1895, c. 30, providing that the following actions must be brought within two years: "Libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury,"—includes an action for malicious prosecution.—71 N. W. 826.

—165—

1. In an action by an assignee in insolvency to set aside a transfer by his assignor on the ground that it was in fact made to hinder, delay, and defraud creditors, it is competent, for the purpose of showing the insolvency of the assignor, to put in evidence the books of account and records, duly verified, pertaining not only to the individual business of the assignor, but also that of a co-partnership of which he was a member.

2. Evidence considered, and *held*, that it supports the findings of the trial court to the effect that the plaintiff's assignor made a bill of sale of a quantity of logs to the defendant with the intent to delay and defraud his creditors, and that the defendant then had notice of such intent.

3. *Held*, that the assignee did not ratify such transfer as to creditors by the mere fact that some of the notes given for the purchase price came into his hands as such assignee, and were retained by him until the trial of this action.

4. *Held*, that the trial court did not err in refusing to modify its conclusions of law so as to permit the defendant to pay the value of the logs instead of surrendering the logs and lumber manufactured therefrom, nor in refusing to provide for an accounting as to the cost of manufacturing such lumber.—71 N. W. 827

—166—

1. In an action to set aside a conveyance as fraudulent as to creditors, *held* that, from the facts found by the trial court, it necessarily follows that the grantee is chargeable with notice of the fraudulent intent of the grantor.

2. The plaintiff held a mortgage on the premises executed by the fraudulent grantor, payment of which he accepted from the grantee after the conveyance. *Held*, that this does not estop the plaintiff from attacking the conveyance as fraudulent, but, if it is set aside, the grantee is entitled to be subrogated to plaintiff's rights as mortgagee.—71 N. W. 829.

—167

An accident insurance policy provided that, "in consideration of the warranties and agreements contained in the application indorsed hereon," the company accepted him as a member, "subject to all the conditions indorsed hereon." One of the conditions indorsed on the policy was that "the application for membership is made a part of this contract, and printed thereon." *Held*, that attaching a copy of the application to the back of the policy with mucilage or some similar substance, and delivering the same to the insured, constituted an "indorsement"

of the application upon the policy, with in the meaning of the contract.

2. The answer to a question required to be answered categorically was indistinctly written in the original application, appearing to consist of the letter "n" and a part of the letter "o," but in the copy attached to the policy and delivered to the insured the answer was clearly and distinctly written "No." The insured retained this for over three years, and until his death, without objection, and without suggestion that it did not correctly state his answer to the question. *Held*, that there was no error in refusing to submit to the jury the question what the answer actually was; that, even if the answer as written in the original application was illegible, the insured, by retaining the copy of the application attached to the policy without objection, must be held to have approved of it, and accepted it as containing his answer to the question.—71 N. W. 831.

—168—

1. Persons in charge of a locomotive in motion are not bound to keep a lookout for animals tresspassing upon the track, nor to presume that they will be there, but having notice of their presence, and that they are liable to injury, are bound to use reasonable care, at least, to avert such injury.

2. The circumstances in this case, as shown on the trial, would have warranted the jury in finding that the defendant's employes, running one of its locomotives, saw certain horses, which where run over and killed while on the track, in time to have avoided the killing, although there was no positive evidence that the horses were discovered until they were struck, and no evidence as to the time or distance within which the locomotive could have been stopped.

3. *Held*, on the evidence, that the question whether the persons in charge of the locomotive neglected to use reasonable care after discovering the horses on the track was for the jury.—71 N. W. 905.

—169—

Certain members holding shares in a mutual building association defaulted in the payment of monthly installments and dues in January, 1891. As early as July 1st the association, by resolution of the board of directors, absolutely forfeited these stock shares and the money paid thereon to its own use, without a sale thereof, and without notice, except as notice was contained in the members' certificates. And such money, with other earnings of the association, was distributed in good faith to all shares in good standing in accordance with the by-laws, and under the direction of the public examiner. The defaulting members, residents of this state, made no application for reinstatement, and took no steps whatever to protect their interests or assert their rights, except as might be inferred from the fact that in December 1895, they assigned their certificates and all rights and interests therein to this plaintiff, who, in March, 1896, brought an action as for conversion, and to recover the value of the certificates. Meantime, in the years 1891, 1892, and 1893, the association, in accordance with the scheme of the organization and the by-laws, paid off all shares of the class of those assigned to the plaintiff, and in making payment included the sums paid by the defaulting members, and distributed as before stated. *Held*, that the defaulting members should have dissented, and should have asserted their rights within a reasonable time, and, not having done this, they will be presumed to have assented to the ultra vires and unlawful act of the directors in forfeiting their shares, and in appropriating the sums paid in for the benefit of members in good standing.—71 N. W. 906.

—170—

Held, that the complaint herein, as amended after a former decision in the action (68 N. W. 23), states facts sufficient to constitute a cause of action for specific performance of an executory contract for the conveyance of land, not only as against the contracting vendor, but also as against a third party to whom the land had been conveyed.—71 N. W. 908.

—171—

1. Where, in a deed or mortgage, it is recited that the real property therein described is sold or mortgaged subject to a certain specified and existing incumbrance, such recital qualifies subsequent covenants of seisin, quiet enjoyment, and of general warranty, and they do not cover or embrace the incumbrance mentioned.

2. Where the maker of a promissory

note secured by a second mortgage on real property enters into an agreement with the payees of the note, owners and holders thereof, that he will pay the interest then due upon the debt secured by the first mortgage upon the property,—he being under no personal obligation to pay such interest, either as original debtor, or because he has assumed it, or by reason of any covenants in the second mortgage,—in consideration of which such payees agree to release and discharge him from all personal liability on the note, and to look solely to their security for payment, and the maker performs on his part by paying the interest as agreed on, there is a sufficient consideration to support the agreement to release and discharge him.

2. *Held*, that it was for the jury to determine, from the evidence introduced on the trial of this case, whether an agreement of the nature above referred to had been entered into between the payees of the note sued upon and defendant, by which the former had released and discharged the latter from all personal liability as the maker of such note. —71 N. W. 909.

172

1. This court has the right, and under some circumstances, in the exercise of a sound judicial discretion, it may become its duty to allow an information in the nature of quo warranto to be filed by a private person, having no personal interest in the question, distinct from the public, to test the right of an incumbent of a public office to hold the same, notwithstanding the attorney general has refused to give his consent thereto.

2. But the granting or withholding leave to file such information at the instance of a private person rests in the sound legal discretion of the court, and is not a matter of strict legal right, and when the attorney general has refused to consent the case should be exceptional, and one in which it clearly appears that the public interests require it to justify the court in overruling his judgment.

3. Without deciding whether a stenographer in the district court is holding an "office," within the meaning of article 4, § 9, of the constitution, and in view of the provisions of the statute (Sp. Laws 1891. c. 370,) under which such stenographer is appointed by and for each of the judges of the district court in question and his duties thereunder, in connection with the fact that the proposed relator has no personal interest in the question distinct from the public, it is *held* that, in the exercise of a sound judicial discretion, the petition herein, praying, upon the ground that the appointee is holding his position in violation of the constitutional provision above mentioned, that the petitioner be granted leave to file an information for the purpose above indicated, should be denied.

Buck and Canty, JJ., dissenting.—N. W. 910.

—173—

Evidence considered, and *held*, that it sustains the findings of the trial court to the effect that the promissory note upon which this action is based was obtained from the defendants without fraud, for a valuable consideration, and that it is not usurious.—71 N. W. 913.

—174—

The fastenings of the side door of an ordinary box car were defective and out of repair, and, by reason thereof, the door came off the car at one corner, fell down, and hung by the other corner, when plaintiff, an employe, attempted to push it open, and, by reason thereof, he fell out of the car, which was upon a high trestle, and was injured. *Held*, on the evidence, it was a question for the jury whether defendants were guilty of negligence in failing to inspect the car and discover the defect before the injury. His contributory negligence was also for the jury, and the court erred in dismissing the action.—71 M. W. 915.

—175—

In an action by an assignee in insolvency to set aside a payment to a creditor on an atnecedent indebtedness as an unlawful preference, and to recover back the amount paid, *held*, the finding of the court that at the time of such payment the creditor did not have reasonable cause to believe the assignors insolvent is sustained by the evidence.—71 N. W. 916.

—176.—

1. If the facts stated in the alleged libel as to the acts and conduct of plaintiff are true, *held*, the publication was justifiable.

2. *Held*, every one has a right to comment fairly, with an honest purpose, on the conduct of public officials, and, if the facts so stated are true, a jury would not

be warranted in finding that the alleged libel is not a fair comment, with an honest purpose, on the conduct of plaintiff.

3 But *held*, it is alleged that the article was falsely composed and published; it is not conceded that such facts are true; they are not presumed to be true, the burden is on defendant to prove their truth; and therefore the complaint states a cause of action.—71 N. W. 917.

—177—

1. The judgment debtor claims as his homestead, exempt from execution, the whole of the five-acre tract on which he resides. It is within the laid out and platted portion of St. Paul, a city of over 5,000 inhabitants, but has never been itself platted. *Held*, whether or not the whole is exempt as is homestead depends on whether it is within the rural or urban portion of the city.

2, *Held*, it does not conclusively appear that it is within the urban portion of the city, and the order of the court below holding the whole exempt is affirmed.—71 N. W. 919.

—178—

1. A conditional contract for the sale of personal property in which the vendee stipulates that the title to and ownership thereof shall remain in the vendor until the purchase price is paid, which contract is not filed in accordance with the provisions of Gen. St. 1894, §§ 4148, 4149, until after an assignment has been made by the vendee under the insolvency law, is a conveyance made by the debtor within the meaning of the title of the act of 1877 (Gen. Laws 1877, c. 142; Gen. St. 1894, § 4233). And such a contract is covered by section 1 of said chapter (section 4233, supra), which declares that in all cases of general assignments for the benefit of creditors assignees shall be considered as representing the rights and interests of creditors as against all transfers and conveyances of property which would be held fraudulent or void as to creditors, and shall have all the rights which such creditors would have to avoid such fraudulent transfers and conveyances.

2. Such an instrument, not being filed at the time of the assignment, is fraudulent and void as to all creditors of the vendee having no notice of the state of the title to such property, and the assignee may enforce the rights and interests of these creditors in an action of replevin brought against him by a vendor to recover possession of property in his hands under the deed of assignment.

3. When the bond of the assignee has been approved by the court, and filed within the period prescribed by statute, it is immaterial, in so far as the assignee's rights are concerned, that the bond had not been approved or filed when the action in replevin is commenced.—71 N. W. 921.

—179—

1. The possession of one who enters upon the land of another as a mere naked trespasser is limited to so much thereof as he actually occupies, and he cannot claim title by adverse possession to wild and uninclosed land, adjoining that actually occupied and used by him, from the mere fact that he cut natural hay thereon, and let his stock run over and pasture upon it.

2. Evidence considered, and *held*, that it was not sufficient to require the trial court to submit to the jury the question whether the defendant had acquired title to the lands in controversy by adverse possession.—71 N. W. 923.

—180—

A real estate mortgage, executed before, but not recorded until after, the mortgagor has made an assignment for the benefit of his creditors, under the insolvency law of the state, is void as to the assignee in so far as he represents such creditors. He has the same right to avoid such a mortgage as creditors would have had if they had acquired a lien on the mortgaged premises by attachment or judgment.—71 N. W. 924.

—181—

1. Section 5309, Gen. St. 1894, which provides that the service of the summons upon the garnishee shall attach and bind all property belonging to the defendant in his hands at the date of such service, construed, and *held*, that the garnishee cannot be held for property coming to his possession or control after the service of the summons in the proceedings against him.

2. Where judgment is asked against the garnishee upon his disclosure, which is not evasive, it will not be granted if the disclosure does not affirmatively show his liability.

3. *Held*, that the trial court did not err in denying the motion of the plaintiff for judgment against the garnishee in this case.—71 N. W. 925.

—182—

1. An instrument whereby the maker, for value received, promises to pay to the payee therein named, order, or a certain number of dollars on a certain day, with interest payable semiannually, in which it is also provided that, if default be made in the payment of interest, the principle, at the option of the holder, shall become due, is a negotiable promissory note.

2 A general guaranty by the payee of the payment of such a note, written thereon, passes with the assignment and delivery of the note to the holder thereof. Harbord v. Cooper, 45 N. W. 860. 43 Minn. 466, followed.

3. Such guaranty was in these words: "For value received, I hereby assign, indorse, and transfer the within note, and guaranty payment thereof, and all interest to accrue thereupon at maturity, according to its terms." *Held*, that this last clause refers to all of the stipulations of the note as to the time of its payment, and that a cause of action accrued on the guaranty when the maker defaulted in the payment of interest, and the holder exercised his option to treat the principle of the note as due.—71 N. W. 927.

—183—

Evidence considered, and *held* sufficient to justify the order of the trial court in denying the petitioner's motion to vacate the judgment, and permit him to become a party to the action ---71 N. W. 928.

—184—

Evidence considered, and *held* sufficient to justify the findings of the trial court.---71 N. W. 929.

---185---

Evidence considered, and *held* sufficient to justify the verdict of the jury.---71 N. W. 930.

—186—

1. The defendants owned lots in the city of Little Falls, Morrison county, Minn., which were assessed and taxed upon a basis of equality and uniformity with other real property in said city, the whole thereof being assessed and taxed at one-third of its cash valuation. *Held*, that as defendants were charged with only their just proportion of the taxes, compared with valuations generally on the same assessment roll, they had no right, as taxpayers, to defend against proceedings to enforce payments of such taxes, as they were not injured, and therefore had no right to complain.

2. Conceding that a municipal corporation cannot legally contract with private parties to refund the amount of taxes which their property is assessed and taxed, yet, if all property is assessed its just proportion, such contract does not render the taxation invalid, even if the agreement to refund is void.

3. Evidence considered, and *held*, sufficient to sustain the findings of fact of the trial court.---71 N. W. 931.

—187—

1. Section 1, c. 143, Laws 1893 (section 621, Gen. St. 1894), providing for the creation and organization of new counties construed, and *held*, that new counties to be created out of territory to be detached from a county already organized must be composed of contiguous territory, and leave the remaining part of the original county one contiguous portion of territory.

2. *Held*, further, that the trial court rightly dismissed the contest in this matter, on the ground that, if Garfield county were established, it would divide, the remaining territory of Polk county into two entirely separate parts.—71 N. W. 933.

—188—

A bank has the right to set off a note owing it by an insolvent depositor against the depositors account, whether the note is due or not.—71 N. W. 934.

---189---

The issue herein was as to the number of feet in a certain lot of logs sold and delivered by plaintiff to defendants. The logs were in fact surveyed by a deputy surveyor general, but his report thereof was not approved or recorded by the surveyor general. *Held*, that it was competent to prove by the deputy the fact that he made the survey, and the result thereof.---71 N. W. 935.

---190---

The setting aside of a judgment, regular upon its face, had in a court of competent jurisdiction, and not effecting the title or estate in real estate, does not avoid a judicial sale of real estate, under an execution issued thereon, made to a stranger, who had purchased in good faith for a valuable consideration.---71 N. W. 1026.

---191---

1. A certain subscription, by which, in substance, each signer agrees to pay the sum set opposite his name, to defray any loss or excess of expenses above receipts of a certain public enterprise about to be undertaken, *held*, from its language, to

require a pro rata apportionment of such loss among all the subscribers; and in an action to recover on such subscription, a complaint which does not show the amount of such loss and the total amount subscribed, and merely alleges that an assessment was duly made, does not state a cause of action. *Held*, further, the signers of the instrument are not joint promisors, but can be sued separately.

2. Complaint construed. An instrument signed, "R. F. Jones, Secy," *held*, under the circumstances, to be prima facie the individual act of Jones. Certain words of description in an order rejected as false and surplusage.

3. *Held*, the liability of the subscribers in said instrument is not secondary to the liability of some one else, but the intention is to make the subscribers, to the extent of the amount subscribed by each, ultimately and solely liable for such loss; and the subsequent carrying out of the undertaking and the incurring of the risk of such loss by the promise is sufficient consideration for such subscription, and no other consideration need be expressed in the instrument, and the contract is not within the statute of frauds.

4. The amount of the assessment against defendent on said subscription is claimed to be $375. The promisee therein gave plaintiff an order on defendant for $350, reciting in the order that the same is "the amount of your assessment to subscription to guaranty fund." *Held*, the order is an equitable assignment of the fund, at least pro tanto; but the order on its face purports to be for the whole assessment, and it must be presumed that plaintiff bargained for the $350 as the whole amount due, and is entitled to proceed alone and without joining the drawee of the order, and unless the latter intervenes he will waive his right to collect the balance of $25, and therefore, on the facts appearing, there is not a defectof parties plaintiff.

5 *Held*, the fact that plaintiff may have seen the subscription list before he gave credit to the promisee therein is immaterial.

6. *Held*, it was error to refuse to permit defendant to cross-examine plaintiff's witness as to matters bearing on the question of whether or not the assessment was properly made.—71 N. W. 1028.

—192—

Where a third party is in possession of eased premises under the lessee, the law presumes that the lease has been assigned by the lessee to such third party, and, in a suit against him for rent, the burden is on him to explain the character of his possession; such burden is also on his assignee in insolvency. This rule is not changed by the fact that the lease contains a condition of forefeiture in case of such an assignment by the lessee.—71N. W. 1030.

—193—

1. The testator devised a certain part of his property (consisting mostly of real estate) to certain named trustees in trust to be disposed of for the use of the branch of the Salvation Army located in St. Paul, Minn., said proceeds "to be permanently invested in the purchase of a lot. and the erection thereon of a place of worship where said Salvation Army may hold meetings," and, if said branch, "should become legally organized so it may take and hold the title to property," the trustees were directed to transfer to it all the property, or the proceeds thereof. The Salvation Army is an unincorporated religious society having its headquarters in England, and while its officers have military titles, their duties correspond to those of the bishops, elders, and pastors of other churches. Said St. Paul branch was then in existence. *Held*, under the provisions of chapter 43, Gen. St. 1894, the beneficiary of the trust must be certain or capable of being rendered certain, and no such unincorporated voluntary association, or branch thereof, whose membership is fluctuating and uncertain, can be such beneficiary. But *held*, under the provisions of title 4, c. 34, such branch may incorporate, and, if it does so within a rersonable time. the devise will, under the provisions of sections 3027 and 3048, vest in such corporations *Held*, further, section 3049 has abrogated the rule against perpetuities and the rule which prohibits restraint of alienation, so far as such rules apply to such meeting house. Whether or not the policy of the Salvation Army is such that it will permit the St. Paul branch to incorporate as a separate entity is not for the courts to determine.

2. The will further provides: "The rest residue and remainder * * * I give and bequeath to the Central Park Methodist Episcopal Church of St. Paul, Minn., absolutely to be used by said church in aiding the cause of home and foreign missions equally." The church was incorporated, and was authorized by statute to

acquire property by gift for mission purpoes, and to accept any gift in trust for the purpopes for which given. *Held* the devise is an absolute gift to the church, and not a devise in trust. and is valid.

Buck, J., dissenting -.-71 N. W. 1031.

Fourth District. Hennepin County.

American Book Co. vs. Kingdom Publishing Co.

C. S. Jelley, for plaintiff; Fifield, Fletcher & Fifield, for defendant.

A party is not entitled to an injunction to restrain the publication of a libel, although the publication of the libel will result in injury to his property.

Elliott, J.: The plaintiff files its bill in equity asking an order of this court perpetually enjoining and restraining the defendant, its agents, employes and servants, absolutely from publishing, issuing and circulating any further copies or editions of the book called "A Foe to American Schools," and from issuing, publishing or circulating any part of the reading matter contained in said book. The case comes before the court at this time on an application for a temporary injunction; and the question for consideration is the power of the court to issue such an order. After a careful consideration of this very important question, I have come to the conclusion that the injunction should not issue.

Every person reasonably familiar with the constitutional history of England and of the United States is aware of the great importance which has been attached to the principle of liberty of the press and freedom of speech. The right of every man to speak and publish his thoughts has not been judicially denied since the days of the star chamber, and the decision of Chief Justice Scroggs, prohibiting the publication of the Weekly Packet of Advices from Rome.

At the time of the adoption of the constitution of the United States, the principle of the freedom of the press was well established; and the first amendment to that constitution provides that congress "shall make no law abridging freedom of speech or of the press." Recognizing this existing right, the constitution of Minnesota (paragraph 3) provides "the liberty of the press shall forever remain inviolate; and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." In order to understand this provision, it is necessary to know the construction which had been placed upon the language used.

Blackstone had said that the liberty of the press, properly understood, is essential to the nature of a free state; but that this liberty consists in laying no previous restraint upon a publication; and not in freedom from censure for criminal matters when published. Justice Story (Const. Law, 1884) wrote: "Every freeman has the undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. * * * Thus, the will of the individual is left free, and the abuse only of the free will is the object of legal punishment." Again he says, after citing De Lome, "The liberty of the press, as understood by all England, is the right to publish without previous restraint or license; so that neither courts of justice or other persons are authorized to take notice of writings intended for the press, but are confined to those which are printed, (published) and in such cases, if there occurs the question whether they are lawful or libelous, it is to be tried by a jury, according to due proceedings at law."

Chancellor Kent, recognizing the same principle, wrote: 'It has become a constitutional principle in this country that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

It would seem unnecessary to cite authorities in support of this principle, were it not for the fact that recent decisions show a tendency on the part of certain courts to assume what amounts to a censorship by the exercise of the power to issue injunctions. These cases, while admitting the general principle, destroy its life by assuming that property interests only are involved.

Of the English law Mr. Odgers (Libel and Slander, p. 3) says: "No injunction can be obtained to prohibit the publica-

tion or republication of any libel or to restrain its sale. The matter must go before a jury, who are to decide whether the words complained of are libelous or not. The court has no authority to restrain the press; and the courts, whether of law or equity, cannot, until after verdict, issue any injunction in respect to any libel, save such as are contempt of court."

Vice Chancellor Malin, in Spring Head Spinning Company vs. Riley, L. R. 6 Eq., 551; Dickson vs. Holmes, L. R. 7 Eq. Cas., 488, asserted a contrary doctrine. But these cases were reversed by Prudential Assurance Company vs. Knott, L. R. 10, Ch. Ap., 142, where the plaintiff sought to enjoin the publication of a pamphlet which attacked its method of doing business, and asserted that the company was being managed in a reckless manner and was insolvent. The bill alleged that the statements were false and injurious to the business of the plaintiff. But Lord Cairns said: "If these comments do amount to a libel, then, as I have always understood, it is clearly settled that a court of chancery has no jurisdiction to restrain its publication because it is a libel."

Lord Justice James in the same case said: "I think that Vice Chancellor Malin, in Dick vs. Holden, was, by his desire to do what was right, led to exaggerate the jurisdiction of this court in a manner for which there was no authority in any reported case and no foundation in principle."

But the English courts now exercise the power of granting injunctions in cases of libel, by virtue of their statute. In Bonnard vs. Perryman, L. R. 2 Ch. 269, Lord Coleridge granted such an injunction, stating that the seventy-ninth and eighty-second sections of the common law procedure act of 1854 undoubtedly conferred on the courts of common law the power, if any case should arise, to grant an injunction, at any stage of the cause, in all personal actions on contracts or tort, with no limitation as to defamation. This power was, by the judicature act of 1873, conferred upon the chancery division of the high court, representing the old courts of equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a court of common law until the case of Saxby vs. Eastman, 3 C. P. D., 339, which was decided in 1878. After reviewing the cases, he continues: "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong act committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in case of libel for dealing most cautiously and warily with the granting of interim injunctions."

Mr. Odgers argues that the statutes above referred to do not confer jurisdiction, and predicts that the rulings will not stand the test in the house of lords.

In the case of the Grand Rapids School Furniture Company vs. The Haney School Furniture Company, 92 Mich., 558; 52 N. W. Rep., 1009, cited by plaintiff, the court said: "The English courts by recent decisions have exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title; and libelous publications which are injurious to the plaintiff's business, trade or profession; and the wrongful use of a name, by which the public would be misled and the plaintiff injured in his business. Thus far, however, most of the American courts seem unwilling to follow the example of the recent English decisions, and decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title and the like."

American decisions have been practically unanimous in denying the right to injunction in cases of libel. One of the earliest is Brandreth vs. Lance, 8 Paige, Ch. 24, 34 Am. Dec., 386, where Chancellor Walworth treats the claim with very little respect. In Boston Diatite Company vs. Florence Manufacturing Company, 114 Mass., 69; 19 Am. Rep., 310, Ch. J. Gray said: "The jurisdiction of a court of chancery does not extend to cases of libel and slander, or to false

representations as to character or quality of plaintiff's property or as to his title thereto, which involve no breach of contract."

In Flint vs. Hutchins Smoke Burner Company (Mo.), 16 L. R. A., 243, it was held that an injunction would not issue against slander or libel of letters patent until the question of slander had been determined in an action at law. In Raymond vs. Russell, 143 Mass., 295, 58 Am. Rep., 137, it was held that a court of equity has no jurisdiction to restrain a person from publishing in the books of a commercial agency false representations as to the credit and business standing of plaintiff, if no breach of trust or of contract is involved.

In Mayer vs. Stonecutters' Association, 47 N. J. Eq., 519, it was held that a court will not interfere by injunction to prevent the circulation of a libel, although it may tend to injure the person affected in his business or employment. The same principle is recognized in Prudential Assurance Company vs. Knott, L. R., 10, Ch. Ap., 142, and independent of statute, in Bonnard vs. Perryman, L. R. 2, Ch. 269, and Salman vs. Knight, L. R. 2, Ch. 244.

In the Singer Manufacturing Company vs. Domestic Sewing Machine Company, 49 Ga., 70, 15 Am. Rep., 674, the court said: "It is well settled that an injunction will not be granted restraining slander or libel of title or of reputation, 6 Sim., 297, 11 Beav., 112; 11 Sim., 582. Not that it is not a wrong, not that the wrong might not be irreparable, but simply because courts of chancery in the exercise of the extraordinary powers lodged in them have uniformly refused to act in such case, leaving their remedy at law."

Mr. High (Injunctions, 693) says that it is the settled rule that libel and slander, however illegal and outrageous, will not be enjoined.

In Reyes vs. Middleton (Fla.), 29 L. R. A., 66, the court says: "It seems to be well settled that a court of equity will never lend its aid by injunction to restrain libel or slander of title to property, where there is no breach of trust or contract involved; but that in such case the remedy, if any, is at law; and that the alleged insolvency, of the libellant in such case will not of itself authorize the interference of a court of equity." Citing Boston Diatite Company vs. Florence Manufacturing Company, 114 Mass., 69; Wetmore vs. Scovell, 3 Edw., Ch. 523; Brandreth vs. Lance, 8 Paige, Ch. 24; Mauger vs. Dick, 55 How. Pr., 132; Life Association of America vs. Boogher, 3 Mo. Ap., 173; Clark vs. Freeman, 11 Beav., 112; Prudential Association Company vs. Knott, L. R. 10, Ch. Ap., 143.

In some cases, however, it is held that an injunction will issue to restrain threats to prosecute infringement suits against plaintiff's customers using a patented article, when the threats are not made in good faith. Emack vs. Kane, 34 Ind. Rep., 46; Shumacher vs. South Bend Spark Arrester Company, 135 Ind., 47, and cases cited in note to 16 L. R. A., 243. In these cases, however, there was something more involved than the mere libel. There was a direct attack upon the property and business of the plaintiff. In the case at the bar, the attack is upon the character of the plaintiff and its methods of transacting business. The plaintiff relies upon Grand Rapids School Furniture Company vs. Haney School Furniture Company. But this case is of little value as supporting its contention. The bill there alleges that Haney and the Haney School Furniture company had entered into a conspiracy with the defendant, Ballard, to obtain a decree in favor of Haney, and against Ballard, which might and should be used by the conspirators to injure the complainant, and recites that in pursuance of such conspiracy a bill was filed in the United States court for the eastern district of Michigan, and a decree obtained by fraud and collusion for the purpose of benefiting the trade of the Haney School Furniture company at the expense of the complainant; that the defendants well knew the patent was invalid, and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for infringement of said patent. The court said: "Admitting that the weight of authority in this country is against the proposition that a court of equity has jurisdiction by injunction to

restrain the publication of a libel upon one's business, it is no answer to the questions here raised. The complainant has no adequate remedy at law under the circumstances here stated."

It is true that a man's business is property, and that a direct attack upon property will be enjoined. Every libel upon a business man's character for honesty is necessarily an injury to his business. For such injury he is given an action in damages. Of a bill similar to the one in the case at bar, Lord Coleridge said: "It is an attempt to give color to the application by saying that these are libelous publications, which will injure property; and then in order to defend the proposition, it is said that the business of the company and the good will of the company is property; that the company in its property will be injured, and that, therefore, the interference of the court is asked for the protection of property. But with regard to nine out of ten libels the same thing might be said. Things are written of men or corporations, which have an effect upon their character, and upon their trade or business. But no case can be produced in which under those circumstances the court of chancery has interfered." Prudential Association Company vs. Knott, L. R., 10, Ch. Ap., 142.

The allegation that the defendants are insolvent is not sufficient to confer jurisdiction. The constitution does not say that citizens who are able to respond in damages "may speak, write and publish their statements, being responsible for the abuse of such right" and that those who have no property not exempt from execution shall remain silent.

This pamphlet is a serious attack upon the business methods of the American Book company. I find no power, however, in this court to prevent such criticism.

ABSTRACT OF RECENT CASES.

A by-law prescribing notice of a call for an installment on a stock subscription is held, in Germania Iron Min. Co. vs. King (Wis.) 36 L. R. A., 51, to be a condition precedent to a valid call, where the statute provides for calls on giving notice as the by-laws prescribe.

Peeking into the windows of an occupied, lighted residence at the hours of night when people usually retire is held, in Grand Rapids vs. Williams (Mich.) 36 L. R. A., 137, to constitute indecent or insulting conduct or behavior within the meaning of an ordinance relating to disorderly persons.

The purchaser of a negotiable promissory note with the indorsement of a guaranty thereon is held, in Dunham vs. Peterson (N. D.) 36 L. R. A., 232, to be an indorsee within the rule protecting innocent purchasers for value before maturity. The annotation to the case reviews the decisions on the transfer of title to a note by indorsement in the form of a guaranty.

A provision for the treatment of habitual drunkards in private institutions at county expense when they are not financially able to pay for their own treatment is held, in Wisconsin Keeley Institute Co. vs. Milwaukee County (Wis.) 36 L. R. A., 55, to be outside the range of the police power and such use of the public money is held not to be for a public purpose.

Jumping in the dark from a freight train in rapid motion on which one was riding without permission is held, in Shevlin vs. American Mut. Acc. Asso. (Wis.) 36 L. R. A., 52, to constitute an exposure to unnecessary danger within the meaning of an accident insurance policy which did not contain the words "voluntary," "wantonly," "willfully," or any equivalent words.

The liability for injury to an employe sent from Michigan to the Canadian end of a tunnel to work in compressed air is held, in Turner vs. St. Clair Tunnel Co. (Mich.) 36 L. R. A., 134, to be governed by the law of Canada, where the action is based on the alleged wrong in allowing him to enter upon the work in ignorance of dangers known, or which should have been known, to the master.

One who takes property in consideration of a naked pre-existing debt is held, in Schloss vs. Feltus (Mich.) 36 L. R. A., 161, not to be such a purchaser that he can hold it against replevin by the original owner from whom it was purchased by fraud of the intermediate purchaser. An extensive note to the case reviews the authorities on a pre-existing debt as consideration for a bona fide purchase of property not negotiable.

The relaying of a street railway after non-user for about five years, when no action has been taken to forfeit the franchise, is held, in Milwaukee Elec. R. & L. Co. vs. Milwaukee (Wis.) 36 L. R. A., 45, to be beyond the power of the city to prevent where the state has not granted to the city any power to forfeit the franchise.

The non-user of a street railway franchise for more than four years during a period of great industrial depression and financial difficulties during which the street is paved with wooden blocks and the old rails and ties, which were substantially worthless, taken up, but some of the poles and wires remain in place is held, in Wright vs. Milwaukee Elec. R. & L. Co. (Wis.) 36 L. R. A., 47, insufficient to show an abandonment or surrender of the franchise.

COAL STRIKE INJUNCTIONS.

So much has been said about the coal strike injunctions, it will interest attorneys to know the text of some of those injunctional orders.

The following is given as the text verbatim of eight of those orders granted by Justice Jackson, of the United States circuit court, West Virginia:

"On this the 14th day of August, 1897, in chambers, the complainant in this suit, by —— —— ——, its counsel, presented to the undersigned, one of the judges of the circuit court of the United States for the district of West Virginia, its bill of complaint, alleging among other things that the defendants named in its said bill are about to interfere with the operating and conducting plant and mines, and by such interference are about to prevent the employes of the plaintiff from mining and producing coal in and from its mine, and that unless the undersigned judge grant an immediate restraining order, preventing them from interfering with the employes of the said plaintiff, there was great danger of irreparable injury and damage and loss to the said plaintiff, inasmuch as the defendants are insolvent and wholly irresponsible in damages in an action at law.

"Upon consideration whereof it is ordered that the plaintiff's prayer be filed with the clerk of this court at the City of Charleston, in the State of West Virginia, and that process do issue thereon; and a temporary restraining order is hereby allowed restraining and inhibiting the defendants, their confederates, and all others associated with them from in any manner interfering with the plaintiff's employes now in its employment at or upon its premises, or from in any manner interfering with any person in or upon its premises who may desire to enter its employment hereafter by the use of threats, personal violence, intimidation, or by any means whatsoever calculated to intimidate, terrorize, and alarm, or place in fear any of the employes of the plaintiff in any manner whatsoever at or upon its premises.

"And the said defendants and all other persons associated with them are hereby enjoined from undertaking by any of the means or agencies mentioned in the plaintiff's bill from going upon the plaintiff's land to induce or cause any of the employes of the plaintiff to quit or abandon work in the mines of the plaintiff, as set forth and described in its said bill, and said defendants and their associates are hereby enjoined from congregating in, on, or about the premises of the plaintiff for the purpose of inducing the employes in said mines to quit and abandon their work in them.

"And the said defendants, their confederates and associates, are further restrained from conducting or leading any body or bodies of men up to or upon the premises of the plaintiff for the purpose of inducing or causing plaintiff's employees to quit or abandon working for the plaintiff or from in any manner interfering with, directing, or controlling plaintiff's employes on its land or from in any manner interfering with the business of the plaintiff upon its land as set forth in the plaintiff's said bill.

"And the said defendants and their associates are hereby enjoined from going on any part of the plaintiff's lands and premises for the purpose of intimidating, coercing, or endeavoring to procure and induce the plaintiff's employes from working in its mines and upon its premmises by any improper threats, unlawful means, or agencies whatsoever; and the said defendants are further enjoined, as well as their confederates and associates, from in any manner interfering with the plaintiff's employes while they may be passing to and from their work in said mines on and near plaintiff's premises.

"The plaintiff's motion for a permanent injunction, now made in chambers, is set down for hearing at the United States court room at the City of Charleston on Nov. 10, 1897, that being the first day of the next term thereof. But a motion to dissolve this injunction will be considered at Charleston on Sept. 7 next upon ten days' notice of such motion to the plaintiff. This injunction is not to take effect until the plaintiff, or some responsible person on its behalf, shall enter into bond in the sum of $5,000, conditioned to pay all such costs and damages that may accrue to the defendants by reason of the plaintiff's suing out this injunction, should the same be hereafter dissolved."

OUR EXCHANGES.

Boring for Water.

United States Senator Voorhees once had succeeded in delivering an appeal which had brought tears to the eyes of several jurymen. Then arose the prosecuting attorney, a gruff old man, with a piping voice and nasal twang. "Gentlemen," said he, deliberately, "you might as well understand from the beginning that I am not boring for water." This proved so effectual a wet blanket to the emotions excited by Mr. Voorhees that he realized the futility of his own "boring."—The Barrister.

Pettifoggers and Shysters.

Robert L. Harmon, of Troy, Ala., in an address before the Alabama State Bar association, speaking of pettifoggers and shysters, said:

"The pettifogger, as a lawyer, is an unlearned, little, mean character, lacking in ability, sound judgment or good common sense, while the shyster may be possessed of much learning, great ability or an abundance of shrewdness and cunning, but he is a trickster and a dishonest schemer; he is a fomenter of litigation, strife and discord in the community; he is a manufacturer of evidence, a fosterer of perjury and a promoter of bribery; he is a cunning thief, who conceals his perfidy and rascality under the cloak of the law; he cunningly abuses the noble profession to which he has been admitted as a weapon of offense in deeds of unjust oppression, scheming knavery and the procurement of confidence and the repose of trust, which he basely abuses, when there is opportunity to profit by so doing; he 'damns his soul to share with knaves in cheating fools.'"

NOT QUITE DEAD.

Some years ago an Eastern farmer, in trying to repeat Webster's dying words, "I still live," gave an amusing rendering of the spirit, if not the exact letter of the phrase. A gentleman had remarked to him, "Life is very uncertain." "Ah, yes," replied the farmer, 'that's true, every word of it; and, by the way, Captain, that makes me think of what one of your big Massachusetts men said when he died a spell ago." "Who was it?" inquired the Captain. "Well, I don't jist call his name now, but at any rate, he was a big politicianer, and lived near Boston somewhere. My newspaper said that when he died the Boston folks put his image in their windows and had a funeral for a whole day." "Perhaps it was Webster," suggested the Captain. "Yes, that's his name! Webster. Gen. Webster. Strange I could not think on

it afore. But he got off a good thing jist before he died. He riz up in bed and says he, 'I ain't dead yet!'"—Nebraska Legal News.

U. S. SUPREME COURT DOCKET.

The docket for the next term of the United States supreme court, which will begin on the 11th of October, next, is now in preparation. It contains to date 446 cases, showing an addition of 63 cases since the adjournment of the court in May. Of these cases 128 are from the state courts, 110 from the new federal courts of appeal, 49 from the United States circuit courts, 46 from the territorial courts, 32 from the courts of the District of Columbia, 29 from the court of claims, 26 from the private land court, and 17 from the United States district courts. There were 595 cases on the docket when the court convened in October, 1896. This year the number will be fully 100 less. The constant falling off indicates that the court will soon be quite up to date with its business. The diminution of cases coming to this tribunal has been caused principally by the creation of the United States courts of appeal, causing a falling off of from 1,000 to 1,500 cases per year in the cases brought to this court from the United States circuit courts.—The Albany Law Journal.

INSTRUCTING THE JURY.

Mr. Ellis H. Kerr, a well known attorney of Southwestern Ohio, who has been in Geneva, in this state, the last week on important professional business, tells a story involving two prominent lawyers of the Dayton (Ohio) bar which is interesting to lawyers outside of Ohio. For the purposes of the story we will call one Mr. Nerve and the other Mr. Van Shirk. A couple of clients of these attorneys "swapped" horses; as a result a difference arose between them which roused the "Irish" in each to such a degree the matter could be settled only by a lawsuit. So action was begun before a well known, but somewhat eccentric, justice of the peace in Clay township, Montgomery county, and the two prominent attorneys were engaged by the respective parties to look after their interests. The matter at issue was trivial, the whole amount involved not exceeding $10, and the attorneys resolved to get all the fun out of the case possible. The justice of the peace before whom the action was to be tried was known to have an aversion to instructing juries in cases tried before him; in fact, had always refused to do so; and the two prominent attorneys concluded they would have some sport with the "granger justice" by insisting that the jury should be instructed. It was arranged that Mr. Nerve, who represented the plaintiff, should request that the jury be instructed, and that Mr. Van Shirk should join in the insistence for instruction. The trial was tedious and wearisome to all concerned, and when the attorneys had summed up, Mr. Nerve said: "Now, Mr. Justice, it is necessary that you give the jury instructions before they retire to consider their verdict."

"Wall, I never ha' gin the jury no 'structions, an' I guess it ain't necessary here. Besides, I don't 'sider mysel' competent to 'struct this 'ere jury; they've heerd the evidence, and they knows as much about the case as I do."

"Oh, but you must," chimed in Mr. Van Shirk, "or the verdict won't be legal; and we want a verdict that'll stick whichever side gets it."

"Wall," drawled the justice, "I never gin no 'structions yit, and my verdicts 've stuck afore now, an' I guess this one'll do the same 'thout no 'structions."

Both the prominent attorneys insisted that the verdict would not be valid unless the jury were instructed, and pressed the old 'squire so hard in the matter that he finally said: "Wall, ef I mus' 'struct the jury, I mus'." Then turning to the jury he said: "Gentlemen uv the jury: You're as comp'tent ter pass on this 'ere matter as I am; but as I'm required to 'struct you 'pon 't, I say ter ye, gentlemen uv the jury, this ere's a case that the court ner you never should 'ave been bothered with. No, gentlemen, it never should a been brought. But since it has been brought, an' I'm required to 'struct yers, I say to yers, gentlemen uv the jury, that if yers berlieve what Mr. Nerve has said, yers'll bring in yer verdict fer the plaintiff; an' if yers berlieve what Mr. Van Shirk says, yers'll bring in a verdict fer the defendant; but ef yers are like I am, an' don't believe a d—d word

neither on 'em said, then I don't know what in h—— you'll do."—The Washington Law Reporter.

THE COMMERCE CLAUSE OF THE CONSTITUTION.

One of the most interesting papers read at the American Bar association session, Cleveland, was that of Mr. Robert Mather, of the Chicago bar, on the "Commerce Clause of the Constitution." He presented a trenchant review of all the decisions of the supreme court upon this difficult subject, and the speaker concluded his review by a statement that the decisions of the supreme court of the United States had greatly weakened the force and power of the commerce clause.

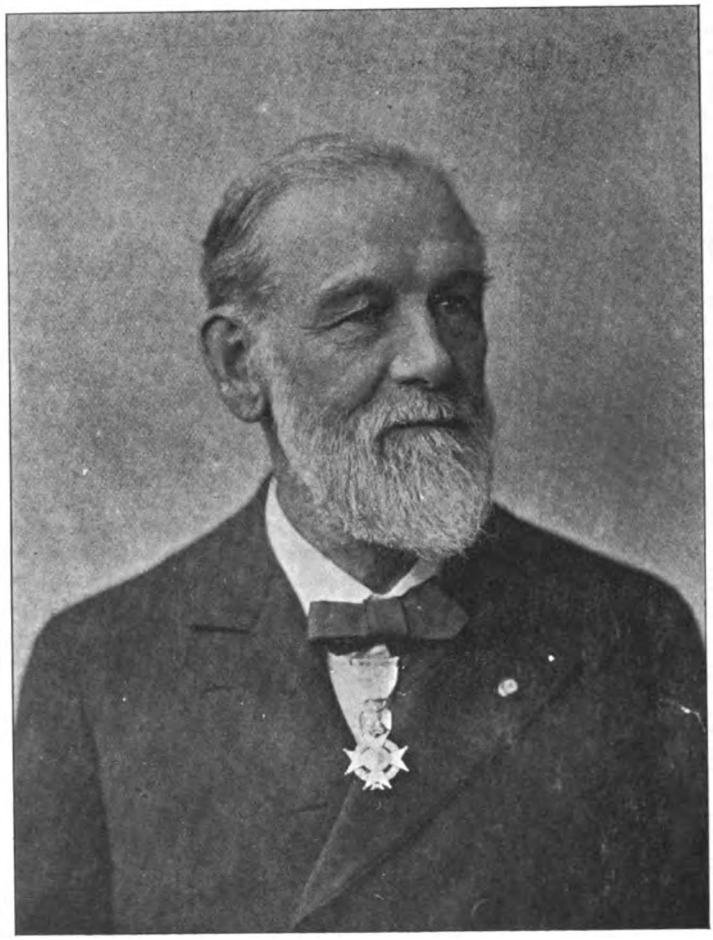
He did not include in this review the late decisions of the supreme court of the United States: Adams Express Co. vs. Ohio, 165 U. S., 194; 166 U. S., 185, decided on rehearing March 15th, 1897.

Regarding this latter class of cases, Mr. Edward Q. Keasby, writing in the New Jersey Law Journal (August, 1897), states as follows:

"The supreme court of the United States has refused a rehearing in the express company tax cases and has reaffirmed the validity of state taxes assessed upon a proportionate part of the entire value of the property of the company in all the states as determined by the value of its capital stock. It was insisted that the state could tax only the tangible property found within its borders, but the majority of the supreme court in denying the rehearing say: 'This contention practically ignores the existence of intangible property, or at least denies its liability to taxation. In the complex civilization of today, a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitation of the federal constitution which restrains a state from taxing, at its real value, such intangible property.' 'It is a cardinal rule, which should never be forgotten, that whatever property is worth for the purfor the purposes of taxation.' The case is Adams Express Co. vs. Ohio. 166 U. poses of income and sale, it is also worth S., 185, decided March 15, 1897. The vote of the court is the same as on the decision of the same case on Feb. 1, 165 U. S., 194. The four dissenting judges added nothing to the forcible argument of Mr. Justice White, made in expressing the opinion of the minority in that case.

The case goes beyond the decisions allowing the taxation of railroad and telegraph properties by the several states in proportion to length of their lines in each. In these, there was the basis of the physical continuity and unity of the property, and the valuation of the parts was ascertained with reference to the value of the whole, but in the case of the express companies, the property in the several states consists of separate horses and wagons in the several states, and the unity consists only in their being combined in one business and under one control. Mr. Justice White, speaking for the dissenting judges, says that "if there be such a rule applicable to the continuous lines of telegraph and railroad companies, 'its existence pushes the power of state taxation as to these particular kinds of property at least to the confines of the constitution, and, therefore, if under the rule of stare decisis, the cases which announce it should be followed, they should not be extended.' He insists that there is no real unity of property in unity of control, or unity of profits, and that in fact, if such a conception of unity were adopted, any manufacturer or merchant who owned property and carried on his business in different states would be liable to have his property in each state taxed with reference to the value of his business. He insisted also that the tax was a tax in one state upon property which did not exist there, and that it was in effect a tax upon the business done outside of the state, and that the business was the business of interstate commerce, which was not subject to be taxed by the states. He reviewed the decision of the supreme court on this subject, and insisted that the ruling announced in the present decision 'greatly weakens or destroys the efficacy of the interstate commerce clause of the constitution.'"

It is not difficult to say on which side of this controversy Justice Bradley would have stood. It was his earnest wish to live long enough to succeed in establishing beyond question the position of the court on federal control of interstate commerce, and since his death the rulings of the court have been uncertain and confusing. Justice White has taken up the fight with great vigor and ability, in this case, and is supported by Justices Field, Harlan and Brown, but the present decision is a long step beyond the railroad and telegraph cases, and it is not easy to tell what may be the consequences of it.—National Corporation Reporter.



THE LATE JUDGE McMILLAN.

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COMMUNICATIONS SOLICITED.

Contribution, items of news about court, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions upon points of interest, as well as important decisions, are solicited from members of the bar and those interested in legal proceedings. Decisions from each of the Judges in the district Courts of Minnesota are urgently solicited.

JUDGE MCMILLAN.

The Honorable Samuel James Renwick McMillan, formerly associate justice and afterwards chief justice of the supreme court of Minnesota, died at his home in St. Paul, on the 3rd day of October, 1897.

Judge McMillan, was born in Brownsville, Fayette county, Pennsylvania, on the 22nd day of February, 1826. He graduated at Duquesne college in 1846, and studied law with Hon. Edwin M. Stanton, President Lincoln's distinguished war secretary. He was admitted to the bar in 1849, and in the same year began the practice of law in Pittsburg. In 1852 he came to Minnesota, settling in St. Paul, where he resided for two years, when he removed to Stillwater, Minnesota. In 1856 he returned to St. Paul, and has ever since made that city his home, except when in Washington, D. C. during the time when he was United States Senator.

As a lawyer, Judge McMillan early achieved distinction, and in 1858, the year in which Minnesota was admitted as a state, he was elected judge of the first judicial district, and in 1864, and before his term of office had expired as judge of the district court, he, together with Hon. Thomas Wilson, was appointed by Gov. Miller, associate justice of the supreme court of Minnesota. He was continued in office as associate justice, by

successive elections, until 1874, when upon the resignation of Hon. G. C. Ripley, he was appointed by Gov. Davis, chief justice of that court. The following year he was elected chief justice for the full term of six years. His first reported opinion in the supreme court is in the case of Tierney v. Dodge. 9 Minn. 153 (166), and the last is the case of Wampach v. St. Paul & Sioux City Ry. Co., 21 Minn. 364, covering a period of about eleven years. So for a period of nearly seventeen years Judge McMillan continuously occupied positions on the supreme and district court benches in this state.

The highest compliment that can be paid to a judge of the courts in this country is the vote of the people in re-electing him to that exalted position. Judge McMillan was re-elected three times while sitting as a member of the supreme court,—twice as associate justice and once while chief justice. Thirteen volumes of reported cases bear witness to the learning, wisdom and ability of this distinguisded jurist while serving as a member of the supreme court.

In 1875, Judge McMillan was elected to the United States senate. How well he justsfied the expectations of his constituents during these six years is told by his re-election to that office in 1881. Thus, for a period of twenty nine years he well and faithfully served his country.

During his career in the senate he was a member of the judiciary committee, chairman of the commerce committee, and also a member of the Revolutionary claims committee.

After leaving the senate Judge McMillan opened an office in St. Paul, and resumed the practice of his chosen profession.

It is difficult at the present day to understand how any man can gain distinction as a public servant without first entering the school of politics. The career of this distinguished man should be taken as a noble example of what can be accomplished without the aid of political combines, and instead thereof by keeping ever in view the idea of being *honest* as well as useful to ones state and country.

"The purest treasure mortal times afford,
Is—spotless Reputation; that away.
Men are but gilded loam, or painted clay."

JUSTICE FIELD'S RESIGNATION.

The supreme court of the United States has received formal notice of the resignation of Justice Stephen J. Field to take effect December 1st.

Justice Field's resignation closes a period of thirty four and a half years of active service as justice of the supreme court of the United States, and the country loses the services of an able and faithful jurist.

Justice Field's announcement of his resignation is as follows:

"Supreme Court of the United States, Washington, D. C., October 12, 1897.—Dear Mr. Chief Justice and Bretheren: Near the close of last term, feeling that the duties of my office had become too arduous for my strength, I transmitted my resignation to the president, to take effect on the first day of December next, and this he has accepted, with kindly expressions of regard, as will be seen from a copy of his letter, which is as follows:

" 'Executive Mansion, Washington, D. C., Oct. 9.—The Hon. Stephen J. Field, Associate Justice of the Supreme Court of the United States, Washington, D. C. —My Dear Sir: In April last Chief Justice Fuller, accompanied by Mr. Justice Brewer, handed me your resignation as Associate Justice of the Supreme Court of the United States, to take effect Dec. 1, 1897.

" 'In hereby accepting your resignation I wish to express my deep regret that you feel compelled by advancing years to sever your active connection with the court of which you have so long been a distinguished member.

" ' Entering upon your great office in May, 1863, you will, on the first of next December, have served upon this bench for a period of thirty-four years and seven months, a term longer than that of any member of the court since its creation, and throughout a period of special importance in the history of the country, occupied with as grave public questions as have ever confronted that tribunal for decision.

" ' I congratulate you, therefore, most heartily upon a service of such excep-

tional duration, fidelity and distinction. Nor can I overlook that you received your commission from Abraham Lincoln, and, graciously spared by a kind providence, have survived all the members of the court of his appointment.

"'Upon your retirement both the bench and the country will sustain a great loss, but the high character and great ability of your work will live and long be remembered, not only by our colleagues, but by your grateful fellow countrymen.

"'With personal esteem and sincere best wishes for your contentment and happiness during the period of rest which you have so well earned, I am, dear sir,

"'Very truly yours,

"'WILLIAM MCKINLEY.'

"My judicial career covers many years of service. Having been elected a member of the Supreme Court of California, I assumed that office on October 13, 1857. holding it for five years, seven months and five days, the latter part of the time being Chief Justice. On the 10th of March, 1863, I was commissioned by President Lincoln a Justice of the Supreme Court of the United States, taking the oath of office on the 20th day of the following May. When my resignation takes effect my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years. I may be pardoned for saying that during all this period, long in comparison with the brevity of human life, though in retrospect it has gone with the swiftness of a tale that is told, I have not shunned to declare in every case coming before me for decision, the conclusions which my deliberate convictions compelled me to arrive at by the conscientious exercise of such abilities and requirements as I possessed.

"It is a pleasant thing in my memory that my appointment came from President Lincoln, of whose appointees I am the last survivor. Up to that time there had been no representative here of the Pacific coast. A new empire had risen in the West whose laws were those of another country. The land titles were from Spanish and Mexican grants, both of which were often overlaid by the claims of the first settlers. To bring order out of this confusion Congress passed an act providing for another seat on this bench, with the intention that it should be filled by some one familiar with these conflicting titles and with the mining laws of the coast, and it so happened that I had framed the principal of these laws and was, moreover, Chief Justice of California, it was the wish of the senators and representatives of that State, as well as those from Oregon, that I should succeed to the new position.

"At their request Mr. Lincoln sent my name to the senate and the nomination was unanimously confirmed. This kindly welcome was extended in March, but I did not at once enter on the discharge of the duties of the office for the reason that, as Chief Justice of California, I had heard arguments in many cases in the disposition of which, and especially in the preparation of opinions, it was fitting that I should participate before leaving that bench; and I fixed the 20th of May as the day on which to take, as I did, the oath, because it was the eighty-second birthday of my father, who indulged a just pride at my accession to this exalted position.

"At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the associate justices was Mr. Justice Waite, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity, nearly an entire century of the life of this court. During my incumbency three chief justices and sixteen associate justices have passed away, leaving me precious remembrances of common labors and intimate and agreeable companionship.

"When I came here the country was in the midst of war. Washington was one great camp, and now and then the boom of cannon could be heard from the other side of the Potomac. But we could not say '*inter arma silent leges.*' This court met in regular session, never once failing in time or place, and its work went on as though there were no sound of battle. Indeed, the war itself simply added to the amount of litigation here as elsewhere. But the war ended in a couple of years and then came the great period

of reconstruction and the last amendments to the Federal Constitution. In the effort to re-establish the nation, to adjust all things to the changed political, social and economic conditions, questions of far-reaching import were developed—questions of personal liberty, of constitutional right, which, after oft times heated discussions before the people and in the halls of Congress, came to us for decision. I do not exaggerate when I say that no more difficult and momentuous questions were ever presented to this or any other court. I look back with pride and joy to the fact that I was permitted to take part in the consideration of all those important questions, and that not infrequently I was called upon to express the judgment of this court thereon. And now that those times of angry debate, deep feeling and judicial decision have passed, it is pleasant to realize that the conclusions announced by this court have been accepted, not simply of necessity, as so prescribed by the fundamental law, but, in the main, as in themselves both correct and wise.

"As we all know, the period of war was followed by one continuing event to the present time of marvelous material development. Wealth accumulated—such as was never before dreamed of in this country. Gigantic enterprises were undertaken and carried through. Inventions have multiplied the conveniences of life, as well as the possibilities of achievement. Indeed, the conditions of life have essentially changed from those that prevailed prior to the war. Out of this changed social and economic condition have sprung not merely an immense multitude of cases, but litigation of a character vitally affecting the future prosperity and safety of this country. To this court have come for final solution and decision many of these questions and cases. By the blessings of Almighty God, my health and life have been preserved, and I have been enabled to take part in the consideration of all these cases. Few appreciate the magnitude of our labors. The burden resting upon us for the last fifteen or twenty years has been enormous. The volumes of our reports show that I alone have written 620 opinions. If to these are added fifty-seven opinions in the Circuit Court and 365 prepared while I was in the Supreme Court of California, it will be seen that I have voiced the decision in 1042 cases.

"It may be said that all or our decisions have not met with the universal approval of the American people, yet it is to the great glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions and demonstrates that the people of the United States are capable of self-government.

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their States and representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people and for the people.' It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistence, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours.

"With this I give place to my successor, but I can never cease to linger on the memories of the past. Among the compensations for all the hard work that a seat on this bench imposes have been the intimacies and friendships that have been formed between its members. Though we have often differed in our opinions, it has always been an honest difference, which did not affect our mutual regard and respect. These many years have in deed been years of labor and of toil, but they have brought their own rewards, and we can all join in thanksgiving to the author of our being that we have been permitted to spend so much of our lives in the service of our country. With profound respect and regard, I am, my dear brethren, very sincerely and always yours, STEPHEN J. FIELD."

The court replied as follows:

"Supreme Court of the United States,

Washington, D. C., October 13.—Dear Brother Field: We are profoundly moved by the letter in which you announce to us your retirement from the bench. The termination of a judicial career of such length and distinction can not fail to inspire among all your countrymen, and indeed, wherever the realm of jurisprudence extends, a keen sense of loss, which to your colleagues assumes the aspect of a personal bereavement. For the intimacy necessarily incident to the conduct of work so constant, so exacting, and of such vital importance as ours inevitably draws us together by ties of the closest character, which can not be dissolved without emotions of deep sadness and regret. We feel that our parting involves not simply the deprivation of the assistance afforded by your learning, your vast experience, and your earnestness in advocacy of your convictions, but the severance of those relations which have contributed so much to lighten the hardest labors of the road.

"This is not the time or place to dwell on the reputation you have achieved as a jurist. The record is made up and may safely be committed to the judgment of posterity. But we can not part with you as an active member of the court without the fervent expression of the hopes that you may be spared for many years to enjoy the repose you have so thoroughly earned and the commendation bestowed on good and faithful service. We are, dear Brother Field, your affectionate brethren.

"MELVILLE W. FULLER,
"JOHN M. HARLAN,
"HORACE GRAY,
"DAVID J. BREWER,
"HENRY B. BROWN,
"GEORGE SHIRAS, JR.
"E. D. WHITE,
"R. W. PECKHAM."

DIGEST MINNESOTA SUPREME COURT DECISIONS.

—194—

1. In an action brought upon a certificate issued by defendant association to a member of a subordinate grove, and certifying that the beneficiary therein named was entitled to the benefits of a specified fund, known as the "Widows' and Orphans' Fund," upon the death of the member, certain articles of the constitution of the association considered and construed. *Held*, that the "monthly contributions" provided for in section 1, art. 5, are the "monthly dues" required to be paid by the terms of section 2, same article.

2. And *held*, that according to these articles, the member must be "in good standing" at the time of his decease, to entitle his beneficiary to share in the benefits of this fund. The beneficiary of a member who is in arrears for nonpayment of monthly dues for more than 30 days, and whose name has properly been stricken from the rolls, is not a member in good standing.

3. When joining defendant association, each member paid as a fee into its treasury, and into the fund before men-

tioned, a small sum of money. He thereafter paid monthly dues to the subordinate grove, and special assessments, if required. At the death of a member in good standing, defendant's secretary was by the articles authorized and required to collect from each subordinate grove a sum equal to one dollar for each of its members; and the amount thus collected, coming out of the treasuries of the subordinate groves, constituted the fund out of which the beneficiary was paid. *Held*, that if the subordinate groves have, by a long-continued course of conduct, misled their members respecting the payment of monthly dues; have created a belief that payment need not be made in strict accordance with the articles, and will not be exacted on the day stipulated; have thus lead the members to rely upon a belief that delay in payment is unobjectionable, and will not effect their good standing, or their rights and interests in the fund in question,—payment in strict compliance with the articles has been waived, and the defendant association cannot claim that such members are not in good standing, if delinquent in accordance with the custom, and is estopped from insisting upon a forfeiture.

4. *Held*, in the case at bar, that the evidence was sufficient to support a finding that, within this rule, there had been a waiver, and that the deceased member, although delinquent as to his dues, was a member in good standing when he died.

5. Assignments of error relative to the admission of certain letters in evidence discussed, the same having been admitted as tending to support an allegation in the complaint that defendant had been duly notified of the death prior to the commencement of the action. *Held*, in view of the vagueness of the article relating to proof of the death of a member, and the fact that the letters were treated by the board of directors of the association as a compliance with the articles, and as sufficient proof of the fact therein stated, that they were properly admitted in evidence as tending to prove the allegation in the complaint as to notice.—72 N. W. 48.

—195—

1. An agreement for the cultivation of land on shares construed, and *held*, that the owner and the occupier were tenants in common of the crops; the title, however, remaining in the owner as security for the performance by the occupier of the terms of the agreement, and for the repayment of advances which the owner might make to the occupier, and for the payment of all indebtedness due from the latter to the former. Strangeway v Eisenman (Minn.)71 N. W. 617, followed,

2. Where a mortgage is given to secure future advances, the filing of a subsequent mortgage is not constructive notice to the prior mortgagee, so as to postpone the lien of his mortgage for advances thereafter made, even although such advances were optional, and not obligatory. The prior mortgagee is effected only by actual notice of the subsequent mortgage, and the burden is on the subsequent mortgagee to prove such notice.—72 N. W. 52.

—196—

1. The governor of a state has the power to revoke his warrant for the surrender of an alleged fugutive from justice at any time before he is taken out of the state.

2. In a proceeding in habeas corpus on behalf of the alleged fugutive, if it appears that the warrant has been revoked, he must be discharged, and the grounds of such revocation cannot be inquired into.—72 N. W. 53.

—197—

1. *Held*, that the evidence justified the court in finding that certain payments were made generally on acconnt, and not specially made and received in extinguishment of the principal of the debt. Moran Manuf'g Co. v. City of St. Paul (Minn) 67 N. W. 1000, followed.

2. By the terms of certain street sprinkling contracts, the amount of work to be done, and consequently of compensation to be paid, were not definately fixed, and could not be definately fixed, and could not be ascertained until the end of the sprinkling season. These contracts were payable only out of the proceeds of assessments to be made for that purpose. *Held*, that the board of public works was not required to make monthly assessments to pay for the work, but might wait until the work was completed, and then make one assessment for its entire cost; also, that it was an implied term of the contracts that the city

should have a reasonable time after the completion of the work in which to make and collect such assessment, and that, until the expiration of such reasonable time, the contractor was not entitled to interest, as damages for the non-payment of the contract price.—72 N. W. 54.

—198—

The defendant demanded a struck jury, pursuant to Gen. Laws 1895. c. 328. When the cause was called for trial, the court, on motion of the plaintiff, set aside the struck-jury list, and required the defendant to go to trial with the common jury of the regular panel. Subsequently the legislature repealed the struck-jury law. Gen. Laws 1897, c. 13. After the repeal of the struck-jury act, the court, on motion of the defendant, granted a new trial solely on the ground that it had erred in setting aside the struck-jury list. *Held* that, assuming that the court had erred in setting aside the struck-jury list, this furnished no ground for granting a new trial, inasmuch as this would merely result in a trial before another common jury, thus doing over again what had been already done.—72 N. W. 55.

—199—

1. Appellant claims title to the land in question by adverse possession under color of title. After he had taken a conveyance from a stranger having no title, he entered into possession; but before the statute had run in his favor he commenced an action against the five tenants in common, who were the true owners. Three of these answered, and were adjudged to be the owners of three-fifths of the land; and thereupon he purchased their interest, took the title in the name of his wife, and the land was subsequently, during the remaining portion of the 15-year period, occupied by tenants procured by him. *Held*, the evidence tended to prove, and the trial court was justified in finding, that he abandonded the possession to his wife, procured the tenants for her, and paid the taxes and managed the premises for her and as her agent, and not in his own right, and that the statute ceased to run in his favor as against the other tenants in common holding the other two-fifths of the land.

2. When a middle initial is added to a name or omitted from it in a conveyance, so as to raise a doubt that the maker of the deed is the owner of the land, a further description of the maker in the deed as the heir of a certain other person deceased, and a statement in the notary's certificate of acknowledgement that she is known to him to be the same person described in, and who executed, the deed, will remove such doubt, and establish prima facie the identity of the maker. Buck J., dissenting.—72 N. W. 56.

—200—

1. In the lifetime of L., she and K. entered into an agreement whereby the former agreed to give and leave at the time of her death all her property and effects to the latter, and whereby the latter agreed, in consideration thereof, to support the former during her life. K. performed the contract on her part, and L. died. When her estate was about to be distributed in the probate court, K. appeared and made claim to the same under said contract. *Held*, the probate court had jurisdiction to hear and determine such claim, as, on the death of L. K. was, under said contract, the immediate successor to said estate, subject to administration and the rights of creditors.

2. Said estate was personal property and was the distributive share which came to L., as next of kin of her sister, who died 14 months before L. died, and and whose estate was not settled or distributed at the time of the death of the latter. *Held*, such distributive share passed to K. by said contract, although the contract was made before the death of said sister of L., and when neither K. nor L. knew that said share would ever come to the latter.

3. The contents of a written instrument shown to be beyond the jurisdiction of the court, and not in the control or custody of the party, may be proved by secondary evidence.—72 N. W. 59.

—201—

1. Elevators owned by other parties, situated on the right of way of a railroad company, are, for purposes of taxation, personal property. Minneapolis & N. Elevator Co. v. County Com'rs of Clay Co. 60 Minn. 522, 63 N. W. 101, overruled.

2. Where a receiver of the assets of a corporation has been appointed under section 9. c. 76, Gen. St. 1878 (section 5897

Gen. St. 1894), the personal property of the corporation continues assessable at the same place at which it was assessable before the receiver was appointed, without reference to the residence of such receiver.

3. A personal tax assessed against the corporation cannot be collected in an action or proceeding against the receiver personally; instituted under Gen. St. 1894. § 1569.—72 N. W. 60.

—202—

Held, that the evidence justified the findings.—72 N. W. 62.

—203—

1. *Held*, the court below was, on the evidence, warranted in finding that the Swedish-American National Bank brought itself within the conditions laid down in the opinion on the former appeal (reported in 66 N. W. 986), and in holding that the bank had fairly and properly exhausted its collateral security by a sale of the judgment rendered for the same, and in approving such sale and allowing the bank to participate in the proceeds of the insolvent estate for the balance of its claim.

2. When the motion of the bank to be allowed so to participate came on for hearing, the court adjourned the same to a certain time, and ordered it to be heard on evidence such as would be competent on the trial of an action. The parties appeared at the time to which it was adjourned, and the appellant assignee objected to the introduction of the bank's evidence because no issues had been framed. *Held*, conceding, without deciding, that the hearing was the final trial on the merits of a matter involving substantial rights, for which issues should be framed by proper pleadings, the objection came to late, and should have been made when the court ordered the matter adjourned to be heard on competent evidence as aforesaid.

3. *Held*. the court did not err in allowing the bank to deduct from the proceeds of the sale of such judgment reasonable attorney's fee's necesarily incurred by it in obtaining the judgment.—72 N. W. 62.

—204—

In the construction of an ordinance, rule applied that the expression of one thing is the exclusion of another, and that that interpretation is favored which gives effect to every part of the ordinance. *Held*, a certain ordinance of St. Paul prohibiting the allowing of dense smoke to issue from the chimney of buildings does not make the servant of the owner or occupant liable.

Collins J., dissenting.—72 N. W. 64.

—205—

1. *Held*, sections 2, 5, 6, 7 and 8 of article 9 of the constitution do not prohibit the legislature from appropriating the surplus revenues in the state treasury, or a part of the revenue collected each year for the erection of a state capitol, so long as sufficient public funds applicable thereto are left to defray the current, ordinary expenses of the state government; and it does not appear that chapter two, Laws 1893, contravenes these sections of the constitution.

2. *Held*, the legislature may, for the purpose of erecting a state capitol, make appropriations covering a period of time beyond the two years for which it is elected.

3. *Held*, the legislature may create a board of public officers for the purpose of purchasing a site for, and superintending the erection of, a state capitol thereon, and expending the moneys appropriated for that purpose.

4. *Held*, St. Paul is the permanent seat of government of this state, until such seat of government is removed in the manner provided by section 1 of article 15 of the constitution.

5. By section 5 of the act of congress 11 Stat. 166) authorizing the people of Minnesota territory to form a constitution and state government, 10 sections of land were granted to the state for the purpose of erecting public buildings at the seat of government. *Held*, the legislature may erect a new capitol building without first disposing of these lands, and exhausting the proceeds thereof in erecting the same.

6. *Held*, said chapter 2, Laws 1893, is not unconstitutional as embracing more than one subject.—72 N. W. 65.

—206—

Chapter 107, Laws 1897, purporting to license and regulate hawkers and peddlers throughout the state, provides that the act shall not "be construed to prevent any manufacturer, mechanic, nurseryman, farmer, butcher, * * *

selling, as the case may be, his manufactured articles, or products of his nursery, or farm or his wares, * * * as butcher, either by himself or employe." *Held*, the business of hawker or peddler is so far a legitimate and moral business that the legislature can regulate it only for the purpose of preventing it from becoming a nuisance; and for that purpose, the distinctions attempted to be made between peddling by the manufacturer, mechanic, nurseryman, farmer, and butcher, as aforesaid, and the peddling of the same articles by the purchaser from these parties, constitute no proper basis for classification, but the classification so attempted is founded on no proper or natural distinction, but is arbitrary, and contravenes sections 33 and 34 of article 4 of the constitution.—72 N. W. 67.

—207—

Defendant and another corporation entered into a contract by which the latter was to deposit, and the former was to hold in trust, certain securities for the benefit of the owners and holders of certain debentures which were to be issued and sold by the depositor of the securities. Among other securities deposited was a real estate mortgage, with the note and interest coupons thereto attached. The mortgage was absolutely assigned to defendant by the depositing corporation, mortgagee, and it also guarantied the payment of the note, and each of the coupons upon the backs thereof. It was stipulated in the contract that, so long as the interest was paid on the debentures, the depositing corporation should have the right to collect all interest as it matured upon its securities, and in conformity with this stipulation the trustee delivered up the cupons which fell due at the maturity of the note, retaining possession of the latter and of the mortgage. The depositor did not collect the interest, and soon afterwards became insolvent, failed to pay interest upon its debentures, and went into the hands of a receiverr The trustee then foreclosed the mortgage, and at the sale bid in as trustee the property for an amount due on the note, with interest from maturity and costs. It had no notice that the cupon was unpaid, and did not take into account the amount due thereon, at any time during the foreclosure proceedings or at the sale. The property was not redeemed, and thereafter the receiver sold and transferred the cupon to this plaintiff. *Held*, in an action brought to enforce an alleged equitable interest in the property in the proportion that the amount due on the cupon bore to the amount due on the note when the sale was made, that the complaint in which these facts appeared did not state facts sufficient to constitute a cause of action.—72 N. W. 68.

—208—

1. In an action to declare a forfeiture of a deed in which was a condition subsequent, and to eject defendants from the premises, in which the court below, upon findings of fact, based its conclusions of law that plaintiff was the owner of the land, was entitled to and should recover possession with $300 damages for its detention, judgment being ordered accordingly, *held*, that the findings were supported by the evidence and justified the conclusions of law, except as ot damages.

2. *Held*, that there was no evidence which would support the finding that plaintiff demanded poseession of the premises from defendants more than three years prior to the commencement of the action, or at any time prior thereto; and that there was no evidence, and no finding upon which to base a conclusion of law, that plaintiff was entitled to judgment for anything more than nominal damages for a detention of the premises.

3. A deed upon condition subsequent conveys the fee, with all its qualities of transmission. Notwithstanding a breach of the condition, the estate continues in the grantee until defeated by actual entry, or by some act equivalent to entry at common law, made for the purpose of claiming a forfeiture by some one having a right to terminate the estate.—72 N. W. 69.

—209—

A set-off of one judgment against another is not demandable of right, but is discretionary with the court, and will be denied when the court, in the exercise of its discretion, can see that an injustice will be done by granting it. This rule is not changed by Gen. St. 1894, § 6194, which provides that an attorney's lien on a judgment shall be subordinate to the rights existing between the parties to the action. —72 N. W. 71.

—210—

1. Where a written contract contains characters, abreviations, or apparently ambiguous terms, parol evidence is admissible to show that they have a recognized and generally understood meaning to the trade or business to which the subject of the contract relates. Such evidence does not vary or add to the writing, but merely translates it from the language of the trade into the language of people generally.

2. A memorandum of a contract for the sale of goods *held* to comply with the requirements of the statute of frauds

3. *Held*, that there was no evidence to justify a finding that a certain transaction made by one partner in the name of the firm was within the scope of the partnership business.—72 N. W. 72.

—211—

1. *Held*, in an action brought against the municipality in which the accident occurred and the owner abutting property, to recover for injuries received in falling into a coal hole in the sidewalk, that there was evidence sufficient to support a verdict in plaintiff's favor on the question of defendant's negligence.

2. Certain assignments of error considered and disposed of.—72 N. W. 73.

—212—

1. The article of defendant, a life insurance association upon the assessment or co-operative plan, provided that all assessments for death losses should be made by resolution of the board of trustees, and a by-law had been adopted which read "until, and unless otherwise ordered by the board of trustees," mortuary assessments, shall be made only on the first secular days of April, July and December in each year, and by special resolution. On November 6, 1893, the board, by resolution, made and levied the regular December assessment for death losses which had actually occurred, and from that time on until the last day of November the secretary and his clerks were actually engaged in preparing, causing to be printed, and in preparing for the mailing of necessary notices of assessments for over 12,000 members of the association. These notices bore date December 1st, and were mailed to members November 30th. *Held*, that the articles and by-laws were substantially complied with, and that the December assessment was regularly and properly made.

2. On being admitted, each member was required to deposit with the association as many dollars for each certificate of $2,000 as he was years of age, in pledge to secure the payment of all assessments occasioned by death of members made against him. *Held*, taking into consideration the general plan of the association and the articles relating to this deposit, that a member who had defaulted in the payment of his assessments was not entitled to have his "guaranty deposit" applied in payment of such assessment.

3 If in negotiations or transactions with a member after knowledge of a ground of forfeiture of his membership such an association recognizes the continued validity of the certificate, or does acts based thereon, the forfeiture is, as a matter of law, waived and such a wavier need not be based on any new agreement or on estoppel. The forfeiture may be waived although the maker was in ill health at the time, and could not have furnished evidence required by the association as to his continued good health.

4. A secret intention on the part of the association not to waive a forfeiture cannot defeat the legal effect of unequivocal and deliberate acts of its officers.

5. *Held*, taking into consideration all of the circumstances appearing on the trial that there was evidence which would have warranted a finding that defendant association, by its conduct subsequent to knowledge of a forfeiture, had waived the same, and had concluded to treat its contract as still in force.—72 N. W. 74.

—213—

1. Where a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is made before a judge other than the one who tried the cause, it is his right and duty to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, with the proviso or qualification that such discretion must be exercised entirely with reference to the evidence disclosed by the record, as he can know nothing else as to what occurred or appeared at the trial.

2. If, in such case, the judge grants a new trial, in determining whether or not he abused his discretion this court will apply the rule in Hicks v. Stone, 13 Minn. 434 (Gil. 398), having in mind, however, that such discretion must have been exercised exclusively upon what the record discloses.

3. Certain parts of the charge of the court *held* to have been, under the evidence, inacurate and misleading upon the subject of the degree of care which the defendant owed the plaintiff as its servant.—72 N. W. 78.

—214—

1. Upon habeas corpus cognizance can be taken only of defects of a jurisdictional character, which render the proceedings under which the relator is imprisoned, not merely erroneous, but absolutely void.

2. Under the general grant of power to make all regulations and to ordain all ordinances which may be expedient or necessary for the preservation of health, the suppression of disease, and to prevent the introduction of contageous diseases, the common council of St. Paul had authority to pass an ordinance requiring those carrying on the business of scavenger, as therein defined, cleaning out and removing the contents of privy vaults, cees pools, sinks and private drains, to first obtain a license, and requiring the licensee to obtain a permit from the commissioner of health before removing the contents of any privy vault, cees pool, etc.—72 N. W. 79.

—215—

1. In an action of ejectment brought by H. against the city to recover possession of a strip of land occupied by the city as a part of a public street, judgment was entered in his favor, ejecting the city. Thereupon it commenced condemnation proceedings to condemn such strip for such street, an award of damages was made to the owners of such strip, and a special assessment made therefor against the lots abutting on the street, but such assessment has not been paid, and no tax judgment has been entered therefor. The city having failed to pay the award of damages within six months after the confirmation of the award, the owners of the strip so condemned were, by the provisions of the charter, entitled to recover the amount of such award out of the public funds in the city treasury, and thereupon the assignee of H. brought this action to recover the same. In truth and in fact H. had no title to such strip, and ought not to have prevailed in the ejectment action, but such title was in the abutting owners. Two of these owners, whose right of access would be cut off by the vacation of the street over said strip, intervened in the action. *Held*, neither such abutting owner nor the city was estopped, as against the other, to assert that said strip always was a part of the public street; therefore, the city took nothing from such owners by such condemnation, and they are not entitled to any part of the award

2. *Held*, further, such abutting owners have a good defense to such special assessments against their lots, and, if plaintiff recovers out of the general funds, the city cannot be reimbursed by such special assessments; but, as against plaintiff, such abutting owners have a right, independent of the city, to assert that said strip always was a part of the street, and by reason thereof, and of such owners being general taxpayers, they have a right to object to the recovery by plaintiff of the amount of said award out of the general funds in the city treasury.—72 N. W. 104.

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1. A mortgagee paid the taxes on the mortgaged premises before he commenced proceedings to foreclose by advertisement, but he did not state in his notice of sale the amount claimed for taxes paid at the date of the notice. His mortgage authorized him, in case of its foreclosure, to deduct from the money arising from the sale all sums paid by him for taxes, and in his notice of sale he stated that the premises would be sold to pay the principal and interest of the mortgage debt, and any sums paid for taxes or insurance. He was the purchaser at the sale, and included in his bid the full amount of his debt, including the sum paid for taxes and insurance. *Held*, that he was entitled to retain from the proceeds of the sale the amount of the taxes so paid.

2. On the morning of the sale he paid the premium for insurance on the premises covering the period of redemption, but it not appearing that such insurance was for the benefit of the mortgagor as well as himself, *held*, that he was not entitled to retain the amount paid for such insurance from the money arising from the sale.

Canty, J., dissenting.—72 N. W. 106.

—217—

Held, that by virtue of the decision of this court (69 N. W. 217) made on a former appeal herein, which was from an order denying appellant's motion for a new trial, he had the right on the case being remanded, to move the trial court for a further finding of fact as to a question reserved for further consideration, but, having omitted

to do so, he cannot, on this appeal from the judgment, raise the question that the finding on the particular question as originally made is not sustained by the evidence, nor that it was such as to require the trial court to find certain additional facts.—72 N. W. 108.

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Evidence considered, and *held*, that it sustains the findings of fact and conclusions of law of the trial court, to the effect that the respondent did not, within 90 days next before his assignment for the benefit of his creditors, give or permit any preferences contrary to the provisions of the insolvency law.—72 N. W. 109.

—219—

1. A life insurance policy made the insurance money payable to the insured, his executors, administrators, or assigns. Plaintiff, a daughter of the insured, claims that he assigned the policy to her, and then joined her in a written request to the insurer that the policy be surrendered, and a new one issued to her in lieu of the old one, and this action was brought on the new one. The intervener, the widow of the insured, claims under the old policy through his will. The jury, by a special verdict, found the insured assigned the old policy to plaintiff, but that he never made or signed any request that the same be surrendered, and a new one issued to her, as she claims, and they also found a general verdict for the intervener. *Held*, the special finding controls the general verdict, and the court did not err in ordering judgment for plaintiff on such finding, notwithstanding the general verdict.

2. *Held*, further, the erroneous instruction of the court, not excepted to, that if the jury found that the insured did not make or sign such request they should find for the intervener, did not become the law of the case, so as to prevent plaintiff from having judgment on such special finding.

3. Rule applied that where the jury have made a special finding on a separate and distinct issue, which conclusively disposes of the case, it is immaterial that the judge may have erred in his instructions in submitting to the jury other separate and distinct issues.—72 N. W. 111.

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Evidence considered, and *held* sufficient to justify the verdict of the jury.

Canty, J., dissenting.—72 N. W. 112.

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Gen. St. 1894 § 7926, in so far as it requires the governor to appoint members of the state board of pharmacy from among a certain number of phamacists elected by the state pharmaceutical association, is opposed to the provisions of the constitution (article 5, § 4), and is unconstitutional and void.—72 N. W. 117.

—222—

1. Where a mortgagor surrenders possession of mortgaged premises to a mortgagee on account of a default in the conditions of the mortgage, the latter is given distinctly different and additional security for his debt.

2. If the mortgagee forecloses his mortgage while thus in possession and the property sells for less than the amount due, he is as against a subsequent mortgagee, entitled to continue in possession during such part of the year of redemption as may be necessary to satisfy the unpaid balance of his debt.—72 N. W. 118.

—223—

1. The purpose for which property is leased must be observed. To accept a lease of premises for a certain purpose, amounts to a covenant on the part of the lessee that he will so use them.

2. Where a lease does not contain an express or formal covenant that the premises shall be used for a certain purpose, with a forefeiture clause in case of a breach, but does contain language and stipulations equivalent to such a covenant, the lessor may, by injunction, prevent the lessee, or those claiming or holding under him, or acting by his authority, from converting the demised premises, or a part theaeof, to uses inconsistent with the terms of the contract.

3. Defendant E. entered into a lease with plaintiff, S., whereby E. became a tenant for years of certain hotel property. E., while operating the hotel under this lease, used and occupied certain rooms in the building for family purposes. He then became insolvent, and, under the insolvency laws or the state, a receiver of his estate was duly appointed. This receiver took possession of the hotel property, and, by order of the court, continued to operate the same as an hotel. In proceedings instituted to oust E. from his rooms, so used and occupied, it was held (In re Emerson's Homestead, 60 N. W. 23, 58 Minn. 450) that the rooms consti-

tuted his homestead, and that, as against the receiver, he was entitled to possession. *Held*, in an action bronght by the lessor to restrain E. from continuing to occupy and use the rooms as his private residence, and also to restrain the receiver from permitting E. to so use the rooms, that, although there was no express or formal covenant in the lease with respect to the purposes for which the premises were demised, certain language and stipulations therein contained amounted, and were equivalent, when considering the lessor's rights in this action, to an express and formal covenant that the premises should be used for hotel purposes exclusively.

6. *Held*, that the complaint herein states a cause of action, as against E. and the receiver of his estate, for an injunction, as therein demanded,—72 N. W. 119.

—224—

Held, following Scott v. Austin, 32 N. W. 89, 864, 36 Minn., 400, that, by virtue of the statute, a plaintiff asking for cancellation of securities for usury need not, as a condition of obtaining such relief, pay what he has received.

2 Evidence held to sustain the finding and decision of the trial court to the effect that the securities here in question were usurious—72 N. W. 121.

—225—

The defendant was indebted to plaintiff upon three promissory notes secured by a trust deed given by a third party. Subsequently defendant became further indebted to plaintiff in the sum of $767, and, becoming insolvent, they executed a composition agreement as follows: "$383.80 and interest from Nov. 15, 1894. In consideration of the payment in cash to us by Albert Wunderlich within twenty days from this date of the sum of $383.80, being 50 per cent. of his entire indebetness to us, and in consideration of other creditors accepting a like percentage of their respective claims and demands against him in full settlement and compromise thereof, we hereby agree to accept said percentage of our claims and demands against him in full settlement and compromise thereof." It was conclusively shown, without objection, that the indebtedness represented by the three notes was not included in the composition agreement, and that the defendant, soon after its execution, paid a large number of his creditors in full, and that only a bare majority of the creditors ever signed such agreement. Defendant paid 50 per cent. on the $767 indebtedness in full of the payment thereof. *Held*, that the words "other creditors," as used in the composition agreement, meant all other creditors, and that plaintiff could maintain an action for the unpaid indebtedness represented by the three notes.—72 N. W. 122.

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1. B., as the agent of and in behalf of plaintiff herein, a corporation, entered into a written contract with defendant board for the construction of an iron bridge, with approaches, on a country road. B. supervised the work, and defendant board accepted it from him as agent when completed. He was the only person with whom the board dealt, and was in fact a shareholder in the corporation, and its agent. *Held*, in view of all these circumstances, it was not necessary for B. to state in his verification of plaintiff's claim or account, presented to the board under Gen. St. 1 94, § 687, that he was plaintiff's agent.

2. It is not required by statute, when letting a contract of the character before mentioned, that the board of county commissioners advertise for bids, or that the contract be let to the lowest bidder. Gen. St. 94, §§ 1894–1902, have no application to such a case.

3. Where a bridge is built across a stream, upon a public road. more than 3 feet above the level of the bank upon either side of such stream, Gen. St. 1894, § 1851, requires such bridge with its approaches to be at least 16 feet wide. *Held*, that this requirement in respect to the width of the bridge is observed when, from the evidence, it appears that between the trusses, the innermost projecting parts of the superstructure, the distance is 16 feet, although it also appears that wheel guards, 4 inches wide and 16 inches high, are laid upon the flooring, and encroach on the 16 feet.

4. Gen. St. 1894, § 1846, limits and restricts the power of the board of county commissioners to appropriate or expend money upon public roads in excess of a specified sum or ratio of the assessed val-

nation of real estate in the country, unless such expenditure is ratified by a vote of the people. *Held*, assuming that the limitation and restriction has not been modified or removed by Laws 1895, cc. 387, 389, or 297,—and on this no opinion is expressed,—that the defendant board had no authority to enter into the contract in question, and no power to expend the money needed on account of the same, unless, by vote of the electors of the county, such authority and power had been conferred.

5. The contract was not ultra vires, however, and, if either of the statutes before referred to had been complied with, the authority and power existed.

6. While acting within the scope of their official duties, upon any subject-matter over which they have control and are empowered to act, the presumption is that public officials obey the law when entering into contracts, and that they do not act in a different mode from that prescribed. So all contracts made by public officials, if within the scope of their power and authority, are presumed to be made in view of and in conformity with the law making them valid.

7. *Held*, on the trial of an appeal from the allowance by defendant board of a balance due upon such a contract, the answer alleging that the same and the expenditure of the required money was never authorized or ratified by a vote of the electors, that the burden of proof was on defendant board to show that it was guilty of official misconduct when it entered into the contract, and that the same and the expenditure had not received the sanction of the voters.—72 N. W. 123.

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In an action brought by plaintiff to obtain an accounting between herself and one of the defendants, upon the ground that a certain transaction, whereby the legal title to plaintiff's homestead became vested in said defendant, was a mortgage of the premises given to secure her husband's indebtedness, and that said indebtedness had been fully paid, and, further, to obtain a decree, upon the payment of such sum as might be found due and unpaid, if anything, adjudging that defendants, husband and wife, have no further interest in or lien upon said premises, it is *held* that the court below erred when dismissing the case for insufficiency of the evidence when plaintiff rested.—72 N. W. 126.

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1. A payment by an insolvent debtor on a secured debt may constitute an unlawful preference, under the insolvent law, where the security is inadequate. But it cannot be an unlawful preference if the payment is made out of the proceeds of the collateral security itself.

2. *Held*, that there was no evidence in this case that the payment sought to be recovered back was made with any intent to give a preference, or that such payment could have resulted in a preference.—72 N. W. 127

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The cause of action which one defendant may set up against his co-fendant by a cross complaint must be one arising out of, or having reference to, the subject of the original action. *Held*, accordingly that the cross complaint interposed by two of the defendants herein against their co-defendants were rightly struck out as irrelevant.—72 N. W. 120.

DISTRICT COURT DECISIONS.

1ST DISTRICT WASHINGTON CO.

James Mathews and Joanna Mathews, Relators
vs.
H. H. Gillen, Respondent

Attorneys—Contempt—Failure to pay over money collected—Question for Jury.

On order to show cause why respondent should not be punished as for contempt for failing to pay over money collected by him as an attorney on a judgment.

CROSBY, J.

It is ordered that the order to show cause which was granted by his Honor W. C. Williston, district judge, on the 17th day of November, 1896, and which was made returnable Nov. 28th, 1896, and which was finally submitted to the under signed upon oral testimony be and the same is hereby discharged without prejudice to the relators bringing and maintaining an action for the trial and determinating of all matters at issue herein and between the parties hereto.

Note:

I think the rule adopted by the English courts to refuse a summary interference unless the facts are settled or conceded, the better one to follow.

In this case the respondent does not claim a lien on the money but claims that it was paid to him for professional services.

This is denied by the relators An issue of the fact is presented which the respondent is entitled to have tried and determined by a jury in an action brought for that purpose. After the controversy is thus settled, if it be determined adversely to the respondent, I apprehend that summary proceedings may be instituted.

2ND DISTRICT RAMSEY, CO.

In the Matter of the assignment of the Standard Brass & Electriet Co.

John V. L. Dodd, for Claimant.

Horton & Denegre, for the Assignee.

Insolvency—Preferred Claim—Dissolution of actions—Costs.

Lewis J. 1. The preferred claim for $50 allowed under G. S. 1894 § 4231, for wages owing for three months prior to making an assignment, is not lost by the claimant's putting his laim into judgment.

2. G. S. 1894 § 4245, which provides that costs upon which attchments or levies are made which are dissolved under the provisions of the insolvent law, shall be preferred and paid first, does not contemplate the allowance of costs made in the entry of judgment in the first instance.

2ND DISTRICT RAMSEY CO.

Ida M. Macredy,
vs.
J. J. Macredy.

C. N. Bell, for Plaintiff.

Welch, Hayne, Hubachek & Conlin, for Defendant.

District Courts—Powers—Orders.

Lewis, J. This court has the right or inherent power, after the death of one of of the parties, to make an order directing an unannounced decision for absolute divorce to be entered as of the date the case was tried and submitted, *nunc pro tunc*, where the failure to announce the decision was the act of the court.

2ND DISTRICT RAMSEY CO.

Buka Brothers, vs. St. Paul Fruit and Produce Dealers Association.

S. C. Olmstead for Plaintiffs.

John L. Townly, for Defendant.

Libel—Black List—Association.

Action for damages for placing plaintiffs' names on "black list" or "delinquent list" for failure to settle account of previous week with a member of defendant association, as required by defendant's by-laws. On motion for an order requireing defendant to make its answer more definate and certain. Motion denied

Otis J. If the complaint standing alone or as helped out by the answer states a good cause of action, then the plaintiffs are entitled to a more definate answer, which shall designate by name the person or persons to whom it was claimed the plaintiffs were indebted, which occasioned the notice of which they complain. On the other hand, if it fail to state such a cause of action, then of course they are not entitled to any relief.

A careful examination of the complaint discloses that the only grievance well stated therein is the act of defendant in falsely circulating among its members that plaintiffs were delinquent in paying their bills to some one or more of its members, whereby the plaintiffs were refused credit by all the members of the defendent association by virtue of certain agreements among themselves. There is no claim, except inferently, that such notice was circulated ontside of such membership, or that plaintiffs were injured ohterwise then in their credit and dealings with such members.

If defendents were a corporation and had circulated defamatory statements among its stockholders, perhaps such an action would lie, for there is no indentity between it and its stockholders, but defendant is an unincorporated association composed of its members, and has no separate indentity. A judgment against it is a judgment against its members, and is collectable out of their common property and also out of the separate property of each member served. Plaintiff seeks damages from the members of the association for circulating false statements concerning the plaintiff, by reason whereof such members refuse credit to plaintiffs. No man or association of men can be mulcted in damages for refusing to extend credit to plaintiffs, no matter what the motive for such refusal, or whether it be founded on false or true statements of their financial status. Bohn Mfg. Co. vs. Hollis, 54 Minn. 223.

A man or any number of men who may have injured plaintiffs' credit with others by false reports, may be compelled to respond in damage for such injury, utnot for injuries resulting from their refusal to give credit, nor for like false statemants which they may be making to each other, and for the making of which each is equally guilty with the other, and which

are not shown to have been otherwise circulated or to have otherwise affected plaintiffs in the community.

If plaintiffs brought their action, not, against the association as a whole, that is against all the members of the association as they have done, but had singled out the person or persons guilty of circulating these defamatory reports among the members, and brought the action against them it would undoubtedly lie, but it will not lie in the present form. For the reason that no cause of action is stated plaintiff's motion must be denied.

3rd DISTRICT. WINONA CO.

Geo. H. Selover vs. M. Sheardown.

Damages—Reply to telegram.

Action to recover damages by falsely answering a telegram Plaintiff telegraphed defendant who was deputy clerk of the U. S. circuit court for Minnesota, as to whether judgment had been entered in a certain case, and defendant answered "judgment not entered," when, so plaintiff claimed, defendant knew judgment had been entered. Action to recover damages alleged to have been caused by falsely answering the telegram. On demurrer to the complaint Sustained.

Snow, J. "It is not charged that defendant intentionally deceived plaintiff or his associates, nor that there was in his conduct any element of fraud. It appears that two judgments were in fact entered, one nearly six months before, and the second twelve days after the date of the telegram. It is evident from the allegations in the complaint construed together, that defendant's negligence, if any existed, consisted in his assuming that plaintiff's inquiry related to the second judgment, which had not been entered, but according to the practice of the court was likely afterwards to be entered. Now, whether or not defendant was negligent in this assumption is a question of fact which ought not to be decided on demurrer, the question being one upon which reasonable minds might perhaps differ.

"The phase of the complaint which in my opinion justifies the demurrer in this; It seems to me that the complaint fails to show any necessary or natural connection between the alleged negligence and the alleged consequence—in other words, does not show that the alleged negligence was the proximate cause of the injury of which plaintiff complains.

"Further, plaintiff should have made it appear by allegation that had defendant telegraphed truly, success in the suit would have been won, a manifest impossibility."

4th DISTRICT. RAMSEY CO.

John W. Pinch vs. John McCulloch.

Pinch & Dampier for Plaintiff.

James H Barnard for Defendant.

Assumption of mortgage—Surety—Defense.

Kelly, J. Where a purchaser of land accepts a deed of conveyance thereof conditioned that he assumes and agrees to pay a certain mortgage on the lands conveyed, he is not released from liability to pay such mortgage because of the delay or failure of the holder thereof to prosecute his claims against the principal debtor.

Hue v. Pinney, 5 Minn. (Gil.) 246; Burdick v. Olson, 37 id 431; Hungerford v O'Brien, id. 306; Yale v. Watson, 54 id 173; Osborne v. Gullickson, 64 id 218.

4TH DISTRICT HENNEPIN CO.

Vilroy M. Connelly, Adm'n'r, Plaintiff,
vs.
John H. Dunn, Defendant.

Spooner & Laybourn, for Plaintiff.

MacDonald & Kane, for Defendant.

Practice—Service of Pleadings—Legal Holiday.

Elliott and Simpson, J. J. The summons and complaint were served August 17th, 1897, and the last day for answering fell on the first Monday in September following, which was a legal holiday known as "Labor Day," and also the last day for filing notes of issue or the September term of court. On the last day named the plaintiff had the case put on the calendar as a default case, and on the following day (September 7th) the defendant attempted to serve his answer. *Held*, on motion to strike from the calendar, that, under G. S. 1894 § 7987, which provides that no public business shall be transacted

nor civil process be served, on legal holidays, the answer was not a "process" nor would the service thereof have been "public business," and that through failure to answer on that day defendant was in default. Slayter v. Schak, 41 Minn. 269; Malmgren v. Phinneys 50 Minn. 457.

4TH DISTRICT HENNEPIN CO.

S. Anna M Cune vs. Chas. T. Haywood.

Ell Torrance, for Plaintiff.

Lane and Nantz, for Defendant.

Bicycles—Pedestrians — Personal injuries—Negligence.

Action for damages for injuries alleged to have been caused by carelessness of defendant in riding his bicycle against plaintiff Verdict for defendant. On motion for new trial on the ground of error of law. Motion granted.

Russell, J. Upon a more careful consideration of the charge in this case than could be given in the haste of the trial. I am convinced that there was error in that part of it which directed the jury "If you find from the evidence that she (plaintiff) failed to look all the time, and by a continuous looking, if she had looked, she could have avoided the injury, then the verdict must be for defendant"

The charge was based on the fact that plaintiff testified she saw the defendant on the opposite crossing, and did not look again. But, even with that fact admitted, the whole question of contributory negligence was for the jury.

Watson v. Minneapolis St. Ry. Co, 58 Minn. 551.

Shea v. St. P. City Ly. Co., 30 Minn. 395.

Hall v. C. B. & O. Co., 46 Minn. 447.

5th DISTRICT. RICE CO.

J.R. Ellis et al. vs. Mrs. J. I. Stene.

Robert Mee, for Plaintiffs.

C. S. Roberts, for Defendant.

Insolvency—Corporations—Stock Subscription—Who may Enforce Payment.

Buckham, J. Plaintiffs were judgment creditors of a corporation in which defendant was an alleged stockholder and indebted on the stock subscription for the full amount of her stock. It was admitted that the corporation was insolvent and that it had assigned for the benefit of its creditors. *Held*, that indebtedness on stock subscription is an asset of the corporation, and that the assignee alone is entitled to reach and control the debt, if any, due from the defendant.

9TH DISTRICT LINCOLN CO.

Joseph Cherchowski, Plaintiff.
vs.
John Zerambo, et. all., Plaintiffs,
and
Frank Segroeder et. al, Plaintiffs,
vs.
Frank Cherchowski et. al., Defendants,

John Mckenzie, for Plaintiff.

J G. Forbes, for Defendants.

Boundary Lines.—Second Trial

Webber, J. The above entitled actions were brought under Chapter 69, Gen. Laws 1893 to establish a certain boundary line. The action was duly tried before a referee, determined by the court and judgment duly entered therein. A portion of the defendants now demand a second trial under § 5945 Gen. Stat. 1894, and the plaintiffs move that the demand and notice of said defendants for a second trial set aside and vacated.

The action is not one for the recovery of real property and there was no prayer for ejectment in any of the pleadings and no such relief was granted. Motion granted.

9TH DISTRICT LINCOLN CO

Peter Peterson, Plaintiff.
Karl Porth, Defendant.

John McKenzie, for Plaintiff.

C W. Stites and A. P. McGuirk, for Defendant.

Practice—Time for answering—Appearance.

Webber, J. The defendant in the above entitled action was a resident of the state of Iowa and the plaintiff commenced the service of the summons by publication. Before the service was compete, on the 30th day of July, 1897, the defendant served upon the plaintiff's attorney, a written notice of appearance and therein demanded a copy of the complaint, which copy was duly served upon the defendants'

attorney on the 31st of July, 1897. More than 20 days have elapsed since said appearance by the defendant, and no answer or demurrer, has been served upon the plaintiff's attorney; and the plaintiff contends that the defendan ist in default and applies to the Court to have his damages assessed or the amount he is entitled to recover ascertained. In my opinion the plaintiff is correct. "The entry of appearance may be made before the summons is issued or served, or after such service. If entered before the summons is served, which is frequently done in amicable suits and agreed cases, the defendant will have the same time allowed him within which to answer or plead in the action, in the absence of any agreement to the contrary, which he would be allowed by the statute had the summons been actually served on the day of the entry of his appearance. The time allowed is computed from the day of the entry of appearance, and the court cannot require him to plead at any earlier time than given in the statute. This arises from the fact that an entry of appearance is the equivalent of an actual service of the summons, and the day of entering the appearance is treated as the day of the service of the summons, from which the time to answer is to be computed." Pitman's Trial Procedure, page 331, § 252; 2, Estee's Pleadings and Forms, (8ED.) 648; Gen. Stat. 1894, §§ 5209 and 5212.

15TH DISTRICT AITKIN CO.

State, et rel. — vs. Stearns

Mandamus—Taxation—Railroads—Constitutional law.

Mandamus to compel defendant, as author of Aitkin county, to place St. Paul & Duluth railroad lands on the tax list for ordinary taxation.

Holland J. (Findings in part as follows):

That part of said land so granted by the legislature to the railroad company and described in the writ of mandamus, is located in the county of Aitkin; that said St. Paul & Duluth has annually paid to the state, as provided by law, the proper gross earnings tax fixed by said act; that said company has never sold or conveyed the land described in the alternative writ of mandamus except as said land was sold, transferred and conveyed from the Lake Superior & Mississippi to the St. Paul & Duluth, and that neither of said companies has ever leased or sold any of that land; that said land in Aitkin county is not in the assessment roll or tax list, and has never been, and is not taxed except and unless through taxation on the gross earnings of the railroad as provided by law; that said company has owned the land for over five years; that said land is not used or necessary to be used in the operation of the railroad, but that the preferred stock of the St. Paul &Du luth, amounting to $5,000,000, is payable and redeemable out of the proceeds of the land grant, and the land grant has been used exclusively for the purpose of raising funds with which to maintain and operate said railroad. That a part of the land described in the alternative writ of mandamus and situated in Aitkin county, M nn , is the property of the Northern Pacific; that said parcel of land was granted and conveyed by the United States to said company, and said company now holds and owns the same, and has never contracted to sell or lease or convey the same; that the percentage of the gross earnings of said railroad provided to be paid by an act of the legislature of the State of Minnesota has been duly paid to the treasurer of the state each year as provided by law. That the Great Northern by an act of the legislature was granted lands to aid in the construction of its line of railway; that said railway company has not accepted chapter 8 of the Special Laws of Minnesota for 1873; that 3 per cent of the gross earnings of said road have been paid each year to the state in the manner provided by law, that no part of any of the lands desired in this action are held, used or occupied for light of way, gravel pits, side tracks, depots or for any buildings or structures used in the operation of said companies; that during the session of the twenty-ninth session of the legislature there was introduced in

the house of representatives a bill for an act entitled "an act relating to the taxation of certain lands owned by the railroad companies in this state, and repealing laws and parts of laws relating to taxation of the same and to provide for the submission of this act to the people of this state for their approval or rejection;" that said bill was declared passed by the house of representatives, and was by said house transmitted to the senate on the 9th day of February, 1896; that it appeares upon the journal of the senate, and that it was received in the senate, referred to a committee and put upon its final passage on the 13th day of March, 1895, and that the roll of the senate and its yeas nays being called upon the final passage of the bill, there was 28 votes in its favor and no more, and that among those voting yes, or in favor of the passage of the bill, was Frank A. Day; that said Day was an acting and de facto senator on said last-named day of said session, and that said bill was thereafter signed by said Frank A. Day as president of the senate, and transmitted to the governor, and that it received his approval on the 19th day of March, 1895: that at the general state election in November, 1897, a ballot was prepared by the secretary of state, a copy whereof is attached to defendant's answer and made part of same, and that H. F. No. 1, being chapter 168 of General Laws, 1895, was not attached to said ballot or referred to therein, by reference to title or otherwise, save as indicated by the words printed thereon.

The court finds as conclusion of law that the plaintiff is entitled to the relief prayed for with costs.

MISCELLANEOUS.

The conviction and execution of Luetgert, on the evidence produced, would make a clear case of death by compound inference.

In the injunction suit against the village council of North St. Paul, to restrain the building of cycle paths, Judge Willis, in dismissing the injunction, held that such paths are highways.

DeLestry's Western Magazine, is the title of a new Journal published at St. Paul by the Interstate Publishing Co., with Louis De Lestry as editor-in-chief and general manager. From an examination of the first number we must say that the Magazine ought to be received into many homes and offices at double the small price ($1.) charged for subscription; and from a personal acquaintance with its genial and energetic editor and manager we feel that it will become useful to its patrons as well as profitable to its promoters.

If Luetgert should be convicted, his sentence be commuted, he be pardoned and then married again, all within seven years, what would be the positions, respectively, of the accused and the state of Illinois, if the supposed murdered wife should turn up, and, woman-like, desire to make his new conjugal relations unpleasant through proceedings for bigamy? Luetgert would not deny the actual and animate existence of wife number one, but would not the state be bound by the record and forced into the ridiculous position of contending that, though "technically" alive she must be dead?

That the law is no respecter for persons, is clearly illustrated in the recent trial of Mrs. Myrh Atkinson, wife of Gov. George Atkinson, of West Virginia. Mrs. Atkinson was formerly the wife of Judge Camden, who died possessed of a large estate. On his death the will which conveyed the estate to his wife (now Mrs Atkinson) was contested by the grandchildren of Judge Camden, but without success. At the time the will was being contested, Mrs. Atkinson was accused of having signed Judge Camden's name to the will. Later a man to whom she had given receipts for

payments of money, caused her arrest on the ground that she had forged the name of her husband to the receipts She was indicted and tried at Glenville, W. Va., but the jury failed to agree upon a verdict.

The Luetgert trial furnishes another example of the uselessness of opinion evidence in some cases. One of the medical experts —Dr. Dorsey, professor of osteology in the Columbia Museum, testified on behalf of the prosecution that the bone found in the vat in the defendants sausage factory soon after the disappearance of Mrs. Luetgert, was the bone of a delicately organized human being. On the part of the defense, Dr. Allport, professor of descriptive and comparative anatomy in the Northwestern University, testified that the bone which Dr. Dorsey indentifed as the bone of a human being was nothing more nor less than the bone of a small sized hog. This testimony of Dr. Allport is said to have created a sensation in the court room. When, however, Dr. Dorsey was recalled, this "eminent" specialist not only reiterated his former testimony, but enlightened the court and jury by declaring that Dr. Allport, while on the stand, had positively identified the sesamoid of a buffalo as the patella of a dog, and the temporal bone of a shepherd dog as the temporal bone of a monkey.

The aforesaid experts are undoubtedly "eminent," but, when we consider, as we are justified in considering from the "evidence," that the desire of each "expert" was to assist the side that called him and to show how little the "other fellow" knew, it is surprising that only three jurors were found who had the good sense to not want to hang the defendant on evidence of that character.

BOOK REVIEWS.

KERR'S SUPPLEMENT to WITTSIE on MORTGAGE FORECLOSURES.—A Treatise on the Law and Practice of Foreclosing Mortgages on Real Property and of Remedies Collateral thereto, with Forms, by CHARLES HASTINGS WILTSIE, of the Rochester Bar With a Supplement bringing the Work down to March, 1897, and Additional Chapters on Mortgage Redemptions, by JAMES M. KERR, of the New York Bar, Author of "Kerr on Real Property;" "Kerr on Business corporation;" "Kerr on Homicide," etc., etc. In two Volumes. Vol. II. Rochester, New York Williams Law Book Company. 1897.

As we understand this "Supplement," its an addition to the original of Mr. Wiltsie which retaled to the foreclosure of mortgages in the state of New York. In this additional volume the profession have a treatise which, together with the original, covers the whole field of American law on the subject of mortgage foreclosures. By his *work* Mr. Kerr is well and favorably known, and his authorship of this valuable addition to law literature will be a sufficient gnarantee that it is both complete and exhaustive on the subject of mortgage foreclosures.

GENERAL DIGEST American and English, ANNOTATED. Refers to all Reports Official and Unofficial. Vol. III NEW SERIES. Rochester, N. Y. The Sawyer's Co-Operative Publishing Company. 1897.

Lawyers will find the above named digest about as complete and as well gotten up as it is possible to make a work of its character. The publishers have conceived the idea of giving all the information there is on legal questions, and to that end are giving in the Digest, in addition to the decisions digested, the authorities relied on by the courts outside their own decisions, with the citations of cases criticised, distinguished, limited or overruled. Besides this references are made to all unofficial reporters and journals in which the digested opinions appear.

This feature of adding to the digested opinion citations of the governing precedents as well as of cases criticised, distinguished limited or overruled, will be of great value to the profession, since it gives what is in fact a brief on the point under consideration; and justifies the claim of the publishers that they are giving "the century's law without a cent of cost".

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TERMS.

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To Our Subscribers.

This issue of the Journal marks a sleight change, in that it contains no Supreme court decisions and lacks the usual number of pages. The Supreme court cases are omitted because we have learned that attorneys having a more complete report in the Northwestern Reporter, do not care particulary for the abridged report of those eases heretofore eontained in the Journal. The lack of the usual amount of reading matter is due to an effort that is making to give to attorneys commencing with the year 1898, a journal second to none; and we hope our patrons who have kindly remembered us in in our needs will have no cause to complain of our apparant short comings at this time. With this apology we ask a contiuance of your kindly consideration.

Below we publish a communication from a prominent member of the St. Paul bar who suggests that the Journal's columns be opened to admit criticisms on courts and lawyers. Since just criticism must do good, and can do no injury except possibly to temporarily inflict an imaginary wrong on the person criticised; and there being quite a field for operation along critical lines, th Journal will gladly publish all proper and respectful criticisms on the terms laid down by our correspondent.

To the Editorof the Journal:

I have sometimes thought it would be beneficial to thebench and the bar of this state ff you should establish a column in the Journal to be devoted to criticisms and suggestions, without publishing them over their own names, such complaints and criticisms of judges, courts and brother lawyers, as they have to make. Of course, the judges of our courts should have the like privileges on like terms with the lawyers.

I do not mean that any one should be permitted to air a personal grievance through your columns, nor that any person should be permitted to attack any lawyer, judge, or court, nor that you should publish any criticism, complaint or suggestion unless the writer furnish you his name and be responsible for the writing. But as in ordinary journalism is done, you can do,—require that the writer furnish you his name, not to be published, but to be used to protect the Journal in case of necessity, and as an evidence of good faith. I am sure that there are many things which lawyers and judges can say of lawyers and courts that will profit lawyers to read. I firmly believe that there are some things which lawyers can properly say about courts and judges which it will profit the judges (and lawyers) to have the judges read. I believe that the best good of all of us and of the community would be subserved by plain talk and honest criticism. I think a little such would be good for both bench and bar, and also for the people generally in the State of Minnesota.

To start the ball rolling I enclose some remarks.

Nov. 26, 1897- A LAWYER.

To the Journal:

The following is the dissenting opinion of Justice Mitchell in the recent case 72, N. W. Rep., 708, Stiehm vs. Stiehm:

"MITCHELL, J. I concur in the dissent of Justice Canty. While the amount involved is so small that defendant's appeal is not calculated to impress a court favorably, yet the legal principle decided is liable to become a precedent for more meritorious cases of the same kind."

What right has Justice Mitchell, or any judge, to be impressed, favorably or unfavorably, as to an appeal, by the amount involved? I know that courts have been so impressed, both appellate courts and lower courts, and probably have been influenced by the impression, but I have failed to find any excuse in reason or justice for the judge in such case, and cannot convince myself that it is otherwise than a violation of the duty of the judge and of his oath of office.

The statutes of this state and the constitution have determined what courts have jurisdiction in particular cases, and on what conditions the courts shall take jurisdiction. It is by law made the duty of the judges to determine the matters brought before them fairly, honestly and in accordance with the law. Now, since the law in a case involving only $25, is the same as it would be if it involved $25,000,—no judge has any right to be impressed or influenced by the amount involved in an appeal.

Justice Mitchell says that, though the amount involved is small, "yet the legal principle decided is liable to become a precedent for more meritorious cases of the same kind." While objecting to any rule which makes the fact whether an appeal is meritorious depend in any degree on the amount involved, I wish to say it is precisely because every case decided by that court may become a precedent for meritorious cases, that it is the duty of that court to consider fully and carefully the law of the case without reference to the amount involved. There is quite wide-spread dissatisfaction with many of the decisions of our supreme court among the lawyers. Reversals and modifications of recent decisions have been so frequent in the past few years as to materially weaken the respect theretofore had for the decisions of that court, and increase the difficulties (always many and weighty) which a lawyer meets in advising his client or the court. It is possible that this state of affairs is accounted for in part by the impressions made upon the minds of the judges by the amount involved. Judging from Justice Mitchell's opinion above quoted, it is probable; though I think the prevailing opinion among lawyers has heretofore been that it was due to insufficient consideration of the cases by the court, and their unwillingness to hear argument. Of course, the excuse is that the docket is over crowded. The docket generally is over crowded, it is true. If any excuse for poor work can be entertained, the excuse is sufficient. It seems to me that it would be better, even though so many cases should not be decided, to give more time to the argument and decision of the cases which are heard.

The supreme court will not hear arguments on the facts, nor upon questions of practice except a few minutes. All other questions which come before it are questions of law, which, when decided, will rule cases to follow regardless of the amount involved. What sense can there be then in allowing but half an hour for argument of cases involving $500 or under, and twice that where the amount is larger. The rule is ridiculous. The supreme court will not hear argument (except in very exceptional cases) for more than an hour a side. The United States courts hear arguments on each side for two hours, and it was but a short time since, when sitting in a federal circuit court of appeals, that I heard the court announce that it preferred to have cases argued orally BECAUSE "WE THINK WE GET MUCH ASSISTANCE FROM THE ORAL arguments of counsel. I never knew our supreme court to express itself to the same effect. On the contrary, the impression it frequently makes, is, that it prefers not to hear oral argument. It is but reasonable to suppose that the court thinks an hour long enough time to enable the lawyers to fully present the points in his case, though the grounds for entertaining the supposition are much weakened by the fact that the court has made the half-hour rule for cases involving certain AMOUNTS. It is but reasonable to suppose that if the court thinks a case can be fully argued in two hours (an hour to a side) or an hour, (a half hour to a side) it thinks it can be decided in a like short time.

I think all cases should go before the supreme court on the same footing and because the point of law in a case involving $100 is just as important as if the case involved $100,000—and will in one case equally with the other serve for a precedent by which cases to follow will be ruled, there should be the same time allotted for oral arguments in every case, regardless of the amount involved, and at least an hour and a half or two hours allotted to each side for argument. In the majority of cases the lawyers will not take more than the necessary time, and, although

fewer cases may be decided in the course of the year, the general result will be more satisfactory. If necessary to keep up the work the court could probably hear arguments for thirty more days in the year than it usually does.

Nov. 26, 1897. A LAWYER

OUR EXCHANGES.

Whisky Experts in Arkansas Courts.

Rather a novel proceeding came up before Squire Hastings' court in Little Rock one day last week. A writ of replevin had been brought to recover a horse that had been traded while the plaintiff was under the influence of liquor. The defendant was his own lawyer. He pleaded that a person was never so drunk but knew what he was doing, and called John Baker as a whiskey expert to prove that fact, but it is said that the expert got somewhat confused and failed to convince the court that the position taken by the defendant was correct. From this on we presume whisky experts will become popular, as several are in training.—Nebraska Legal News.

Hon. John N. Dean of Xenia, probate judge of Greene county, in making out the papers, a short time since, for committing a man by the name of J. W. Murphy to the insane department of the county infirmary, absent-mindedly inserted his own name in the papers where that of the crazy man's should have appeared, and the mistake was not discovered until Constable Mathews presented Murphy at the infirmary. The officer then came back to town and informed the judge that he had proper papers for his commitment to a mad house, and asked if he would go quietly or would have the handcuffs on. The judge altered the papers and grimly remarked that he would beg to be excused now."—The Green Bag.

The recent detention of six Turks, by New York immigration officials, on the ground that the law excludes them as polygamists, raises a nice question under our immigration laws. The subjects of the Sultan, referred to, wish to become farm laborers, their objective point being Michigan. When asked by the inspector if they believed in the Koran, their reply was, of course, in the affirmative, for all good Turks do. Being asked, further, whether they believed in the Surahof the law where the prophet tells the faithful that they may marry by twos, by threes, or by fours, of course they replied again in the affirmative. The Turks were then told that they could not enter the United States, the law distinctly declaring that a polygamist cannot become a citizen of the United States by adoption. It is argued by the immigration officials that a believer in the Koran is necessarily a polygamist. On the other hand, it is claimed by the Turkish consul that the United States do not intend to discriminate in their immigration laws against religions; that they do not forbid Mormons to believe in polygamy—what they do is to forbid them to practice it, and they punish them if they do. It is therefore claimed that, no matter what they believe, if they have no intention to violate the laws of the United States they are entitled to enter the country. Whether these detained Turks are polygamists within the meaning of the law is not certain, and the question will have to be decided by the courts. It will hardly be claimed that in passing the laws referred to congress intended to exclude those believers in the Koran who do not practice or intend to practice what they profess to believe; and the intent of congress will be, of course, the controlling consideration with the courts. If these six Orientals make declaration in proper form, that they will not practice polygamy, it seems right that they should be given entrance. In other words, the courts, it seems to us, are likely to make a distinction between theoretical and practical polygamy.—The Albany Law Journal.

QUEER OLD VERDICTS.

Odd Decisions by Juries a Century Ago.

One of the curiosities of the old records in this office of the clerk of the court of Worcester county, Maryland, says the Baltimore Sun, is an inquisitor taken on the body of Nehemiah Hayman on Oct. 24,1801. The finding of the jury is "that the afsd Nehemiah Hayman, at the county afsd, on the twenty-second day of October as afsd was then and there' manslatered' by the hands of one certain Benjamin Dennis, and we the juriers afsd upon their oaths do say that the cause afsd in manner and form asfd that Nehemiah Hayman came to his death by a unmerciful stroke by a Chunk on the mole of the head by the hands of Benjamin Dennis as afsd" The finding of another jury in August, 1800, "sworn and charged to enquire on the part of the State of Maryland when, where and how and after what manner George Ennis came to his death," is couched in the following language: "Do say upon their oaths that the said George Ennis on the 27th day of August in the year afsd at the county afsd was then and there found dead and we the juriers do say that George Ennis by the visit of Almighty God was the cause of his death in manner and form afsd came to his death and not otherwise." These are unique Maryland verdicts, but they are not gro-

tesque, like the findings of the Delaware coroner's jury just after the war. A negro named Jim (history fails to record his surname) was lynched. His body was found hanging from the limb of a cherry tree, with a rope adjusted in the most approved fashion. The nature of Jim's crime had so incensed the people generally that the public sentiment rather approved the manner of the punishment and the jurors who viewed the body solemnly brought in a verdict that "while climbing a cherry tree to gather fruit he fell and broke his neck, from which accident death immediately resulted."—Nebraska Legal News.

When Does "Issue" Mean "Children."

Perhaps there is no more fruitful source of litigation than the use, in wills and other documents of the word "issue." It is an ambiguous word. In ordinary language it means children, and only children; as when one talks of what issue a man has, or what issue there has been of a marriage. But in the language of lawyers it includes descendants of every degree, and even the addition of such words as "begotten by John Smith" will not necessarily restrict "issue" to the sense of "children" of John Smith. But there is a case which often arises in which it is settled that the generality of the word "issue" will be restricted; or where the "parent" of "issue" is spoken of, the word issue is prima facie restricted to children of the parent. This rule is commonly known as the rule in Sibley v. Perry, and its importance may be easily recognized if one considers the enormously large class of wills which contain devises or bequests to children of a named person with a direction that the issue of any child dying before the period of distribution shall take their parent's share. Lord Eldon does not, however, appear to have intended to lay down in that case any general rule or canon of construction; he only dealt with the peculiar language of the will which he had before him. Subsequent decisions have built up the rule which has not always been spoken of respectfully. "Suppose," said Lord Justice James, "a man to leave his property to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead, equally to be divided between them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them, leaving families. The grandchildren might go to the workhouse and the family property go to a stranger under the residuary gift. That seems a possible result of that rule." In the same case Lord Esher is reported to have said that he should have no objection to be present at the funeral of Sibley v. Perry. But the rule is very often one of convenience; it may prevent property which a testator really intended to go to his children or grandchildren per stirpes from being divided among children, grandchildren, and great-grandchildren as tenants in common per capita.—The Washington Law Reporter.

A somewhat remarkable case, and one which well illustrates the diversity and difficulty of the questions brought before that tribunal for adjudication was argued in the New York Court of Appeals last week. It involves the question whether the adjudication by a court of the Roman Catholic church of a controversy is a bar to a civil action in the regularly constituted courts of the State of New York. In the case to be considered, for the facts of which we are indebted to the Albany Argus, both of the lower tribunals, the supreme court, special term, and the supreme court, appellate division, decided that such a religious court is, in its nature, ecclesiastical only, and has no jurisdiction to determine the civil rights of parties, and is no bar to action even by priests of that church in a civil court.

The question comes up on the appeal of the Rev. John S. Baxter, a priest in the diocese of Brooklyn, from a decision of the Metropolitan Court of the Arch Diocese of New York, presided over by the vicar-general of the Roman Catholic church, rejecting his application for reinstatement to his parish and for an award of $6,665 salary alleged to be due him, and also from the judgment of the apostolic delegate at Washington, affirming that decision.

Rev. Father Baxter, a priest in the diocese of Brooklyn, was assigned by Bishop Laughlin to duty in the mission church at Babylon on the 10th of September, 1885, at the usual salary of $1,000 per year. All the funds of the church were turned over to the bishop, who, it is alleged, guaranteed the payment of the salary. In 1892, Father Baxter, because of physical disability, following a severe attack of grip, was relieved from duty, and at this time there was a balance due him of $5,598. In December of the same year, recovering somewhat, he was assigned to duty at St. Mary's hospital, Brooklyn, with a promise, as he alleges, that he should retain his pastor's salary and be sent back to his old charge. In 1896, after having received only $300 per year for service in the hospital, and the Rt. Rev. Charles E. McDonnell having succeeded Bishop Laughlin, he brought his case to the attention of the Metropolitan court of the Arch Diocese of New York. The complaint asserts that while the case was in this ecclesiastical court, and while he was

still suffering in health, he was induced by the vicar-general, who presided, to sign a release for $1,500 of his entire claim of nearly $7,000. Upon his signing he was given the money, but was not restored to his parish. He appealed to the apostolic delegate at Washington, but the appeal was dismissed.

He then took the case into the state courts, and the defense interposed by the Roman Catholic prelates was that the plaintiff had admitted that such Metropolitan court had jurisdiction over him, and that, being a member of the Holy Roman Catholic church and subject to the rules, laws and disciplines of that church, he was subject to the jurisdiction and adjudication of that church.

The supreme court, special term, held differently, and Judge Bradley, writing the decision for the appellate division on the same lines, said: "Beyond the question of doctrine, discipline or church government, there can be no recognition in this state of the jurisdiction and judicial power of any ecclesiastical court. The question of civil rights of persons relating to themselves personally or to property, whatever may be the relation to church organizations, are subjects of adjudication in the civil tribunals exclusively. * * * Judicial notice will be taken of the fact that it was not a court created or organized pursuant to any law of the State of New York, but was one that could not by virtue of any law be created within the state. It appearing that the alleged tribunal in its nature is ecclesiastical only, it cannot be assumed, that it, as such, had jurisdiction to determine the civil rights of the parties; but judicial notice must be taken to the contrary."

Upon this decision Father Baxter was allowed to bring action in the civil court and from this Bishop McDonnell appeals to the court of appeals.—The Albany Law Journal.

A very interesting case involving the liability of an inn-keeper for the loss of a bicycle, the property of one of his guests, which had been left in the charge of one of the landlord's employes, was decided recently at the Luton (Eng.) county court, His Honor, Sir Alfred G. Marten, delivering the judgment of the court. The plaintiff, H. W. Mathias, had journeyed from St. Albans to Luton on his bicycle and put up at the George hotel, kept by the defendant. Arriving there shortly after noon, he placed the wheel in charge of an attendant of the hotel, and the latter put the machine, with many others, in a shed in the yard attached to the hotel. After partaking of luncheon, and paying the bill therefor, the plaintiff returned to the shed, intending to resume his journey, when he discovered that his bicycle was missing. The court found that there was no negligence on plaintiff's part conducing to the loss. It was contended for the defendant that he did not receive the bicycle into his care, and that assuming him to have so received it, he received it as a bailment for which he was not liable unless shown to be negligent; and that no such negligence was proven. The court thought it plain that the only relation which existed between the parties was that of landlord and guest, and that the bicycle was received by the defendant accordingly, as goods brought by the plaintiff to the inn. That being so it was not necessary to show the negligence of the defendant, for an inn-keeper is prima facie liable for the loss of goods of his guests. The court cited Calye's case, 8 Reports, 32; s. c., 1 Smith's Leading Cases, 10th edit. 115; Morgan v. Ravey, 6 Huls. & Norm. 265; Medawar v. Grand Hotel Company, 64 L. T. Rep. 851 (1891) 2 Q. B., 11; Robins v. Gray, 73 L. T. Rep. 252; (1895) 2 Q. B. 501, affirming Ibil. 78. The question was raised whether a bicycle is within the law of liability on inn-keepers, inasmuch as it does not, like the horse, consume povender, and so bring profit to the inn-keeper; and that it is a modern invention. The court was unable to see any distinction between a bicycle and any other goods which a guest may bring with him. A similar question was raised with respect to carriages in Turrill v. Crawley (13 Q. B. 197), where Mr. Justice Coleridge, in giving judgment, said: "New usages have grown up, and as carriages are commonly used in traveling, the inn-keeper's duties and privileges are extended to them. It would be absurd to say that an inn-keeper might receive a guest and refuse to receive his carriage." Moreover, in Taylor v. Goodwin, 40 L. T. Rep. 458; 4 Q. B. Div. 228, it was held that a bicycle was a carriage within the meaning of the act. 5 and 6 Will. 4, c. 50, s. 78, as to furious driving of any sort of carriage. The court, therefore, found the defendant liable for the plaintiff's loss of his wheel, and assessed the damages at £21.—The Albany Law Journal.

DYING DECLARATIONS AND DEPOSITIONS.

The death of one of the defendants in a prosecution for criminal libel, now pending at the Central Criminal court, has raised a number of questions as to what would have been the admissibility of the evidence had a dying declaration been made by the deceased. Though the case, at the time of writing this article, is still unfinished, yet, as no such question can now arise on it, there can be no prejudice in dealing with certain questions which might have arisen, and which, in all proba-

bility, may never occur again.

Owing to a confusion of ideas that seems to arise in the lay mind, it will be as well, however, to point out the difference between a dying declaration and a deposition taken in consequence of the dangerous illness of any person who is a witness. The latter is made by virtue of 30 & 31 Vict., c. 35, s. 6, which enables the magistrate to take on oath the deposition of any person dangerously ill and not likely to recover. But such deposition must be made on the oath or affirmation of the person so ill, and before such statement can be read in court it must be proved that notice of intention to take such statement has been served upon the person, whether prosecutor or accused, against whom it is proposed to be read in evidence, and that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

It will be seen, therefore, that a deposition taken under such circumstances is evidence for either the prosecution or defense, that it is made on oath and has been subjected to the test of cross-examination. A deposition so taken is available in any criminal case. We are not, of course, dealing with commissions to take the evidence of people either too ill or too aged to appear in person at the hearing of a civil cause.

The case of a dying declaration is very different. The declaration is not taken on oath, but written down in the presence of a magistrate and signed by the witness. The principle on which such statement is admitted in evidence is laid down by Eyre, C. B., in the case of Reg. v. Woodcock, 1 Leach, at p. 502:

Now the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth, a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. It is not admissible in any civil case, though at one time it was held that it might be. Thus, the dying declaration of a subscribing witness to a forged instrument was held to be admissible to impeach it (Wright vs. Littler, 1 W. Bl., 389), and the dying declarations of a pauper, respecting his settlement were admissible; but this doctrine was disposed of by the judgment of Abbott, C. J., in Reg. vs. Inhabitants of Abergwili.

A dying declaration is, therefore, only admissible in criminal cases, and then only in cases of murder or manslaughter. In Reg. vs. Mead, 2 B. & C. 605, where the defendant, having been convicted of perjury, a rule nisi for a new trial was obtained. While that was pending the defendant shot the prosecutor, and on showing cause against the rule an affidavit was tendered of the dying declaration of the latter as to the transaction out of which the prosecution for perjury arose. Held, that it could not be read, for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration.

There is a curious case in which the dying declaration of the person was admitted, on which the prisoner was being tried, not for murdering the deceased, but another person, by the administration of poison, but in the perpetration of that act he had also inadvertently poisoned the deceased. In that case the court held that the same act caused the death of one as of the other, and that, it being all one transaction, the evidence was admissible: Reg. vs. Baker, 2 M. & Rob. 53.

There are also certain rules which apply to a dying declaration, which we may sum up, briefly, thus: It must have been when the declarant was in actual danger of death, had a full apprehension of his danger, and that death must have ensued. The various circumstances attending the making of such a declaration are evidence to its character. It must also be complete and unqualified, and it is governed by the ordinary rules of evidence as to the admissibility of the matter contained therein. From a consideration of these decisions it will be seen that a dying declaration properly understood, could not have been received in the case mentioned at the commencement of this article. It was a criminal case, but not one of murder or manslaughter, and, therefore, not admissible.

A deposition taken under the act (31 & 32, Vict., 35, s. 6) as we have seen, is a different matter, and is expressly taken in order to be used as evidence, owing to the fact that the witness is so dangerously ill that it is probable death may prevent his making his statement in open court and the person against whom such evidence is to be used, whether prisoner or prosecutor, has his interests safeguarded by the fact that he has notice when such deposition is about to be made, and can attend and cross-examine if he so pleases.

Taking, however, the case of a man who is prosecuting two or three persons for a criminal libel imputing to him an indictable offense, certain questions may arise which may give rise to

an interesting discussion. In the first place, though a criminal trial, yet, by 51 & 52 Vict., c. 60., S. 4, every person charged with the offense of libel, before any court of criminal jurisdiction, and the husband or wife of such person, shall be competent but not compellable witnesses. The same position would arise under any indictment under the Criminal Law Amendment Act. But in the case of libel it often appears to the lay mind that it is the prosecutor himself who is on his trial, and it is this impression which has no doubt given rise to many of the loose expressions of opinion of those who do not regard the case from a legal point of view

No doubt much of this confusion springs from the fact that the distinction between a dying declaration and depositions taken in the case of the serious illness of a witness is not properly appreciated. It is, moreover, deeply rooted in the human mind that the fear of approaching death is such that a man in such a position is bound to tell the truth. But, however this may be with regard to the intention of the witness, there are many circumstances which may affect the credibility of the witness.

Putting aside motives of spite or anger, there is still to be remembered that few people, even with the greatest possible desire to speak the truth, can give an absolutely accurate statement of circumstances which only took a few moments to occur, still less so, perhaps, when the memory and recollection are apt to be impaired by impending death. The law, threfore, has safeguarded, as much as possible, the use of dying declarations, and restricted their employment to cases where the manner of death is the subject of inquiry.—Justice of the Peace, in Chicago Legal News

JUDGE SCOTT IN CONTEMPT.

Judge Cunningham R. Scott, famous for many reasons as one of the judges of the district court of Douglas county, was cited yesterday by the supreme court to appear Dec. 7 and show why he should not be fined for contempt. This order was issued by the supreme court on relation of Attorney L. D. Holmes of Omaha, representing the George R. Dickinson Paper Company. The principal cause for complaint against Judge Scott is his willful refusal to enforce a mandate of the supreme court issued last January in the case of Ackerman vs. Ackerman, a suit involving a distribution of assets of the firm of Ackerman Bros. & Heintze. Under the mandate of the supreme court there if $2,050.66 due the George R. Dickinson Paper Company. Another cause for complaint is that Scott has illegally issued an injunction against Attorney Holmes proceeding in the supreme court against the receiver of the firm's assets, because the receiver has failed to settle according to the supreme court mandate

History of the Case.

The relation made by Louis D. Holmes, attorney for the George R Dickinson Paper Company, is a complete history of the case. The paper company, as appellant in the case of Ackerman vs. Ackerman, shows that the supreme court, upon a final hearing of the case, made an order, Jan. 20, 1897, directing John H. F. Lehman receiver in the case, to pay to the defendant paper company, within thirty days from that date, a sum of money, which, together with the money to be received from the clerk of the district court, would be equal to $2,782.87, for said company's unpaid distributive portion of the moneys arising from the firm assets of the firm of Ackerman Bros. & Heintze; that there was paid upon said order by the clerk of the district court of Douglas county, on Feb. 5, 1897, the sum of $732.21, leaving a balance due to the paper company of $2,050.66 under the order of the supreme court

This amount was demanded of the receiver, but no part of it has been paid. On Jan. 30, 1897, a mandate from the supreme court was filed and recorded in the district court of Douglas county, which said mandate directed the district court of Douglas county to carry into effect the provisions of the decree of the supreme court.

Efforts have been made to enforce this mandate in the lower court. Motions for enforcement have repeatedly been argued before Judge Scott, but the motions became lost, were renewed, and Judge Scott has refused to dispose of them. The cause was transferred to Judge Scott's docket, and he is the only judge who is now authorized to make any order or to carry into effect the decree of the court.

In the meantime Receiver Lehman filed his motion in the district court asking to be discharged, and also that his bondsmen be released from liability. This motion was repeatedly before Judge Scott. It was invariably met by a motion from the paper company to enforce the supreme court mandate. Both these motions were lost and had to be supplied again.

The paper company claims the receiver gave no sufficient reason why he should be discharged, and did not claim he was unable to pay the paper company's judgment.

Stultification.

The paper company finally asked Judge Scott to make an order requiring the receiver to pay $2,050. Scott said no such an order would ever come from his court; that he had once ordered the receiver to distribute assets on hand, which had been obeyed, and

he had discharged the receiver, and could not execute the supreme court mandate without stultifying himself, and said: "I shall protect the receiver, at all hazards." Scott used these words in speaking of the mandate: "There is more back of this case than there is in it. There never was such a decree in any court on earth." Attorney Holmes adds that Judge Scott used many absive and contemptuous epithets concerning the supreme court.

Finally, on Sept. 18, 1897, the paper company filed an information in the supreme court asking that Receiver Lehman be required to show cause why he should not be fined for contempt for failure to comply with its orders. This was to have been called up in the supreme court by the paper company Sept. 21. On Sept. 20 Receiver Lehman and A. N. Ferguson, his attorney, filed a petition in the district court of Douglas county praying for an injunction against Attorney Holmes, restraining him from making such application to the supreme court and from proceeding in the matter of obtaining such an order as was asked. Judge Scott issued the order of injunction and set the hearing for Sept. 28. On the following day Judge Scott granted the injunction. In this it is shown that Judge Scott has attempted to obstruct, without jurisdiction, the proceedings of the supreme court. Therefore, Attorney Holmes asks that Judge Scott be cited to appear and show cause why he should not be fined for contempt.

The order citing Judge Scott to appear, issued by the supreme court, is as follows:

"On reading the relation of the George H. Dickinson Paper Company and Louis D. Holmes, from which it has been made to appear to the court that the Hon. Cunningham R. Scott, one of the judges of the Fourth judicial district has wilfully refused and still refuses to carry out or enforce the mandate lately issued by this court to the district of Douglas county, in a cause wherein Emil C. Ackerman et al. are plaintiffs, and Gus A. Ackerman, et al. are defendants, it is ordered that said Cunningham R. Scott show cause on or before the 7th day of December, 1897, whether, and if so, why he has so refused and refuses to carry out and enforce said mandate."

Several years ago Judge Scott was cited to appear before the supreme court for contempt for failing to carry out the terms of a mandate. He filed a statement, and was let off with a fine.—Nebraska Legal News.

ROBERT G. INGERSOLL

The story of Col. Robert G. Ingersoll's retirement from the active practice of law has been expected for some time. When he removed from his Peoria home some years ago to New York he signalized his advent into the Eastern metropolis by entering the court rooms of Manhattan Island and Brooklyn with the exuberance of a boy fresh from college. He arose early in the mornings, and long before wagons began drowning other noises along William street he could be found in his office. Often did he burn the midnight oil so late as to give the slanting shadows of the early morning sun a chance to take its place. His great reputation as an orator had preceded him, and his residence in New York was of less duration than two months before his fees grew apace with those of Rufus Choate, Elihu Root and William M. Evarts. At first he enjoyed his new surroundings. The change of scenery so different from the agrestic prairies of Peoria seemed charming. New friends sprang up around him as quickly as do the buds of dogwood trees give birth to blooms when an April shower falls upon them. Lawyers bade him welcome everywhere, and sedate judges lent him listening ears.

He was soon the guest of millionaires; then he joined downtown clubs, and so on. Before he had been in New York a year he was a well known figure in the Wall street cafes, clubs and all the big court rooms of the island. Then, in an ecstatic moment, he sold his Illinois home and bought a residence in Harlem. His house became a resort for the merry and the light of heart. Money fairly leaped into his lap. His law offices at No. 58 William street was thronged with clerks and assistant attorneys. The newspapers had something to say about him every day, and for a while he swept things before him—became the leading lion, as it were—just as a French actress becomes the only real star as soon as the ship bearing her to American soil passes Fire Island. But the real lawyers "snubbed" him, for some reason or other, saying that he was superficial, lacked judgment, and that his only virtue lay in the fact that he possessed a musical voice; that his gestures were graceful and his rhetoric and diction superbly elegant. That and nothing else. Col. Ingersoll soon had a "neutrality" case to try. It came up for argument before the supreme court at Washington, and two of the New York attorneys who had failed to receive the colonel with that warmth of cordiality that makes a man feel welcome, were in the court room at the time of the trial. It was Col. Ingersoll's first "neutrality' case, and as he arose to address the court he appeared ill at ease. He had talked for an hour, perhaps, when he said:

"May it please the court to correct me if I proceed wrong in this case. It is my first one of such character, and if my procedure be not in line with the

way such cases are usually presented I beg the court to inform me."

Without a moment's hesitation Chief Justice Waite said to him: "Proceed, sir, proceed. The court is learning from you."

From that moment his ability as a lawyer needed no further proof for the two New York gentlemen who were listening to his argument.

Millionaires and corporations gave him the most of his employment, but occasionally he drifted into criminal practice. He disliked criminal law, and has always entertained a contempt for the usual jury that was elected to pass upon a man's liberty, and it was this feature of the practice that made it odious to him. Still, he oftentimes appeared for defendants; seldom, however, for the prosecution. Years ago he appeared as attorney for the state in a murder case. The accused was convicted mainly because of Col. Ingersoll's appeal to the jury. The man was hanged. Subsequent events proved that he was innocent. Since then the great atheist has been averse to participating on the side of the prosecution. About the time he went to New York the gambling element along Sixth avenue and from Fourteenth to Thirty-second street had many cases to try. At Jake Smith's, who now keeps a saloon at the corner of Twenty-eighth street and Sixth avenue, there one night congregated about twenty professional counterfeiters, card-sharps, green-goods men and the like. They discussed attorneys, and when the night was over they had agreed to band together and to employ Ingersoll to defend them when legal defense became necessary. The first case given the lawyer was one in which a man named Coulson was charged with counterfeiting $1,000 notes. Coulson had been arrested, and a spurious bill of the above denomination had been found upon his person. Col. Ingersoll appeared for him.

The chief prosecuting witness was a man named Jordan, a kinsman of Col. Jordan of the New York subtreasury, who was an expert in detecting counterfeit coin. Col. Ingersoll held the $1,000 bill in his hand. He would lower it, raise it again and then place it in such a manner as to catch every angle of the eye.

"Mr. Jordan, you say that this is counterfeit?" asked the colonel, in a very serious tone, as he held the piece of paper in his hands. The reply was in the affirmative. Then he lowered his hand that contained the bill between his knees and asked: "Do you mean to say this bill is counterfeit?"

Mr. Jordan thought that the colonel had changed bills on him, and replied: "No; I didn't say anything of the kind."

"Then, Your Honor," said Ingersoll, addressing the judge, "I move the case be dismissed," and before the prosecution could make a counter move the defendant had been discharged. As he started from the court room Coulson told his lawyer to keep the bill as his fee. When the note was presented at the subtreasury for change, it was stamped as counterfeit. Six months elapsed, and one night Col. Ingersoll was at Rector's cafe in this city. As he went to settle his bill for his meal a gentlemanly-appearing fellow approached him and asked him if his name was Ingersoll. Then, before the lawyer had time to speak, $1,000 in bills was thrust into his hands, and Coulson walked rapidly away, remarking as he did: "You will find these good ones," and they were.—J. S. Evans, in Chicago Times-Herald.

Abstract of Recent Cases.

The fact that a notary public is secretary and treasurer of a corporation is held, in Horbach vs. Tyrell (Neb.) 37 L. R. A. 434, insufficient ta raise the presumption that he is a stockholder, or to make an acknowledgment of a mortgage to the company, which was taken by him, invalid.

The subsequent insanity of the maker of notes given to aid the enterprise of providing a library building for a board of education is held, in School District v. Stocking (Mo.) 37 L. R. A. 406, insufficient to prevent liability on the notes, if the school district, on the faith of the notes, had expended moneys or incurred liabilities in promoting the enterprise. Such notes are held to be sufficiently delivered when placed in the hands of a third person to be delivered to the board of education wren called for.

The right of a passenger to take packages of groceries for the use of his family with him into a passenger car is denied in Bullock v. Delaware, L. & W. R. Co. (N. J.) 37 L. R. A. 417, when the terms of his ticket entitle him to "personal passage." But it is held that the officers of the railroad company cannot lawfully take the packages away from him by force afer he enters the car, although, if he refuses to remove them, he, with his packages, may be removed without unnecessary force.

A parol sale of growing timber is held, in Leonard v. Medford (Md.) 37 L. R. A. 449, not to relate to an interest in lands within the meaning of Sec. 4 of the statute of frauds, and if the purchaser is placed in full possession, and commences performance of his contract, this is held sufficient to prevent repudiation of it by the seller on the ground that it is within Sec. 17 of the statute relating to sales of other property above a specified value.

An order drawn by a married woman upon the executor of her father's estate is held, in Freeman's Appeal (Conn.) 37 L. R. A. 452, to be subject to the laws of her domicil, where she signs the instrument and it is accepted in that state, although it is dated in another state and is mailed by an agent of the payee to the payee in another state.

The agreement of the plumbers' association to the effect that the members will not deal with wholesale dealers who sell to any persons who are not members of the association is held, in Macauley v. Tierney (R. I.) L. R. A. 455, to be lawful, and not to constitute a conspiracy, since the object of the combination and the means adopted for its accomplishment are lawful.

A loan of money made without the license required by the Idaho statute for doing such business is held, in Vermont Loan & T.. Co. v. Hoffman (Id.) 37 L. A. R. 509, to be enforcable, as the statute merely makes the act a misdemeanor, and provides for suit to recover the license tax, and the act is neither malum in se nor malum prohibitum.

The disability of an alien to inherit, imposed by the laws of a state, is held, in Opel v. Shoup (Iowa) 37 L. R. A. 583, to be removed, so far as the subjects of the King of Bavaria are concerned, by a treaty between the United States and Bavaria

Keeping large quantities of dynamite and gunpowdr in a wooden store in a thickly-settled portion of an incorporated town, in close proximity to many buildings and persons, is held, in Radder v. Koopman (Ala.) 37 L. A. R. 489, to constitute a nuisance which will render the proprietor liable for damages caused to other persons in case of an explosion, even if this is due to a fire which originated without his fault on the premises of a third person.

But it is held also, in Kinney v. Koopman (Ala.) 37 L. A. R. 497, that it will not be liable for damages of which the eplosion was not the proximate cause,—as, for the destruction of a building which would have caught fire and been destroyed from other causes independent of the explosion. Such a keeping of explosives is held to be prima facie negligence.

A representation that notes are as good as gold, made to induce a vendor tol accept them as part of the purchase price of land, and intended and understood to be a representation of facts within the vendee's knowledge, of which the vendor knew nothing, is held, in Andrews v. Jackson (Mass.) 37 L. A. R. 402, to constitute an actionable false representation, and not merely an expression of opinion

A constitutional provision requiring laws to prevent gambling, is held, in People, Sturgis v. Fallon (N. Y.) 37 L. A. R. 419, to be not necessarily violated by fixing the penalty for making or recording a bet on a horse race merely a forfeiture of the value of the wager, to be recovered in a civil action.

Discrimination between competing omnibus lines at a railroad depot, by giving one of them a more favorable stand than is allowed to the other, where both are given access to the grounds, is held, in Lucas v. Herbert (Ind.) 37 L. R. A. 376, insufficient to constitute any legal ground of complaint against the railroad company.

An injunction against an appropriation on a municipal budget for the lawful purpose of removing garbage, is denied in State, Badger v. New Orleans (L. A.) 37 L. A. R. 540, at the suit of one who claimed to have a right to remove the garbage under a contract which is disputed and in litigation, although it is said that any party in interst may have an injunction against an appropriation for an illegal purpose.

A ded of trust, and not an assignment for creditors, is held, in Tittle v. Vaanleer (Tex.) 37 L. R. A. 337, to be made by an instrument transferring property to a trustee, with authority to sell and convey it in the name of the grantors, "with a provision for returning to them any surplus." With the case are marshalled the authorities of the different states distinguishing between an assignment for creditors and a preference by mortgage or sale.

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CONTENTS.

ANNOUNCEMENT.

This issue closes the "Minnesota Law Journal." The "District Court Reporter" will take the place of the old journal. The whole plan and style of the new publication will be as complete a change from the old, as the name is, and we trust that our subscribers will be more than pleased with the substitution.

"The District Court Reporter" will be, primarily, just what its name indicates, a reporter of district court cases. This statement is made advisedly, since the co-op ration promised by judges in the most important districts in the state insure a sufficient number of cases each month to make good the claim to the title of the new publication.

The arrangement of the contents of the "Reporter" will be such that, at the end of the year, the reported cases may be separated from the other matter, and each be bound in a volume complete in itself.

THE IDENTIFICATION OF CRIMINALS BY THE BERTILLON SYSTEM.

It is a matter of general knowledge that the average person accused of and arrested for crime, seeks to suppress the publication of that fact. If he be so well known that it is of no use to deny his name, perhaps the effort will take the form of using his influence or that of his attorney or such of his friends as he cares to call to his aid, with the public officers and reporters and publishers of newspapers. But if the accused is not known by name, occupation or residence to the person making the accusation or

to the officers making the arrest, and having to deal with him, a far simpler and easier means of suppressing the publication is at hand. He conceals his identity; he gives a false name, residence, occupation and history, and thereby he and his connection with the crime for which he has been arrested, if crime there be, are as completely hid from the public when this false statement is published in all the newspapers of a metropolis as they would be if the entire matter had been suppressed. The motives which lead to this desire for suppression are almost as various as the characters and dispositions of the persons accused. In the case of those who have never been arrested before and who are innocent of the offense charged, there is an indignation which rapidly merges into mortification, and this, together with the thought of saving father and mother, sisters and brothers, sweetheart, wife, children, business or social associates, grievous pain, may prompt the effort towards suppression. In the case of him who has been arrested before and who is indifferent to the feelings of relatives and associates, whether conviction or acquittal followed the previous arrest, the accused knows it will not make his path out of prison any easier to have it known to his accuser, the police and the prosecuting attorney, that he has been there before.

In the case of him who makes crime his business, who is an habitual criminal, he knows that a more severe sentence awaits him if he is convicted and his previous record becomes known.

Following the lead of a movement which certainly seems to have reason back of it, the legislature of Ohio on May 4, 1885, passed an act (85 Ohio Laws, 134) which provided that every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for a felony, either theretofore or thereafter, either in Ohio or elsewhere in the United States, shall be convicted, sentenced and imprisoned in the Ohio penitentiary for felony committed after the passage of this act, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced, he shall not be discharged from imprisonment in the penitentiary but shall be detained for and during his natural life unless pardoned by the Governor; and the liability to be so detained shall be and constitute a part of every sentence to imprisonment in the penitentiary. The act also contains a proviso for the parole of this sort of a prisoner under the direction of the Board of Managers.

Later, to-wit: April 19, 1893, this principle of punishment was extended to all offences upon conviction of which the law authorized the commitment of an offender to a work-house. The law provides that in case a previous and similar offense shall be proved against such person, the sentence for the last offense shall not be less than double the penalty imposed for such previous offense, and where two previous convictions for such offenses are proved against the offender the sentence shall not be less than double the penalty imposed for the last of such previous offenses; and further that every person who after having been three times convicted and sentenced for offenses under the law of any state or any ordinance of a municipal corporation committed theretofore or thereafter i Ohio or in any other State of the union, shall be convicted of an offense the punishment of which is imprisonment in the work-house, every person so convicted shall be deemed and taken to be an habitual offender and may be imprisoned in a work-house for a period not greater than three years, nor less than one year unless pardoned by the Governor. In all such cases the court may further order that such person shall stand committed to such work-house until the costs of prosecution are paid.

The Supreme Court of Ohio has held that in order to lay the foundation for a sentence of this sort it is necessary that it should appear in the information or indictment that the prior convictions had taken place, on the principle that the indictment must always contain an averment of every fact essential to the punishment to be inflicted.*

In states and communities where such laws exist and are enforced, your old offender, if he is still an enterprising burglar, or if he has not lost his spirit, or if he is not ready to retire into the asylum afforded by the penitentiary for the

*Blackburn v. the State 50, O. S. 428. Larney v. the City of Cleveland, 34 O. S. 599.

remainder of his days and enjoy a well-earned repose, is extremely anxious to be known as some other than himself.

It is such enactments as this habitual criminal law (so called), which render some system of identification of professional criminals an absolute necessity in all large cities. A system is needed in order to ascertain, in the first place, if the offender be an old or a new one. Again, after it is ascertained that the present is his third offense, if such be the case, and he has been properly accused either by information or indictment, has pleaded not guilty and thus traversed the averments in the accusing paper as to his previous conviction, the state must be prepared to furnish competent and convincing proof as to those averments and especially that he is the identical person who was convicted under other names and possibly in other states and of other crimes.

It is the habitual criminal, the man who subsists on the fruits of crime, against whom those who have in charge the administration of the criminal law should principally plan and operate. The large other class of criminals who through sudden passion, intoxication or temporary but powerful temptation are betrayed into the violation of law, are more properly designated accidental criminals. In a great many, perhaps a majority of such cases, one experience is sufficient; although, of course, every habitual and old criminal at one time was guilty of only one crime, and belonged then to the class of accidental criminals. A plan which is comprehensive and thorough enough to make the business of burglary, larceny, pocket-picking, forgery, etc., extremely hazardous and burdensome, is the one that should be adopted and rigorously enforced. It is against this class of criminals that those responsible for the administration of the criminal law must wage a constant, relentless and aggressive warfare.

About forty years ago it was thought that the art of photography had become so practical and easy in its application that the difficulties attending identification of criminals could, by its use, be very largely reduced, and commencing in the 60's the Polic Department of every considerable town in the United States and Canada started its "Rogues' Gallery." As good a photograph as possible was obtained of each and every person convicted of crime and there carefully preserved. In the headquarters of the Police Department of the city of Cleveland (and probably in every other large American city), there is a cabinet containing upwards of two thousand photographs which have been accumulated in this way. On the back of the card on which this photograph is mounted is registered a serial number, the subject's name and aliases, age, height, complexion, color of hair and beard, color of eyes, shape of nose, any peculiarity regarding his teeth, his weight, the place where he was born, his occupation, the charge preferred against him at the time the photograph was taken, by whom he was arrested, the day of his arrest, with a space left for remarks concerning matters not properly included under the above heads.

In Paris in eight years, about one hundred thousand of these photographs had been accumulated, and it would seem that if a person was thus photographed and registered it would be an exceedingly difficult thing for him to pass through the hands of the same authorities a second time within a period of say five years, without being identified. But there are two things which render this means of identification liable to fail to furnish conclusive evidence of identity. One of these is the change which may take place in the man himself in a comparatively small number of years. He may have become bald; he may have lost greatly in weight, or, on the other hand, he may have taken on a great deal of flesh. He may have turned gray, his style of wearing the beard may make such a change as to completely throw one off the track. The second thing is that the labor of comparing a photograph taken to-day with the accumulation of photographs taken say in a period of ten or fifteen years, is so great as to render it impracticable. It is estimated that to compare the photograph of a man arrested to-day with the hundred thousand which have been accumulated in Paris, would require the constant work of a staff of men skilled in such things, for at least a week. But whether that estimate is correct or not, it can readily be seen that the labor of comparing one photograph with thousands is not inconsiderable, and when much time has elapsed between them

there is certainly a possibility, and may even be a probability of failure to find the former photograph even if it is there; because, it must be remembered that we have no name to guide us, as there is no assurance whatever that the name given now was ever given before when the same person was arrested. Nor is the matter recorded on the back of these cards a sure guide. Alphonse Bertillon says: "From personal measurement and observations made in Paris, with over ten thousand subjects, among a hundred persons of the same height, of those observed, 87 had what is commonly called brown hair, 10 had blode hair, between 2 and 3 per hundred had black hair and about 1 in every thousand had red hair." So that if the man who is now being examined has brown hair he is only 1 out of 87 in 100; if he has blonde hair, he is 1 in 10 of 100; if he has black hair, he is 1 of 3 in 100; and if he has red hair, he is 1 of 3 in 1,000. The same thing applies to the words "long," "large," "medium," "small,' etc., which in ordinary descriptions mean to convey an idea of the appearance of a nose, forehead, mouth, etc. One sees hardly anything else but medium, and what appears small to one today may be described as large by another.

Again he says: "One-third of the subjects observed of the same height have hazel eyes; one-fourth what is commonly styled gray; one-seventh blue, and one-fourth of indistinct color.'

It is not to be understood that the photograph is useless for the purpose of identification: It is valuable in verifying the identity of an individual, but it is altogether impotent to help you discover the identity, if you have no other means but your eye to search for the photograph among the thousands in an ordinary collection. There are two axioms or principles which seem to lie at the foundation of the Bertillon Method. One is that "Nature never repeats herself," and the other is that after the subject has arrived at the age of 20 or 22 years, certain bones never increase in size or length, and they are possible of accurate measurement to the extent of 4-100 of an inch. The principle is laid down that "a man individualized by measurement of this kind is mathematically identified;" it is said "to find two subjects showing exactly the same anthropometric indications in every particular is just as great an impossibility as to discover two persons or objects that look exactly alike." When the eye cannot discover a distinction, figures 'which will not lie' will certainly do it.'

Classification is said by Bertillon to be the aim and the sole aim of his system, and the first grand division into which all descriptions are subdivided is according to the length of the head. Take a collection of sixty thousand photographs of men and women, divide them into three equal groups according to the measurements of the length of the head: Those with small length 20,000, those with medium length 20,000 and those with large length 20,000; it is apparent that if these groups are to be approximately equal in numbers, the series of medium length of head should be of less extent than those of large or small length and should contain only the individuals whose measurements vary a small fraction of an inch, while the series of large lengths should contain only the individuals measuring more than the largest of the medium class, and those of the same length all those measuring less than the smallest in the class of medium length. Starting now with the three Grand Divisions, each one is then subdivided on the same principle without regard to the length of the head of the individual, into three groups according to the width of the head; this makes 9 subdivisions with approximately 6,000 and upwards photographs and measurements in each subdivision. The next subdivision is according to the length of the middle finger, and dividing each of the nine groups in this manner into three groups each, we have 27 groups in all, and each group with the small middle finger will have about 2,200, each with the medium middle finger will have about 2,200, and each with the large will have about 2,200. The next subdivision is the measurement of the foot in the same three classes, the small, medium and the large, which will divide the 27 groups of about 2,000 each into 81 of something over 600 each; each of these 81 groups will again be subdivided into still smaller groups by taking the length of the forearm as basis of subdivision; then comes another subdivision by the measurement of the height, another by the measurement of the little finger, and another by the measurement of the ear, etc. When

the latter subdivision is reached we have the quotient of 7 in each final subdivision, the result of all which is that we have 60,000 photographs and descriptions divided into groups of no more than 7 or 8 each, which it would be an easy matter to examine rapidly and carefully and with desirable results.

An article reprinted in the Green Bag of November, '91, from Chambers' Journal gives a short description of the apartment presided over by the author of the system in Paris, and the means taken to apply his system. The card, 8 inches by 6, contains the name, measurement, and any distinguishing marks about the person, his photograph in two positions, one the front view and one the side view of the face, and these cards are kept in small drawers which stand on shelves like those of a library and are arranged in sections according to the measurements as I have already indicated. One main section contains cards of all with a certain length of head; this section is subdivided according to the breadth of the head and again subdivided according to the length of the middle finger an so on, the maximum and minimum of the measurements being written on the outside of each drawer.

The writer of the article then relates an actual case of identification which took place in his presence. A young man had been arrested and was brought into the room for measurement; he was barefooted and bare-headed; 10 measurements were taken in four minutes, one doing the measuring and the other making the record, as a tailor and his assistant measure a man for a suit of clothes. In addition to his height standing, his height sitting was measured; the length of his arms extended and the length and breadth of his ear. When this was completed he was asked his name, and replied "Albert Felix;" he was then asked if he had ever "been up" before, and with considerable assurance answered "No." When asked if he was sure of it, he replied that he was, and he was then sent from the room. The search of the cards was then commenced; section after section was eliminated by comparing the figures on them with the figures on the card which bore the record of the measurement just made. At last the search ended in a drawer which contained just two cards. The first card showed a discrepancy of some of the measurements, but all the figures on the other corresponded exactly with those just taken of Felix. Up to this time the photographs had been covered. Felix was again brought into the room and re-questioned; he repeated the former answers, but with less confidence; the photograph was then exposed, and there he was to the life, but the name was different. The card also had details of certain marks and scars on the hands and body which were found to exist on Felix, who then broke down and confessed to his identity.

Gallus Muller, the clerk of the Illinois State Penitentiary at Joliet in 1889, wrote concerning the matter of measurement as follows: "Experience has demonstrated that the different parts of the human body are not by any means in constant congruity one with each other. One person is of small stature but has a large head and large feet; another has small feet and short fingers but is of tall stature; the variations in individuals are so great and the precision of the measurements so minute and perfect that among 100,000 subjects there are hardly 10 who will show approximate figures on every indication, but even these few can by the description, according to the Bertillon Method, of the eye and the nose and the form and location of accidental scars and marks, be individualized almost beyond a possibility of doubt or confusion." An article by Bertillon, published in the Forum in November, 1891, speaking of the same subject, says: "The comparison and discussion of the description on the cards in any one of the final packets or subdivisions show that it is almost impossible to find two similar ones, so that the equivalence of the corresponding figures of two measurements constitutes almost a certainty of identity." One is surprised at the presence of the word "almost" in this connection. That the author of the system stops short of claiming absolute certainty of identity is a matter of some surprise, but it speaks well for his moderation, and his good judgment; as do the following remarks in the same connection:

"Nevertheless in the pursuit of justice, absolute certainty ought to be aimed at in all cases where it can be obtained. Anthropometry, properly speaking, is always supplemented in practice by a descriptive identification, by noting the col-

or of the eyes, hair, beard and complexion, and by analyzing the contours of the profile, forehead, nose, lips, chin and ear. The vocabulary, therefore, is clear, precise, brief, orderly and classified. The police vocabulary of description is an intellectual descendant of the vocabulary of ethnography; it is necessary only to lower and limit the methods of strict science so as to adapt them to the use of the police agents. The descriptive parts is replaced by photographs, face and profile, side by side, whenever the necessities of the police render the preparation of a portrait desirable." He then adds, "finally the record of particular marks, scars of cuts, boils or wounds, tattoo marks, e. g., 'vertical cicatrix in the middle of the back of the second of the phalanges of the left index finger,' 'mole six centimeters to the left of the vertebral column and fouteen centimeters below of the 7th vertebrae,' particular markings having an identifying power greater than that of the measurements of the bony frame. They would even be called upon to replace these completely were it not for the difficulty of properly classifying them."

So the Bertillon system does not end with measurements; his system of describing the different features is all that is implied in the language with which he describes it as I have quoted. His notation of the eye, for instance, is based on the theory that there is found in the human race but two fundamental types of eyes, viz: the blue eyes and the maroon eyes; all other shades must be considered an intermediate as between these two types. By the term blue he comprehends the pale-blue, azure-blue, violet-blue and slate-blue eyes, although he admits that many eyes of more or less bluish tints may participate in two or three of these qualifications at once. The maroon eyes have a unique tint which reminds one of the French chestnut or of the horse chestnut when the fruit is ripe and fresh and the shell sleek and shiny; it is the black eye, the eye of the Arab, the Negro, the people of southern climes generally. The shade of this eye is more or less deep, more or less light, but its general aspect is more uniform than that of the series of blue eyes. The intermediate eyes, to which class three-fourths of the eyes of the Caucasian race belong, generally approach either the pale, azure, violet, or slate-blue or the maroon eye. The more or less yellowish, orange-colored matter which is observed in most eyes when they are examined by gazing directly into them from the front is what he denominates the pigment of the eye. The more abundant this pigment is in the eye the darker it appears and the nearer it approaches maroon.

In most cases this yellowish, orange-color matter is in the shape of a circle around the pupil, and the four varieties of pigmentation which serve for the notation and classification of intermediate eyes are yellow, orange, hazel and maroon. Eyes of imperfect maroon color, those whose surface is not entirely covered with maroon, are subdivided as follows: First, maroon circle, where the maroon is grouped around the pupil; second, irisated maroon, where the pigment enters a portion of the external zone and leaves exposed on the surface of the iris only small triangular or crescent-shaped spots, either of greenish yellow or dark slate-blue color. It is his claim that in his classification a place is found for eyes of every description .

Before the adoption of this system in Paris there was a prize of five francs offered to every policeman or prison official who recognized a person who was concealing his identity and who could tell the prisoner's real name. Seven or eight thousands francs a year were paid for recognizing fourteen hundred to sixteen hundred criminals, yet it was estimated that more than one-half of the habitual criminals arrested escaped recognition. It is stated as a fact that some criminals who found themselves closely pursued for some serious offense, would commit some minor crime for the purpose of being apprehended and cast into prison where they could safely hide until the storm blew over. It is the claim of the anthropometrical system that it cut short all such expedients in Paris; the time of assumed names is past; they resort to them no longer, save in desperate cases. An habitual criminal who had killed his wife, and who was apprehended in company with thirty or forty other persons, such as we would designate as the tramp genus, was about to be discharged unrecognized, although the police had been searching for him for several days, when some remark he chanced to let drop caused a search to be made to

see if he had ever been apprehended before. He had given a false name, but by means of the measurements his card and correct name were found, and he was completely identified as the man who was being sought. It is the claim of Bertillon that from four to five hundred of this kind of criminals are annually detected in Paris.

To those who say to him, "We see your success, but are your failures not more?" he has this answer: "There are two kinds of errors: First, mistaken identity; second, failures to identify. Mistaken identity arises from confusion of two measurements which do not relate to the same person; as when B. is arrested to-day and he is declared to be A., who was arrested five years ago, although they are two persons. An English magistrate has collected numerous examples of this kind of judicial error in England in a period of four years." Bertillon claims that anthropometry protects us completely from such mistakes. "When," he says, "in the midst of a mass of one hundred thousand measurements we find a record presenting identically the same figures as that of the subject who is under examination, a mathematical mind may object with justice that the concordance of the figures is not a sufficiently convincing proof of identity, since the method of classification has for its aim the grouping and bringing to life of similar records of measurement, but when on this card, selected from one hundred thousand, we find in addition a concordant personal description, the probability is wonderfully increased, and it changes to absolute certainty when we read on the back of this very card the record of all the bodily marks that are observed on the subject under examinatoan. So that by these three things—first, measurement; second, description of photograph of the face and profile; third, a record of the bodily markings—the identity is established with such absolute certainty that those making the examination do not inform the accused that his identity is discovered, but send that information to the proper magistrate, and the prisoner is confronted with the statement of who he is and what his history has been, so accurate as to lead to his utter confusion. Of course, habitual criminals protest, but it is the claim of the author of this system that not one mistake has been proved. But how as to the failure to identify? How many of the one hundred who pass each day through the process of measurement are not unmasked at once and are recognized later, either by the aid of the old method or otherwise? After this system was adopted in Paris the prize of five francs which had formerly been awarded for the discovery and identity and real name of a prisoner seeking to conceal the same, was doubled, and a provision was made that this reward be paid from the salary of those making the measurements and records. In the year 1889 there were only four such failures to identify, and when these were analyzed the primary cause was found, not in the system, but in the fact of human fallibility; the searches had been incomplete or there had been blunders in dictating or writing figures.

One of the consequences of the use of this system as claimed by Bertillon is the practical disappearance from Paris of that class of criminals known as international pickpockets. One hundred of this class were arrested per year before this system was introduced; in four years that number has fallen to 34, and three years later there were not to exceed 12 of this class arrested.—Alex. Hadden, in Western Reserve Law Journal.

A NEW POSTAGE STAMP.

Commemorative of the Holding of the Trans-Mississippi Exposition.

For the third time in the history of the nation, in recognition of the importance of a brilliant enterprise, Postmaster General Gary has decided to order a series of special postage stamps, commemorative of the holding of the Trans-Mississippi and International Exposition at Omaha in 1898. The stamps will be issued in denominations of 1-cent, 2-cent, 5-cent, 10-cent and $1, making it possible for the public to use these stamps on all outgoing foreign as well as domestic mail matter. The issue lends the Exposition the prestige of government recognition.

In issuing these special stamps it is not designed by the postmaster general to withdraw from sale the current series, as was the case during the World's Fair. The issue will be of marked artistic order in design, symbolic of the great Trans-Mississippi region.

The design contemplates portraits of

distinguished persons identified with the country, appropriate historical events as illustrated by existing paintings or engravings.

It is suggested that one of the denominations might have on the face a reproduction of a celebrated painting, "Fremont: Hoisting the Flag on the Rocky Mountains." Prominent men and events in connection with the Western territory, typical of its marvelous development and its progress during the past one hundred years, are suggested. Among these is the statue of the distinguished Western leader and statesman, Senator Thomas H. Benton, which bears upon one side of the base a quotation from one of Mr. Benton's speeches, wherein he outlined the possibilities of the country beyond the Mississippi. The complex figure which hangs in the south corridor of the capitol, known as "Westward-ho," emblematical of the hardships attendant upon the pioneer.

A representation of the picture, "De Soto's Discovery of the Mississippi River," in the rotunda of the capitol at Washington, is suggested for use on one of the stamps.

The stamps will be different in color from the regular service. In shape they will resemble the Columbian stamp issued in commemoraton of the World's Fair.

Third Assistant Postmaster General Merritt invites suggestions of scenes for use of the stamps, it being the desire of the postoffice authorities to give the Trans-Mississippi and International Exposition the handsomest set of stamps ever issued to commemorate an exposition.

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