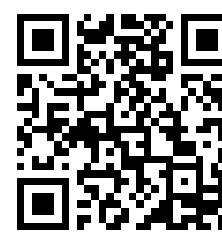

# FOREWORD

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# THE MINNESOTA LAW JOURNAL

## VOLUME IV

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## 1896

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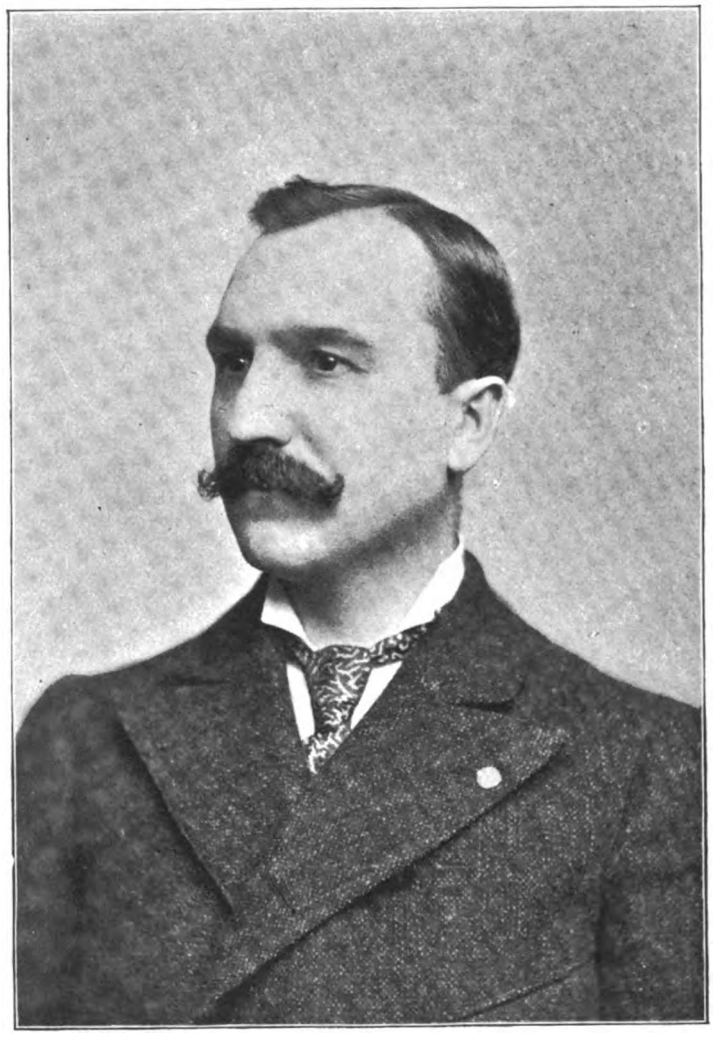

FRANK P. DUFRESNE, PUBLISHER.

. . . THE . . .

# 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 IV.

COVERING THE YEAR

## 1896.

PUBLISHED BY

FRANK P. DUFRESNE,

**PUBLISHER AND LAW-BOOK-SELLER,**

**ST. PAUL, MINN.**

# LIST OF PORTRAITS.

...THE...

# MINNESOTA LAW JOURNAL

A PRACTICAL MONTHLY MAGAZINE.

VOL. IV. JANUARY, 1896. No. 1.

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CONTENTS.



## The Standard Fire Insurance Policy.

In 1889 the Minnesota legislature passed an act (Gen'l Statutes, 1894, secs. 3200-3202) delegating to the Insurance Commissioner the duty of preparing a form of fire insurance policy which, when so prepared, should be known as the Minnesota Standard Policy and should be used to the exclusion of all others by fire insurance companies doing business in this State. The Insurance Commissioner drafted such a policy and the fire insurance companies adopted it. On the 15th day of May, 1895, the Supreme Court held the 1889 law unconstitutional in the case of Anderson vs. Manchester Fire Assurance Co., 63 N. W. Rep. 241, on the ground that it provided for the delegation of legislative functions to an executive officer. The Supreme Court of Pennsylvania had already made a similar disposition of a like statute which had been enacted by the legislature of that state and in anticipation of such an outcome here the Minnesota legislature of 1895 had in effect repealed the 1889 law before the decision in Anderson vs. The Assurance Co. was handed down.

The repealing act was Chap. 175 of the 1895 General Laws (approved April 25, 1895), which, in its Sec. 53, prescribed the language which must thereafter be followed in all fire insurance contracts made in Minnesota. The provisions of this legislative form are simple and conventional as far as they go. It begins with the insuring words; stipulates that the policy shall be void if the insured is guilty of deceit, takes out other insurance without the insurer's permission, or the risk is increased; requires a sworn statement to be furnished the company forthwith after a loss; permits the company to replace the destroyed or damaged property; protects a mortgagee against suffering from the wrongful acts of an in-

sured mortgagor permits cancellation by either the insured or the insurer; makes arbitration a condition precedent to a suit at law if a disagreement arises as to the amount of a loss, and limits the time within which an action may be brought to two years.

The law also permits companies to incorporate in their policies, by writing across their face or upon their margin or in the form of riders, provisions adding to or modifying those contained in the standard form, with the condition that such provisions shall not be inconsistent with the positive requirements of the act. Under this section the insurance companies prepared a general rider before the law went into effect on October 1st, 1895, and most of them append it to their policies when issued. The first section of this rider is taken up with definitions of various words or terms used in the policy; the second section limits the company's liability in certain directions; the third defines more exactly the duties of the insured in the matter of proof in case of loss and the fourth adds various stipulations found in the old forms of policy to the effect that incumbrances on the insured property or a change in the ownership shall vitiate the policy and makes it the duty of an insured mortgagee to keep the insurer informed of any facts coming to his knowledge which would avoid the policy as to the mortgagor. It should be noted, however, that the employment of this or any other rider is not necessary; that some companies do not employ any rider at all, and that the insured for his own protection ought, even when a rider is employed, to examine it with care because there is nothing in the act requiring the riders employed by different companies or by the same company with different policies, to be uniform.

The limits of this article do not permit a more detailed statement of the contents of the new policy which can readily be found by reference to the law under consideration. But the reader's attention is called to some of the changes which this legislation has effected. One of these has already been referred to when it was stated that insurance policies are no longer of necessity alike. Again, the requirement of immediate notice of loss, followed within sixty days by proofs of loss accompanied by a magistrate's certificate, has been eliminated. Under the new statute and the general rider commonly adopted, no magistrate's certificate is necessary and the proofs of loss are to be made forthwith after the fire without any preliminary notice, and the company's obligation to pay matures within sixty days thereafter. By the form of policy prescribed the right to begin an action is extended to two years from the time the loss occurred but this seems to be inconsistent with Sec. 25 of the act, which in effect, permits the insertion of a one year's limitation in a policy.

The most radical features of the new policy, however, are the introduction of the so-called "valued policy" provision and the provision forbidding any stipulations in the contract, the purpose, or effect of which is to make the insured to any extent a co-insurer with the company. Under Sec. 25 of the act the insured is entitled to receive in case of a total loss the full amount mentioned in his policy and on which he has paid the premium, whether it represents his actual loss or not, and in the case of a partial loss, he is entitled to receive the full amount of this partial loss. All provisions of a policy limiting the insurer's liability to a percentage of the loss suffered are declared void as well as all provisions requiring him to maintain insurance to the extent of any percentage of his property's value.

The statute has not as yet come before the courts for interpretation but the Attorney General has already been called on by the Insurance Commissioner a dozen times or more to write opinions on its doubtful points. Some of these opinions cover matters not germane to the subject here immediately under consideration, but others of them are very suggestive of the sort of questions which will have to be answered before the construction of the law is settled. On the 5th of August, 1895, the Insurance Commissioner asked the Attorney General whether a fire insurance company was authorized to limit the time within which a suit on a policy could be begun to one year. Sec. 25 of the law, as already noted, forbids any limitation less than one year and Sec. 53 giving the form of the policy puts the time as two years, The Attorney General on the 9th of August, 1895, answered that he thought there was no repugnancy between the two sections and that a one year limitation was permissible. The insurance companies apparently do not agree with him for they have inserted the two years period in their printed policies. On Nov. 5, 1895, the Attor-

ney General held the following rider permissible:

"Permission is hereby granted for other insurance to an amount, including this policy, aggregating not to exceed eighty per cent of the actual cash value of the property; provided, however, that if at the time of the fire the total insurance on the property shall exceed said eighty per cent this policy shall thereby become void only in the proportion of such excess to such total insurance."

giving his reasons as follows:

"It is very evident that an insurance company may determine for itself the limit beyond which insurance shall not be permitted so far as its own risks are concerned. It may withhold assent to other insurance when resulting in an excess, and thus prevent it. In such regard authority is clearly conferred. I perceive therefore no valid objection to the use of the rider."

But in the same opinion he held the following proposed rider bad:

"It is hereby stipulated and the assured hereby agrees to maintain insurance during the life of this policy, upon the property hereby insured, to the extent of eighty (80) per cent of the cash value thereof, and that if at the time of the fire the whole amount of insurance on said property shall be less than such 80 per cent this company shall in case of loss or damage less than such eighty (80) per cent be liable for only such portion thereof, as the amount insured by this policy shall bear to said eighty (80) per cent of such actual cash value of such property,"

because it required the insured to maintain insurance to a percentage of his property's value. On Nov. 15, 1895, he gave an opinion to the effect that a policy insuring against loss of rents in consequence of fire was in effect a policy insuring property and that the provisions of law forbidding stipulation that the insured should carry a certain amount of insurance or be a co-insurer with the company to certain limit applied to such a policy. On Dec. 12, 1895, the following rider was submitted for his opinion:

"Permission is hereby granted for other insurance to an amount including this policy, aggregating not to exceed eighty per cent of the actual cash value of the property; provided, however, that in case of any loss or damage to the property covered by this policy amount to less than eighty per cent of its actual cash value at the time of the fire, this company shall be liable for not to exceed such proportion of such loss or damage as the amount insured by this policy bears to such eighty per cent of such actual cash value of said property."

The companies submitting it urged that it was good because it related only to a loss less than eighty per cent of the value and therefore did not apply to a "total loss" and that it contained no requirement that the insured should maintain any amount of insurance upon the property insured. The attorney general thought it contrary to the statute however, and said:

"This, in my judgment, is in plain violation of the statute against co-insurance. In fact I am unable to perceive how a case more clearly offensive in such respect can arise. The assured is obviously required to carry insurance to the amount of $100 upon the property destroyed. I see no force to the contention that the rider relates to insurance less than eighty per cent and not to a total loss. When companies impose an eighty per cent restriction, as is suggested by the rider in question, that maximum must be deemed within the meaning of the prohibition of the statute upon the subject of co-insurance to constitute the insurable value of the property."

On Dec. 12, 1895, the Liverpool & London & Globe Insurance Co. asked. Is the following form of rider permissible?

"Permission is hereby granted for the building described in this policy to be vacant, or unoccupied for the period of..... days from this .....day of.....189.. and in consideration of the increased hazard, by reason of such vacancy, it is hereby understood and agreed that during such vacancy, one-third of the amount of the insurance under this policy shall be and remain suspended and of no effect; and in case of loss this company shall not be liable to pay or make good to the assured exceeding two-thirds of the amount insured hereunder, nor exceeding two-thirds of the amount of loss or damage. In case of other insurance on property covered by this policy that has been, or shall be, rendered void or voidable by the vacancy or non-occupancy hereby permitted for the purpose of contribution in case of loss, such other insurance shall be held as valid and subsisting."

And the attorney general answered:

"The form of the proposed rider may be allowed if there is stricken therefrom all that follows the word 'effect.' The retention of what follows that word would be in violation of the provision against the use of a co-insurance clause."

AMBROSE TIGHE.

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"And you tell me," the modern girl murmured, thoughtfully, "that your heart has my name, and mine alone, engraved upon it." "Yes," he answered, "and it is the truth." "You can also call to mind the financial resources such as to warrant you in undertaking to supply me with such a home as that to which I have been accustomed." "Of course." "Would you mind going up to the next corner with me?" "Certainly not. But for what purpose?" "They are conducting some experiments with the cathode ray, and, if it is all the same to you, I'd like to have what you say verified."—Washington Star.

WM. LOGAN BRACKENRIDGE was born at Meadville, Penn., Aug. 19, 1856, and in the fall removed with his parents to Rochester, Minnesota, where he has since resided. He graduated at Shattuck Military school, Faribault, Minnesota, in 1876 and at the University of Michigan Law school, 1879. He was associated with the firm of Start & Gove at Rochester, Minnesota, for several years; served several terms as city attorney of Rochester, Minnesota and two terms as county attorney of Olmsted county. It is also "reported" (to quote his own language) that he ran for the attorney generalship on the Democratic ticket in 1894, but he seems to be in some doubt about this. Perhaps he means that none of the Democratic candidates in 1894 attained the gait of a "run."

WM. LOGAN BRACKENRIDGE.

## NEW CODES.

Iowa and North Dakota have recently adopted new codes and the result seems to be confusion worse confounded. This is especially true in North Dakota where nearly $44,000 has been expended to date on the work with results which are very unsatisfactory. Some of the errors are so great that it seems a special session of the legislature is inevitable. The most costly error, so far discovered, is the one relating to assessors in the unorganized sections of the State. For assessment purposes that omiss on does not cut much figure in the eastern part of the State, as there are few unorganized townships, but out in the western part of the State it means everything. In some counties one or two townships would have to bear the entire taxes of the county, while the countless herds of cattle in the unorganized territory would escape taxation. The American Adjustment Company of St. Paul and Minneapolis has recently issued to its patrons a brief summary of some of the provisions of the new North Dakota code, from which the Journal makes the following extracts:—

A new code went into effect in North Dakota on the first of January, 1896, which makes a number of changes in the laws previously in force in that State.

Some of these have been much talked about, but are of more apparent than real value. Others have a good deal of interest for the Minnesota jobber.

Of the first class are the amendments to the exemption law. One of these limits the right to claim exemptions to the head of a family. But as the head of a family is defined so as to include whoever has any relative by blood or marriage residing with him, or under his care, practically almost every adult comes within the list.

Another of them abolishes the partnership exemption to the extent of deducting from each partner's individual exemption his proportionate share of the exemption allowed the firm. But as each partner is still allowed an individual exemption of fifteen hundred dollars, including his proportion of the partnership exemption of fifteen hundred dollars, the gain to creditors is not very material.

Of the greatest importance, however, is the insolvency law, which is entirely new and contains the most radical additions to the State's Code. It provides that any person who is unable to pay his debts in full may petition the court to adjudge him insolvent, or that any one or more creditors whose claims aggregate at least four hundred dollars, may make a similar petition if the debtor has concealed himself, or his property, to the hurt of his creditors, has preferred any creditor, or has suspended payment of his commercial paper to the amount of five hundred dollars or more for thirty days. When a person has been adjudged insolvent, the Clerk of the District Court gives notice of a meeting of his creditors, and at this meeting an assignee, who apparently need not be a resident of North Dakota, is elected, each creditor's vote being in proportion to the size of the claim he holds. Creditors having security for their claims must either convert the security into cash, and prove up for the balance, or if they prefer, can surrender their security and prove the whole debt. Preferences are forbidden, and if made within sixty days prior to the beginning of insolvency proceedings, may be recovered back, provided the creditor receiving the preference had

reasonable cause to believe the debtor insolvent at the time. And all payments on pre-existing debts made by an insolvent within thirty days of his insolvency, are declared void, and may be recovered back, no matter whether the creditor receiving the payment had cause to believe him insolvent or not. Formal releases are not required, but at any time after six months from the date he has been adjudged insolvent, whether his estate has been closed or not, the insolvent may petition the court for an order discharging him from his debts, and if it appears that he has turned over all his unexempted property to his assignee, and has been guilty of no fraud, his petition will be granted and he will be discharged from all his debts, including those to non-residents with some ill-defined exceptions.

The law is a long one embracing nearly a hundred sections, and is very similar to the Minnesota insolvency law as amended by the 1895 legislature. It involves many serious constitutional questions and promises to be the source of much litigation before its meaning is finally settled. In such litigation the experience of Minnesota lawyers under our insolvent law will be of great value.

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JOHN W. ARCTANDER was born in Stockholm, Sweden, Oct. 2, 1849, and was graduated from the Royal University of Christiania, Norway, in 1869. At first he adopted the profession of an editorial writer and journalist.

JOHN W. ARCTANDER.

He came to America in 1870, and was admitted to the bar in Carver Co., Minn., in 1874, and practiced in Minneapolis, from 1874 to 1876, in Willmar, from 1876 to 1886, and since Jan. 1, 1886, in Minneapolis. He was district attorney, Twelfth Judicial District, in 1880 and 1886. His specialties are negligence law and Supreme Court practice and his record is a noteworthy one. He argued twenty-four cases in the Supreme Court during the last two years, won twenty-three and lost one.

## CONSOLIDATION OF ACTIONS.

A Minneapolis correspondent writes that the law cited in the November Journal in the article on the consolidation of actions, is not correct, and that "not only does the section cited not provide as the writer says it does but it does not purport to treat of the consolidation of actions at all."

That article stated that the consolidation of actions was governed by G. S. Ch. 66, Sec. 118, 129. Section 118 provides that all causes of action arising out of the same transaction or transactions connected with the same subject of action should be jointed. Section 129 provides that when two or more actions are pending at the same time between the same parties and in the same court upon causes of action which might have been joined, the court may order the actions to be joined.

By putting these together we have the rule that if the same transaction or transactions connected with the same subject is divided into two suits the court may order the actions consolidated, because they are causes of action which might have been joined.

The facts assumed in that article were that there was one order but two shipments and two actions. The one order or several orders for goods is but one transaction and if not, it is certainly transactions connected with the same subject and should have been joined, because there can be but one action for one transaction or transactions connected with the same subject.

In framing the joinder of actions the code commissioners merely boiled down the common law rules of the joinder of actions, though imperfectly done, and the Section 129 merely provides for the joinder instead of the special demurrer at common law for the non-joinder.

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## WORK OF THE SUPREME COURT.

The supreme court has disposed of all the cases on the October calendar.

There were 358 cases, of which 255 were disposed of by written opinions, 7 affirmed on motion, 2 reversed on motion, 23 dismissed, 5 stricken from the calendar, 52 continued to next term and 14 were included in other decisions handed down. Of the 255 opinions, 65 were reversals, 2 on dismissal, 3 on order to show cause, 4 modifications, 3 writs of ouster, 1 per curiam decision and 167 affirmations.

This is a vast amount of work for five

judges to accomplish in four months and a half when one takes in consideration the fact that they have also heard and disposed of a large number of motions which are not reported. The Supreme Court goes on the principle that promptness of decision subserves the ends of justice better than scholarly effusions promulgated only after interminable delay. Some lawyers are inclined to disagree with this view but they would not if they once practiced in states where a lifetime of necessity intervenes between the beginning of a suit and its final determination in the form of an elaborate essay by the court of last resort.

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DAVID T. CALHOUN is a southerner by birth and a democrat. He was born in Tennessee in 1853, came to Minnesota when he was a child; returned to his old home where he was admitted to practice in 1874; settled at St. Cloud in 1877 and has been engaged there in the successful practice of his profession ever since. He served as county attorney of Stearns county for one term, as mayor of St. Cloud for three terms, and in 1890 ran for the attorney generalship of the state, but he was not elected, because as above stated, he is a democrat.

DAVIDT. CALHOUN.

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### LIEUTENANT ATE ALL THE PIE.

In the early part of the war, when Gen. Grant was in command of an expedition in Southwestern Arkansas, a forced march brought them into a country where supplies were very scarce One day Lieut. Wickfield of an Indiana cavalry regiment, who commanded the advance guard, found a farmhouse where he secured an excellent meal by representing himself to be Brig.-Gen. Grant. He was on his way again before Grant reached the farm house, and when the latter came up and asked for something to eat he was informed that "Gen. Grant had just eaten everything in the house except a pumpkin pie." The General guessed what had happened and paid the woman 50 cents for the pie, saying he would send back for it later. Then Grant rode on some fifteen miles to where the army was to go into camp for the night. There the various regiments were notified of a full parade at 6:30. This was so unusual that it created a decided sensation.

The parade was formed ten columns deep, and nearly a quarter of a mile in length, and, after the usual ceremonies, the Assistant Adjutant-General read the following order

"Headquarters, Army in the Field—Special Order: Lieut. Wickfield of the Indiana Cavalry, having on this day eaten everything in Mrs. Selvidge's house, at the crossing of the Ironton and Pocahontas and Black River and Cape Girardeau roads, except one pumpkin pie, Lieut. Wickfield is hereby ordered to return with an escort of 100 cavalry and eat that pie also.

U. S. GRANT,
"Brigadier-General, Commanding."

At 7 o'clock the Lieutenant filed out of camp with his 100 men, amid the cheers of the entire army. The escort returned to camp about midnight, reporting that Wickfield had eaten the whole pie.

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In North Carolina last year the Republicans elected some of their judges for the first time in over twenty years, and one of that party was so delighted that when Judge Robinson, one of the new judges, came to hold court, he put on a new suit, including a new pair of shoes, and went to the court house to see a Republican judge on the bench." He began at the door and his shoes went creak, creakety, creak all the way down till he got near the judge to get a good view and feast his eyes on the novel sight. The Judge stopped and eyed him, the proceedings stopped, all eyes were fixed on the newcomer with the creaking shoes, whose nervousness and the sudden stillness made the creaking seem louder than ever. When the owner of the shoes had about reached a vacant seat, the judge stormed at him: "Sit down there, "shoes and all." There is now one man in that county who no longer hankers to "see a Republican judge on the bench."—Green Bag.

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### OBITUARY.

Mrs. Gilger, wife of John W. Gilger, died Feb. 11th, at the hospital in Minneapolis of cancer.

The wife of Hon. Thos. Wilson, who died at the Aberdeen on Feb. 11th, was buried at her old home in Winona on Feb. 13th.

NATHANEL KINGSLEY was born at Sharon Conn., Sept. 10, 1850.

NATHANIEL KINGSLEY.

In 1858, his father moved west, settling on a farm in La Salle Co., Ill. In March, 1869, Mr. Kingsley came to Minnesota, and worked on a farm until the following year, when he learned the miller's trade. He was admitted to the bar at Preston, Fillmore Co. in November, 1876, and in February, 1877, commenced practising law at Rushford, Fillmore Co. In December, 1878, he moved to Chatfield in the same county, and opened an office there.

At the November election in 1880, he was elected county attorney of Fillmore Co., and held the office four years. In April, 1887, he moved to Austin where he now lives. His education is that of the common schools.

He studied law at home while he was working at his trade, and continued to work at his trade, after he was admitted to the bar, from November until February following.

## ILLEGAL DUNNING.

The recent case of the United States v. Smith, 69 Fed. Rep., 971, had its origin in a postal card on which was written: "You must do something on your note. I wish you to pay the interest and one hundred dollars of the principal. You have been fighting time all along, and now at the end you remit nothing. If I do not hear from you, I must be around. I will garnishee and foreclose. But I do so dislike to do this if you will only be half white. Rep." The United States District Court, D. Minnesota, holds that it was nonmailable.

Had the writer merely requested payment of part of the debt, and stated that, if not complied with, he would take legal steps by garnishee process or foreclosure to secure it, the court intimates that there would be some doubt about the language used being of such a threatening character as to render the postal card nonmailable, and within the purview of the law. But the latter part of the postal card contained an expression which manifestly was intended to reflect injuriously upon the character of the person to whom it was sent, when taken in connection with the preceding language used. No other construction, the court says, can be put upon the following paragraph: "But I do so dislike to do this (garnishee and foreclose) if you will only be half white." The writer thus indicated that the person addressed was dishonest, and his reputation not spotless. Such imputation upon his character, expressed upon a postal card deposited in the mail, is a reflection prohibited by law.—Business Law.

## LITERARY.

No one ever thought of introducing so expensive a feature as lithographic color work in the days when the leading magazines sold for $4.00 a year and 35 cents a copy. But times change, and the magazines change with them. It has remained for The Cosmopolitan, sold at one dollar a year, to put in an extensive lithographic plant capable of printing 320,000 pages per day (one color). The January issue presents as a frontispiece a water color drawing by Eric Pape, illustrating the last story by Robert Louis Stevenson, which has probably never been excelled even in the pages of the finest dollar French periodicals. The cover of The Cosmopolitan is also changed, a drawing of page length by the famous Paris artist Rossi, in lithographic colors on white paper takes the place of the manilla back with its red stripe. Hereafter the cover is to be a fresh surprise each month.

H. Sidney Everett contributes to the February Atlantic a paper on Unclaimed Estates. He gives minute and most interesting information in regard to the large European estates which are supposed to be awaiting American claimants. Mr. Everett's long diplomatic career has afforded him every opportunity of securing inside information. There is also an able paper entitled The Presidency and Mr. Reed. It is a thoughtful presentation of the requirements of the presidential office and a discussion of Mr. Reed's fitness for it. It is the first of a promised series upon the issues and some of the personalities of the forthcoming campaign.

# THE MINNESOTA LAW JOURNAL.

Communications in regard to the Contents of the Journal should be addressed to the Publisher, FRANK P. DUFRESNE, St. Paul, Minn.



## DISTRICT COURT.

### Personal Property Tax--Distress--Priorities.

**St. Paul Title Insurance & Trust Co., vs. D. E. Lyon, Adm. of Geo. Tileston, decd., and I. A. Morrison.**

*(District Court, Stearns County.)*

**Before Hon. D. B. Searle.**

1. A valid levy under a tax warrant implies not only the taking of actual possession of the property distrained, but the retaining of such possession until a sale is had. The mere giving of a receipt by an agent of the owner, without any change of possession, is not a waiver of a proper distress.
2. The existing rights of a mortgagee of personal property cannot be divested by the subsequent levy of a distress for personal property taxes assessed only against the mortgagor. A purchaser at a tax sale of such property can acquire no greater rights than the mortgagor had at the time of levy.

H. C. ELLER for Plaintiff; D. T. CALHOUN and G. W STEWART for Defendants.

Several years ago the owners of the St. Cloud street car line, which was then a horse railroad, were approached by parties who proposed to convert the same into an electric line, with the further proposition that a new company should be organized, the road converted into an electric line and extended and that the original owners should take bonds in the new company in payment for their ownership in the old street car line. They acceded to this request and took their bonds in the new company which was formed and have since held these bonds. At that time it was proposed that the St. Cloud Water, Light & Power Co. should supply the motive power. The new company was organized on a basis which not only involved the purchase of the old line but expensive extensions and additions thereto and issued bonds to the nominal amount of $125,000, secured by trust deeds to the St. Paul Title Insurance and Trust Co. of St. Paul. The balance of the bonds above the amount due the original owners of the street car line were advanced to the new company and the majority at least of them are held by purchasers or by those who have made advances to the new corporation to enable them to construct and enlarge the plant. These bonds bear interest at the rate of six per cent. payable semi-annually. The interest was paid until January, 1894, when a portion thereof became delinquent and no interest has since been paid. Under the terms of the trust deed the trustee was required upon the request of a majority of the bondholders, in case of default to institute foreclosure proceedings for the benefit of all the holders of the bonds which it has done and during the month of August last year E. E. Clark was appointed receiver in that foreclosure proceeding, but he never succeeded in obtaining control of the line.

The action to foreclose that trust deed came on for trial before Judge Searle and while there was no defense in behalf of the corporation the executor of the late George Tileston and one I. A. Morrison filed an answer in which they allege that the property of the Street Ry Co., in Stearns County had been sold to one C. H. Harkens of Minneapolis, in June, 1895, for non-payment of personal property taxes which had been assessed against the corporation for the taxes for the year 1894 and whose rights had been assigned to the parties mentioned prior to foreclosure proceedings. It appeared upon the trial that the trust deed had been duly recorded and the question was whether these purchasers at the tax sale had a title which was paramount to the lien of the trust deed.

The testimony showed that some of the bonds, at least, had been accepted and received in good faith and for a valuable consideration and that the trustee had attended to the proper recording of the deed in the respective city and village officers and had certified to the bonds and delivered them to the company, and further that from time to time the trustee had been supplied with funds to meet the accruing coupons, and

had paid the same which were produced by bondholders residing in different parts of the country.

The title under which Tileston and Mrs. Morrison claimed was a certificate of the sheriff of Stearns County issued to Horkens upon the sale mentioned dated June 22nd, 1895, and it was claimed by the defendants on the trial that the title to the entire line of railway located in Stearns County passed to defendants by said sale. The amount of the tax for which the sale was made was $328. This tax remaining unpaid, in pursuance of a distress warrant, the sheriff made a levy upon the property of the Street Ry. Co. May 3, 1895, by going to the street car barn and stating to some workmen there employed that he was in charge of the car line. It further appeared that after making that statement he returned to his office and thereafter applied to Mr. Benson, who was at that time the manager of the Street Car Co., for a list of the property belonging to the company, the items whereof he was unfamiliar with, and that Benson furnished him a list as requested and executed to him in the afternoon of that day a receipt for these articles, agreeing to produce the same at the time of the sale to be had under said tax proceedings. At the time of the sale, June 22, 1895, the sheriff struck off all of the property in its entirety, consisting of the cars, street car track, wires and poles, to Harkens as above stated.

The validity and effect of this sale was attacked by the plaintiffs on the following grounds: First, that no sufficient distraint of the property under the distress warrant issued to him was ever made by the sheriff, the plaintiffs claiming that a distraint involved the taking and retention of the normal and physical possession of the property. Second, that the line of street railway track including poles and wires were not subjects of distraint within the meaning of the statute. Third, that even if a lawful and sufficient distraint of the property could be said to have been made that no rights could be acquired in that property except subject to the prior lien created by the trust deed above mentioned.

SEARLE, J.:—This action is brought by the plaintiff to foreclose a certain deed of trust and chattel mortgage, executed by the defendant "The St. Cloud City Street Car Company" described in the complaint in this action, by reason of the default of said defendant company to pay the interest due on the bonds therein mentioned, which said mortgage was given to secure. The complaint also states that the defendant D. E. Lyon, as executor of the last will and testament of Geo. Tileston, deceased, and I. A. Morrison claim title to a portion of the mortgaged property, which is situated in the county of Stearns, under and by virtue of a pretended tax title made in certain personal property tax proceedings more fully set forth in the complaint; and asks that such claim of the defendants Lyon and Morrison be determined and adjudged to be null and void as against this plaintiff, and the bondholders mentioned in the complaint. There is no controversy as to the right of the plaintiff to foreclose the mortgage, it being admitted that the defendant Street Car company is in default for non-payment of the interest due on the bond, by reason of which the provisions of the mortgage providing for a foreclosure have become operative. The important and only question involved in this action is as to the validity of the tax title in controversy. Upon this issue the burden of proof is upon the tax title claimants to prove a substantial compliance with the several provisions of the statute concerning such pretended sale. A tax title is purely technical, as distinguished from a meritorious title, and depends upon a strict, or at least substantial, compliance with the statute. In determining the validity of the tax title in controversy two questions arise, viz:

First, was there a valid or sufficient levy or distress made upon the property under the distress warrant mentioned in the complaint?

Second, assuming such distress, and the sale thereunder to have been valid as against the Street Car Company, is the title thereby acquired good as against the plaintiff, and the holders of the bonds secured by the trust deed?

In my opinion the evidence in the case fails to show any valid or sufficient levy or distress of the property in question. The action of the sheriff in merely going to the street car barns and stating to one or two persons there employed that he was in charge, and then returning to his office, over a mile distant, and making no list of the property, nor placing any person in charge thereof at the time, and making no other effort to take actual possession of the property claimed to have been distrained was not sufficient to constitute a distraint. Levying a distress under a tax warrant, as well as at common law, implies not only the

taking of actual possession of the property distrained, but the retaining possession of said property until a sale thereof is had. The action of Mr. Benson in signing a paper in the form of a receipt for the property, the possession of which had not been interfered with, was not a waiver of proper distress on the part of the Car Company, or the trustee plaintiff. Benson's authority as superintendent or manager of the railway line could not be construed as authorizing any such act which would even bind the Street Car Company, much less this plaintiff or the bondholders.

Waiving, however, all questions as to the legality or sufficiency of the attempted distress, the tax that was attempted to be enforced. was one that had been assessed against the car company alone. Being for personal property taxes it was not a lien upon any specific property, but only upon the property belonging to the car company and then only to the extent of the rights of such company therein at the time the lien attached or subsequent thereto, and by the statute authorizing the distress, it was only the property of the street car company that was liable to be taken under the warrant. The rights of the plaintiff and the holders of the bond secured by the trust deed, were paramount to any rights of the car company in the property, or any lien for any personal property taxes the books for the collection of which were delivered to the collector subsequent to the execution and filing of the trust deed; and a purchaser of a tax sale of such property, no matter how regular the proceeding, could acquire no greater rights therein than the car company itself actually possessed at the time the distress was levied. See:

Garr vs. Hurd, 96 Ill. 315.

Binkert vs. Wabash R.R.Co., 98 Ill. 201.

Cooper vs. Corbin, 105 Ill. 224.

Gormley's Appeal, 27 Pa. St. 49.

Miller vs. Anderson, 47 N. W. R. 957.

For the reasons above given the court is of the opinion that the plaintiff is entitled to the relief demanded in the complaint and the pretended tax title in question is null and void and of no effect.

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### REFUSED TO BE WORKED.

Dinguss—"By the way, Shadbolt, talking of those X rays—"

Shadbolt (sheering off)—"No use, Dinguss. You'll make no X raise from me this time."

## Insolvency Law of 1895--Constitutionality--Contract Obligations.

**In Re, the Assignment of J. C. Harper & Co., Insolvents.**

**(File No. 63691. Hennepin County, Jan. 10, 1896.)**

The above entitled matter came on for hearing before the said court at a special term thereof held on Saturday, the 30th day of November, 1895, on the order to show cause heretofore issued herein why said insolvents should not be discharged from their debts, in accordance with their application and under chapter 67 of the Laws of 1895.

BENJAMIN DAVENPORT, Esq., appeared on behalf of the insolvents, and MESSRS. KEITH, EVANS, THOMPSON & FAIRCHILD and GEORGE F. EDWARDS on behalf of the creditors.

After hearing the argument of counsel and duly considering the same, being fully advised in the premises, it is ordered that the said order to show cause be and the same is hereby discharged and the application of said insolvent is hereby dismissed.

MEMORANDUM.

BELDEN AND RUSSELL, J. J.: The law under which the insolvents make this application, is Chapter 67 of the General Laws of Minnesota, for the year 1895. This chapter seeks to amend Chapter 148 of the General Laws of 1881, entitled: "An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors and for the release of debts against debtors," and the acts amendatory thereof. The amendments are in the form of additional sections and relate to the discharge of the debtor and provide a method by which that discharge may be secured. The creditors object to the granting of the application on the ground that the law is unconstitutional as to them. This objection is well taken. The law is in derogation of the Constitution of the State of Minnesota, and of the Constitution of the United States, in that it impairs the obligation of a contract. It is admitted by all the parties and is shown by the files in the insolvency proceeding that the debts owing to the creditors, from which a discharge is asked, were all contracted prior to its passage of the law in question. It also admitted that the assignment was made and the claims were all filed prior to the passage of the law. What effect the law may have on debts contracted subsequent to its passage, we are not called upon now to decide. The question squarely presented here is the effect on debts previously contracted.

The insolvency law of 1881 provided for a release by the creditors of their debts before participating in the dividends declared in the insolvency proceedings. The new law absolutely releases the debtor from all debts which have been proven against his estate. That is, it provides that where an

application is made by an insolvent debtor, and he shows that he has complied with the terms of the statute, and not concealed or held back any of his estate or sought to prefer any creditor, he may be discharged from the debts of all creditors who have appeared in the proceeding by filing their claims, or by doing other acts which the law provides, or, on appearance, irrespective of when the debts were contracted, the assignment made, or the claim filed. In effect, it strikes out the clause in the old law requiring a voluntary release by the creditor before the debtor is discharged.

This is a most radical and material change, and certainly affects the obligation of the debtor to the creditor. It does not, as counsel for the insolvents suggest, apply merely to the remedy. It not only affects the procedure, but it destroys substantial contractual rights. When the debt was contracted, the statute of 1881 was in force, and became a part of the contract. Under that the debtor agreed with the creditor that if he became insolvent and made an assignment, he would do so for the benefit of all his creditors who might voluntarily file releases. Under the new law the contract is changed and the debt of the creditor is discharged where he has merely complied with his right, under the old law, of filing a claim. When he filed the claim the law said that he did not, by that act, release the debtor from any part of his debt; but that he might afterwards determine whether he would make this release, when he ascertained what the condition of the estate was. The new law thus compels the creditor to do that which he might not have done and which he did not agree to do when his debt was contracted, or his claim filed. The statute reads into the contract something that was not there before.

There is a long line of decisions by the Federal Supreme Court relating to this question. They are well stated in the "American and English Encyclopedia of Law," Vol. 3, pp. 751 & 752.

Our decision is sufficiently supported by a reference to two cases in which the constitutionality of the Minnesota Insolvency Law of 1881 was involved; the first, Wendell vs. Lebon, 30 M. 234; and the other the decision of the Supreme Court of the United States rendered in Denny vs. Bennett, 128 U. S. 489. By both of these decisions the law is sustained for the reason that it does not affect debts previously contracted in that it leaves to the creditor himself the determination of the question whether he will release the debtor and take the dividend which may be declared in the estate. It may fairly be deduced from the decisions that the law would not have been sustained if it had undertaken to absolutely release debts previously contracted without this act of the creditor himself.

Our own Supreme Court, in Wendell vs. Lebon, refer to the decisions of the Supreme Court of the U. S. beginning with Ogden vs. Saunders, 12 Wheat. 213, and sum up the settled law as follows:

"First: The several states have power to legislate on the subject of bankrupt and insolvency laws, subject, however, to the authority conferred upon the congress by the constitution of the U. S. to adopt a uniform system of bankruptcy, which, when exercised, is paramount; provided, however, that such state laws do not impair the obligation of contracts, within the meaning of section 10, article 1, of the Federal constitution.

"Second: A state bankrupt law which discharges both the person of the debtor and his future acquisitions of property, and thereby terminates the legal obligations of the debt, is not a law impairing the obligation of contracts so far as respects debts contracted subsequent to the passage of the law, but cannot be constitutionally applied to contracts entered into before it was passed."

In Dunny vs. Bennett, Judge Miller, who delivered the opinion of the court, goes over the ground quite fully regarding the reasons urged against the validity of the law of 1881 and sustains the law, using the following language:

"The question of the invalidity of this Minnesota statute, as it relates to the rights of creditors, is an interesting one. The argument in favor of that proposition is twofold. First, that it impairs the obligations of contracts, and second, that such a statute can have no extra territorial operation, and cannot therefore be binding on creditors living in a different state from that of the debtor and of the situs of his property.

With regard to the first of these, it may be conceded that so far as an attempt might be made to apply this statute to contracts in existence before it was enacted, it would be liable to the objection raised, and therefore in such a case of no effect. But the doctrine has been long settled that statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the states where the property and the debtor are to be found. The courts of the country abound in decisions of this class, exempting property from execution and attachment, no limit having been fixed to the amount—providing for a valuation at which alone, or generally two-thirds of which the property

can be brought to a forced sale to discharge the debt—granting stays of execution after judgment, and in numerous ways holding that, as to contracts made after the passage of such laws, the legislative enactments regulating the rights of the creditors in the enforcement of their claims are valid. These statutes exempting the homestead of the debtor, perhaps with many acres of land adjoining it, the books and library of a professional man, the horse and buggy and surgical instruments of a physician, or the household furniture, horses, cows and other articles belonging to the debtor, have all been held to be valid, without reference to the residence of the creditor, as applied to contracts made after their passage.

"The principle is well stated in the case of Edwards vs. Kearzey, 96 U. S. 595 to 603, in the following language: 'The inhibition of the constitution is wholly prospective. the states may legislate as to contracts thereafter made, as they see fit. It is only those in existence when the hostile law is passed that are protected from its effects."

The reasoning in these decisions is sufficient authority for holding the law now under consideration as to debts previously contracted. and for dismissing the application of the insolvent.

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C. A. NYE was born on a farm in St. Croix Co., Wis., in 1861, and worked at home in the summer and attended common schools in the winter until he was seventeen years of age. Then he attended the State Normal school at River Falls, Wis., and also taught several terms. He studied law with his brother Frank M. Nye now county attorney of Hennepin county, who was then located in Wisconsin. He was graduated from law department of Wisconsin university, class of 1886 and commenced practicing at Moorhead, January, 1887. He held the office of city attorney of Moorhead four years and is now serving his second term as county attorney of Clay County.

C. A. NYE.

## School District--Liability for Negligence--City of St. Paul.

**Margaret Johnson v. The City of St. Paul.**

**(District Court, Ramsey County.)**

The City of St. Paul, as an independent school district, is not liable for the negligence of its school inspectors in allowing a school house to become, and remain so much out of repair, that it causes sickness in the family of a janitor who is required to live therein.

This action was brought against the City of St. Paul to recover $10,000 damages for the negligence of the school inspectors in failing to keep one of its school houses in proper repair.

The complaint alleged that the city as the successor of the old school board owned the property, and was required to keep it in good repair. That plaintiff was the wife of the janitor of the school house and that under his contract he was required to live with his wife and family in rooms fitted up in the basement for that purpose and that $5 per month was deducted from his salary as a rental for such rooms. That a water pipe in the basement of the building froze and burst, and that the school inspectors, although notified of the fact, neglected to repair the same. That the water flooded the basement and rendered it so damp, foul and unhealthy that plaintiff contracted a severe fever, was for a long time confined to her bed, and became permanently diseased and disabled.

The answer admitted the ownership of the property, and that plaintiff's husband was employed as the janitor of the school house in question.

It further alleged that the school house had always been kept in good repair, and denied all of the allegations of the complaint not thus admitted or qualified.

When the case was called for trial counsel for defndant moved for judgment on the pleadings on the ground that the complaint did not state a cause of action.

Robertson Howard for defendant.

It is a well settled rule of law that municipal corporations are not liable for negligent omissions, or commissions in the performance of duties for which they receive no pecuniary profit, but which are imposed upon them as mere governmental agencies.

Under this rule a county is not liable for the negligence of its commissioners in failing to keep a court house in good repair.

Dosdall vs. Olmstead Co., 30 Minn. 96.

Nor is the City of St. Paul liable for the negligent operation of an elevator in its City Hall.

Snyder vs. St. Paul, 51 Minn. 472.

Nor for the negligence of its board of health in the discharge of its duties.

Bryant vs. St. Paul, 33 Minn. 289.

Nor for the negligent acts of its fire department.

Grube vs. St. Paul, 34 Minn. 402.

Nor is a village liable for negligently maintaining its lock-up or prison in such a condition that a prisoner confined therein contracts a disease.

Gullickson vs. McDonald, (Minn.) 64 N. W. Rep. 812.

This principle applies with even greater force to a school district than to other municipal corporations.

"School districts are made a part of the educational system of the state. They are corporations with limited powers, organized for public purposes, and the duties of the trustees, or boards of education, entrusted with the management and care of the property of such districts are public and administrative only, and they are not liable to individuals for mere neglect or non-feasance in failing to make repairs."

Bank vs. Brainard, 49 Minn. 106.

Freel vs. School City of Crawfordsville, (Ind.) 41 N. E. Rep. 312.

The act of 1891 (Spl. Laws 1891, ch. 36) which made the City of St. Paul an independent school district, so far as school houses are concerned, simply put the city on the same footing as any other school district in the state, and it is not liable in action of this kind.

Walter Holcomb for plaintiff.

The act of 1891 making St. Paul an independent school district vested the title and entire control of school houses in the city, and authorized it to sue and be sued, and takes this case out of the general rule that a school district cannot be held liable for negligence. In caring for school property, and making repairs they are not performing a purely governmental function.

Besides in this case the relation of landlord and tenant existed, and the failure to keep the building in a healthy condition was a breach of contract for which the city is liable.

EGAN, J.:— After having heard the arguments of counsel, on January 23rd, 1896, and being fully advised in the premises, it is this 15th day of February, 1896, ordered, that the defendant's motion for judgment on the pleadings be, and is hereby granted, within five days after date of service of copy of this order.

NOTE. Charles Johnson, the husband of the above named plaintiff, also sued to recover $5,000 for expenses and loss of his wife's services, and in that case the same motion was made and the same order entered.

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## Exemption--Dentist's Watch.

**Thomas Gardner, Plaintiff, v. D. H. Day, Defendant.**

**(District Court, St. Louis County.)**

Sec. 5459, Statute 1894. Sub. Div. 8, providing that "The library and implements of any professional man" shall be exempt, construed and held to exempt a watch of a dental surgeon.

FRYBERGER & Johanson for Plaintiff; TEARE & MIDDLECOFF for Defendant.

The plaintiff recovered judgment against the defendant, who is a practicing dental surgeon, and thereafter issued an execution which was returned unsatisfied. Thereafter an order in supplementary proceedings was issued, and the defendant disclosed, among other things, that he was the possessor of a gold watch, chain and charm, and that his business was that of a dental surgeon, and was at the time practicing his profession in Duluth. He was not represented in the supplementary proceedings by an attorney and upon his disclosure an order was issued directing the defendant to turn over among other things his gold watch, chain and charm, to the sheriff, who was also appointed by the order receiver to take and sell all the property, including the watch, to satisfy the judgment, etc. The defendant upon demand by the sheriff delivered to the sheriff his gold watch, chain and charm. Application is made by his counsel then employed, upon affidavits, to vacate the court's former order requiring the delivery of the property, and to compel the sheriff to redeliver to the defendant his property. The affidavits stated that the defendant was a practicing dentist, and that it was necessary for a dentist to carry on his business successfully, that he have a time-piece such as a watch or clock. By the affidavits of six dentists it appeared that no dentist could vulcanize a set of false teeth without a time-piece, and that by defendant's affidavit the watch was the only time-piece he possessed. It was claimed that the watch was an implement of his profession, and that he had no other similar implement. Counter affidavits were filed but admitted that a dentist must have a time-piece such as a watch or clock, in order to vulcanize teeth. The court would not consider the fact that it was a gold watch or a silver watch, and it was held exempt, and the former order was vacated and the sheriff

required to re-deliver the watch. The chain and charm were held unexempt, but by consent were delivered to the defendant.

MOER, J.:— The property (watch) from the affidavit of defendant appears to be the only time-piece he owns. It appears by all the affidavits that a time-piece is necessary to successfully vulcanize a set of teeth.

The fact that the watch was carried upon the person instead of being attached to the vulcanizer and left in the office can make no difference. If it can be used for more than one purpose, so good, it is necessary and is exempt.

Defendant cited in his brief, 43 N. Y. 539. 44 Minn., 216. 134 Mass. 401. 58 N. H. 271. 59 N. H. 188-200-206-562-573. A complete text book upon the subject. The cases of 18 Minn. 331, and 59 N. W. Rep. 731, were distinguished.

The court filed no minutes in the case. The remarks above were his oral remarks.

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## Stockholders Liability Action.--Practice.--Pleadings Filed Under Section 23 of Chapter 76.

**Sturtevant-Larrabee Co., Plaintiff, vs. Mast, Buford & Burwell Co., et al., Defendants, and Whitman Barnes Manufacturing Co., et al., Claimants.**

**(File No. 60924. District Court, Ramsey County.)**

In an action brought under Chapter 76 against a corporation and its stockholders wherein an order has been obtained in accordance with §23 thereof allowing creditors to become parties to the action and exhibit their claims and file their pleadings. a pleading filed under such order cannot contain allegations seeking to charge any defendant stockholder with any further and different liability than that set out in the plaintiff's complaint, but, if it is proper to raise such new issues in the action, it must be done through an amendment of the original complaint, or by the filing and serving of a supplemental complaint. upon notice and leave.

EDWARD B. GRAVES. attorney for plaintiff; YOUNG & LIGHTNER, attorneys for defendants; FLANDRAU, SQUIRES & CUTCHEON, WARNER, RICHARDSON & LAWRENCE, and HUBBARD & TAYLOR, and EDWARD B. GRAVES, attorneys for intervenors.

The Mast, Buford & Burwell Co., having made an assignment in insolvency and their assets being only sufficient to pay a dividend of 25 per cent to the creditors, the plaintiff, whose claim had been allowed by the Receivers in insolvency, instituted an action against the corporation and its stockholders under Chap. 76. The complaint simply sought to charge the defendant stockholders upon their constitutional liability, and contained no allegations charging any of them as directors. The defendants filed a notice of general appearance in the action, and answered. On April 30th, 1895, an order was obtained in the suit under sec. 23 of the above chapter, allowing any creditor seven months in which to become a party to the action and to exhibit his claim and file his pleading. Under this order various creditors represented respectively by Warner, Richardson & Lawrence, Flandrau, Squires & Cutcheon, Hubbard & Taylor and Edward B. Graves, filed pleadings which not only contained a statement of their respective claims against the corporation, but also contained allegations by virtue of which these claimants sought to charge certain of the defendant stockholders who they alleged were also directors for the entire corporate indebtedness on account of unfaithfulness in the performance of their official duties as such directors. The defendants moved to strike out from the pleading of one of these claimants all allegations of this character. This motion was based upon the grounds: 1st. That such allegations were no proper part of a pleading authorized to be filed under the order of April 30th, 1895, and no leave of court had been obtained for the filing of any pleading setting out or alleging any additional cause of action. 2nd. That said portions of said pleading attempted to set out another and additional cause of action which could not be joined with the cause of action set out in the plaintiff's complaint.

The motion was heard by Judge Willis and was argued at length by counsel for all parties, it being agreed and the court consenting that the motion should be heard and determined only upon the first ground. On February 8th the court made its order granting the motion. Similar motions were then made as to all similar pleadings containing like allegations and similar orders entered. For the purpose of showing the exact question involved we quote a part of one of these orders. This order recites that the motion is to strike out,

"Those portions of the pleading of said Intervening Claimant wherein are contained other allegations save and except such allegations as set out the claim of said Intervening Claimant against said Defendant Corporation, and wherein there is asked for other relief save and except such as is asked for in the plaintiff's complaint, upon the ground that said portions thus asked to be stricken out were no proper part of a pleading authorized to be filed under said order of April 30th, 1895, or of the claim authorized to be exhibited under said order."

The order then proceeds as follows:

"It is hereby ordered that said motion be and the same is hereby granted upon the above ground, and that there be stricken from said pleading paragraphs thirteenth to paragraph twenty-sixth inclusive, and from the prayer of relief the 7th paragraph

thereof, and 'Exhibit A' attached to said pleading.

"It is understood that said order is made solely upon the ground above named and without prejudice to said Intervening Claimant or to the plaintiff herein to move this court upon due notice to all parties interested to file any further or additional or supplemental pleading or complaint in this action containing the same allegations or matter, or asking for the same relief hereby stricken out of said pleading already filed or to so amend the plaintiff's complaint by inserting therein such allegations and such prayer for relief, or to have a complaint or pleading containing such allegations and asking for such relief substituted for said plaintiff's complaint."

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WALLACE B. DOUGLAS was born at Leydon, N. Y. in 1852, and completed a course in the law department University of Michigan, in 1875. He was admitted to the Chicago bar in 1875, and practied there until '83. He has been in practice at Moorhead ever since. He was a member of the last legislature, and held the position of city attorney of Moorhead for four years, and later was county attorney of Clay County for six years.

WALLACE B. DOUGLAS.

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## Constitutional Law--Impairment of Contract--Seed Grain.

**Middlesex Banking Company (a Corporation, v. J. F. Emery, et al.**

**(District Court, Becker County.)**

Chap. 5 General Laws 1889, giving the state a first lien on taxable property of purchaser from it of seed grain is unconstitutional in as far as it seeks to effect the priority of a mortgage on the property at the time of the purchase.

J. H. IRISH for Plaintiff; C. M. JOHNSTON for Defendant.

On February 22nd, 1889, Magne K. Bjorgo and wife executed to plaintiff a mortgage upon certain real estate situated in Becker County, which was duly recorded. Thereafter, the indebtedness not having been paid when due, the plaintiff proceeded to foreclose said mortgage under the power of sale contained therein, and the premises were thereafter, on March 30th, 1895, sold by the sheriff in said proceedings to the plaintiff and the sheriff duly executed his certificate of sale therefor to plaintiff who is still the owner and holder thereof.

On March 2nd, 1889, the defendant Magne K. Bjorgo made application to the board of county commissioners of said county, under and in pursuance of the provisions of chap. 4, 5 and 6 of the Gen. Laws for the year 1889, for one hundred bushels of wheat, and under such application received from the county seventy-five bushels of wheat, and made and entered into the contract with the auditor of said county as therein provided. That thereafter the county auditor placed one-half of the purchase price of said wheat upon the tax list for the year 1889, and one-half for the year 1890, levying the same as a part of the general taxes for said years. These taxes were not paid and judgment was entered against said land, and the premises sold to the defendant Emery and a certificate of sale issued to him therefor. The plaintiff sets up these facts in his complaint and asks that the certificate of sale under the tax judgment be declared illegal and void and that the auditor and treasurer of said county be required to cancel the same on their records. The defendants demurred to the complaint upon the ground that it does not upon its face state facts sufficient to constitue a cause of action.

The court overruled the demurred and in a note attached to the order says:

"NOTE: This case involves substantially the same question decided in the case of Teatman vs. Kiney, 51 N. W. R. 721, and there is no doubt about the principles laid down in that being applicable to this. The case would be different if bonds were issued by the county to provide for the relief of certain classes generally and making the same a charge upon the tax payers generally; but in this case the obligation under the law is upon the person who receives the temporary aid. It creates a debt due to the county from such person and is in no sense a tax. There is not the faintest resemblance between this case and the cases where the obligation given rests upon all alike to aid a population or some part thereof who are destitute of means of credit, and who are liable to become a public charge. Then, too, the obligation given for seed grain, and which it is claimed constitutes a first lien on the real estate in controversy, was given after the mortgage under which the plaintiff claims title, was made and recorded. In view of this fact the statute which makes the seed grain contract a first and valid lien upon the taxable property of the purchaser of such grain would not be valid as to the mortgagee of mortgage executed and recorded before the making of the seed grain contract, for the reason that such legislation would be repugnant to the Federal constitution forbidding the impairment by any state of the obligations of a contract.

## Municipal Corporations---Common Law Liability---Husband and Wife.

**Charles McDevitt v. The City of St. Paul.**

**(District Court, Ramsey County.)**

For injuries caused by defective streets and sidewalks in the state of Minnesota, a municipal corporation proper, such as a city, is liable at common law; and a husband may maintain an action against it to recover for money expended and for loss of services on account of injuries sustained by his wife by reason of such defects.

Action against the City of St. Paul by plaintiff to recover $1,000 for loss of his wife's services and society, and expenses incurred for medicines and medical treatment.

After the jury were impaneled defendant moved for judgment on the pleadings on the ground that the complaint failed to state a cause of action. This motion was denied.

Plaintiff then proceeded to offer evidence to prove his case, whereupon defendant objected to the admission of any evidence under the allegations of the complaint. This objection was overruled, and plaintiff was allowed to put in his evidence.

When plaintiff rested, defendant moved the court to instruct the jury to find a verdict for defendant. This motion was denied.

The jury brought in a verdict in favor of plaintiff for $120.

Defendant prepared a bill of exceptions, and moved thereon for a new trial under chap. 320 of Gen. Laws of 1895.

Robertson Howard for defendant.

A city in this state is not liable for failure to keep its streets and sidewalks in repair except so far as it is made liable by its charter.

Nichols vs. Minneapolis, 30 Minn. 545, 547.

The only liability existing in this case is that imposed by Mun. Code, 1893, secs. 44, 94, 631.

Wherever this point has been raised it has been held that a husband could not sue a municipal corporation for loss of his wife's services, as in the case of a railroad or other corporation that is liable at common law for negligence.

Harwood vs. Lowell, 4 Cush. 310.

Osgood vs. Lynn & Boston R. Co., 130 Mass. 493.

Reed vs. Belfast, 20 Me. 246.

Chidsey vs. Canton, 17 Conn. 475, 450.

Roberts vs. Detroit, (Mich.) 60 N. W. Rep.

In all of these cases it was held that the right to recover for loss of wife's services was not "property" within the meaning of the statute.

John H. Ives for plaintiff.

A city in this state is liable at common law for failure to keep its streets in repair, and this action can be maintained.

Snyder vs. City of St. Paul, 51 Minn. 466.

KERR, J.:— This was an action by the husband to recover for moneys expended, loss of services, etc., on account of injuries sustained by the wife by reason of a defective sidewalk.

The defendant claims that such an action will not lie in this state, that the city is accountable to the person directly injured and to that person alone, for damages arising from such cause.

This contention of defendant is supported by decisions in Michigan, Massachusetts, and other states, where it is held that the liability of a city in such case is purely statutory, and that unless the right of action is expressly given by statute to the husband, or the city made expressly liable for damages of the character here sued for, no recovery in such a case can be had.

Notwithstanding the language used in Nichols vs. City, 30 Minn. 545, and the fact that same has not been expressly overruled still it seems to me in the later decision of Snyder vs. The City, 51 Minn. 466, it is clearly established as the law in this state that for injuries caused by defective streets and sidewalks, municipal corporations proper such as cities, are liable at common law. If so, damages such as those involved in a case at bar may certainly be recovered.

Even if there were no liability beyond that imposed by statute, it is held in 30 Minn. 545, supra, that this covers injuries to property as well as person, and I cannot see why a husband who has suffered pecuniary loss on account of injuries to his wife should not be entitled to recover as well as the man who has suffered pecuniary loss on account of injuries to his horse and wagon.

Ordered, that defendant's motion be denied.

Defendant gave notice of an appeal to the Supreme Court.

BENJAMIN D. SMITH was born in Blue Earth county in 1860, and has lived there ever since. He studied

BENJAMIN D. SMITH.

law in Mankato, was admitted to practice there in 1883, and was county attorney of Blue Earth county for two terms.

## Stockholders' Liability Action--Who are Creditors.

**(District Court, Hennepin County.)**

A party claiming unliquidated damages for libel uttered against him is not a creditor who can prove his claim against the stockholders of insolvent corporations under the provisions of Sec. 5911, Genl. Statutes 1894.

FLETCHER, CAIRNES & ROCKWOOD for Claimant; COBB & WHEELWRIGHT for Receiver.

An interesting question has recently been decided by Judge Belden, one of the judges for the Fourth Judicial District. The Minneapolis Times Company,a corporation, was placed in the hands of a receiver under and by virtue of the provisions of sec. 5897, St. 1894, (sec. 9, ch. 76, Gen. St. 1878.) Prior to the institution of the receivership proceeding this corporation had been publishing a daily newspaper in the City of Minneapolis under an order of the court requiring all creditors of the corporation to exhibit their claims and become parties to the action (sec. 5911). Tyndale Palmer come into the proceeding by filing a complaint in which he set forth a claim for damages in the sum of $50,000 on account of a certain libelous article published of and concerning him in the insolvent's said newspaper. The receiver demurred to this complaint on the ground that it appeared on its face that the claimant was not a "creditor" of the corporation. It was conceded that a good cause of action for libel was pleaded. The question presented by the demurrer was whether a person having an unliquidated claim for damages against a corporation based upon a pure tort—like one for a libel—is a "creditor" entitled to exhibit his claim and share in the benefits of the final judgment rendered in a sequestration proceeding, (sec. 5897-5911, St. 1894.) Judge Belden sustained the demurrer, holding that on the facts stated in the complaint, the relation of "debtor" and "creditor" within the purview of the statute in question, did not exist between the claimant and the corporation.

## Will—Power to Alienate Includes Power to Mortgage.

**Dorothea Schwabe v. Henry F. Schwabe et al.**

**(District Court, Ramsey County.)**

A will left certain real property to the plaintiff for her use or enjoyment during life and which was left after her decease to her children with power in her to alienate or sell with the counsel of the children or their legal representatives. Held

1. The power to alienate included a power to mortgage.
2. The consent of the children of her deceased child was necessary.

C. R. ST. JOHN for Plaintiff; E. S. DURMENT for Defendants.

A suit was brought to secure the interpretation of a will. With the decision the following memorandum was filed by Otis, J.:

Upon a careful examination of the provisions of the will, in the light of authority, I am satisfied the construction here given to it is the proper one.

After the payment of debts all the residue and remainder of the real estate, was given to the widow for her use and enjoyment during her life. Whatever is left after her decease goes to the children. It is not the property, but whatever is left of it, that the children are to have, which shows that it was not expected that the property should remain intact, but it was contemplated that a portion of it, at least, might be required for the widow's support. It is the property itself, not the use of it, which during life she is to have for her use and enjoyment. The principal may be required for the purpose, and were it not for other provisions of the will, she could sell and dispose of it without let or hindrance for this purpose. See, In re Oertel, 34 Minn. 173; Clarke vs. Middleworth, 82 Ind. 246.

By further provisions such sale is conditioned on the consent of the children or their legal representatives. The term "legal representatives" is used twice in the will and manifestly with the same signification. The residue shall "fall in equal proportions to my four children (or their legal representa-

tives)," that is, their heirs at law. One of the children has died leaving a widow and minor children. Their consent, then, becomes necessary in order to effect a disposition of the property, and as to the minors this is to be obtained by proper proceedings in the probate court. State vs. Ueland, 30 Minn. 277, will be found instructive on this point.

Upon the facts disclosed upon the trial, the propriety, if not the necessity, of selling or mortgaging the premises or a part thereof was evident, without which the whole property is in jeopardy by reason of unpaid taxes and assessments.

The power given by the will was to "alienate or sell." By the use of the disjunctive or the words "alienate" and "sell" are to be given different meanings. The former evidently covering any form of disposition, other than by sale, which the parties interested might see fit to make of it. It therefore includes a disposition by mortgage.

See:

Kent vs. Morrison, 153 Mass. 138.
Waterman vs. Baldwin, 68 Ia. 259.
Zane vs. Kennedy, 73 Pa. St. 190.
Vinnedge vs. Shafer, 35 Ind. 343.
Faulk vs. Dashiel, 62 Tex. 647.
Lobenthal vs. Raleigh, 36 N. J. Eq. 169.

OTIS, J.

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## Assignment of Verdict—Assignment of Judgment—Levy by Judgment Creditor upon Judgment.

**John Melrose vs. St. Paul City Railway Co.**

**(District Court, Ramsey County.)**

1. A cause of action for a personal injury is assignable under Cooper vs. Railway Co., 55 Minn., 134 which in effect overrules Hunt vs. Conrad, 47 Minn. 557.
2. An assignment of a judgment not yet entered operates to pass the judgment when actually entered.

W. P. WESTFALL for John Melrose; JONES & MCMURRAN for Lizzie Assman, judgment creditor of Melrose.

This cause came on to be heard on the order issued herein January 27th, 1896, requiring Charles E. Chapel, sheriff of Ramsey County and Lizzie Assman, plaintiffs in a certain action in this court, wherein the above named plaintiff is defendant, to show cause "why the levy upon an execution issued in said action of Assman vs. Melrose, out of this court and made by said sheriff by means of said execution upon a certain judgment duly entered and docketed in this court in the action above entitled on the 22nd day of January, 1896, in favor of the plaintiff herein and against the defendant above named should not be vacated, released and discharged. After hearing counsel for the respective parties, Ordered, that said levy above described be and the same is hereby set aside and vacated.

WILLIAM LOUIS KELLY,
District Judge.

MEMORANDUM.

The plaintiff in this action for personal injury on June 14, 1895, had a verdict against the defendant in his favor for $640 and on the same day he filed an assignment thereof in writing to E. J. Darragh. The Supreme Court in Hunt vs. Conrad, 47 Minn. 557, held that a cause of action for an injury to the person is not assignable even after verdict. The reason given is, that such a cause of action does not pass to the personal representative of the plaintiff and is therefore not property like a judgment. But in a later case, Cooper vs. St. Paul City Railway Co., 55 Minn. 134, the same court while not in terms overruling Hunt vs. Conrad as to the effect of an assignment after verdict of such a cause, has so construed sec. 5171, Stat. Minn. 1894, (particularly the last sentence) that the reason for the rule in Hunt vs. Conrad no longer exists. Under that ruling, a cause of action for a personal injury, after verdict, is property and descends just as a judgment would at common law. Such being the case it is assignable.

While this seems to dispose of the question before me, there remains another reason why the judgment in this action passed to Darragh.

"There can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment book. Until this is done, it does not matter that the party is entitled to judgment either by default of defendant or upon decision or direction of the court."

Rockwood vs. Davenport, 37 Minn. 533.

It is admitted the judgment herein was entered and docketed in the clerk's office on January 22, 1896, at 11 o'clock in the forenoon. On the same day, at 10 o'clock and 10 minutes in the forenoon, the sheriff of Ramsey County attempted to levy upon the judgment, by virtue of an execution held by him, wherein Lizzie Assman was named as judgment creditor and the plaintiff herein, John Melrose was judgment debtor. This attempted levy was a nullity for the reason that at the time it was made no judgment existed upon which it could take effect.

About the same time, in the same day, and before the judgment herein was entered but in anticipation of its entry and intending to pass it, there was filed herein an assignment, in good form, properly executed by

the defendant, of the judgment to Edward Darragh. Afterwards when the judgment was entered and on January 22, 1896, an execution was issued thereon, reciting that said judgment had been assigned to Mr. Darragh, and he was the owner thereof, and delivered to the sheriff of Ramsey County. On January 24, the sheriff collected it in full, and on January 25, he paid to Messrs. Westfall and Darragh all of the same except $335 which sum he claims the right to retain by virtue of his levy of the execution of Assman. In this the sheriff was wrong. Edward Darragh on the face of this record was the owner of all the judgment in plaintiff's favor and the sheriff cannot lawfullq apply Mr. Darragh's property to pay the debts of Melrose.

The difference between the attempted levy and the assignment of this judgment is, the first took effect, if at all, at the moment it was made and the second, after filing, at the moment the verdict ripened into a judgment. The levy failed because when it was made there was nothing in existence to which it could attach, the assignment being continuing and intended by the parties so to do, passed the judgment when entered.

KELLY, J.

---

## Municipal Corporation—Contracts—Right to Interest on Deferred Payments.

**The J. D. Moran Manufacturing and Construction Company, Plaintiff, v. The City of St. Paul, Defendant.**

**(District Court, Ramsey County.)**

A contractor working for a city whose compensation is payable out of the proceeds of local assessments is entitled to interest on the contract price from the date of the completion of his work, even though the assessments have not been collected

WARREN H. MEAD for Plaintiff; E. J. DARRAGH for Defendant.

WILLIS, J.:— In my opinion a proper construction of this contract, so far as the terms of payment are concerned, is that the corporation which is the defendant in this action, has the right within its discretion to issue, from time to time, estimates or computations of the proportional value of the work done upon given dates, with reference to the entire contract price; that such estimates may result in the issuance of a warrant upon the city treasury and a payment of money. In case such warrant is paid, then the transaction in reference to such estimate constitute a payment, pro tanto, on the contract price; that if the estimates remain unpaid at the date when the contract work is finished the estimates are nugatory; they become entirely superseded by the obligation of debtor and creditor existing between the contractor and the city. And, while they may be used by the contractor (and sometimes undoubtedly are, and were in this case) as a basis for the issuance of warrants on the city treasury, they are mere incidents to an accounting between the parties.

The fundamental principles of justice require, and the proper intendments of the contract are that the full contract price shall be paid when the work is completed. The contract provides, in referring to the contract price and the various payments to be made, "all of which shall be payable out of the fund collected upon the assessment of said improvement." The city charter also provides that the fund out of which any money shall be paid shall be designated in the contract. It therefore results that the city is under the obligation to provide the fund by the date when the contract work is completed, or show good cause to the contrary. In case it appears that the contractor has not received his payment when the work has been completed, the burden rests upon the city to show that it was actually impossible to provide the fund by the date of the completion of the work. In my judgment, that burden has not been sufficiently sustained by the city in this cause. The city has not shown, in my opinion, any sufficient reason why the fund was not ready, and why full payment was not made to the contractor on the 11th day of August, in the year 1893.

The city should deal in a businesslike way with its contractors. They are employers of large numbers of laboring people who should receive their wages promptly. They also transact large amounts of business with the local banks which ought to have some assurance with respect to the time at which the contractors will be able to meet the advances of money necessary for these various enterprises; and the contractors ought not to be required to place upon the streets or buildings of the city the results of his labor, intelligence and skill, and then be subjected to large damages in the payment of interest upon the moneys which should have been his at the moment when he had fulfilled his entire contract obligation to the city.

The city and all its departments are one entity, or complete whole. The corporation cannot excuse itself for a moral legal delinquency, on the ground that any of its machinery failed to work. It is the duty of

the corporation to have all its corporate machinery in working order, so as to comply with the rules of right and justice.

For these reasons and many other good reasons which appear from the evidence and pleadings, and notwithstanding the extremely able and clever manner in which the defense has been presented, the plaintiff will have judgment for $100 of the principal, with interest at 7 per centum per annum from the time when it was properly payable, and 7 per cent interest on the balance of the contract price over and above this $100, from the 11th day of August, in the year 1893, down to date of trial.

## Personals.

Edwin A. Jaggard was called East on Jan. 30, by the sudden death of his brother, in Philadelphia, Pa.

A. Ueland removed from the Guaranty Loan Building to the ninth floor N. Y. Life Building, Minneapolis.

Jayne & Morrison have moved their office from Temple Court to the new Phoenix block, Minneapolis.

W. A. Funk, formerly of Lakefield, has removed to Mankato, where he has opened an office for the practice of his profession.

Mr. S. E. Hall removes to Chicago this month. His address hereafter will be 506 and 507 Tacoma Building. Mr. Hall enters the firm of Smith, Shedd & Underwood.

Woods & Kingman, attorneys, 909 N. Y. Life Building, Minneapolis, have associated with them Mr. Thomas F. Wallace, under the firm name of Woods, Kingman & Wallace.

Douglas A. Fiske and J. A. Young, under the firm name of Fiske & Young have removed to the New York Life Building, Minneapolis.

Mr. D. E. Tawney, of Winona, and Miss Jeanette Jones, of Aurora, were married at Lake Geneva, Wis., on Aug. 4th last. Mr. Tawney is a brother and law partner of Congressman Tawney, of Winona.

Mr. John Crosby, a graduate of Harvard law school, class of '93, and who has been for the past three years with Koon, Bennett & Whelan, has opened an office for the practice of his profession in rooms 910 and 911 N. Y. Building, Minneapolis.

Louis P. and Fred B. Chute, two bright young attorneys of Minneapolis, have hung out their shingle in the N. Y. Life Building, room 915. Mr. Louis P. was for several years with Judge Pierce and F. B. graduated from Minnesota law school, class '95.

Mr. M. R. Everett, of Waterville, Minn., is now comfortably settled in his new and handsome building, and is ready for the transaction of business. The lower part has been fitted up in a fine manner, and presents a cosy and homelike appearance. It is divided into two large rooms for the law office proper. On the east side is the bank with its commodious fire proof vault, containing a very fine safe and several private safe deposit boxes. A walk has been laid down from the rear of the building to Banker Everett's handsome residence, standing but a short distance away, near the bank of the lake. Mr. Everett can congratulate himself in possessing such a fine commodious place for his banking and law business. He has been engaged in these two lines of business, in Waterville, for many years past, and is well known and appreciated for his energy, reliability, integrity and success as a business man.

## RECENT FOREIGN DECISIONS.

A statute authorizing attorney's fees to be taxed as costs in actions for wages is held in Hocking Valley Coal Co. v. Rosser (Ohio), 29 L. R. A. 386, to be unconstitutional on the ground that it denies to employers the equal protection of the laws in making an honest but unsuccessful defense.

An injunction to prevent a city from shutting off a water supply from a consumer is sustained in Wood v. Auburn (Me.), 29 L. R. A. 376, where the attempt was to coerce payment of an old claim, subsequent to which water had been furnished and paid for.

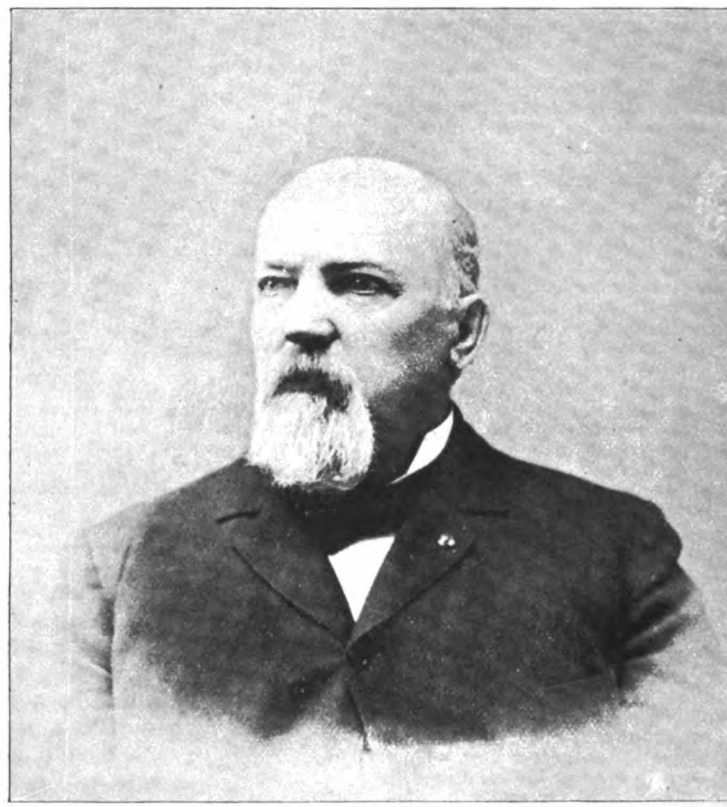
A bona fide indorsee for value before maturity of a negotiable note which was secured by mortgage is held in Kernohan v. Manss (Ohio), 29 L. R. A. 317, to have a better right to the proceeds of the mortgage than one to whom the mortgage had been previously assigned, together with forged notes secured thereby, as the mortgage is regarded as an incident of the debt, and not a fit subject of assignment apart from the notes.

Attachment of a nonresident's shares of stock in a foreign corporation, in a state where the corporation is doing business, although its officers are also in that state, is held in Ireland v. Globe Milling & R. Co. (R. I.), 29 L. R. A. 429, to be invalid, as the situs of the stock is at the domicil of the corporation only.

"The Progress of the World," the editorial department of the Review of Reviews, is especially live and vigorous in the February number. Its paragraphs are packed with information about Venezuela, British Guiana, South Africa, and Canadian politics, to say nothing of its comment on the American financial situation and other matters of immediate national importance. The department is illustrated with the usual number of timely portraits and maps.

## SUNSHINE AT GREENWICH.

The average of sunshine observed at Greenwich for fourteen years is only three hours a day.



**HON. LUTHER L. BAXTER,**

**District Judge, Seventh Judicial District.**

...THE...

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## CONTENTS.



### A LEGAL DISPENSARY.

Early in 1894 some of the members of the junior class in the College of Law of the University of Minnesota had their attention directed by one of their fellows to an article which had but just appeared in Harpers' Weekly, descriptive of a novel method of study pursued by the Miller Law Club of Philadelphia. It was a particularly attractive idea and after some discussion among themselves and no little correspondence with its originators, it was brought to the attention of the Dillon Chapter of the legal fraternity of Phi Delta Phi, whose members now have it under consideration. This organization has modified and developed the mere outline suggestion which was given it and now has a nicely finished and philanthropic plan for the establishment of a legal dispensary.

In order to furnish indigent litigants with the legal advice and assistance which they will otherwise be unable to obtain, in very much the same manner that the same sort of patients are given their medical attendance by corresponding medical establishments, and in order to present to the law students, as it were, real and living specimens or subjects for his study and possible legal surgery, there is to be established a "Dispensary Board," a sort of committee composed exclusively of students, which will meet as frequently as may be deemed advisable to have submitted for its consideration such cases as may be within its province. This board will then assign any cases that are deserving and within the scope of their efforts to different bodies of law students to develop and conduct.

The plan is best understood perhaps in examining the two principal reasons which the young men themselves give as imperative for its successful establishment. Speaking from their point of view then, there is, in

the first place, a large portion of the body of citizens who are unable, from purely financial reasons, to obtain that legal advice and assistance to which they are really entitled, and which it is absolutely necessary that they should have to secure to them their full rights and privileges. Several such cases came to the attention of the members of the Dillon while they had this matter under consideration. It is just this body of men who are most restless and least intelligent in the community, who grow to thinking that the law has no majesty and is but the instrument of those who are fortunate enough to be able to control it, and that they certainly have no share or part in it unless it be in the losses it imposes. There are many others who share in these feelings of disrespect. In most cases they have been wrong in their deductions, and their disrespect could easily be turned to respect were an opportunity offered, otherwise the result of any such growth among the masses is easy to forsee. Perhaps these law students are wrong in taking such an extreme view of the conditions, but they feel that they should have a share in allaying the fears of these people and assisting them to a better understanding of it all. They realize that their part may be a small one and that there are few lines for them to speak, but they think that this is one of the ways in which it can be done, and they are certainly to be commended.

But perhaps the important consideration is the benefit to be derived by the students themselves. In their ordinary routine class work and in their study of the leading cases they familiarize themselves with the great principles and maxims of jurisprudence, and try to apply them in a limited way. If these principles, as thus acquired, could be immediately seen in their relation to an existing set of facts, not hypothetical but actual, there can be little doubt that they will be more enthusiastically and so more intelligently applied. The Dispensary will of course be compelled to depend upon its recent graduates for the prosecution of what cases they may be able to take into court, but the undergraduate members investigate the facts and draw up the necessary papers and pleadings. They receive almost all the benefits of actual practice up to bringing the case before a judge and jury, and become acquainted with the most attractive side of the study of the law.

The Dispensary idea has been but lately taken up by the members of the bar of the City of Chicago, who are operating it successfully as a philanthropic and charitable institution, and the success which in a modified form it has had in Philadelphia, gives the members of the Dillon reason to think that it will meet the requirements of the occasion here. They have no doubt of their ability to bring themselves in touch with the class in the Twin Cities which they hope to reach by a judicious use of the press and through the Associated Charities of the two places. Rigid rules have been adopted and the students are to be very strict in their requirements both of themselves and of their would-be patients. No case will be considered for a moment which can be said to have attached to it a conditional fee, and no patient will receive treatment until the board is fully assured of his inability to retain an attorney. The plan is being submitted at present to various attorneys in St. Paul and Minneapolis for their approval or disapproval, for the students who have it in charge wish to be sure of their ground before taking any steps.

FRANK H. GRIGGS.

St. Paul.

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### OUR PORTRAIT.

LUTHER L. BAXTER was born at Cornwall, Vt., June 8th, 1832; and pursued a partial collegiate course at Norwich University, Vt. He studied law with Hon. Horatio Seymour at Middleberry, Vt; came to Minnesota in March, 1857, and has been a resident of this state ever since. He served in the army during the war of the rebellion over two years, first as major of the Fourth Minnesota Volunteer Infantry, and afterwards as major and lieutenant colonel of the First Minnesota Heavy Artillery and served in the legislature of this state from Scott and Carver counties, either in the senate or house, from 1864 to 1883, except during the sessions of 1876-7-8. He was appointed Judge of the Seventh Judicial District March 18th, 1885, and elected to the same office in 1886, and was again re-elected to the same office without opposition in 1892. Judge Baxter presides over a rich, populous and litigious district, and discharges the arduous duties of his post impartially, intelligently and faithfully.

HON. MOSES E. CLAPP was born at Delphi, Indiana, in 1851. Six years later he removed with his parents to Wisconsin where he received the ordinary common school education until he entered the Law Department of the State University at Madison. Here he took a course of two years' study and received his diploma in 1873. He opened a law office at Hudson, Wisconsin, and met with success in the practice of his profession. In 1878 he was nominated and elected district attorney and served in that capacity with credit and honor. In the spring of 1881 Mr. Clapp came to Minnesota and located at Fergus Falls, the county seat of Otter Tail County. Here he built up a very extensive and lucrative practice in many of the counties in the northern part of the state. He took an active part in the political compaign, is an earnest Republi-

can, and in 1886 was nominated for attorney general. He was elected and again re-elected in 1888 and 1890. Mr. Clapp is essentially one of the people in his sympathies and convictions, and consequently was recognized by the people and was a very popular candidate. He is a lawyer of fine attainments, deeply read and eminently successful in the practice. Although identified with the politics of the state, he takes little interest except in campaigns. Gen. Clapp is one of the best offhand speakers in the state and is invariably called upon at conventions and other political gatherings. In person he is a perfect type of ideal manhood. Tall, well proportioned, and with an admirable poise Gen. Clapp makes a favorable and lasting impression with all whom he meets in an official capacity or in private affairs. Should he enter the race for the governorship in the next campaign he will command the enthusiastic support of his friends and their name is legion.

## Crowded Calendars.

At a recent meeting of the Chicago Bar Association, a number of the members discussed the question of crowded calendars. The Chicago Legal News in its issue of March 14, 1896, gives an interesting transcript of the proceedings. It appeared that the cases now on trial before the various Chicago courts were begun some as far back as 1892 and most of them as early as the spring of 1894. One of the speakers thought that the fault was with the judges and the lawyers. With the judges because they let trials go on after it is plain that the complainant has no case; and with the lawyers because they do not prepare their cases and do not know which they want. Judge Goggin said it was not the judges fault, but that it was the result of the developement of personal injury business, that 770 people were killed or injured in Chicago in January, 1896, by street or steam cars, and that half the time of the judges was spent in hearing cases arising out of such accidents. Another speaker suggested that no more than one trial should be allowed for any one cause, and that the appellate court should so announce the law on an appeal that the lower court could render a judgment on the record already before it without having to hear the facts rehearsed anew. But the News itself is of the opinion that there is no remedy possible in view of the vast increase there is making in the volume of legal business in Chicago. It advises a number of reforms in practice, however, which seem to have very obvious merits to Minnesota lawyers who find most of them already employed in the courts of this state.

William H. Freeman was arrested in New York charged by the Superior Court with contempt. Mr. Freeman went to New York to attend a trial in which his brother was interested. While motion was being argued for a new trial William Freeman walked into the Court Room and took a position immediately in front of the Judge. He gave the Masonic sign of distress to the Judge and when the latter exclaimed, "What do you mean, sir?" repeated it. Thereupon the Judge ordered his immediate arrest. It is thought to be the first event of its kind where a Mason has been arrested for making a sign of distress to a brother. Freeman protests that he did not attempt to influence the Judge.

AMBROSE TIGHE was born in Brooklyn, N. Y., May 8, 1859, and was graduated from Yale College in the class of '79. For a year and a half after his graduation he held the Douglas Fellowship and for three years and a half was tutor in Yale University in the department of Roman history and law. He

studied law at Yale and Columbia Law Schools and began the practice of his profession in St. Paul in 1886. In 1887 he was appointed commissioner of the U. S. Circuit Court for the District of Minnesota, a position which he still holds.

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## A Bench Show.

The social and professional life of the community had known him as an exemplar for forty years. The business world had made him a man of affairs. The ramification of these beyond his personal conduct had implicated him in the technical guilt of a crime against the state. The ceremony of trial was not only bitter in its humiliation of a morally-clear conscience, but the youth and affected imperiousness of the trial judge had inveighed its rancor and prejudice against the accused. Conviction had been declared with all its formal impressiveness. The honored and respected was tainted with the character of the felon. He had the sympathy of the populace—but the law knew no emotion. The prisoner was at the bar for sentence. The penalty prescribed was severe.

The learned court, so fresh from youth and masters' curriculum; still shivering in the ecstacy of the political circumstance which calcimined his virtues, extolled his defeat, and crowned his fundament with the woolsack, adjusted his intellect for the distressing duty of consigning a "leading citizen" to the dungeon. The few thousand sinister grudges which the piebald, honorable court quietly held in cold-storage, were now to be fearlessly subdued as a sacrifice to the conscience of place and power derived from the people.

"The prisoner will please come forward," quoth this judicial hen, hatching a brood of borrowed epigrams from the littered lore of Mr. Mark Aurelius et al. The prisoner looked sick and felt very pale. He was positively not haggard, but the stoical expression on his chest denoted his brick-veneered contempt for the he-virgin on the bench.

"Mister Givadam Phielmore, have you anything to say why the learned court should not now pass sentence upon you for the crime of which you stand convicted?"

"Nothing, except . . ."

"There can be no exceptions taken at this time, the court regrets to say. You have been tried before a fair court and a common jury, and you have been convicted. The painful duty of passing sentence and expressing penalty upon you, for your crime, devolves upon this court. The court's sentence is that you be confined in the state prison for a term of seven years. It is, at times like this, that the court feels itself called upon to discuss the moral elements involved in the crime of one of the city's prominent citizens, so that the youth of this and future generations may observe the lesson disclosed. You were a pillar of the church, a respected citizen, a distinguished member of the professional world, a man of education and fortune. The court knew you when you were a boy piling slabs in a mill yard, when you carried a polished dinner pail and unpolished boots; when you were yet in that inchoate state of intellectuality common to the western boy of twelve, when you thought a stray dog and a handy brick ought to go together; when you hid your pants behind a hazel bush near Moriarity's swimming hole, when, as the court recalls, you and your wicked comrades held an autopsy on Dillon's horse and found an oyster can and a piece of barb wire fence, the cause of the animal's demise, when . . ."

"May it please the court to grant me a word," said the prisoner with the emphasis of disgust. "I have been convicted of a felony. Surely that is the mean result of many years of probity. I am now a convict. That stigma is a blot of blood upon my household. I have been sentenced to penal servitude for seven dismal years. That is a long and severe penalty.

Your honor knew me and played with me in my youth. That, too, may be regretted. My doom is now sealed by your sentence. You have done for me what the law exacts. Society is avenged. I pray, sir, forbear further moralizing; the coloring of this scene for the gratification of the deities in yonder gaping gallery. Is it the province of the court to spit upon the condemned the spawn of loquacity, of a distempered mind, a gutta percha heart? Why not let me go to my prison? My time belongs to the state. I owe it seven years. Your honor's harangue is impairing the obligation of my contract. I am a charge and a property of the state. Have you license to use me as an instrument of your policies or your vanity? I insist that, having declared me a felon, you besmirch your mantle by holding public converse with a convict. Tho' my civil rights may be in abeyance, it is not your privilege to bay at me now, to see the echo of your voice in tomorrow's paper. This, sir, is my humane right; that you be brief, that you be just, that you comport yourself with the propriety and reserve befitting your place."

And those learned in the law, from far and near, applauded the prisoner for this long-merited rebuke of a malignant form of degeneracy.

## MORPHY, EWING, GILBERT & EWING.

### A Model Law Firm.

This firm composed of Frank H. Ewing, E. H. Morphy, Philip Gilbert and Arthur W. Ewing, occupy almost the entire front of the 6th floor of the Manhattan Building and have a splendidly appointed suite of offices.

One enters a spacious room, used as a clerks' and general office in which three stenographers, a book-keeper and five clerks engage in their various duties. Opening off this room are the private offices of Mr. Gilbert and Mr. A. W. Ewing, fitted up with electric bells, electric lights and all the paraphernalia of "up to date" offices. Then leading from the general office is the library, a comfortable room containing a well chosen assortment of text books and law reports.

From the library is an entrance to the private offices of Mr. Morphy and Mr. F. H. Ewing, which, like those of the other members of the firm, have all the appointments necessary to a well regulated and well conducted office.

The personnel of the firm is well known.

Mr. F. H. Ewing was born and educated in New York state, and on being admitted to the bar in 1879, came west and settled in Stillwater in 1881. After a residence there of six years, during which time he practiced law in connection with Mr. J. N. Searles, he removed to St. Paul and shortly thereafter was joined by his brother Mr. A. W. Ewing who received his legal education in the state of Missouri and was admitted to the bar by the Supreme Court of that state in 1888 and the two brothers entered into co-partnership as Ewing & Ewing.

Mr. Morphy was born and educated in Ontario, Canada, and was "called" to the bar as a Barrister and admitted to practice as an attorney and solicitor in 1880. After a residence of five years in Winnipeg, Manitoba, he decided to make his home in this country and chose St. Paul and came here in 1886 and was admitted to the bar of this state.

Ann Arbor, Michigan, is the *Alma Mater* of Mr. Gilbert where he graduated in 1885 and the next year settled in St. Paul when he and Mr. Morphy formed the firm of Morphy and Gilbert.

Besides a general law practice the firm are counsel for several corporations and have a large Eastern English and Canadian connection.

None of the members of the firm are politically ambitious; they are all hardworking, conscientious lawyers devoted to their profession and we know of no better equipped or better organized legal firm in the northwest.

## LITERARY NOTES.

The General of the Army, the General commanding the U. S. Corps of Engineers, Vice-Pres. Webb of the New York Central, and John Jacob Astor, compose THE COSMOPOLITAN MAGAZINE'S Board of Judges to decide the merits of the Horseless Carriages which will be entered in the May trials, for which THE COSMOPOLITAN offers $3000 in prizes. This committee is undoubtedly the most distinguished that has ever consented to act upon the occasion of the trial of a new and useful invention. The interest which these gentlemen have shown in accepting places upon the Committee is indicative of the importance of the subject, and that the contest itself will be watched with marked interest on both sides of the Atlantic.

Frank Stockton's new story, "Mrs. Cliff's Yacht," which begins in the April COSMOPOLITAN, promises to be one of the most interesting ever written by that fascinating story teller. Readers of "The Adventures of Captain Horn" will find in "Mrs. Cliff's Yacht" something they have been waiting for.

During these months of extraordinary unrest in foreign politics, the REVIEW OF REVIEWS devotes its attention in large measure to international affairs. Its editorial department discusses matters in South Africa, the attitude of the great European powers, and the most recent phases of the movement among the nations for the arbitration of disputes; the March number also contains a most timely article on "The Government of France and Its Recent Changes," by Baron Pierre de Coubertin; "A Review of Canadian Affairs," by J. W. Russell, and a character sketch of "Cecil Rhodes, of Africa," by W. T. Stead. It can hardly be said that the REVIEW OF REVIEWS is narrowly provincial in its outlook on men and events!

### A SCIENTIFIC MEASURE OF THE ACCURACY OF TESTIMONY.

Every lawyer familiar with the usual course of events in courts of law has felt the imperative need of some sufficient means to test the accuracy of witnesses who are honestly willing to testify to the truth. Strange as it may seem to those unacquainted with the fact, it is well known to experienced lawyers that dishonesty is the least frequent cause of inaccuracy in testimony. Because one has witnessed an event or is familiar with an object or place, it by no means follows that he accurately observed, or can verbally describe the same. In the ordinary individual eye-sight, hearing, recollection, the faculty of observation, and the power of accurate expression in speech are faulty to a degree; and yet the honest errors of a witness in any of the particulars named often involve vital points.

Prof. J. McKeen Cattell, of Columbia College, has made some interesting experiments with a class of fifty-six students, testing recollection, power of observation, accuracy in estimating weight, distance, and time, and the comprehension of size, shape and dimensions of perfectly familiar objects and places. The results are astonishing, as well as interesting, and prove that the ordinary man is a most unreliable creature, even when animated by a sincere and uninfluenced purpose to be exact in his opinion, judgment, and memory. The Professor's description of his experiments, and his philosophical deductions therefrom, were published in "Science" for December.—American Lawyer.

### BOOK REVIEWS.

Elements of Damages, by Arthur G. Sedgwick; 336 pages; 12 mo. In cloth, $2.50; in sheep $3.00. Little, Brown & Co.

This is a new volume in the publishers well known Students' Series and is by the author of the large work on Damages. In its Part I it treats of the general principles applicable in proving damages and fixing their measure, and in its Part II discusses the different sorts of injury either by tort or breach of contract for which damages may be recovered with the rules peculiarly pertinent to each. The method employed is to state a proposition of law, to follow this by illustrations from actual cases and where the point at hand requires it, to elaborate it at some length either by explanatory or historical matter. The work is evidentiary of a high degree of scholarship and of a rare capacity for analytical and logical statement. The writer has used it in actual practice a number of times during the past two months and has found it of great value in clearing his own mind on complex questions, in guiding him to the leading cases and in helping him to a condensed and effective presentation of the law for the court's consideration. The Journal commends the book to the profession.

### PERSONAL.

Lane & Briggs, of Minneapolis, have removed to the Oneida Block.

Geo. Cudhie has opened an office for the practice of law at 208 Century Building, Minneapolis.

Mr. Ellsworth Benham, ex-assistant city attorney of Duluth, has been appointed city attorney.

Douglas A. Fiske wishes to announce that he has removed his office to No. 535 N. Y. Life Building, Minneapolis.

Howard Wheeler, class of '95, College of Law, University of Minnesota, is the manager of the "American Adjustment Company" in the Manhattan Building, St. Paul.

Judge Searle of the Seventh Judicial District, who has been in the East for the past month visiting his old home in New York State, has returned in renewed health and spirits. His vacation was well earned.

Harry Mee, of Duluth, a real estate attorney, was found dead in bed on March 4th. His death must have occurred early in the evening of apoplexy.

Mr. Charles J. Tryon, of Minneapolis, who for several years was counsel for the Minnesota Title Insurance and Trust Co., has opened up a law office at 704 Oneida Block, Minneapolis.

Mr. L. C. Simons, ex-deputy collector under Johnson and Jno. O. Hanchett, graduate Minn. Law School and for the past five years with U. S. Circuit Judge Sanborn, have opened up an office at Red Lake Falls. The young men are bright, honest and capable and will suceeed.

Hon. J. B. Douglas formally of Duluth, died suddenly at his home in Bridgeport, Conn., Saturday, December 14th. He graduated from the Yale Law school in the class of '79 and began to practice law in Hartford, Conn., but owing to poor health he was obliged to go out west, and settled in Duluth, Minn. He returned East about two years ago and located at Bridgeport.

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The members of the Hennepin County bar met Saturday, February 29th, in the large court room in Minneapolis and organized an association to be known as the "Hennepin County Bar Association." The following officers were elected:

President, Geo. R. Robinson; first vice president, Judge Daniel Fish; second vice president, John H. Robertson; secretary, Joseph W. Molyneaux; treasurer, Frank D. Larrabee. The executive and legislative committees were elected as printed in the papers a day or two ago, with the exception of Geo. R. Robinson, whose place was filled on the executive committe for one year by Judge A. Ueland.

The committees of the new Hennepin County Bar Association were announced. The executive committee of 15 consisted of the following attorneys:

Three Years—Geo. P. Wilson, A. H. Young, J. O. P. Wheelright, C. T. Thompson, C. S. Jelley.

Two Years—C. H. Woods, Geo. P. Flannery, D. F. Simpson, F. N. Hendryx, Weed Munro.

One Year—Geo. R. Robinson, A. B. Jackson, Fred V. Brown, W. A. Lancaster, L. A. Reed.

The legislative committee consists of J. B. Atwater, C. J. Bartleson, F. H. Carlton, E. Cohen, N. F. Hawley, W. E. Hale, C. A. Willard.

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### SHARPS AND FLATS.

Hon. C. B. Moore, Ex-Attorney General of Arkansas, vouches for the truth of the following incident, which took place while he was present in the court-room at the Crawford County Circuit Court last November. A man named Driver was prosecuted for stealing hogs from a man named Pig. A witness named Shoat testified that the accused remarked, that is, changed the marks on the hogs, and then mortgaged them to a man named Ham. This combination of names induced a member of the bar to hand to Justice Evans, who was presiding, a slip of paper on which he had written something like this: "This is a remarkable case; here is a (hog) driver accused of stealing pig's hogs. He ought to meat this allegation without difficulty since pig says his hogs were simply mortgaged to a ham, and this can only be proved by a shoat. This is not larcency; it is nothing but Bacon's abridgment."—Note and Comment.

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Some years ago a man well known in the western part of Stearns County was engaged in the collection business for one of the prominent machine companys. His duties required him to take chattel mortgages to secure farmers' notes and the first mortgage drafted by the gentleman was not only unique but far reaching in its operation. The description was as follows: "One red yearling steer, two years old, and his increase." The mortgage was afterward paid so it did not become necessary to identify the "two-year old yearling steer" nor to make any search for his increase.

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The other day I was discussing with a lawyer of some note in the state, matters of general interest to the fraternity. The conversation turned to the question whether it paid from a purely financial point of view to engage in the practice of law as a life profession. He quoted two adverse opinions. One was that of a professor in a law college to the effect that "a lawyer must work hard all his life and at last die poor." The other was from a layman who had evidently had some experience with the city practitioner. It was related that he, with several other farmers' was looking over a piece of waste land, which was practically worthless, the soil being so poor, and considering what it would be best to do with it. "I tell ye what to do," said he, "plant it to lawyers, they thrive on any kind of soil."

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An action was once brought in the court of the late sheriff Galbraith, in which the plaintiff sought to recover the sum of £10 lent on a bill marked payable on day of judgment. The defendant, looking to the terms in which the bill had been drawn up, thought he was safe, and he stated quite glibly on oath that he had actually received the money, and was prepared to pay on the day alluded to. Sheriff Galbraith eyed the man with a severe expression and in the most solemn tones declared: "This is the day of judgment; enter judgment for plaintiff, with costs."—San Francisco Argonaut.

# THE MINNESOTA LAW JOURNAL.

Communications in regard to the Contents of the Journal should be addressed to the Publisher, FRANK P. DUFRESNE, St. Paul, Minn.



## DISTRICT COURT.

### Milk Inspection Ordinance--Delegation of Legislative Power.

**State of Minnesota against Nels Broberg.**

**(Municipal Court, Minneapolis.)**

**File No. 21216.**

A city ordinance which delegates to the health commissioner the power to license and to regulate the sale of milk and to revoke and to cancel such license is void.

M. D. PURDY, for plaintiff; FRANK F. DAVIS, for defendant.

KERR, J.: The city council of the city of Minneapolis, June 14, 1895, passed an ordinance providing for the inspection of milk, dairies and dairy herds, and the licensing and regulating of the sale of milk in the city of Minneapolis the ordinance makes it a misdemeanor for any person to sell milk in the city of Minneapolis without obtaining a license therefor. The only provision for issuing a license is found in section 6.

The defendant is charged with selling milk in the city of Minneapolis in January, 1896, without having obtained a license under the provisions of said ordinance, and is sought to be punished for so doing:

The defendant claims that the ordinance in question is void for the following reasons:

First—Because it appears that at the time of his arrest and at the time of the violation of the ordinance complained of, defendant was duly licensed by the State of Minnesota to vend and sell milk throughout the state, and the ordinance attempts to punish defendant for doing that which the state has licensed him to do.

Second—Because it appears by the evidence that at the time of the sale complained of defendant was arrested in Anoka county, and that the dairy herd from which the milk was sold and obtained was at all times in Anoka county and without the corporate limits of the city of Minneapolis, and that the ordinance attempts to give the city commissioner of health authority over the herds and dairies which are beyond the corporate limits.

Third—That the ordinance is unreasonable and arbitrary in its requirements and operation.

Fourth—That it is not within the scope of chapter 203, general laws of 1895, under which the city claims the right to pass such an ordinance.

Fifth—that it, in its operation, works discrimination.

Sixth—That the ordinance in question is void because it delegates to the health commissioner the power to license and regulate the sale of milk and to revoke and to cancel such license in his discretion.

I do not think the ordinance in question is open to objection on tne first five grounds claimed by defendant. The sixth objection, to the constitutionality of the ordinance, is, in my opinion, well taken.

The act of the legislature under which this ordinance was passed is chapter 203, general laws of 1895.

From this it appears that the council has attempted to delegate to the commissioner of health the sole right to issue the license. The commissioner of health, under this ordinance, may refuse to issue a license and there is no appeal to the city council from his refusal to do so. This gives the commissioner of health, and not the council, the power to regulate and control the sale and production of milk, and to issue licenses for the sale of milk, and he, the commissioner of health, and not the city council, is discharging the power conferred by the legislature upon the city council.

The granting and refusing of a license requires the exercise of discretionary, legislative and semi-judicial power. Under this

ordinance the commissioner of health, in his discretion, and acting upon his individual belief as to the propriety or impropriety of licensing or refusing to license a particular dairy, exercises a discretionary, legislative and judicial function which the legislature has specially vested in the city council.

It is a fundamental principle of municipal law that a municipal corporation cannot shift responsibility in the execution of public discretionary or legislative power designated to it, by redelegating exercise of such powers to others, unless the statute or charter so provides. This rule forbidding the delegation of discretionary, legislative or judicial powers does not prevent the performance of ministerial routine duties by agents or officers appointed by the city council. The distinction is clearly drawn between the powers and trusts of a governmental nature or involving the exercise of legislative discretion or sound judgment upon the one hand, and duties of a merely ministerial or routine nature, such as receiving a license fee where a fee is required, upon the other hand. Dillon on "Municipal Corporations," Vol. 1, Sec. 96.

Thus the power and trust of the board of county commissioners to issue licenses to sell liquors, as it requires the exercise of discretion and judgment, cannot be delegated by the board to any other officer. (In this case the county attorney).

The County of Hennepin vs. Robinson, 16 Minnesota, 340 (381): "And a city council authorized to issue licenses cannot delegate the power in whole or in part to another." (In this case the city clerk).

Darling vs. The City of St. Paul, 19 Minnesota, 336 (389): "And a council having ordained that liquors shall not be sold within the city except in what is termed active patrol districts, it cannot delegate to the mayor the power to designate such districts, because that is a legislative act which it must perform itself, and it can only exercise the power by ordinance enacted in the manner prescribed in the charter. Of course, the council may appoint a committee to investigate, procure information, and make recommendations to it, or to carry its determinations into effect; but the council only, itself, can finally determine in any matter committed to its discretion and judgment."

In re Wilson, 32 Minnesota, 145.

Minneapolis Gas Light Company vs. City of Minneapolis, 36 Minn., 159: "Further, the legislature in this case has in so many words strictly defined what the council itself may do, and what it may authorize and empower others to do. The statute reads: 'The city council of any city may, by ordinance, provide for the inspection of milk, etc., and issue licenses and may authorize and empower the board of health to enforce all laws and ordinances.' etc."

The ordinance in question is no doubt a proper one in its general scope, and the necessity for the existence of such an ordinance, passed in conformity with the powers granted to the city council, can not be questioned. But for the reasons above stated, I hold that this ordinance is void, and defendant is discharged.

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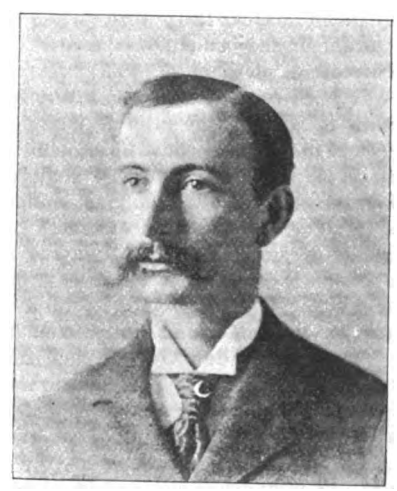
JAMES C. MICHAEL was born in "Old Virginia" in 1863. He received his educational training at the University of West Virginia, from which institution he graduated. Mr. Michael came to Minnesota in 1884, and was admitted to the bar at Red Wing the same year. After practicing in that city for five years, he removed to St. Paul, and was shortly afterwards appointed



assistant city attorney, in which position he distinguished himself. He was prominently mentioned for city attorney last spring, but declined the honor. He has been frequently suggested for judicial honors. Mr. Michael is gentlemanly, scholarly and a profound lawyer and student: a Democrat, and the senior of the firm of Michael & Peebles.

## Municipal Corporations-Condemnation Proceedings--Assessment of Damages.

**St. Paul Trust Co., as administrator, vs. City of St. Paul.**

**(District Court, Ramsey County. File 63898.)**

Condemnation proceedings by the City of St. Paul in which no provision is made for the payment for the land condemned either by special assessment or out of the general fund, are void under its charter.

HARVEY OFFICER, for plaintiff; E. J. DARRAGH, for defendant.

The facts appear in the memorandum which follows a conclusion of law that the plaintiff is entitled to no relief.

MEMORANDUM—

KELLY, J.: This action is to recover $4,500, and interest since May 1st, 1891, on account of an alleged condemnation by the City of St. Paul, of lots 2, 3, 4 and 5, block 21 of Amb's Addition to West St. Paul, for the so-called Sixth Ward Levee. The condemnation, if there was any, is evidenced by the confirmation on July 18th, 1890, by the Board of Public Works, of an assessment entitled, "Assessment for condemning and taking a street or levee in the Sixth Ward, from Missouri street to Delos street, in the City of St. Paul, Minnesota, in accordance with an order of the Common Council of said city, approved March 19th, 1890." It is evident it must be judged by the law as it existed March 19th, 1890, when the initial order of the council was made.

To correctly understand what the law then was with reference to this levee, it is necessary to refer to the prior legislation.

Section 113 of the constitution—bill of rights—reads: "Private property shall not be taken for public use without just compensation therefor, first paid or secured." Applying this constitutional provision, the Supreme Court, in re Lincoln Park, 44 Minn., 299, held a law which provided a "fund" to pay for lands condemned and taken for parks, but left it doubtful or uncertain whether the fund would be sufficient to meet the demands upon it, and imposed no general obligation upon the city to pay for these lands, is void.

Prior to 1879, under the city charter, compensation—usually called damages—to the land owner for lands condemned and taken for local improvements, street openings and the like, was provided for wholly by assessments made upon property benefited. This compensation was to be paid within a reasonable time, fixed in the charter.

"And these statutory provisions are deemed sufficient to afford an adequate and certain remedy to the land owner." In re Lincoln Park, p. 302, supra.

The law being as above stated had the following legislation: An act approved March 8, 1879 (Spec. Laws 1879, Ch. 368), whereby the City of St. Paul was "authorized to appropriate and condemn whatever land * * * necessary for the making * * * of a levee or street along the Mississippi river, in the Fifth and Sixth wards * * * and to levy assessments therefor * * * as now provided by law for other local improvements in the City of St. Paul;" provided, however, that upon the Board of Public Works reporting that property cannot be found benefited to the extent of the "damages, costs and expenses" necessary to be incurred, "and to what amount" this deficiency existed, an amount to meet such reported deficiency, not to exceed $10,000 for the entire work, for each ward may be taken from and paid out of the local improvement fund of said city.

This act was amended by chapter 120, Spec. Laws 1881, whereby the act of 1879 was re-enacted substantially and made applicable solely to "a levee along the Mississippi river, throughout its entire length within the Sixth ward of the city." This contains a provision like the original act, to apply a sum, not more than $20,000, out of the "local improvement fund to meet the deficiency reported by the board," upon the whole improvement. This was again amended, Chap. 66, Spec. Laws, Extra session 1881, but not in any particular which affects the question here involved.

Under this the Board of Public Works proceeded to condemn lands for this levee and to set on foot the grading by making an assessment. During the years 1882 to 1885, inclusive, was paid into the treasury in the aggregate $19,412.32 as "benefits," assessed on property, and during the same years the city paid out of the treasury in prosecuting this work $22,597 in all.

It nowhere appears in this action how much of the damages incurred for the value of lands taken was provided for by assessments, or how much deficiency was ascertained by the board, if at all, and to be otherwise secured. Nor does it appear whether any, or what amount of the sum paid out, as above, was for land intended to be taken.

In 1887, by Chap. 7 Spec. Laws, the city charter was amended, in detail, with reference to the Board of Public Works, as to proceedings in cases where lands were

sought to be condemned for public use. Sections 7 to 18 inclusive. The board having fixed the land to be taken and determined its value and all the damages and expenses of such improvment, section 14 requires the board "to apportion and assess the same, together with the costs of the proceeding, upon the real estate by them deemed benefited." This assessment is afterwards reported to the city treasurer for collection. After the assessment warrant is collected by the treasurer then the following provision is made:

"Sec. 18. As soon as the money is collected ready in the hands of the treasurer to be paid over to the parties entitled to damages for property condemned, ten days' notice thereof shall be given by the city treasurer in the official paper of the city, and the city may then and not before, except as hereinafter provided, enter upon and take possession of and appropriate the property condemned." The exception noted is in case of an appeal from award of damages.

Sec. 8 of this act reads as follows: "The chapters hereby amended, except as hereby amended, are continued in full force and effect, and all rights acquired or existing and all things whatsoever done, acted or performed under said chapters or either of them, are hereby established, continued and saved, and all matters and things whatsoever commenced or pending under said chapters, or either of them, are hereby saved and continued to be had and done and completed under this act." "All acts or parts of acts inconsistent with this act are hereby repealed."

All of those parts of the acts of 1879 and 1881 which provided that lands taken for local improvement might be paid for from the general fund, called the local improvement fund, or in any manner other than is found in sections 7 to 18 of Chap. 7, act of 1887, were therefore repealed by the passage of that act.

On March 19, 1890, the common council made the initial order, and on July 18, 1890, the Board of Public Works confirmed the assessment under which plaintiff claims to recover; and if under this proceeding no land could be condemned the plaintiff must necessarily fail.

Six thousand three hundred fifty dollars was awarded to plaintiff's testator, Mintzer. No provision whatever was made by assessment upon real property benefited, for the payment of these damages, except that an assessment of $1,500 was made upon other land described as Mintzer's, as benefits from said improvement. Four thousand eight hunderd fifty dollars of damages awarded is thus left without any way of payment.

It seems to be the only logical course to hold this attempted condemnation void. It is self-evident that lands must be condemned and damages awarded therefor, to support an assessment to pay such damages. And in like manner, lands cannot be condemned and damages collected therefor, unless an assessment of corresponding benefits is made, or some other provision is made by which to pay those damages. At the time these proceedings were had, in 1890, the charter provided no other way by which damages for lands taken could be paid.

Nor will it do to say, that these proceedings referred back to the laws of 1879 and 1881, for only such things were saved as were commenced or pending under chapters 6 and 7 of the charter. But if it should be held they were not repealed as to the Sixth ward levee, then the section I have quoted from the act of 1887, as to everything commenced or pending, "are hereby saved and continued to be had and done and completed under this act" (i. e., act of 1887). And that act, as I have shown, required all damages for lands condemned to be assessed on lands benefited. To make a valid condemnation there must have been an assessment, at least to the amount required to pay the damages awarded for the land.

This case is not to be confounded with the results in James v. City of St. Paul, 60 N. W. R., 21, which is ruled by an entirely different statute, but it is well to note the language of the court. Chap. 152, of Spec. Laws of 1883, is not applicable to this case because the land was attempted to be condemned under the law of 1887. Nor does Chap. 33, Spec. Laws 1891, help the plaintiff. More than this, the second section of the act of 1891 designates the fund out of which this payment must be made "Out of the unexpended balance remaining in the city treasury, as belonging to the fund collected upon the assessment as confirmed by the Board of Public Works, July 28, 1882, for opening, extending and widening a street or levee along the Mississippi river."

There is no evidence of any balance belonging to that fund "collected" upon the assessments of July 28th, 1882, and if there was it was the plaintiff's duty to point it out.

The delivery of the deed by plaintiff to the city did not alter the situation.

## Stockholder's Liability Action—Basic Judgment—Joinder of Action.

**Sturtevant-Larrabee Company v. Mast, Buford & Burwell Company et al.**

**(District Court, Ramsey County).**

1. An action is not maintainable under the provisions of Chap. 76 of Gen'l Statutes to enforce the constitutional liability of stockholders until after the plaintiff has obtained a judgment at law and an execution thereon has been returned unsatisfied. The insolvency of the corporation does not dispense with the necessity of the basic judgment.

2. An action to enforce the liability of directors for unfaithfulness in the discharge of their duties as such as fixed by Chap.34 of Gen'l Statutes,cannot be joined with an action under Chap. 76 to enforce the constitutional liability of Stockholders.

E. B. Graves for plaintiff. W. H. Lightner for defendant.

The plaintiff brought an action against the defendant corporation and its stockholders to enforce the so called double liability of the latter for the defendant corporations' debts. It subsequently sought to amend its complaint joining the officers and directors of the defendant corporation on the claim that they were liable for its debts through neglect of their duties. The application for leave to amend was denied and the following memorandum was filed by

WILLIS, J. This order is based upon the conclusions that proceedings undertaken to enforce the provisions of chapter 76 are essentially of such a nature as to differentiate them from the proceedings to enforce by an action sounding in tort the liability of directors and officers of a private corporation as fixed by section 9 of chapter 34 of the General Statutes of the state of Minnesota. To allow the proposed amendments herein would, in my opinion, violate the salutary provisions of chapter 66 of the General Statutes forbidding the joinder of causes of action founded upon contract with causes of action founded upon tort or with causes of action arising out of the liability of a defendant to the enforcement of certain penalties. It seems to me that such a decision is rendered necessary by the authorities.

Again, it seems to me that the original complaint is demurrable and that the proposed amended complaint would be demurrable because of the absence of an allegation that the plaintiff, prior to the institution of the proceedings herein under chapter 76 of the General Statutes, had obtained a judgment upon its claim, and that a writ of execution had been issued and returned unsatisfied. Such an allegation is a condition precedent to the maintenance of an action similar to the cause at bar, unless the institution of an action, the rendition of a judgment and the issuance and return of a writ of execution as provided by statute have been without fault of the creditor rendered absolutely impossible.

It seems to me that this objection is not removed by reason of the mere fact that the corporation has become insolvent and has made an assignment for the benefit of its creditors. Our statute makes no exception in the premises, and the only exception which is sustained under similar circumstances by the authorities exists where the plaintiff has been enjoined by a court of competent jurisdiction from instituting an action to recover his claim, or where other circumstances constituted an absolute impossibility. Mere inconvenience or inadvisability of bringing an action seem to me to constitute no excuse.

The fourth proposition advanced by the defendants is sustained for the same reasons as those advanced for sustaining the first proposition. To allow an amendment adding a cause of action against the directors of the corporation based upon their alleged misconduct (such misconduct being rendered penal by virtue of section 9 of chapter 34 of the General Statutes) to the cause of action under chapter 76 of the General Statutes originally contained in the complaint, would be to sanction a fatal misjoinder of causes of action essentially different.

The seventh proposition advanced by the defendant, "the proposed new cause of action, to-wit: The liability of directors and officers cannot be enforced under chapter 76 of the General Statutes," is sustained not only because of the reasons militating against a misjoinder of causes of action, as before stated, but also because the recent decision of the supreme court of the state of Minnesota, in re First National Bank vs. Harper, 63 N. W. Rep., 1072, seems to sustain fully the proposition in question.

In overruling the third proposition advanced by the defendants, to the effect that it would be inequitable and contrary to the dictates of a sound discretion to allow the defendants to be prosecuted upon causes of action additional to those preferred in the

original complaint, I deem it proper to state that, in my opinion, where a defendant has entered a general appearance in a civil action he stands upon the same footing with reference to the making of proper amendments as a defendant duly served with process. Nothing appears in the evidence submitted to the court to show any lack of good faith or any breach of professional propriety or etiquette on the part of the learned and able counsel for the plaintiff. If his clients have a statutory right to join together the causes of action which he seeks in their behalf to join in one complaint, then I should be unwilling that any considerations arising from discretion should bar that right or hamper its exercise. Discretion is distinctly exercised in overruling the fifth and sixth propositions advanced by the defendants opposing this motion, because, although courts ought not to countenance a failure to comply with the salutary rule that separate causes of action should be separately stated, nor to look with favor upon dilatory applications for special relief, still the controlling reasons for denying the relief here sought are so important and the exercise ofgood faith on the part of the counsel for the plaintiff is so apparent, that minor delinquencies may, it seems to me, be fairly and reasonably overlooked. The rules of practice should be strictly enforced except in cases where to lay stress upon them would be to affect disastrously material claims of right, which are disputed upon grounds which involve the merits of the controversy.

After very careful consideration, it seems to me that the motion should be denied, and that all parties hereto should, by the statements in this memorandum, be set right as to attitudes and motives.

The argument upon this motion has been prosecuted on all sides with a zeal, ability and display of learning which reflects great credit upon the bar, and affords sincere gratification to the court.

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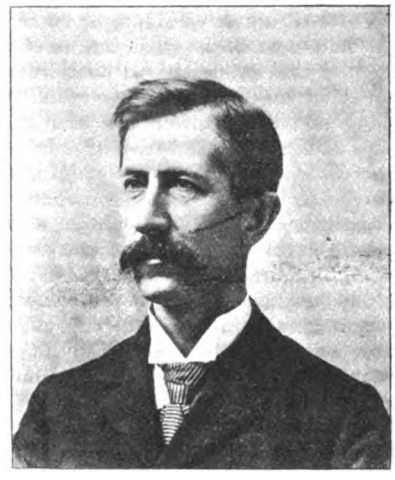
The question is sometimes asked as to whether a suit can be commenced on a promissory note payable at a bank on the day it falls due after the close of banking hours of that day. Decisions on the question are conflicting. In Massachusetts it can be done, in New York and Pennsylvania it cannot, and the New Jersey Supreme Court has just adopted the rule as followed in the two latter states.

HENRY M. FARNAM was born in Vermont and worked for six years on the New York Tribune under Horace Greeley. He studied law with Noble and Smith, the at-



torneys of the Central Vermont Railroad Company and was admitted to the bar sixteen years ago. Fourteen of these years he has spent in active practice in Minneapolis.

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## Negligence of Fellow Servant--Proof of Employee's Reputation--Notice of Employee's Incompetency.

**Annie Funk, as Administratrix of the Estate of Henry Funk, deceased, v. The St. Paul City Railway Company**

**(Ramsey County. No. 50025.)**

DAVIS, KELLOGG & SEVERANCE appeared for plaintiff, and MUNN, BOYESEN & THYGESON, for the defendant.

This is an action by the plaintiff, as administratrix, of the estate of her husband, Henry Funk, against the above named defendant, to recover damages on account of his death, which was caused by being struck and run over by a cable car of defendant company.

At the time of his death plaintiff's deceased had been working continuously for at least three weeks at the corner of Seventh and Broadway streets, the place where he was killed. During that time he had been engaged in repairing the conduit and in repairing the pulleys stationed in the conduits. This work required him to go down in the manholes leading to the conduits.

Plaintiff avers that on the 15th day of August, 1892, the said Henry Funk, deceased, relying on the due and diligent perform-

ance of its duty to notify him of the coming of trains upon said railway, and further relying upon the said custom of the defendant company to so give notice and warning of the coming of trains, did in the course of his regular employment enter one of the said manholes, when the defendant negligently and carelessly, without warning or notice of any sort, run a certain train over the said track within five and a half minutes after a train had been over the said line of railway and that this plaintiff's intestate, solely by reason of the carelessness and negligence of the defendant in so running said extra train out of the regular schedule time, and by reason of the carelessness and negligence of the defendant in failing to give plaintiff's intestate any notice or warning of the approach of said extra train, and by reason of the failure to follow said custom of giving notice of the approach of said train, and by reason of the negligence of the employee in charge of the said grip car, this plaintiff's intestate was by the said train so negligently and carelessly run, struck and dragged for a distance on the ground, and killed.

The plaintiff's amended complaint alleges the incompetency of the gripman.

In the lower court the jury found a verdict for the defendant for $2,500. A motion was made for a new trial and denied whereupon an appeal was taken to the supreme court.

Munn, Boyesen and Thygesson for appellant and Willrich and Lambert for appellees.

The appellant company allege among other things; that the deceased came to his death while performing the ordinary and regular acts of his employment, and was in a position usually taken by him and not in a place of unusual peril.

That it was incumbent on the plaintiff to show that such employee was in fact incompetent, and that the defendant had knowledge thereof or that the reputation of such employee was such that defendant should be presumed to have knowledge of his incompetency.

That in an action aginst an employer for injury resulting from the incompetency of a fellow servant, where it is shown that defendant exercised ordinary care in the selection of such servant, plaintiff cannot recover merely on proof of his reputation for recklessness and carelessness without also proving that he was in fact negligent and careless.

That knowledge of the employee's reputation was to the day of the trial and was not sufficient to give the defendant a chance to discharge such incompetent employee.

That the fellow servant laws of 1887, are not applicable to the case of a street car company.

Appellant relied upon the case of Grier vs. The Consolidated Electric Co., 41 Pac. Rep. 22. In that case the Court says:—"The defendant having exercised due care in selecting its employees, to render it liable for the injury complained of it was necessary for the plaintiff to establish the following facts: first, that the accident happened by reason of the carelessness or incapacity of Defrain; second, that Defrain had become or was actually unfit or incompetent through negligence or incapacity; third, that defendants knew this, or Defrain's general reputation was so in accord with the fact, that the presumption is that defendant knew it and was therefore negligent in not acting upon the knowledge, and this is so because the burden of proving the employers negligence is on the plaintiff." See cases cited.

The Supreme Court reversed the decission of the lower court and remanded the cause the district court for a new trial, where the cause was stricken from the calendar on motion of defendant.

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## Fees of County Surveyor Under Chapter 249, Laws of 1895--Constitutionality of Act.

**Fred Davis, Plaintiff, v. Board of County Commissioners, of St. Louis County, Defendants.**

**(District Court, St. Louis County.)**

In an action brought by the county surveyor to recover for fees for services rendered under provisions of Chapter 249, Laws of 1895, held that said act is unconstitutional and void, general demurrer.

O. W. BALDWIN, Attorney for Plaintiff; H. H. PHELPS, Attorney for Defendants.

This was an action brought by plaintiff, the county surveyor, against the Board of County Commissioners to recover fees for services rendered in accordance with Chapter 249, Laws of 1895, for sub-dividing sections where resident owners petition the county surveyor for such services. The defendants interposed a general demurrer, and this demurrer was sustained on the ground that the said act is unconstitutional.

ENSIGN and MORRIS, JJ.—The question raised by the demurrer to the complaint in this action involves the constitutionality of the act of the legislature passed at its last session, being Ch. 249, Laws of 1895. In passing upon this act we have endeavored not to be influenced by such peculiarities of

the act as do not coincide with our judgment, or by the fact that it apears to be unnecessary in view of the provisions of Gen. Stat. of 1894, No. 697-8, 836, and Ch. 250, Laws of 1895. Whether the law is wise or unwise, whether the method of procedure adopted by the act is approved by our judgment, whether the law is inexpedient or not well devised for the purpose for which it was passed, is quite immaterial and should have no place in the consideration of the questions involved in this inquiry.

It is claimed by the plaintiff:

1. That the act is within the provision of the constitution and laws authorizing the levy and collection of such taxes as are provided for in this act.

2. That the fixing and maintaining of permanent monuments and boundaries of real estate in within the police power of the state and that the state may for that purpose assess upon the property benefitted, the cost of necessary surveys and for the fixing of such monuments and the establishment of such boundaries.

"Taxation is an incident of sovereignty." It is a legislative power and taxation is the direct result of legislation.

"Taxes can be levied for public purposes only." The determination of what is or what is not a public purpose belongs in the first instance to the legislature. The determination of the necessity of raising a tax is to be made by the legislature. Taxation is a burden upon the people and the property of the state and cannot be imposed without a "necessity arises that the legislature determines is imperative." This applies also to that form of taxation arising from local improvements. There must be a necessity for the improvement, and that necessity must be determined by the legislative power. This determination must be made "from public motives only and with the public good in view."

This power of taxation is a sovereign power conferred upon the legislature by the people and "can only be exercised by the legislature, and cannot be delegated to any other branch or department of the government."

There is only one exception to this rule and that is the delegation to municipal corporations of the power to legislate upon the support and management of local affairs under the restrictions and rules provided in the charter granting such power. The municipal corporation can exercise only the powers that are granted to them by the legislature and must exercise and cannot delegate such power to any other person or corporation or exercise them for any purpose except those specified in the grant. To such municipal corporations the legislature may delegate the power to levy certain taxes made necessary for the support and maintenance of the government of the municipality. The municipality is still under the power and full control of the legislature and its powers may at any time be limited or recalled by the legislature. This legislature cannot confer upon merely ministerial or administrative offices the power of taxation or the power to prescribe rules for taxation. The grant must be to the municipal corporation itself. The power to tax the public cannot be conferred upon private corporations nor upon private persons.

In the act in question the power to levy the tax or assessment is not delegated to any municipal corporation. Neither county, city, nor town has any duty or power in determining the necessity of the tax or that it is

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C.A. FOSNES was born in Fosnes, Norway, July 2nd, 1862, and came to America with his parents in 1868. He was brought up in Winona and Faribault counties in this state. When seventeen he entered the Normal School at Winona, Minn.; then taught school three terms, studied law in Winona

and was admitted to practice in the fall of 1894 at Montevido, Minn., where he commenced and has continued practicing. He has been city attorney of Montevideo for several years, and president of the village council. The greater part of his practice is actual court work.

for a public purpose. The legislature does not determine that a public purpose or necessity demands such a tax. The only discretion to be exercised by anyone is by private individuals—a majority of the resident owners in any government section. That is not a discretion. The law does not require them to determine whether the act is a necessary act, whther it is a public purpose, but merely to express their wish that the specified thing be done. The proceedings which eventuate in a tax are not initiated by any municipality nor is any municipality authorized to have the slightest control over it. The power to tax a man's land rests upon the mere wish of two or more resident land owners who need not even be citizens of the state. No necessity need exist for the action none need be pretended. Private land owners owning the smallest parcel of land may cause the owners of eight sections of land to pay taxes which are unnecessary.

The majority of resident owners have merely to wish the act done, notify the surveyor; he must set a time, make the survey, apportion the cost, certify it to the auditor, and he must assess it as other taxes. A tax results, not from a determination by a legislature, for it could not know the facts, nor from a delegation of power, to levy local assessments for an improvement to the county, town, or any municipal authority. No officer of any municipal corporation has any discretion or can exercise any discretion in relation to it. This seems to approach nearer to machine taxation than anything we have seen. A majority of resident land owners have a wish for permanent monuments, notify the surveyor and the rest follows and must follow.

But it is claimed that the fixing of permanent monuments and boundaries between land owners falls within the police power of the state and that the cost of the exercise of such police power may be levied as taxes against the property benefitted. We think that the provisions of the law in regard to boundaries between private owners and making permanent monuments on their corners do not fall within the police power of the state. We do not feel called upon to go over the many definitions of police power, but shall consider it only as it applies to the act in question. This power resides in the state and may be delegated by the state to certain municipal corporations as far as it pertains to the health, peace, good morals, education, good order, etc., of such minor municipal corporations that cannot be well exercised by the state by reason of varying local wants and necessities. The state will not exercise a police power unless it is necessary to do so. It has no right to do so. The corporations to which it may delegate local power will be governed by the same rule. "The safety of the people is the divine law of the land." If the safety of the people is in danger, then the necessity of the exercise of this power arises and not until then.

"The right to exercise the police power can only arise from a vital necessity for its exercise and cannot be carried beyond the scope of necessity." Chy Lung v. Freeman, et al., 92 U. S. 275.

"It is a power co-extensive with self-protection and is not inapdy termed 'the law of overruling necessity' * * * As a general proposition it may be stated, it is the province of the law making power to determine when the exigency exists calling into exercise this power."

Lakeview v. Rose Hill Cem. Co., 70 Ill. 196.

Tiedeman on Lim. Police Power, 1 to 10.

The necessity must rise before the state or any municipal corporation can act and must

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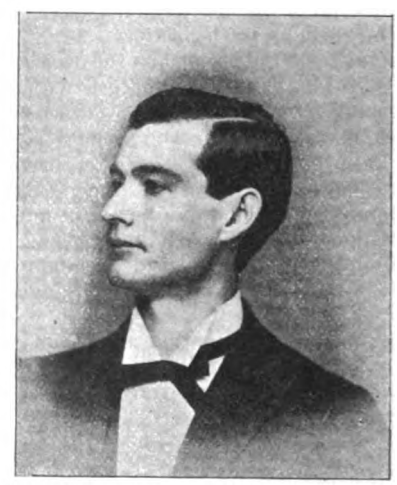
HOWARD H. DUNN was born in a sod shanty in Jackson county, Minn., Oct. 29th, 1867 and worked on a farm until 18 years of age. He then entered the law office of T. J. Knox of Jackson and continued with him as student until June, 1890, when he was admitted to the bar. In October, 1892, he



located at Fairmont, practiced alone until January 1st, 1895, and then formed firm of Ward, Dunn & Ward of which he is still a member. The firm has one of the largest law libraries in Southern Minnesota and devote most of its time to criminal and district court practice.

be determined by the legislature or by the proper authorities of the city, county, or town to which the power is delegated. Take, for instance, certain legislation in relation to monuments and surveys in this state. G. S. 1894, Sec. 697. The county commissioners may order monuments to be set "when it shall be made to appear to their satisfaction" that such monuments have been destroyed or become insecure, etc.

Sec. 836. When the surveyor in surveying land finds that the monument or post is destroyed he shall set a new one. Secs. 2057 to 2059 and following sections as to the enforcement of the law as to partition fences. So in relation to drainage, fire limits, etc., the corporation to whom all these matters are submitted determines the necessity for the action and acts or refuses to act as the facts may be. So in the very next chapter. (Ch. 250, Laws of 1895) to the one in question in relation to the same matter, the county commissioners act upon the petition of the town supervisors, if the facts warrant cause surveys to be made and lost corners restored.

This act utterly ignores the question of necessity and bases action only upon a wish or desire of certain persons, resident of lands. The monuments set by the United States government may be there and no necessity may exist for permanent monuments, but the act does not make necessity a test. No action of any local municipal authority is invoked. Even the discretion of the surveyor is not required to be exercised, but taxes are sought to be imposed under the police power when the primal element of the exercise of that power is absent and not required. The act does not fall within police power for that reason.

Besides the authorities cited by counsel, we have examined the following:

Cooley on Cons. Lim. p. 116-125-191-204 & Ch. 16.

Cooley on Taxation, Ch. 1-2-3 and 19.

Harrington vs. Town of Plainview, 27 Minn. 224.

Board of Co. Coms. vs. Abbott, 34 Pac. Rep. 416.

People vs. Parks, 58 Cal. 641.

Thompson vs. Schemerhorn, 6 N. Y. 91.

Board of Directors vs. Houston, 71 Ill. 318.

## Assignee—Who Proper Party—Insolvent's Attorney.

**In reassignment Irish-American Bank to Frank R. Hubachek.**

**(District Court, Hennepin County.)**

**File No. 68211—Filed Feb. 27, 1896.**

An attorney for insolvent corporation is not a proper party to act as its assignee, when the faithful discharge of his duties as such would probably require him to repudiate acts of the insolvent that he had advised when acting as its attorney, and to prosecute its directors with whom he stands on intimate personal and professional relations.

W. H. DONAHUE & S. MEYERS for Petitioners, EMANUEL COHEN for the Assignee.

This was an application made to the full District bench for the removal of Frank R. Hubachek from the assigneeship of the Irish American Bank of Minneapolis. It appeared from the evidence that the bank had begun business in 1888 with $100,000 capital, that it had loaned large sums to its directors and its directors, often on insufficient security and in some cases beyond the limit fixed by law, that immediately before its assignment it had preferred to a large amount one creditor in which one of its directors was interested, that in all probability its directors would be accountable in an action for at least neglect of duty. It further appeared that one of these directors was the law partner of the assignee, that he had selected as his attorney another director, and that he had been one of the attorneys for the insolvent bank as well as of some of its directors. The court found that Mr. Hubachek was a man of great executive ability and energy and of undoubted integrity but made an order removing him as assignee. In so doing it filed the following:

MEMORANDUM—

Although the evidence in this proceeding was not as full and complete as might have been desired, yet we think it shows reasonable grounds for presuming liability of the present board of directors for losses suffered by the bank. We do not purpose, nor is it necessary, to enter into a detailed discussion of the question. The evidence conclusively establishes certain facts, which, unexplained, very plainly indicate culpable fault in the management of this bank. The bank started in business slightly more than seven years before its downfall, with a paid up capital of $100,000. Today its directors and ex-directors, including Matt Walsh and his business successor, are indebted to it for money they have permitted each other to take from it, in a sum exceeding 80 per cent of its capital. It is doubtless true that much of this money will be repaid, but it is equally

true that a large amount of it will be lost. The disposition of trustees of moneyed corporations to extend mutual accommodations to each other, at the expense of the owners and creditors of such corporations, seems to have been present in the management of this bank.

It is a practice entirely too prevalent, and as pernicious as it is prevalent. Several of the large loans, other than those to directors, that now appear precarious, were seemingly not made in the exercise of that care that a faithful and dutiful trustee ordinarily bestows upon his trust. It would require much ingenuity to reconcile the transactions involving the loans to and for the benefit of the Penny Press company with that standard of care that the law devolves upon trustees. Other loans, notably those to Col. King and James H. Bishop & Co., were apparently not judiciously or carefully made. Several of these large loans were made in palpable violation of the statute limiting the amount that may be made to one person, corporation, etc., and were as offensive to the principles of sound banking as to the letters of the law.

Other criticisms in the same direction might without impropriety be indulged in, but we do not care to go further. From what is made entirely clear by this evidence we have no doubt but the conduct of the affairs of the bank by the directors should be carefully looked into, for the purpose of determining their liability for unfaithfulness to their trust, and, if we are correct in our understanding of the law, the duty of making this scrutiny rests upon the assignee.

It is contended by counsel for the assignee that such duty does not devolve upon him. That the right to recover damages for loss resulting from negligence or fraud is not assignable. We think otherwise. It is true that the right to recover damages for purely personal torts is not as a general rule assignable. But the right to recover for damage to property, whether such damage results from wrongful taking and conversion, or from fraud or negligence, is assignable. In any event, we believe that the doctrine is well established that a receiver or assignee of an insolvent corporation may maintain such an action.

"Thompson's Commentaries on the Law of Corporations," Sec. 4121, 4122, 4126, and cases cited.

Assuming the liabilities of the directors, or reasonable probability that such liability could be made out, and that the right to enforce the same passes to the assignee, is the relation of this assignee to all or any of the directors such as to legally disqualify him from fairly representing the creditors? Such a liability is an asset, and may be a very valuable one to the creditors. The relation of the assignee to creditors is that of a trustee to his cestui que trust, and such relation requires the observance of the most scrupulous fidelity in all things appertaining to the execution of the trust. It has ever been the policy of the law to place the standard of qualification upon the highest grounds. Any personal interest in the subject matter of the trust adverse to that of the cestui que trust is deemed a disqualification. Any relation so close to a person whose interests are adverse to those of the beneficiaries of the trust as would or might tempt the trustee to depart from the strictest observation of his duties, is deemed a disqualification. This rule does not bend to any personal consideration. The man of the very highest probity is not exempted. Service of two masters whose interests conflict implies unfaithful service to one or the other.

The strongest ties of personal friendship, resulting from long continued business and social relations of generous and friendly business partners, must necessarily create a state of feeling rendering those partners entirely averse to taking any action injurious to each other. And that is especially true where such persons are upright and duly recognize their obligations to each other. It is hardly conceivable that this assignee, a man of most kindly and generous impulses, fully appreciative of and grateful for personal favors, and always ready to recognize and return such favors, could prosecute an action against his equally kindly and generous law partner that might result in ruin to such partner. As was stated by the court in re Mast, Buford & Burwell Company, 58 Minn., 313, 12, an assignee that could do this would be a man of the greatest firmness and most heroic moral courage.

No man, however firm in integrity, should ever be placed in such an embarrassing position. He could not do his duty to both his trust and his friends. Full discharge of duty to one implies recreancy to the other. Our acquaintance with this assignee leads us to believe that he would do everything required by his trust that could be expected of an honest man.

The burden here is too great. The con-

flicting claims of duty are irreconcilable. Again, whatever might be conceded to this assignee in consideration of his exceptional fitness, the policy of the law absolutely forbids such inquiry. The bias implied from the relation itself closes the door to investigation. This objection alone is fatal. But there are others, although less weighty. The assignee has retained as counsel a law firm one of whom, Mr. Shaw, was a director of the bank from the beginning of 1889 until the time of its failure. This objection may be obviated by the withdrawal of this firm, but as matters now exist, it is a serious one.

There are various other considerations that are entitled to weight in determining this matter, among which may be mentioned the transfer of the $156,000 of the bank's notes to the American Savings and Loan Association in violation of the insolvency law. While this transfer may have been made with good motives, in view of the condition of the bank, as known to the directors at that time, it was in no sense a justifiable proceeding. There must have been then apparent a strong probability that the bank would ultimately have to succumb.

The intent to prefer the association in such event was most manifest. This wrong must be righted by the assignee, with the aid of his attorneys. While an action contemplating such a result has already been brought, its prosecution necessarily involves a charge of misconduct on the part of the assignee's law partner, as well as the law partner of one of his attorneys. This is another embarrassing situation.

We regret exceedingly the necessity for removing this assignee. Personally he is in every respect exceptionally well qualified to administer this trust. But, as we understand the law, we have no discretion. Its behest is imperative and may not be disobeyed.

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## Bill of Lading—Assignability—Delivery of Goods Consigned.

**Ratzer vs. B. C. R. & N. Ry. Hennepin County. File No. 66138.**

J. F. McGEE, Attorney for Plaintiff and A. E. CLARK and W. F. BOOTH, Attorneys for defendant.

The facts sufficiently appear in the memorandum.

MEMORANDUM—

RUSSELL, J.: On the 5th day of Jan., 1895, the Morrison Grain and Lumber Company, a corporation of the State of Iowa, purchased of the Independent Elevator Company, of Britt, Iowa, two carloads of oats, and of the Central Elevator Company of Forest City, Iowa, one car load of oats. On the 5th day of January it delivered two of the cars and on the 7th day of January the third car to the Minneapolis and St. Louis Railway Company for shipment, and received from it, for each of the cars, a bill of lading in the following form:

"Minneapolis and St. Louis Railway.

No. 56.

Received from Independent Elevator Co., in apparent good order, the following described property (contents and value unknown), to be forwarded to station, subject to the terms and conditions of the published Freight Tariff of this Railway."

| CONSIGNEE AND DESTINATION. | CARS AND INITIALS. | GRAIN WEIGHT. |
|---|---|---|
| Order. Morrison Grain & Lumber Co. Via Chicago, New York, stop at Morrison, Iowa. Notify John Ratzer, Adv'd Charges. Exhibit A. | 2892 M. & St. L. | Oats 3840 not Graded via Erie Desp. C. Chic. & Erie Chgs. |

W. A. ROWLAND, Agent.

The Minneapolis and St. Louis Railway carried the cars from Britt to Livermore, Iowa, and there delivered them to the defendant, a connecting carrier. While in defendant's possession the Morrison Grain and Lumber Company directed the cars to be delivered to it at Morrison, Iowa, a station on defendant's line, which request was complied with. On the 12th day of January, 1895, several days after its receipt of the grain from the defendant company, the Morrison Grain & Lumber Company made a draft on the plaintiff for $850, and attached thereto the three bills of landing, with the following words written on the back of each of them:

"Deliver to order of John Ratzer.

"Morrison Grain & Lumber Co.,

"Per A. E. Rait, Manager."

The draft was duly presented to the plaintiff, in the usual course of business in the city of New York, and on the 16th day of January, 1895, paid by him.

At the time of the delivery to it by the defendant company, the Morrison Grain & Lumber Company was the owner of the grain, the legal holder of the bills of lading, and the consignee named therein.

The right of the consignee to change the place of delivery and receive the grain at a

point other than the destination named in the bill of lading is not seriously contested by the defendant.

The plaintiff's right of action is based upon the claim that the defendant's delivery of the grain to the consignee at Morrison, Iowa, was wrongful, for the reason that it made the delivery without requiring the surrender of the bill of lading.

Plaintiff has presented a large number of authorities in support of his contention, but an examination of them shows that they principally relate to the duty imposed on the carrier to deliver to the proper party; that is, to the holder of the bill and the owner of the freight at the time of delivery. The courts are uniform in their holding in this matter, and most of the cases cited announce this doctrine.

The rule is well stated in Sec. 130 in Hutchinson on Carriers in these words:

"Too great caution cannot therefore be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow, in fact, of no excuse for a wrong delivery, except the fault of the shipper himself; and where there is any doubt, and it can be determined from documentary evidence, its production should be required. Instances of great hardship to the carrier frequently occur from neglecting these precautions.

In the absence of a special agreement, or a statute requiring the carrier to take up the bill on delivery of the property, it cannot be held liable for not doing so. It is protected if it deliver the goods to the party entitled to receive them. A bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself. So far as it is a receipt for the goods, it is susceptible of explanation the same as any other receipt.

Bank of Commerce v. C. B. & N. Ry., 44 M., 224.

A decision cited by the plaintiff and most relied upon by him to support his position, is Union Pac. Ry. Co. v. Johnston, 63 N. W., 144. In that case the Supreme Court of Nebraska adopt the following language from R. R. Co. v. Stearn, 119 Penn. St., page 24: "Bills of lading are symbols of property, and when properly indorsed, operate as a delivery of the property itself, investing the indorsees with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same."

This fairly states the rule, and it is, in application, the same as the above quotation from Hutchinson on Carriers. In the Nebraska case it is carried beyond its proper function and is held to require the surrender of the bill of lading on delivery of the property. Such an application is strained, and not sustained by the greater weight of authority. If the bill is merely a symbol of the property, then if there is no property in existence, or the property for which the bill was given has lawfully passed to the rightful owner from the carrier, it cannot represent anything. If as stated by our Supreme Court, it is like a receipt, susceptible of explanation, then it does not guarantee, by being outstanding, that the property is in the hands of the carrier who issued it. The Nebraska and Pennsylvania court with the courts of Kansas, New York and Illinois, have held that a carrier is liable if it issue the bill, even though the goods never came into its hands. This is the extreme doctrine, and expressly repudiated by the Supreme Court of Minnesota in Bank v. R. R. Co., supra, the decision in which case is based upon a large number of authorities from different states and from the Supreme Court of the United States.

If the carrier is not responsible for the goods named in the bill when it has not in fact ever received them, it cannot be held liable because of the bill still outstanding when it has made delivery to the party holding the bill and legally entitled to the goods. The reasoning of our court applies with equal force to both cases.

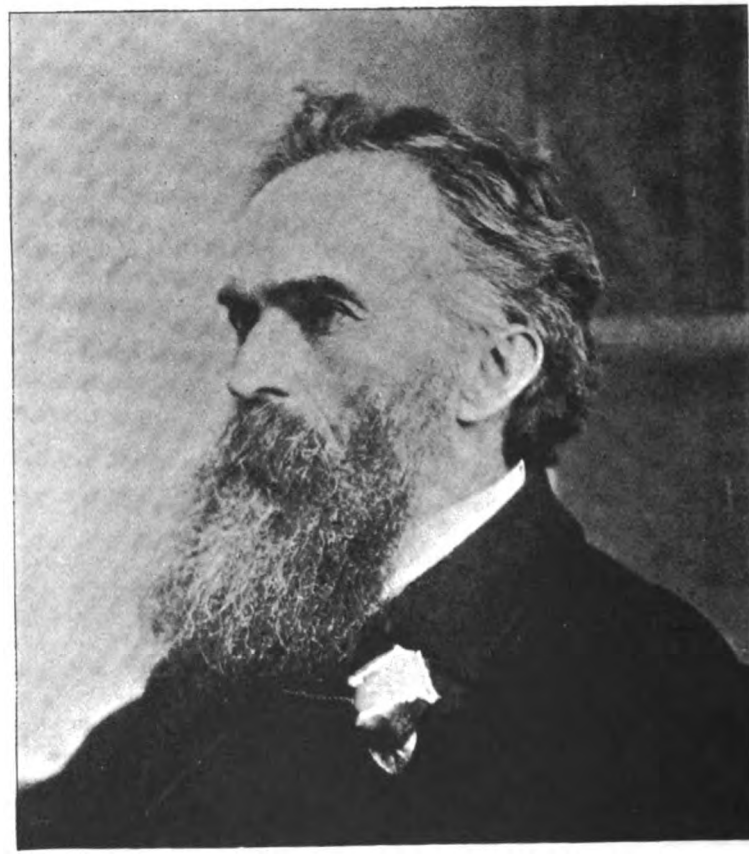
The rule that where "one of two innocent parties must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it," is well applied in a case where the carrier delivers to a wrongful party; but has no application where the bill is outstanding, but the property has been turned over to the owner of it in view of the character of the bill of lading as defined by the Supreme Court of Minnesota in the case above cited. See also supporting this view:

Ala. Nat. Bank v. R. R. Co., 42 Mo. App., 284.

Dwyer v. R. R. Co., 7 S. W. Rep., 504.

R. R. Co. v. McCown, 25 S. W. Rep., 435.

Judgment for defendant.



HON. WILLIAM LOUIS KELLY,

**District Judge, Second Judicial District.**

...THE...

# MINNESOTA LAW JOURNAL

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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.

## HOWARD LAW GOOD.

**Opinion of Attorney General Childs, Holding the Howard Charter Bill Constitutional.**

In reply to an inquiry addressed him by the common council of St. Paul as to the constitutionality of the so-called Howard Charter bill, Hon. H. W. Childs has given an opinion. The Journal publishes it as an interesting example of how opinions can be written. As far as it knows there has been little or no criticism of the Howard charter bill on the theory that it contravenes the doctrine of Nichols vs. Walters. The real point of attack has been that it is unconstitutional under the holding in Alexander vs. City of Duluth, 57 Minn. 47. About the application of this case the attorney general is discouragingly silent. The following is his opinion:

"Calling attention to General Laws 1895, chapter 8, you state that the city council of St. Paul requests my views as to the validity thereof.

It is urged, I am informed, that the act is deemed invalid within the principle enunciated in Nichols v. Walters, 37 Minn., 264. As I view the question that principle has no application to this act. The court there had under consideration a statute which classified counties upon an unnatural and unauthorized basis, namely, a past event. The act provided for the changing of county

seats, and among other things, provided that as to those counties in which the question of change of location had previous to the passage thereof been acted upon, and the county seat thereby "fixed or located by such vote," no change should thereafter be effected "unless three-fifths of all the voters present and voting at such election shall vote in favor of such change or removal." As to all other cases, the question of change of the county seat was to be dependent upon a majority vote of the electors of the county.

The court in assigning one of the reasons for its decision says: "Why one county which had located its county seat by a vote of its electors twenty-five years or six months before the act passed should require a vote of three-fourths of its electors to remove it, and a county which should so locate it three or six months after the act passed, may again remove or locate it upon a mere majority vote, is impossible to conceive, except that the last legislation has arbitrarily so provided. But in such matters the legislature cannot arbitrarily so provide. The act is unconstitutional and void."

The act of 1895 is subject to no such criticism. As a law it became complete upon its approval, and at once effective for the incorporation of municipal bodies. It is in character and scope a general enabling act as much so as to any of the numerous general laws which have from time to time been enacted for the organization of cities and vilages. Indeed, it was doubtless intended to supersede General Statutes 1878, chapter 10, providing for the incorporation of cities. It professes in express terms to accomplish the following, among other purposes:

First:—To provide for the organization of new cities.

Second—To serve as a charter to cities upon the repeal of the law, general or special, under which they are respectively organized.

Third—To enable existing cities to lay aside their present charters, if so disposed, and adopt the provisions thereof for their future government.

I am unable to perceive in its provision anything in either respect which partakes of the nature of class or special legislation, or which otherwise offends against the constitution. It will be seen upon a moment's reflection that instead of being in the nature of class or special legislation, its purpose is quite to the contrary. It seeks greater uniformity of municipal government, and looks to the extinction by gradual process of a variety of special charters. It enables a city to throw off its old charter and adopt the one tendered. Such legislation is frequently indulged in and is supported by the great weight of authority. Sutherland on Stat. Const., 75; Endlich on Inter. of Stat., 499.

It is therefore my opinion that chapter 8 is valid, unless assailable for some other reason than that above considered. No other ground has been suggested for its invalidity, nor have I considered any other.

---

Halvor Steenerson born June 30, 1852, at Pleasant Springs, Dane County, Wisconsin. His parents moved to Houston County, Minn., in 1853 when he was a year old and settled on a preemption. He was educated

in the county common schools there and at the high school. In 1875 he entered a law office at Austin, Minn., and read there two years. In 1877 he attended Union College of Law at Chicago and was admitted to Supreme Court bar of Illinois June, 1878. In Sept., 1878, opened an office at Lanesboro, Minn., and in 1880 removed to Crookston. He was elected county attorney of Polk County in November, 1880. State senator in November, 1882, and has also served as city attorney for Crookston. He does a strictly law business and his practice extends over a wide territory in State and Federal Courts of Minnesota and Dakota.

---

A long winded lawyer lately defended a criminal unsuccessfully and during the trial the judge received the following note: "The prisoner humbly prays that the time occupied by the plea of the counsel for the defense be counted in his sentence."—The Barrister.

### THE LAW OF THE WHEEL.

Solomon has said that "there is nothing new under the sun," but the bicycle is a new thing to the consideration of the courts. Its use for purposes of locomotion and travel is so recent that as yet there has been little adjudication as to the rights and liabilities of travelers employing it on the highway. The trend of judicial opinion, however, seems to place it in the category of vehicles and carriages with the rights and liabilities attendant thereto.

In the early stages of its popularity the wheel met strong opposition from both pedestrians and the agencies of transportation on the road, the former objecting to its use on the sidewalk and the latter objecting to its use on the road, claiming that it was an object of terror, the use of which was perilous in that it frightened horses. In time, however, the wheel rolled itself into popular favor and use to such a degree as to compel its recognition by the courts and the establishment of its legal status with other vehicles. When the courts came to determine the principles applicable to the particular case, it was shown that the wheel was only an apparent exception to Solomon's aphorism, for the principles to which the courts were compelled to look, were those laid down by Blackstone, Coke and the old common law jurists who never saw, and so far as we know, never dreamed of the two-wheeled vehicle or the bloomer girl. We therefore look to the mother country for the first case involving the law of the wheel. The English courts early decided that the wheel was not an obstruction to or an unreasonable use of the streets or roads, "but rather a new and improved method of using the same, and germane to their principal object as a passageway."

The first person to bring the bicycle into litigation was one Taylor, an Englishman, who had come into collision with one Goodwin, who, in the parlance of to-day, was "scorching" along the highway. Goodwin was accused of violating a statute making the furious driving of a carriage upon the highway an offense, the terms of the statute being, "If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any person," etc., proceeding to designate the penalty. When brought into court, Goodwin did not deny the allegation of immoderate speed, but set up that the bicycle was not a carriage within the meaning of the statute, and that the word "driven" could not be applied to the bicycle, and that the statute did not apply, since bicycles, having been invented since the enactment of the statute, could not have been contemplated by its framers. He claimed that the mere fact that the bicycle had wheels did not make it a carriage any more than it did a wheelbarrow or roller-skates. The courts, however, held that the words "any sort of carriage" were broad enough to include the bicycle and that the person propelling a bicycle drives it as much as one drives a horse or as an engineer drives an engine, for he controls its course and regulates its speed.

The anomolous character of the bicycle and its use, however, necessitates some slight variations in applying the law of carriages and vehicles to it, and it seems that the wheelmen in riding the road partakes somewhat of the nature of a horseman and to some extent reaps the benefits and disadvantages of the immemorial usages and customs applicable to him. For instance, it seems that there is no law requiring a horseman to turn to the right. The rule seems to be that a man on horse-back should be governed by his notions of prudence and should be required to consider somewhat the convenience of vehicles which he meets, depending upon their character. A horseman should yield the traveled track to a vehicle, particularly if it is heavily laden, where he can do so without peril. The facts that bicycles and horses can pass along a track much narrower than that required for carriages, and that they also occupy much less space in length are of weight in determining the duty of the wheelman or rider. So, too, is the fact that his control is more absolute than that of the driver of horses attached to carriages. A bicyclist, however, cannot be forced to ride his machine on dangerous ground, and the cardinal rule, subject to the above considerations, is: "Keep to the right."

In general terms the law of the bicycle may be summed up in the following paragraphs:

All persons have a right to use a public highway in the ordinary manner in safety, and municipal corporations or cities are liable to bicyclists for injuries incurred by reason of defective roads, provided they are not guilty of contributory negligence. But a mu-

nicipal corporation is not an insurer, and all that is required of it is that it shall use reasonable diligence to keep the highway in reasonably good condition for safe travel by the ordinary means or vehicles in general. But the corporation is under no special obligation to wheelmen, and an obstruction or defect which will cause an injury to a wheel or its rider, will not sustain an action unless it is also sufficient to operate as a defect with relation to vehicles in general. Thus, a stone might be disastrous to a bicycle and still have no effect upon a carriage, and in such case the wheelman would probably have no action.

The driver or owner of a vehicle who willfully or negligently causes a colision or damages a bicycle while left standing by the street curb or roadside, would be liable for the injury; but it is the duty of a wheelman to avert collisions if possible, and he cannot recover damages unless he himself was free from contributory negligence in permitting the collision or the injury complained of.

A person injured while committing an illegal act cannot recover therefor; so in States having Sunday laws, a wheelman riding on Sunday for business or pleasure cannot recover damages if injured.

When bicycles are going in the same direction the hindermost may pass the others on either side. But one riding on the left-hand side of the road probably assumes all risks and is prima facie guilty of negligence.

Though in general a bicycle has no right upon the sidewalk, a pedistrian has a right to walk in the highway and may cross the street where he pleases, but he is guilty of negligence which will prevent recovery of damages if he attempts to cross immediately in front of a moving vehicle, and for the purposes of such a case, the fact that the vehicle is on the left-hand side of the road is not alone evidence of negligence to charge the rider or driver.

If the bicyclist rides at an immoderate rate of speed on a highway or street and while so doing injures a pedestrian, he may be liable either civilly or criminally, for his recklessness in riding at such a rate of speed will, in general, be held to supply the want of criminal intent. Thus, it has been held that where a bicyclist kills a human being while going at a dangerous speed he may be convicted of manslaughter. But what is "an immoderate rate of speed" is a question to be determined in view of all the circumstances of the case, as time and place, for what might be a perfectly safe rate of speed upon a contry road might be murderous on a city street.—The Law Student's Helper.

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Bill Nye, who died recently, was admitted to the bar in Wyoming. He gives as a reason for leaving the practice of the law: "Having written some humorous sketches which brought me in some sixty dollars in a single year, it so dwarfed my income from my law practice that I took up newspaper writing." He wrote for several western papers and then started the Boomerang over a livery stable. Over the door of the office was a sign which read, "Twist the Tail of the Gray Mule and Take the Elevator." He named the paper the "Boomerang" because, he said, he never could tell where the thing would land.—The Collector & Commercial Lawyer.

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Hon. J. N. Searles, of Stillwater, was born at Royalton, Ohio, in 1840. He received his education at Hiram College in that state and completed a course of legal study at

Michigan University. In 1869 he opened his law office at Hastings, Minnesota, but in 1882 removed to Stillwater, where he soon built up an excellent practice. He has given special attention to corporation law and, as evidence of his ability, enjoys a clientage composed of the leading lumbermen of the state. Mr. Searles served with distinction during the late war and attained therein the rank of captain.

HON. HENRY CLAY CALDWELL.

The American Law Review in its March, 1896, number, prints a picture and an article by Hon. Henry Clay Caldwell and says of its author:

"For fifteen years he has steadily departed from the old idea, which was once paramount in the Federal judicial mind in railway receivership cases, which placed the rights of the bondholder in the fore and ignored the rights of general creditors, whose labor, skill and materials had maintained the property for the benefit of the bondholders. During that length of time he has steadily refused to grant receiverships over insolvent railway properties, unless the applicants would consent to insert in the order appointing the receiver, a clause providing for the payment of meritorious claims of the character above indicated, and also of meritorious claims arising from the destruction of property by railway torts and the like. In this he has been steadily opposed by other Federal judges and there is a remarkable dictum in an opinion delivered in the Supreme Court of the United States condemning his policy and practice in this regard.*

Judge Caldwell's views on the subject of issuing injunctions against the striking employes of railroad companies and railroad receivers have attracted the attention of the whole country. He has acted, in more than one conspicuous case, upon the principle that an injunction cannot be issued by a court of justice to restrain the employes of a railroad company from quitting work separately or in a body; because to restrain such liberty of action would create a state of slavery. It will be remembered that a prominent railroad attorney procured from a United States district judge within the Eighth Federal Court an order restraining the employes of the receivers of a railway system from striking in view of a contemplated reduction of their wages; and that such proceedings were had that this order came before Judge Caldwell for revision. He said, in substance, that if the railroad property had been honestly managed, no such application would have been necessary; that the wages of the employes of the receivers would not be reduced except upon sixty days notice to them, and not then without an investigation before the court, in which they should have a full opportunity to be heard and to present their side of the case. He said in substance that the receivers, whom he had placed in charge of the property, were the servants of the court, and that the distinguished railroad attorney, who was making this application, was as

*In Kneeland v. American Loan &c. Co., 136 U. S., at p. 97, opinion by Mr. Justice Brewer, the following language occurs, the italics being ours: "Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as a holder of a mortgage on a farm or lot." The bar in the Eighth Federal Circuit understand that this language was directed against the practice of Judge Caldwell above referred to. We may shrewdly suspect that it was to offset these remarks that Judge Caldwell carefully collated and cited in his subsequent opinion in Farmers Loan &c. Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182, all the utterances on this subject of Mr. Justice Brewer while still holding the office of United States Circuit Judge; showing that in one case, where the receivership had been granted on a bill filed by the railroad company against its creditors, receivers' certificates had been issued to take up over $3,000,000, much of it evidenced by the promissory notes of the railroad corporation indorsed by certain rich men, given to raise money to keep the road in operation. The debts evidenced by these notes have been contracted more than six months before the receivership—some of them nearly two years before—and the case consequently did not come within the so-called "six months rule." The idea of a railroad mortgage being the same as "a mortgage on a farm or lot," did not seem to operate here. Of course, no order was ever made by any court making all the unsecured indebtedness of a railroad company preferential. It is perhaps generally known to the profession that the English Court of Chancery refused to appoint receivers of railways, and consequently that this remedy is not known in that country. Our courts have justified the exercise of this jurisdiction chiefly on the ground that a railroad is a public institution, and cannot when embarrassed, be allowed to be impeded by the levying of executions upon its rolling stock or other properties. This very reason assimilates a railroad on land to a ship at sea, and calls, of course, within reasonable limits, for the application of the rule of admiralty law, which requires the liens on a vessel to be discharged in the inverse order of their date; so that, to use an expression frequently found in the books, "a mortgage on a ship takes the fragments."

much the servant of the receivers as were the men who operated the trains upon the road; and he told him, in substance, to go home and attend to his proper functions, and not interfere with the policy of the court toward other employes of the court's officers, the receivers. On another occasion, when an application was made to him for an injunction to prevent the striking employes of his receivers from interferring from the railway property, he refuses it on the obvious ground that no such injunction was needed; since the property was within the custody of the court, and anyone unlawfuly interferring with that custody would place himself in contempt of the court. These instances, which could be greatly multiplied, illustrate the strong sense of justice, united with a large practical common sense, which are the distinguishing features of this great judge.

Though but sixty-three years of age and still strong and vigorous, he has been on the Federal judicial bench for thirty-two years. He is one of the two living Federal judges that enjoy the honor of holding commissions signed by Abraham Lincoln, the other being Mr. Justice Field. He is one of the few surviving members of the republican convention which met in the "Wigwam" in Chicago, in 1860, and nominated Abraham Lincoln for the presidency. He subsequently served with courage and distinction in the Civil War, and resigned the office of colonel of a regiment of cavelry to accept the office of United States district judge for the Eastern district of Arkansas. The appointment was very unpopular in Arkansas. The spectacle of a man getting out of the saddle and ascending the bench was looked upon with general aversion and distrust. But Judge Caldwell kept his court out of politics and administered justice with such firmness, impartiality and sound common sense that he soon acquired an affectionate hold upon the people of that state, and there is no more popular man in it today. He was promoted to his present position, that of Circuit Judge for the Eighth Federal Circuit, to fill the vacancy caused by the promotion of Mr. Circuit Judge Brewer to the Supreme bench, by President Harrison. The appointment was entirely unsolicited on his part and was quite a surprise to him. In fact, he hesitated for some time in accepting it, on the ground that it would take him from his home and oblige him to travel over a vast circuit during a considerable portion of his time. But, with the creation of the United States Circuit Court of Appeals, he became, by reason of seniority, the presiding judge of that circuit, and most of his judicial work is performed at St. Louis, in that capacity,—his associates being Mr. Circuit Judge Sanborn, appointed for Minnesota, and Mr. Circuit Judge Thayer, appointed from Missouri.

In stature, mind and heart, Judge Caldwell greatly resembles Abraham Lincoln. Like Mr. Lincoln, he stands at the remarkable height of six feet four. Like Mr. Lincoln, he carries on his tall frame a very large and massive head. Like Mr. Lincoln, he comes from Virginia ancestors. Like Mr. Lincoln, he has remained, through every elevation of official station in touch and in sympathy with the common people. So extensive have the public acquired a knowledge of his character in this respect, that there is at the present time a strong, though quiet movement on foot, to make him a candidate for the presidency; and there are well informed politicians who do not hesitate to predict that if those who favor the free coinage of silver put in the field a separate candidate, Judge Caldwell will be the man. The following extract from a private letter received by the author of this sketch on the day of this writing, from a well informed politician in Chicago, indicates the nature of this feeling and movement: "There was a gentleman in my office today, who has been in correspondence with a number of prominent men in the west on political matters in general; and he tells me that in every instance Judge Caldwell's name was the one name placed above all others. The silent mutterings that are now abroad in our land are surely going to break forth by the time the St. Louis convention comes together."

Judge Caldwell is not, of course, a party to such a movement. He rightly takes the view that members of the judicial bench should not be active aspirants for political offices. But if such a nomination were to come to him unsolicited, there are those who believe that he would not feel at liberty to decline it. He does not believe in concealment in political thought or action. So far as we are aware, he has never hesitated in giving frank expression of his views on the political questions of the time. We do not undertake to speak for him, but we believe that the public and private utterances of those views which he has repeatedly made will justify us in

stating that they are substantialy as follows: (1) He is in favor of the free coinage of silver at the ratio of sixteen to one, and wholly without reference to any action which other governments may or may not take. He also believes that a law should be passed providing that all debts may be discharged either in gold or in silver at the debtor's option, and making void all contracts by which the debtor waives this option. We believe that we state his expressed view on this subject correctly: it is wholly aside from the purpose of this sketch whether we concur in them or not. (2) He is unalterably opposed to remitting the duty of furnishing the paper currency of the country to private State banking corporations, whether with or without the superintendence of the Federal government. On the contrary he believes that the paper currency of the country should be furnished by the general government alone. (3) He is in favor of the passage and enforcement of just and wholesome laws, protecting the people against monopolies and trusts, and controlling, to this end, the exercise of corporate franchises.

### THE LEGAL PRESS.

The Yale Law Journal for March has an instructive article by Prof. T. S. Woolsey on the Consequences of Cuban Belligerency.

The American Law Register & Review gives the third of a series of papers discussing the important question what sort of interest is sufficient to warrant one's insuring the life of another.

The leading article in the American Law Review for March—April is by Judge H. C. Caldwell on Railroad Receiverships in Federal Courts.

In Illinois they are still worrying over the rule in Shelley's case which is in force there and the Chicago Legal News publishes a paper on the subject by Lessing Rosenthal. After reading it the Journal is glad the rule has been abolished in Minnesota.

***The liability of a member of a building and loan association to assessments made for the purpose of covering losses and equalizing the members, so that they may all go out on an equal footing, is sustained in Wohlford v. Citizens' B. L. & Sav. Asso. (Ind.) 29 L. R. A. 177; and with the case is a note on the liability of advanced members of a building and loan association to assessments for losses.

### LITERARY NOTES.

The Review of Reviews is almost indispensable to the general reader who wishes to keep abreast of the rapidly developing international questions of the day. In the April number there is a full and able editorial discussion of the complicated African situation, which is described as "the drama of 'Europe in Africa.'" The mixed interests and motives of England, Russia, Italy and France in the Dark Continent are clearly set forth. Russia's general attitude toward the European powers is also discussed, and the editor comments briefly on America's relations with Spain, our interest in the Cuban revolution, and the present status of the Venezuelan boundary dispute. In addition to this editorial treatment (in the department entitled "The Progress of the World") the Review presents a remarkably complete survey of the Cuban situation by Murat Halstead, a summary of the best current thought in England on the subject of international arbitration, and a vivid account of the relief work now going on in Armenia. In short, the Review of Reviews records a month's activities in both hemispheres.

Justice Brewer of the United States Supreme Court has, in a recent address, expressed himself as favoring the following reforms in the jury system:

1st. In criminal cases, he believes that unanimity should be required, but that in civil cases the verdict of nine or ten jurors should control.

2nd. Better wages should be paid them, so that it would not be such a pecuniary sacrifice for the business man to serve his country.

3rd. Better accommodations should be furnished them, in the way of chairs on which to sit, rooms in which to sleep, etc.

4th. More power to the judges in pointing out the material portions of the evidence, and in giving them the benefit of his learning and experience, thus making him a judge in fact and not a mere moderator or chairman.

There is a new law paper published in Fargo, known as the Northwest Law Journal. The proprietors are D. W. Clandenen and Carl Pinney. We can but sympathize.

# THE MINNESOTA LAW JOURNAL.

Communications in regard to the Contents of the Journal should be addressed to the Publisher, FRANK P. DUFRESNE, St. Paul, Minn.



## DISTRICT COURT.

### THE PUBLISHER.

of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.

### NEW SUPREME COURT RULE.

The Supreme Court has amended its Rule XI by striking out the word "eighty" and inserting the word "sixty" so that appellant's brief has now to be served twenty days before the beginning of the term occurring more than sixty days after the appeal is perfected instead of more than eighty days. The rule as amended reads as follows:

Paper Books and Briefs—Furnishing Copy to Adverse Party.—At least twenty days before the term of this court at which a cause is noticed for trial by the appellant or plaintiff in error, and in all cases at least twenty days before the first term of this court, commencing more than sixty days after the appeal is perfected or writ of error served, the appellant or plaintiff in error shall deliver to the adverse party a copy of the paper book, and of the assignment of errors, and of his points and authorities; and on or before the first day of the term at which the cause is noticed for trial the respondent or defendant in error shall furnish the adverse party a copy of his points and authorities.

As changed April 7th, 1896.

### SUPREME COURT NOTES.

Motions to advance causes on the calendar will be heard when such cause is of great public importance, or where an immediate trial will prevent further litigation, by filing with the clerk of court an affidavit setting forth the facts upon which such motion is made, and no notice need be served on the adverse party of such affidavit.

Where the records do not contain all the evidence of the case as ordered to be placed therein by the trial judge, they will be returned to the District Court to have the bill of exceptions amended so as to include the amendments and evidence directed by such judge to be incorporated therein at the time he settled the same.

Where an order sought to be reviewed is not a final determination of any of the relator's rights, and application for a writ of certiorari will be denied.

### La Fleur vs. Home Savings and Loan Association. (Hennepin County.)

**Building and Loan Associations; remedy when insolvent**—The remedy given the states through its attorney general and at the instance and upon report of the public examiner, as against such associations violating the law, given by chapter 131 of the laws of 1891, is not exclusive of, although subsequent to, the provisions of chapters 34 and 76 upon the same subject.

**Same**—Neither are the provisions of chapter 131 inconsistent with those of chapters 34 and 76, but are merely additional and connective.

**Same; Test of Insolvency; Impairment of capital**—There is no distinction between such associations and other financial corporations as respects the question of what constitutes legal insolvency; the rule is the same, requiring that it be shown that they have failed to pay their just obligations when falling due, in the ordinary course of business. The fact that the capital becomes impaired, from any cause, does not show a state of insolvency, although thereby the stockholders withdrawing are forced to wait for the sums otherwise payable to them.

**Status of Stockholders:**—Stockholders, borrowing or non-borrowing, are not creditors of the association in any sense of the word; they are members and joint investors in the concern.

This action was brought under Chapter 76, General Statutes 1878, on behalf of cer-

tain of plaintiffs stockholders, praying that a writ of injunction issue herein, restraining the association from exercising any of its corporate rights, and for the appointment of some suitable person as a receiver of all its assets.

Various acts on the part of the association were alleged as a ground for the judgment sought, including the insolvency of the defendant, and mismanagement on the part of the officers and directors. The defendant claimed that the action was improperly brought under Chap. 76, and that the plaintiffs exclusive remedy was to proceed under Chap. 131, Gen'l Laws 1891. Judge Pond, before whom the case was tried, overruled the defendant on this point, but refused to appoint a receiver. The memorandum accompanying the decision is one of much learning and discusses very completely many unsettled questions of contemporary interest concerning the affairs of building associations. It was printed in full in the Minneapolis Times of April 6, 1896, and did the limits of The Journal permit, it would be glad to republish it here. As it is, it has only space to give the following extracts on the question as to what constitutes insolvency in a building association.

Second—It is further urged with great earnestness that the defendant is an insolvent corporation and consequently that the plaintiffs are entitled to the appointment of a receiver.

The solution of this question must depend upon what is meant by the term of insolvency, as applied to building and loan associations. If this term is to be employed in its ordinary commercial sense, the defendant cannot be said to be insolvent. Some courts, however, have attempted to apply a different rule to these associations by holding them to be insolvent when found unable to pay back to their stockholders the amounts respectively contributed by them, but it is not easy to see why this distinction should be made. I think this attempt to adopt a new rule has largely arisen from a failure to properly understand the nature of these corporations. As business, money-making institutions, into which they have grown, they are comparatively of recent origin, and the well adjudicated cases determining their rights and liabilities are few in number.

A careful examination of their by-laws, their articles of incorporation, and the legislative acts under which they operate, will disclose them to be pure financial institutions, as much as any real estate, mercantile or banking concern. They have many features common to ordinary partnerships and corporations, and possess rights and liabilities common to and inherent in each. Some courts, however, have coined the word corporate-co-partnership as properly descriptive of them, and probably that term will best suggest their true character.

Towley vs. Am. Bldg. Soc'y, 61 Fed. Rep, 446.

All members of the association, whether investing or borrowing, contribute to a common fund, which constitutes the capital of the concern, and then share pro rata the profits and losses of business transacted. They must all be stockholders, and hence investors, to the extent of their holdings. The membership, however, may properly be, and generally is, classified as borrowers and investors. The investing members are such as purchase stock for the sole purpose of pecuniary profit, the same as investors in other moneyed corporations. The borrowing members are those who become stockholders upon the installment plan, with the right to offset, for the purpose principally of borrowing money, and consequently hold the double relation of debtors and investors. Neither is a creditor.

An investing member is no more a creditor of the association than is the holder of any other stock a creditor. He is properly owner of the accumulated capital to the extent of his investment, with the added right to share in the dividends earned, and the consequent obligation to bear his proportion of the losses sustained. His rights and obligations in this regard are not different from the holder of any other kind of stock. He is no more warranted in denominating himself a creditor of the association than is a member of any business copartnership by reason of that relation for declaring himself a creditor of his firm.

The three distinctive features of these associations, to-wit, first, that its borrowing members must also be investing members with the right of offset; and second, that all its business transactions to the extent of loaning its funds must be confined to its own membership; and, third, that its stockholders may, from time to

M. B. Webber was born in Raymond, Racine County, State of Wisconsin, and reared upon a farm attending district school until he entered the Racine High School and pre-

pared for college. In 1875 he was graduated from Hillsdale College, Michigan. He then began the study of law in office of Hon. W. H. Yale at Winona, Minn., was admitted in the fall of 1877 and shortly thereafter formed a partnership with Governor Yale which continued under firm name of Yale & Webber until March, 1881. He was elected county attorney of Winona County in 1880 and held the office for two years, since which time has held no public office. He is a Republican in politics but not a politician. He is attorney at Winona for C. M. & St. P. and C. B. & N. R. R. In September, 1895, he formed a partnership with Edward Lees under firm name of Webber & Lees.

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time, under certain rules, have their pro rata share of the capital stock refunded, afford no reason for regarding the stockholders in these concerns in any different light than investors or part owners in the corporation assets. The ancient purpose, to-wit, "mutual aid and assistance in securing homes," for which these building and loan societies were first brought into being, exists now only in name. The idea of "mutual aid or mutual asssistance" is no more dominant between these corporations and their members than it is between other loaning corporations and their borrowers. If there is any difference, it is in favor of the latter. It is a well-known fact that they loan money to their members upon all classes of real estate security, without regard to whether the funds are wanted for the purpose of building a home or dealing in wheat options. The only condition made by them in negotiating a loan is that the security shall be satisfactory. In every instance the borrower becomes a party to a hard bargain. Instead of being "aided and assisted" he is crowded into paying an exorbitant price for the use of the money which he borrows. Being without the protection of the usury laws, he is left to be fleeced much according to his necessities. Under the guise of "premiums" he is compelled to pay almost double the rate of interest exacted by other loaning concerns. These associations are therefore not only purely financial and money-making in their character, but in a great many cases they become extortioners and oppressive in their dealings. It is a grave question whether section 24 of chapter 131, which excepts these associations from the wholesome influence of the usury law should not be regarded as class legislation. Maudkin vs. Am. Sav. and Loan Assn., 65 N. W. R., 645.

If this reasoning is good, it must follow that in determining whether a building and loan association is insolvent, the same rule must be applied as in the case of other institutions. If the association is able to pay its debts and liabilities in the ordinary course of business as they mature, then it must be held to be entirely solvent within the meaning of the law. Every reason that exists in any case for making this the test of solvency, exists in the case of building and loan associations. That they may legitimately incur debts in certain cases and thereby actually become insolvent within the commercial rule, as will be seen further on, there can be no reasonable question.

There remains to be considered, under this head, the rights of withdrawing members. It may be said at the outset that these rights are matters of original contract and must be respected. If he becomes tired of his investment and files his stock for withdrawal, he must wait his turn, as he agreed to do. The association did not contract to refund to him whenever he might ask for it, his pro rata share of its assets. The agreement on the part of the withdraw-

ing member to let his contributions remain with the association until they can be repaid him from a particular fund, is as sacred as the contract on the part of the association to reimburse him out of that particular fund when accumulated. He has no cause of action to recover back what he has paid in until this fund has been accumulated, and then only to the extent of the accumulation.

Neither does the impairment of capital stock give the withdrawal stockholder any right to wind up the association and presently share in its assets. That is made no ground, under the statute, for the appointment of a receiver. This would seem conclusive from an inspection of section 27 of chapter 131, which anticipates such a condition of things and proceeds to specifically point out the remedy therefor. That the legislature intended these associations to continue in business, even after impairment of their capital stock, is the only conceivable reason for the enactment of this statute in its present form. This section, among other things, provides: "That whenever the capital of an association has been impaired by losses in excess of its reserve fund and profits earned, it shall be the duty of the directors to suspend sales of all classes of stock until such losses have been adjusted and distributed pro rata as a charge upon the shares of stock in force.

If the impairment of capital was to be made good ground for winding up the concern, then this provision is a delusion and meaningless. Of course, its enactment must have been for a purpose and that purpose would seem to be to enable these associations to prosecute their business, the same as other financial corporations, even after overtaken by such misfortune. The legislature seems to have taken pains to provide this remedy which, owing to the peculiar nature of the association, would alone equitably permit its business to be continued after losses had broken into its capital stock.

The conclusion is that the commercial rule of insolvency must be applied to building and loan associations the same as to other financial corporations, and further that the impairment of defendant's capital stock, gives the withdrawing members no right to any relief therein.

**Arthur R. Rogers vs. Minneapolis Trust Co., as Assignee of the Northwestern Guaranty Loan Company.**

**(Hennepin County. No. 58268.)**

## Stockholders Liability.

1. Jurisdiction of Court.
2. Stockholders—Non-resident.

A judgment was obtained by the L. Kimball Printing Co. against the N. W. Guaranty Co. for the sum of $46, which judgment was duly assigned to the plaintiff, Arthur R. Rogers, for a valuable consideration, by said L. Kimball Printing Company, and the assignment was duly filed in the office of the District Court Oct. 18, 1893.

This action is to collect the aforesaid judgment.

The N. W. Guaranty Loan Assn. is hopelessly insolvent and the Minneapolis Trust Co. has been appointed as assignee of the said insolvent.

A large number of defendants are named in the complaint, among which are a large number who are non-resident stockholders in the insolvent company. The entire assets of the N. W. Guaranty Co. are in the hands of the Minneapolis Trust Co., assignee, and the real value of the said assets cannot now be determined upon the trial of this action.

Seven or eight hundred creditors of the N. W. Guaranty Loan Co. have filed intervening complaints herein setting up their claims against the aforesaid company amounting to about $2,543,689.29, but the exact amount which should be allowed each person cannot now be determined, nor can the exact value of the assets now in the hands of the Minneapolis Trust Co., as receiver, be ascertained.

ELLIOTT, J.: As conclusions of law, the following named defendants, as stockholders of said N. W. Guaranty Loan Co., and over whom this court has jurisdiction, are liable to the extent of the par value of the amount of stock as aforesaid owned and held by them, for the debts of said company, existing at the time of the appointment of said receiver, to-wit, May 20th, 1893, after deducting the value of the assets now in the hands of said receiver which value shall be ascertained by the court upon the further hearing of this action. * * * (Here follow the names of resident stockholders). It is therefore ordered that the further hearing of this action be and the same is hereby continued to the next gen-

eral term of this court for the purpose of determining the amount of claims to be allowed herein against said Northwestern Guaranty Loan Co., and for such other and further relief as may seem fit and proper. It is further ordered that a receiver be appointed herein upon five days notice to the parties appearing in this action.

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**James Flannagan against The St. Paul City Railway Company.**

**(Ramsey County. No. 64128.)**

## Notice of Motion—Precedence.

Where a motion for new trial is made, and by consent of the parties is set for hearing; and at the close of the hearing of such motion, defendant moves for judgment, such motion for judgment must be made subject to the effect of the plaintiffs motion for a new trial.

C. D. & THOS. D. O'BRIEN, appeared as attorneys for plaintiff. and MUNN, BOYESEN & THYGESON, for defendant.

BRILL, J. "I do not understand upon what basis the jury awarded damages in this case. They might, upon the evidence, have found a verdict for the defendant, but if the plaintiff was entitled to anything he was clearly entitled to a much larger sum than was allowed him by the verdict of the jury. The evidence was undisputed that his hack, which was worth seven or eight hundred dollars, was considerably broken, and the carriage-maker, who repaired the hack, a reputable man, placed the damages to the vehicle at from $300 to $350. The plaintiff testified to injuries to the harness to the extent of $20. He also testified that he was earning $5.00 a day at and prior to the time of the injury, and that he was totally disabled for more than two weeks. It clearly appeared that the plaintiff sustained considerable injuries to his person. He was thrown violently to the ground, was bruised and cut, one ear was nearly torn from his head, he was rendered senseless, and required surgical and medical attendance. No effort was made to show that the injuries to his property or to his person were less extensive or less severe than were claimed by the plaintiff; and yet the jury fixed the entire damages at $136. The verdict was evidently a compromise. It was not based on the evidence, and ought not to be allowed to stand."

"When the verdict came in," * * * "the plaintiff's attorney at once gave notice of a motion for a new trial because of the inadequate and insufficient damages, to be heard upon the minutes. The court consented to entertain the motion, and, by consent of the parties, the hearing of the motion was fixed for Saturday, the 28th inst. Defendant took a stay of proceedings for thirty days subject to the right of the plaintiff to make the motion aforesaid. During the argument of the motion, or at the close, defendant's counsel indicated a desire to make a motion for judgment notwithstanding the verdict, under the provisions of Chap. 320 of Laws of 1895, (a motion having been made at the trial to direct a verdict in defendant's favor) and requested the court to take no action upon the motion for a new trial which would interfere with defendant's rights in this regard. Defendant had given no notice of such a motion. Plaintiff's motion had been set for hearing by consent of the parties and was heard. If defendant desired to make the motion for judgment it might have been proper for defendant to have presented this to the court as a reason why the court should not hear the motion of the plaintiff upon the minutes. The plaintiff having given notice of his motion, and the court having consented to hear it, without objection, and having set it down by consent of the parties, and having heard the motion, the right of defendant to make the motion for judgment would seem to be subject to the result of the plaintiff's motion first made. However, if defendant has the right still to make the motion, it is not intended by what is here said to interfere with such right."

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**Hellen M. Hayes vs. Lizzie Wadleigh, et al,**

**(Ramsey County. No. 64113.)**

## Answer After Default.

Where a plaintiff fails to answer until the time for answering has expired, the court may permit him to answer where such default has been made innocently and in good faith.

Plaintiffs are not obliged to receive a joint answer when one of the defendants is in default.

FRANK E. ENCELL, for plaintiff; and M. L. CORMANY, for defendant.

KELLY, J. "I make this order on the merits, although many merely technical objections have been urged. This action is in claim and delivery, and, from the sheriff's return, the summons and complaint was served on Jan. 30, 1896, upon defendant Wadleigh, and on Feb. 3rd, 1896, on defendant Cormany. It is claimed that on Feb. 20, 1896, an attempt was made to serve a joint answer of the two defendants on Frank E. Encell, plaintiff's attorney. but that his office

in St. Paul was not open, nor was his residence.

It is admitted that Mr. Encell was personally absent from St. Paul at the time, but the decided weight of the testimony is that his law office was kept open from 8:30 A. M. to 6 P. M., of the day in question. The affiant Barnes, who swears it was closed omits to say at what time he called. The court cannot assume that he called between the hours fixed by the statute for such service. See Sec. 5204, Statutes 1894. I am satisfied had he called during business hours he could have served the papers. But in any event the defendants as of right, could not compel plaintiff's counsel to accept a joint answer, when one answering defendant was already in default.

Defendant Cormany swears that immediately on learning from Barnes of his failure to serve the answer on Feb. 20th, he (Cormany) on Feb. 21st, deposited in the post office at Minneapolis, (where he resides,) a copy of said answer under cover, addressed to "Frank E. Encell, Esq., at his office in the city of St. Paul, Minn.," postage paid. He swears also, that he mailed at the same time, the "original answer" to the clerk of this court. In these statements, I am satisfied, to put it as mildly as possible, he is mistaken as to the time of mailing. I am so satisfied, (1st) because plaintiff has produced and identified the original envelope, addressed to Mr. Encell and which covered this answer, and the Minneapolis post mark thereon shows it was mailed "February 24th, 5:33 P. M."; (2nd) because the original answer said to have been mailed to the clerk of this court at the same time, is among the papers, and marked "Filed Feby. 25th"; and (3rd) because on this original answer I find the following endorsements, apparently in the defendant Cormany's hand writing, viz: "Copy duly mailed to Frank E. Encell, Union Block, St. Paul, February 24th, 1896."

On Feb. 24th the order of this court requiring these defendants to appear and be examined touching the whereabouts of the property in dispute was served on the defendants. They then evidently attempted to serve the answer by mail on Feb. 24, but defendants were clearly in default, and this attempted service by mail is insufficient, especially as the answer was promptly returned on Feb. 25th by Mr. Comfort, who had meantime been substituted as plaintiff's attorney.

My disposition is always to relieve against honest defaults and inadvertences. But an inspection of these files shows such utter recklessness of assertion on the part of the defendant Cormany, (who seems to run the whole business,) that I must in common justice hold him and his client to strict practice. There is a great deal in the defendant's moving affidavits not material or relevant to any issue yet before the court; and much that tends to show that these defendants even, if allowed to answer, have no valid defence in this action.

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Jno. Rustgard was born in Norway, October 21st, 1863, came to this country in 1880 and located in Minneapolis, Minn. In 1886 he entered the State University of Minnesota, taking the academic and legal courses,

until the spring of 1890, when he was admitted to the bar. Shortly afterwards he opened a law office in Minneapolis, where he practiced until the fall of 1891, at which time he removed to Tower on the Vermillion Range. During the summer of 1892 he removed to Duluth, where he has been practicing ever since. Up to date he has never lost a case in the Supreme Court.

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Counsel: Now, Mr. Jenks, you say Mr. Joseph Jenks is a distant relative of yours?

"Yes."

"What relation is he?"

"My brother."

"But you just said he was a distant relative?"

"So he is; at present he is residing in India."

**Lake Phalen Land and Improvement Co. vs. Rose Lindeke, et al.**

**(District Court, Ramsey County.)**

## Probate Law—Liability of Heirs for Decedents Debts.

The heirs of a decedent to whom his estate has been distributed, are liable for the payment of an assessment properly made on stock of which he was the owner at the time of his death, when such assessment is made after the distribution of the estate.

DAVIS, KELLOGG & SEVERANCE, for plaintiff; WARNER, RICHARDSON & LAWRENCE, for defendant.

The court's findings of fact in brief were as follows:

OTIS, J.:

1. The plaintiff is a corporation.

2. Its capital stock is $500,000, of which William Lindeke subscribed for $25,000, and received a stock certificate for that amount.

3. During his life time William Lindeke paid in on this stock not more than $2500.

4. William Lindeke died on March 9, 1892, leaving the defendants as his heirs and that probate proceedings were begun on his estate in Ramsey County.

5. On January 12th, 1894, a final decree was entered in the probate court of Ramsey County distributing his estate which amount to several hundred thousand dollars but the stock in the plaintiff company was not distributed because none of the heirs would accept it. After the estate was thus distributed the directors of the plaintiff company made three successive assessments on the stock which William Lindeke owned, these assessments amounting in the aggregate to $3675.

For this sum with interest from the date of the call judgment was sought in the action against William Lindeke's heirs and the court found as conclusions of law that the plaintiff was entitled to such judgment.

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**John Weber, as Executor of the Last Will and Testament of John F. Weber, Deceased, vs. The St. Paul City Railway Company.**

**(Ramsey County. No. 56249.)**

## Evidence—Statements of Sick Person of his Condition—Symptoms and Sensations—Statements of Cause of Condition, and Manner of Injury—Admissibility.

The statement of an injured person as to the cause of his injury and the manner it was received is not admissible in an action by his executor for damages for the injury done him.

J. F. GEORGE, attorney for plaintiff; MUNN, BOYESEN & THYGESON, for defendant.

This was a motion for a new trial after a verdict in the plaintiff's favor. The motion was granted.

BRILL, J. While it is settled that the statements of a sick person of his condition, symptoms and sensations are admissible in evidence, it is as clearly settled that his declaration of past events, his statements of the cause of his condition, and the manner of his injury are inadmissible. Chapin v. Juhab, Marlbro, 9 Gray, 244; Markle v. Bennington, 58 Mich. 160; Roosa v. Boston L. Co., 132 Mass. 439; Dundas v. City, 42 N. W. 1011; Eirkins v. C. Gt. W., 63 N. W. 172.

The admission of the statements of plaintiff as to the manner of his injury, testified to by Dr. McCord, was error.

This testimony was considered very material by the plaintiff's counsel, at the time and it was material. The principal question in the case was whether plaintiff was injured in the collision, and it became very important to show what happened to him at that time. His statement bore directly upon that point, and no other testimony in the case disclosed the same state of facts * * *

Defendant is in position to take advantage of the error. When it became apparent that Dr. McCord was proceeding to give the statement of plaintiff as to the occurrences at the time of the collision, objection was interposed by defendant's counsel, and the attention of the court was called to the question whether such statement was admissible. The point was discussed by plaintiff's counsel and attention was called to the cases of Morely v. Ins. Co., 8 Wall. 397, and Barber v. Merriam, 93 Mass. 322, and the court ruled squarely on the point and permitted the witness to give the statement.

That the point was clearly understood is emphasized by the next question asked the doctor and the ruling made thereon. It was not necessary in order to avail itself of its objection and exception that defendant should have thereafter moved to strike out the testimony—its rights were preserved by its objection and exception. The court in its charge did not exclude this testimony from the consideration of the jury. On the contrary, the language in the charge regarding the testimony of Dr. McCord might have led the jury to understand that they were to consider this testimony, and to this part of the charge defendant excepted.

It is possible though not certain, that if defendant had moved to strike out the tes-

timony the motion might have been granted and it is possible that the court should have stricken out the testimony of its own motion, but it is doubtful whether that would have cured the error, and in any event, in view of the attitude of plaintiff's counsel where that course was suggested by the court, they can hardly complain that the testimony remained in the case. Counsel objected to the testimony being stricken out and declared that the testimony was competent, that they were perfectly willing to assume the entire responsibility for the testimony being in the case, and perfectly willing that defendant should have the benefit in this court or any other of any error in admitting it.

In view of the result which must follow the granting of a new trial the conditions which make it necessary are to be regretted, but I have considered the matter with unusual care and am able to arrive at no other conclusion than that indicated.

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**Cornelia Kelly vs. John Kelly, et al.**
**(Hennepin County. No. 66092.)**

## Contract of Marriage.

Where the parties have agreed to live as man and wife, and do so live, holding themselves out to the world as man and wife, the contract of marriage is complete, as though solemnized by a priest or judge.

W. E. HEWETT, Esq., and A. H. HALL, ESQ., appeared for the plaintiff; and FRED ROGERS, Esq., and B. W. SMITH, Esq., for the defendant.

RUSSELL, J.: The above entitled action came on for hearing before said court at a special term thereof held on Saturday, Feb. 13th, 1896, on defendant's motion for a new trial.

After hearing the argument of counsel and duly considering the same, it is ordered, that said motion be and the same is hereby denied.

The question on which this action stands or falls is whether plaintiff and defendant were wife and husband in May, 1895, when the forcible entry and detainer suit was tried before the justice of the peace. Evidence was taken to determine this question and the decision in the case was based upon it.

There was no formal solemnization of a marriage by any officer, civil or ecclesiastical, under the provisions of the statute. The claim is that there was a common law marriage. Marriage is a civil contract, and the parties may by their own solemn agreement and contract bind themselves to it as fully as though pronounced husband and wife by a priest or judge.

In Hutchins vs. Kimball, 31 Mich., 127, Judge Cooley states it to be the law that where parties agree presently to take each other for husband and wife, whatever the form or ceremony, or if all ceremony be dispensed with, and from that time live togetner professedly in that relation, this constitutes a valid marriage. And the judge adds, "This has become the settled law of the American courts; the few cases of dissent or apparent dissent being borne down by the great weight of authority in favor of the rule as we have stated," citing numerous cases. In Londonderry vs. Chester, 2 N. H., 268, Chief Justice Woodbury says: "The form of the contract of marriage, as a mere civil transaction, is well enough established. Thus, if it be per verba in futuro, and if not afterwards executed an action lies for damages alone, though formerly this kind of a contract was specifically enforced by ecclesiastical courts, and its existence was considered a good cause of a divorce. But if the contract be per verba de praesenti, the marriage is complete; and if the parties being in other respects competent to contract and not being influenced by fraud or force, employ such words, they become, by operation of the contract alone, husband and wife, and are liable to the new duties of their new relation." * * *

The doctrine is recognized by the courts of Minnesota in State vs. Worthingham, 23 M., 528, and in re Ferry's Estate, 58 M., 268, where the words between the parties are spoken in praesenti and the matter is thus culminated, there arises less difficulty than where the agreement is for future performance. But in either case it may be valid as stated by Greenleaf in his work on Evidence, Vol. 2 Sec. 460: "If the contract is made per verba de praesenti, though it is not consummated by cohabitations, or if it be made per verba de futuro and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary."

A contract to marry per verba de futuro, followed by cohabitation is a valid marriage by the common law as understood and administered in this country. 2 Kent Com., 87. Chemey v. Arnold, 15 N. Y., 345.

Am. Decisions, 69, p. 609. 1 Bish. Mar. and Div., Sec. 253.

The evidence in this case is sufficient under the authorities to establish the relationship.

About 12 years ago plaintiff and defendant began going together and soon became engaged to be married. About a year after this and while the engagement was still pending, she permitted him to have intercourse with her which continued. When she became pregnant, he provided a home for her and provided her with support. They moved several times, she going with him, and each recognized the other as husband and wife. He recognized the children to her as his and they have always called him father. There has never been any opposition to the publicity of the fact that they were husband and wife until about the time the action in forcible entry and detainer was commenced. * * *

It would be gross injustice to say to this woman "you have no claim to the property of this man and he can put you out of your home and leave you to struggle without his aid and to fight your way alone stamped as a prostitute and the children as bastards." * * * Every reasonable presumption of law is to be allowed in favor of marriage and legitimacy of children as against concubinage and illegitimacy. State vs. Worthington, 23 M., 528. * * * With plaintiff and defendant, husband and wife, the forcible entry and detainer action could not be maintained. Whether they were husband and wife could not be determined in the action before the justice of the peace.

Equitable matter, which requires affirmative relief to make it a defense per se cannot be interposed in such an action. Petsch vs. Beggs, 31 M., 392. Fox vs. Ellison, 43 M., 41.

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**R. A. Eaton vs. First National Bank of Mandan, North Dakota.**

**(Ramsey County. No. 64049.)**

## Attorney—Special Appearances.

A judgment resulting wholly from the unauthorized appearance or acts of an attorney, is void, and is not prejudicial to the party against whom such judgment was rendered.

Service of summons—Process—Laws of 1895, Chap. 352 relating to service of summons on Lincoln's birthday.

R. A. EATON, ESQ., appeared for plaintiff; and F. G. Ingersoll, for defendant.

This was a hearing on an order to show cause why the service of a summons made an on officer of the defendant on Lincoln's birthday should not be set aside. The application was granted and the following memorandum was filed by

KELLY, J. Two questions arise and must be decided upon this motion. The first is, has there been on defendant's part, in law a general appearance by reason of anything contained in the motion papers? In the affidavits of F. G. Ingersoll, Esq., which forms the basis of the motion it is recited, "that he has been and is retained * * * for the purpose only of entering a special appearance * * * for the purpose of moving to set aside the service of the summons." After stating the grounds of the motion to vacate, the affidavit contains the following: That the time for answering said summons and complaint under the pretended service so had as aforesaid will expire on March 1st, 1896, and that affiant is not authorized to answer or to appear generally in said action and is afraid and believes that unless a stay of proceedings is granted herein, pending the determination of this motion, that plaintiff will enter a judgment against defendant as in his complaint demanded." The paper concludes with a prayer that the service of the summons be vacated "and defendant have such other and further relief in the premises as may be consistent herewith. That in the meantime, and until the further order of this court, a restraining order may issue staying all further proceedings herein."

Upon this affidavit and the exhibits accompanying, the Court made its order to show cause, in the usual form, containing, however, the following: And defendant have such other and further relief as may be proper. That in the meantime and until the further order of this court all proceedings herein be stayed and that the time for answering be extended until the further order of the court."

It will be noticed that the words "in the court's order" which are understood to go beyond the prayer contained in the moving papers. It is unnecessary to discuss the question raised by counsel, as to who is responsible for the wording of the order, the counsel who drew, or the judge who signed. The question is, what is its legal effect when acted on by the attorney for the defendant? Reading the order and the papers on which it is based together, the meaning of the order is to stay proceedings pending the

court's decision on the motion, and, in case the motion should be denied, to reserve the right to reasonably extend the time for answering. What effect, if any, did the obtaining and serving this order have upon the defendant? A judgment if had against this defendant and resting wholly upon the unauthorized appearance or acts of the attorney would be void. See note to Benton v. Lyford, 75 Am. Dec. 146-151. It follows, therefore, that an attorney can bind his client to the the extent of his authority and no further. Of course every presumption in favor of regularity is indulged in, and very clear proof of the lack of due authority is required before relief will be granted. In this case the moving papers disclose not only the limited extent of the attorneys' authority, but negative any right in him to appear generally. I am therefore of the opinion that the defendant is not prejudiced, and cannot be by anything done by his attorney herein beyond what was necessary for his special appearance.

The question remains; is the service of the summons made on Feb. 12, 1896, valid? In my opinion such service or attempted service is, if not void at least voidable. By Laws of 1895, Chapter 355, it is enacted "that the 12th day of February, 1896, and annually thereafter, the anniversary of the birthday of Abraham Lincoln be observed in the state as a legal holiday.

"That no public business except in cases of necessity shall be transacted on that day" and "that no civil process shall be served on that day." It is admitted that the service in this case was made by the sheriff. In attempting to serve defendant with the summons the sheriff acted in his official character as sheriff. His act was public business as if he had levied an attachment or execution. But if it be that the "public business" forbidden does not extend to such service by the sheriff, there remains the inhibition against the service of any "civil process" on that day. It has been decided, I know, that a summons is not "process" within the meaning of Sec. 14, Art. 6 of the constitution. Hanna v. Russell, 12 Minn. 80 Gil. 43. But it does not follow that the words "civil process" as used in this act does not include the summons in a civil action, which has taken the place of the old writ which proceeded from the court and was therefore called process. In Durman v. Bailey, 10 Minn. Gil. 306, the court say of the summons: "It serves the purpose and is in the nature of process, and therefore may with propriety be so termed."

In Malmgren v. Phinney, 50 Minn. 457, the Court discussing a similar prohibition as to May 30th, Memorial Day, uses this language: "The object of the prohibition against service of process on these holidays is to prevent any interference with their quiet enjoyment or observance, either by the intrusion of officers to serve process, or by the parties being compelled to obey them on those days." The subject under discussion was the service of a summons (by publication), and this was held valid because it did not tend to disturb the quiet of the day. See also Gibbs v. Queens Ins. Co., 63 N. Y., 114, where the ordinary summons is referred to as "the process necessary to begin a civil action. A summons in a civil action being in the nature of a process comes under the designation, "Civil process" as used in the law, and cannot be lawfully served on Lincoln's Birthday.

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Charles J. Tryon was born September 8th, 1859, at Batavia, Genessee County, New York, and was educated in the public schools of that village. He commenced the study of

law in the office of Hon. William C. Watson at Batavia in 1877; was appointed to clerkship in treasury department, Washington, and there continued his law studies taking L. L. B. at Law School of National University and L. L. M. at Law School of Columbia University. In the spring of 1886 he came to Minnesota settling at Minneapolis and was for a time in office of Kitchel

Cohen and Shaw. In 1887 he was appointed examiner for Minnesota Title Insurance and Trust Company, shortly afterwards assistant counsel, and in October, 1892, counsel of the company. Recently he has opened offices for general practice.

## MUNICIPAL COURT.

**Julia Ritter vs. Louis Burton and Mary Burton. Municipal Court of St. Paul No. 25030.**

**Fixtures—Removal—Storm-windows.**

This case came on for trial before the court without a jury on the 4th day of February, A. D. 1896. Arthur P. Lothrop, Esq., appearing for the plaintiff, and Messrs. Schoonmaker & Fleming appearing for the defendants.

During the life of the mortgage, the mortgagor put nine storm windows on the mortgaged property. The mortgagor transferred to A and A transferred to the wife of the mortgagor. The mortgage was foreclosed by advertisement, and not being redeemed, plaintiff took possession of said property by his agent.

Said windows were detached from the house in the following spring and stored upon the premises, and were replaced upon the house in the manner described each succeeding autumn and removed and stored in the spring. During the summer of 1895 these windows were stored in a shed upon said lot, and while so stored and about the middle of August, 1895, and prior to the expiration of the time of redemption from said mortgage foreclosure, said windows were removed and carried away from said premises by said Catharine Hogan personally, who placed them over the fence upon the Burton lot, and delivered the same to said Mary Burton, who had prior thereto purchased the same from said Patrick Hogan. As conclusions of law, upon the foregoing statement of facts, the Court finds that the plaintiff, Julia C. Ritter, is entitled to judgment for the return and possession of the property described in the complaint, or for the sum of $18.00 in case delivery thereof cannot be had, and for her costs and disbursements herein.

Let judgment be entered accordingly.

ORR, J. The only question to be determined is whether the storm windows mentioned in the complaint are fixtures.

To constitute a fixture, the thing must be of an accessory character, and must be in some way in actual or constructive union with the principal subject and not merely brought upon it. In determining whether the article is personal property, or has become a part of the realty, there should be considered the fact and character of annexation, the nature of the thing annexed, the adaptability of the thing to the use of the land, the intent of the party in making the annexation, the end sought by annexation, and the relation of the party making it to the freehold.

To make it a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or, at least it must be mechanically fitted so as, in ordinary understanding, to constitute a part of the structure itself.

Wolford vs. Baxter, 33 Minn. 12.

Intention is important to be considered in determining whether an article is or is not a fixture, not, however, that it may, as some few of the cases seem to hold, be in lieu of actual or constructive annexation; but when an article is annexed, it is important to inquire, was it annexed with intent to make it a permanent accession to the freehold, or for only a temporary purpose? And where attachment once made is severed, was the severance intended to be permanent or temporary?

Farmers' L. & T. Co. vs. Mpls. E. & M. Works, 35 Minn. 543.

As between vendor and vendee, the mode of annexation is not the controlling test. The purpose of the annexation and the intent with which it was made, are in such cases the most important consideration.

Mc Rea vs. Cen. Nat. Bank, 66 N. Y. 495.

The doctrine as between vendor and purchaser is the most liberal in making fixtures real estate, and having them pass with the land, and the same doctrine is applicable as between the mortgagor and mortgagee.

Bank of Utica vs. Finch, 3 Barb. Ch. 299.

The general rule as to fixtures between vendor and vendee, mortgagor and mortgagee, is that all annexations to the realty pass by deed or mortgage, unless excepted in express terms from the conveyanc.

Woodham vs. First Nat. Bank, 48 Minn. 67.

It is a general rule that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate; and this rule, however modified between landlord and tenant, remains in full

force as between vendor and vendee.

Smyth vs. Sturges, 15 N. E. 544.

Fixtures attached to the realty after the execution of a mortgage on it become a part of the mortgage security, if they are attached for the permanent improvement of the estate and not for a temporary purpose, or if they are such as are regarded as permanent in their nature.

Jones on Mortgages, Sec. 436.

If fixtures be added to the property by a tenant at will of the mortgagor, after the mortgage, the right to remove them is determined by the rule which prevails as between mortgagor and mortgagee. They cannot be removed without the consent of the mortgagee, nor does it avail the tenant that he annexed the fixtures under a special contract with the mortgagor.

I Jones on Mortgages, Sec. 439.

### IN JUSTICE COURT.

Justice Smith, of Minneapolis, in the case of Blickensderfer Typewriter Co. vs. Tollefsen, decided a point of law of interest to lenders of property. The decision is to the effect that a police officer of the city serving a municipal court process, is not entitled to the exemption from suit for conversion which is given to the sheriff who levies upon property not owned by the party against whom the process is issued, and that a police officer acts at his peril in doing so.

### NOTE AND COMMENT.

A recent decision by a Chicago judge will be of interest to both lawyers and clients as it upholds a very important precedent. A woman began suit against a street railway company for damages because of personal injuries. She employed an attorney to fight her case, and agreed that if he succeeded in getting a judgment in her favor he should receive 45 per cent. of the amount recovered. Should the case go against them, the attorney was to get nothing for his pains. The matter came to trial, and in the lower court a judgment for $1,700 rewarded the efforts of the attorney. The defending railway company appealed to a higher court, and the lawyer of the plaintiff asked to be made a party because he had an interest in the judgment. But before the case came to a hearing in the Appellate Court the railway company effected a compromise with the woman by paying her $1,000. This she pocketed entire and refused to give the lawyer his fee. The attorney then went into court and asked that the railway company be compelled to pay him 45 per cent of $1,700, the amount of the original judgment. The Court decided in his favor, the railway company being ordered to pay him $765 and the costs of the proceeding.—American Lawyer.

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The first actual transfer of land at Chicago under the Torrens system was made a few days ago, and affords an opportunity for comparison of the old and the new way. Under the former mode there would have been a charge of $25 to $100 for examination of title, lawyers' fees to pay, a risk of flaw in the title would also have existed, and to guard against this, many purchasers would have had the title guaranteed by a company which insures such risk. Under the Torrens plan, the purchaser paid $3 to the county treasurer for having the transfer entered on the books, and the State guarantied the title. The previous outlay on the part of the seller was $15 for examination of title, $6 for the indemnity fund held by the State, and $2 for the certificate. —Albany Law Times.

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Utah at a recent election ratified the constitution framed by its convention. The territory will therefore become a state as soon as the necessary formalities can be complied with. The new state comes into the Union with new ideas in regard to the jury system. The Grand Jury system is practically abolished. A provision of the constitution desires the judge to convene such a body when he may deem proper but it abolishes it in all other cases. The constitution drops the traditional number of the ordinary jury, making it to consist of eight men instead of twelve; three-fourths of the eight are declared sufficient to make a verdict.

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University Education.—"For the highest success at the English bar," says one writer, "a university education is regarded as essential." What, then, about the Lord Chief Justice of England, who was a solicitor first and a barrister afterward? In the ordinary sense of the term, Lord Russell had no university education. And what, again, about Sir Edward Clarke, of whom the same may be said? A university education affords advantages to members of both branches of the profession, but to talk about it being essential either for one or the other is simply silly."—The Brief, (England).

## PERSONALS.

St. Paul—

L. E. Jones has removed to St. Louis, Mo.

Louis Fockler has moved his office from the Lumber Exchange to 816 New York Life Bldg.

Attorney F. A. Hutson, who has been troubled for the past four years with tuberculosis in the right arm, has had an operation performed removing the arm above the elbow.

Minneapolis—

John H. Robertson and Stephen Mahoney have moved into the offices formerly occupied by Uhland & Holt, in the Guaranty Loan Bldg.

John Day Smith began his lectures on Constitutional Law, before the University Law Class, on April 13th.

Joseph Cohn and D. W. Evans have opened an office for the practice of law, in the Temple Court Bldg.

H. J. Fletcher has moved his law office from the Oneida Blk to Lumber Exchange Bldg.

Chas. W. Somerby has moved from the New York Life Bldg. to the Guaranty Loan Bldg.

Judge Elliott is lecturing to the law students on Corporation Law.

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## LOST BOOKS.

St. Paul—

T. T. Fauntleroy has lost vols. 26 & 27, L. R. A. Who has them?

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Hadley and Armstrong have lost vol. 93, U. S. Sup. Court Reports. Please return.

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P. J. McLaughlin has missing vol. 6, Cushing; 103, 105 Mass.; 17 N. Y. Who has them?

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Minneapolis—

Shaw & Cray have lost vol. 1, Abbott's Forms, and J. B. Atwater has also lost vol. 1, Abbott's Forms. If you have borrowed these books, kindly let us know where we will find them.

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A case of some interest is that of Nix v. Goodhile, 63 N. W. Reporter, 701. In this case the Supreme Court of Iowa holds: "That an action for damages will lie against one who maliciously, and without probable cause, garnishes the exempt earnings of his debtor, knowing them to be exempt, with the purpose of harrassing the latter's employers, and thereby compel him to pay the debt out of such exempt earnings in order to avoid discharge."

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German Gender.—The following colloquy in court is quoted from the Law Notes, London: "Moses. (Interrupting the witness): He no speak truth. He is his wife—The judge: What!—Moses: His wife is Breitstein's son. (Laughter)—The Judge: You mean he is Breitstein's son-in-law?—Moses: Dot is so."

This brings to mind a long-remembered threat of a German respecting an elopement, which was in these words: "If my vife runs avay mit anoder man's vife I vood shake him oud of her breeches, if she vos mine own fadder."

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"Only one thing, your honor," replied the foreman. 'Was the prisoner's attorney retained by him or appointed by the court?' "

" 'The prisoner is a man of means,' said the judge, 'and hired his own attorney.' "

"I could not see what bearing the question had on the evidence," continued the perspiring lawyer; "but ten minutes later in filed the jury, and what do you think the verdict was?"

"What?" asked his companion?"

"Why, not guilty, on the ground of insanity."

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A Texas paper says that in one of the earliest trials before a colored jury in Texas the twelve gentlemen were told by the Judge to "retire and find the verdict." They went into the jury room, whence the opening and shutting of doors and other sounds of unusual commotion were presently heard. At last the jury came back into court, when the foreman announced: "We hab looked ever' whar, Judge, for dat verdict—in de drawers and behind de doahs, but it ain't nowhar in dat blessed room."

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A prisoner was brought before a Dutch justice in eastern Pennsylvania charged with stealing.

"Guilty, or not guilty?" demanded the justice.

"Not guilty, your honor."

"Den go away,—vat you vant here? Go apout your pishness!"

...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.**

### AGISTERS' LIENS.

At common law, keepers of livery or boarding stables and other persons had no lien for their charges and expenses in keeping, caring for or supporting live stock; and the lien for work and labor expended upon any personalty depended on possession of the property. It can only arise by statutory enactment or special agreement.

The legislature of Minnesota, by Laws 1885, chap. 81, created this lien. The statute now in force is Laws 1889, chap. 199, which amended and repealed all former inconsistent legislation. It reads as follows: "Sec. 2 * * * any keeper of a livery or boarding stable for horses, mules, cattle or stock, and any person who pastures or keeps the same, at the request of the owner or lawful possessor thereof, shall have the same lien for his charges for * * * keeping, supporting and caring for such property, and the same right to hold and retain possession thereof, and the same power of sale for the satisfaction of his reasonable charges and expenses, upon the same conditions and restrictions as provided in the preceding section."

The conditions and restrictions are that if the charges and expenses "are not paid within three (3) months after the labor is performed or the mate-

rial furnished" the lien holder "may proceed to sell the property at public auction by giving public notice of such sale by advertisement for three (3) weeks in some newspaper printed and published in the county, or if there is none, by posting up notice of such sale in three (3) of the most public places in the county three (3) weeks before the time of sale."

The Supreme Court in Smith v. Stevens, 36 Minn. 303, settled the question as to the priority of this statutory lien over a previously executed chattel mortgage in the affirmative, and declared the statute constitutional. It also decided in Ferris v. Schreiner, 43 Minn. 148, that this lien depended upon possession of the property at the time of enforcing the same. Other decisions hors de propos are 45 Minn. 222; 63 N. W. Rep. 103.

In view of these decisions, the legislature affirmed the former and reversed the latter decision by enacting Laws 1891, chap. 28, which reads substantially as above, but adds thereto the words "every farmer" * * * "vehicles or other property used in connection with such * * * or vehicles * * * and providing that the person entitled to the lien may file with the clerk of the town, city or village where such person resides, notice of his intention to claim and enforce the lien at any time while he keeps the property, or within five (5) days after ceasing to do so by filing in the same office a verified itemized statement of his lien; also, that if such charges are not paid within thirty (30) days after they become due he may sell the property at any place within the county where the same has been kept," by giving public notice of such sale and the time and place thereof, and the amount claimed "at least ten (10) days before such sale by advertisement in some newspaper, etc., as in the former statute.

But this latter statute is not a substitute for nor amendatory of the former, nor does it contain a repealing clause of any kind.

Starting with the principle of law that all statutory requirements must be strictly complied with in availing oneself of statutory benefits a lien holder in confronted with the following queries:

(1) Does Laws 1891, ch. 28, as regards the class of persons recited therein, repeal by implication that part of Laws 1889 ch. 199 relating to this class of lien-holders?

(2) Or is it merely amendatory thereof?

(3) When do the charges become due, 3 months after demand, or 30 days after demand, or 3 months after filing the statement or 30 days thereafter.

(4) How is the lien claimant to retake possession of the property under Laws 1891, ch. 28, sec. 2, by replevin or under the lien statement filed, (treating it as a chattel mortgage)?

(5) Is it the owner of the property or the lien claimant who shall give notice of the sale for charges to a prior chattel mortgagee under section 3 Id., or does it refer to another independent sale by the owner?

(6) Or are the words "mortgage" and "lien" used synonomously?

Repeals of statutes by implication are not generally favored, and after careful reading of the decisions of our Supreme Court upon this point, Moss v. City of St. Paul, 21 Minn. 421; Gaston v. Merriam, 33 Minn. 271; Smith v. County of Nobles, 37 Minn. 535; State v. St. P. M. & M. Ry Co., 40 Minn. 353; State v. Archibald, 43 Minn. 328, it would seem that Laws 1891, ch. 28 is in operation amendatory of the class of persons who are allowed a lien, and also of the time when the charge becomes due, yet failing to accurately specify it, and also of the time and manner of advertising the sale. It is an instance of a good intent thwarted by lack of invistigation or understanding of prior enactments.

Will the framer of this statute, or those who voted for it kindly answer these questions, or will some philanthropic lien claimant or embarrassed horse-owner with a store of pugnacity or a surplus in his treasury, commence litigation to have these questions decided by the court of last resort?

M. S. SAUNDERS.

William C. White was born in Racine, Wisconsin, March 12th, 1853, in which city he received a common school education, graduating at the high school in 1871. He entered the University of Michigan, Scientific Department, in 1873, but after reaching

the Junior year, his natural inclination took him from that institution to the Law Department of Union University, at Albany, New York, where he graduated in 1876.

After a year spent in a law office in Albany, he returned to his boyhood's home, where he opened an office in 1877, and where he acquired a small practice as a lawyer. In 1880 he moved to Jamestown, North Dakota, where he became one of the prominent members of the bar of North Dakota, his practice extending over the line of the Northern Pacific Railroad, from Fargo to Bismarck. He was there associated with Oliver H. Hewit, as senior member of the law firm of White & Hewit, and attributes much of his success to that association.

In 1887, he moved to Duluth, Minnesota, and in 1890, Mr. Hewit followed him there, the firm relations having been meantime unbroken, and it was not until three years later that ill health of Mr. Hewitt obliged him to dissolve the co-partnership, Mr. Hewit removing to Hollidaysburg, Pennsylvania. Mr. White retains the business of the old firm, which is a large and successful one. He is known especially as a safe counsellor and office lawyer, his rule being to avoid litigation rather than encourage it; but is a good fighter in court when fighting is necessary.

### PREVIOUS OCCUPATIONS OF FAMOUS LAWYERS.

The fact that Mr. Finlay, Q. C., the newly-appointed solicitor-general, was, before he became a law student, for some years a practicing surgeon, will recall the circumstances that some of the most eminent ornaments of the bench and bar have been originally designed for other avocations which in some instances they have actually followed.

Thus, Peter King, who was appointed to the lord chancellorship by George I., was a son of a grocer in the city of Exeter and spent some years behind his father's counter. "Who," writes Noble, King's biographer, "who had stept into the shop of Mr. Jerome King and had there seen his son up to the elbows in grocery, would have perceived in him a future chancellor of Great Britain?" So, too, another lord chancellor, Lord Erskine, was, before his call to the bar, a midshipman in the royal navy for four years, and subsequently for seven years a subaltern in an infantry regiment; while a third lord chancellor, Lord Brougham, migrated from the Scotch to the English bar, to which he was called at the mature age of nine and twenty; and a fourth holder of the great seals, Lord Truro, better known as Sir Thomas Wilde, was for thirteen years a practicing solicitor, not being called to the bar till he had entered on his thirty-fifth year.

At least one chief justice of England, Sir Charles Abbott, afterward created Lord Tenterden, was on the point, before his call to the bar, of taking holy orders in the Angelican communion; as were, before their call to the Irish bar, the late Right Hon. William Brooke, a master in chancery, and one of the greatest equity lawyers of the past generation—and the Hon. Francis A. Fitzgerald, whose brother was a bishop of Killaloe, who was for twenty-three years one of the barons of the Irish Court of Exchequer, and who retired from the Irish bench in 1882,

amid universal regret, almost immediately after he had been offered and had declined the great office of Lord Chief Justice of Ireland. So, too, the late Mr. Justice O'Hagan, the judicial member of the Irish Land Commission, and the Right Hon. The MacDermott, Q. C., who was attorney-general for Ireland in the late administration, were both educated for the Roman Catholic priesthood.

At the Irish bar there were in comparatively recent years two instances of men who attained great eminence, having followed for many years other callings. The Hon. Charles Burton, who was a justice of the Court of Queen's Bench in Ireland from 1820 till his death in 1847, came to Dublin from England and worked for ten years before his call to the bar as clerk in an attorney's office. The late Mr. Gerald Fitzgibbon, an Irish master in chancery, was, till his approach to middle age, the chief clerk in a distillery. Mr. Justice Burton, before whom Mr. Fitzgibbon was examined as a witness in a complicated matter of account, was so much struck by his ability that he recommended him from the bench to get called to the bar, instancing his own case.

The most notable illustration, perhaps, of success attending the abandonment of the bar for another calling is that of the late Right Rev. Cannop Thirlwall, the eminent historian of Greece, who was for many years bishop of St. David's. Dr. Thirlwall was called to the bar, and for several years before his ordination followed assiduously, and with considerable success, the practice of the profession.—Law Times.

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The attorney general has prepared a long and very exhaustive brief on the section 30 case, known as the "State of Minnesota v. William Craig."

The case is pending before the secretary of the interior upon appeal from the ruling of the commissioner of the general land office, denying the application of the state of Minnesota for a hearing before the local officers upon allegations that the land is swamp land and overflowed. A decision in this case will be reached in a few weeks.

### PATENT INSIDES.

Mortgages—Notice of foreclosure Newspaper—Place of Publication—Statute of Frauds—Constructive Trusts.—A newspaper named the "D. Rock" was one of several newspapers, all having the same contents, but different headings and date lines, according to the different towns of their destination, printed in F., and entered at the post office there, and from there sent to the towns whose names they bore respectively. The D. Rock was sent by mail to its subscribers, and by express, for sale and distribution, to an agent at D., who kept an office called the "Office of the D. Rock"; but the publishers of the paper paid no office expenses there, and the agent got his pay in commissions on sales. It was held, that the paper was not published at D., within Pub. St. c. 181, § 17, requiring notices of mortgage foreclosure sales to be printed in a newspaper, if there be any, published in the town wherein the mortgaged premises are situated. Rose v. Fall River Five Cent Savings Bank (Mass.) 43 N. E. Rep. 93.

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### CAN USE CREDITOR'S BILL.

While it deems it against public policy that a municipal corporation should be harassed with garnishment proceedings, the supreme court of Illinois decided, March 28, 1896, in the case of Addison Pipe & Steel Co. v. city of Chicago, that a city may be made a party to what is called a creditor's bill. Here, the person who owes the debt, and against whom a judgment therefor has been secured, is made a necessary party, jointly with his alleged debtor—the city or other municipal corporation. He must protect his own rights. The city is only required to make discovery as to whether or not it holds money due and owing him. If it denies the alleged fact that it owes him anything, that is the end of the litigation, so far as it is concerned. If, on the contrary, it answers that it is indebted to him, it is only required to pay such indebtedness to the complainant, or into the hands of a receiver of the court appointed for that purpose. The court adds, that it sees no reason why,

In order to protect an honest creditor, city officials should not be required to undergo such light inconvenience.—Business Law.

### LAWYERS.

Below are given some of the lighter extracts from an address delivered before the law students of Maryland University, by Mr. Justice David J. Brewer, who is as keen as a humorist as he is great as a judge.

"It is a blessed thing to be a lawyer, providing always that you are of the right kind, and I take it no one is permitted to graduate at this law school unless he is of the right kind. It is the rule of our profession to work hard, live well and die poor. And to such a life I most cordially invite you.

"Never sign your own name as plaintiff or defendant, but only as counsel.

"One class of persons would as soon expect to find a baby that never cried, a woman that never talked, a Shylock loaning money without interest, a Mormon advocating celibacy, a gentleman without a cent opposed to the income tax, or a candidate for the presidency hurrying to express himself on the silver question, as an honest lawyer.

"I admit that lawyers do not support themselves by planting potatoes or plowing corn, though there is many an attorney who would bless himself and bless the Bar and bless all of us if he struck his name off the Court-rolls and entered it on the books of an agricultural society.

"We are not as a profession, physically speaking, like Pharoah's lean kine. Those pictures which Dickens, that prince of slanderers, and others like him, draw and call attorneys, are nothing but atrocious libels.

"From time immemorial, size physical, as well as mental, has been considered one of the qualifications of a Judge. Justice and corpulence seem to dwell together. There appears to be a mysterious and inexplicable connection between legal lore and large abdomens. I do not know why this is, unless it be that in order that justice may not easily be moved by the foibles and passions of men she requires as firm and as broad a foundation as possible.

"George Washington's hatchet is not popularly regarded as one of the heirlooms of the legal family. I can say that for over thirty years I have been a judge, and of the many thousands of lawyers who have appeared before me I have never found but a single one upon whose word I could not depend.

"While other professions and vocations are constantly putting on striped clothes, how seldom does any lawyer respond to a warden's roll-call!

"The business man needs us to draw his contracts, the laborer to collect his wages, the doctor to save him from the consequence of his mistakes, the preacher to compel the payment of his salary, the wife to obtain a divorce and the widow to settle her husband's estate. The people need us in the Legislature and in Congress to hold the offices and draw the salaries. Every convention and public meeting needs us to fill the chair and occupy comfortable seats on the platform. Every man accused of crime needs us to establish his innocence through the verdict of twelve of his peers. In short, it may be said of us, in the language of the itinerant vendor of soap, 'everybody needs us,' and, like that very useful article, nothing tends to keep society so clean as the presence of a lawyer.

"Blot from American history the lawyer and all that he has done and you will rob it of more than half its glory. Remove from our society today the lawyer, with the work that he does, and you will leave that society as dry and shifting as the sands that sweep over Sahara."

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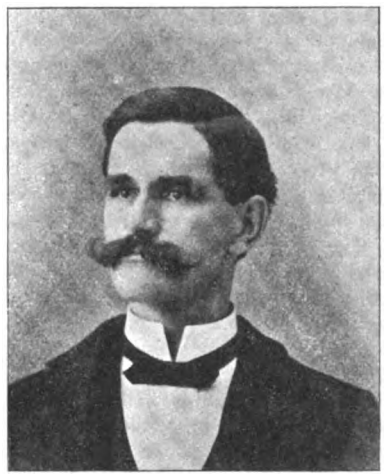
On the much disputed question as to deductions from a claim against an insolvent for collections made from collateral security, the supreme court of Illinois decides, in Levy v. Chicago Nat. Bank, 158 Ill. 88, 30 L. R. A. 380, that a secured creditor can prove his claim and participate in dividends only for the balance of his claim after deducting collections from collateral up to the date of filing his claim and making his preliminary proofs, but payment upon collateral received on the day of proving the claim need not be deducted.

JOHN McKENZIE, of Lake Benton, Minn., was born at Buffalo, N. Y., Sept. 20th, 1862. In the fall of 1881 he



came to Minnesota where he alternately taught school and studied law until June, 1886, when he was admitted to practice at Marshall. In October, 1886, he located at Lake Benton where he has since practiced his profession. He has been connected with all the important litigation in his county since locating there. He is also a director of the First National Bank of Lake Benton.

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**NEED AN OFFICER OF A CORPORATION BE A STOCKHOLDER.**

It is stated in Morawetz on Private Corporations, Sec. 505, and other text writers, that it is not necessary that a director should be a shareholder, unless this be expressly required by the company's charter. This rule has also been held by the Supreme Court of Illinois.

The point, however, is not so clear whether an officer of a corporation, when the office is required by statute, can act as such without being a stockholder, because an implication may arise that he cannot be a good statutory officer without being at the same time a stockholder. Still, the point is doubtful, in view of the decision of the Supreme Court of Florida in Florida Savings Bank and Real Estate Exchange v. Rivers, 18 So. Rep., 800.

In that case, upon a foreclosure of a mortgage, the evidence showed that the officer who had taken the acknowledgement was the vice-president of the corporation, (the grantee in the mortgage,) and the trial court held, as a conclusion of law, that, by reason of his office, he must have been a stockholder and a party in interest. The conclusion was reached below that the execution of the mortgage was void, because made before an officer interested in the instrument. The Supreme Court held that the trial court was in error in concluding that because it was shown that Rollins was vice president he must, therefore, be held to be a stockholder. It was conceded in the case that the bank was a corporation organized under the laws of the State of Florida, and no provision was found in the statutes applicable to the organization of the bank requiring the vice-president to be a stockholder therein.

"In the absence of any showing as to the eligibility of the vice-president, as may be required by the articles of incorporation or the by-laws of the bank," said the Court, "we do not see that it can be assumed, as a matter of fact or law, that, because Rollins was vice-president, he was also a stockholder. Without such an assumption it cannot be said that Rollins, the vice-president, was interested in the mortgage, and his certificate of acknowledgment for that reason void."

"It is clearly established that the grantee in a deed or a party interested therein cannot take an acknowledgment of the deed; but in the present case the Court deemed it unnecessary to say what would have been the effect of the acknowledgment taken by Rollins, if it had been sufficiently shown that he was a stockholder in the bank. On the record before the Court, it was held error to assume that he was a stockholder, and, therefore, interested in the mortgage.

In Ohio it has been held (State v. McDaniels, 22 Oh. St., 354), that it was not necessary for directors to be stockholders in a corporation, existing under a statute requiring only that they should be residents of the State. The decision was that the stat-

ute only required the directors to be residents of the state, and, in the absence of a statute requiring it, the discretion of the stockholders in electing directors was not limited to stockholders.—National Corporation Reporter.

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**URGING THE JURY TO BE IMPARTIAL.**

In a life insurance case a Federal judge recently charged the jury as follows:

"Now, gentlemen of the jury, I try to close my eyes, as well as I can, to the fact that a woman and child have any interest whatever in the result of a controversy when it is brought into court. I cannot always do it. I don't suppose you can. It is not expected. If a man can do that, he is no better than a brute. He is as bad as the heathen is supposed to be, and worse than the horse thief is thought to be. If he close his eyes to that fact, lose all sense of decency and self-respect, he would not be fit for a juror. But so far as it is possible for you to do that, you do so, and decide the case precisely as you would if it was between man and man, or between a woman and a woman." And yet the insurance company took an exception to the charge.—Case & Comment.

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**WHO IS THE MINNEAPOLIS SHYSTER?**

A printing house in Buffalo, N. Y., had occasion to collect a debt of a shyster lawyer in Minneapolis. The amount was less than $50, and the fellow made up his mind that if he stood out about it he would escape payment. So when the bill came in he returned it, saying that he wasn't prepared to pay it. Of course, at that distance, there was no thought of bringing suit, for it would cost several times the amount. The house procured a list of the Minneapolis banks, and began to draw on the lawyer through them. The draft came back unpaid every time, but that had been expected, and the business went on. There are twenty-two business banks in Minneapolis. When the list had been exhausted Dun's and Bradstreet's were added, and preparations were made to go through the whole list again. The lawyer appears to have had some credit at home, and he did not care to lose it, so when he found that the round was to be repeated he offered to pay half of the debt, but was told that it was all or nothing, and the demands went on. After the drawings had gone about half way through the bank list for a second time a check came for the full amount. One over-smart lawyer had been beaten. —Publisher's Guide.

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A man sent this letter to a bookseller who sent in his account for a book some time before it was delivered. "I never ordered the book. If I did, you did not send it; if you sent it. I never got it; if I got it, I paid for it; if I didn't, I won't."—Catholic Register.

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The word "heirs," in a policy of life insurance payable to "heirs and assigns," is held in Hubbard, P. & Co. v. Turner (Ga.) 30 L. R. A. 593. to mean next of kin according to the statute of distribution, where the insured left neither wife nor child. The meaning of this word in an insurance policy is the subject of annotation to the case.

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Garnishment of a debt due to a nonresident creditor, in the state to which the debtor resorted merely for the purpose of doing business through agents, and when the debt arose on the contract of another state, is held invalid in Reimers v. Seatco Mfg. Co. (C. C. App. 6th C.) 30 L. R. A. 364, on the ground that the debt has no situs for the purpose of garnishment in the state where the proceedings are brought.

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What constitutes a "subscriber" of a newspaper within the meaning of a statute requiring the selection for official newspapers of those having the largest number of bona fide yearly subscribers within the county is considered in Ashton v. Stoy (Iowa) 30 L. R. A. 584, in which a person is held not to be a subscriber when a paper is sent him without his knowledge or consent, either express or implied, although it is done under a valid contract with a third person.

# THE MINNESOTA LAW JOURNAL.

Communications in regard to the Contents of the Journal should be addressed to the Publisher, FRANK P. DUFRESNE, St. Paul, Minn.



## DISTRICT COURT.

**THE PUBLISHER**

**of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope thd tthis means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.**

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**A CORRECTION.**

Fred Davis v. Board of Co. Com., St. Louis Co.

In the report of the above entitled case in the February number of the JOURNAL there were two errors inadvertently made.

In the last paragraph in the first column on page 36 the sentence, "We think that the provisions of the law in regard to boundaries between private owners and making permanent monuments on their corners do not fall within the police power of the state," should have read "do fall within the police power of the state."

And in the second column on the same page, seventh line. the quotation should have read, "The safety of the people is the supreme law of the land."

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**Louise Hortenbach vs. Fred Blesi et al.**
**(Hennepin County. No. 67719.)**

### Sale of Property Pending Suit Involving the said Property.

Lawrence, Truesdale and Torriston appeared as attorneys for plaintiff and A. L. Brice for defendant.

This case was heard on a motion by plaintiff for an order restraining the defendants from selling, on execution issued on a judgment of plaintiffs against her husband, the property discribed in the complaint until the determination of this action. Motion denied.

The property in question was conveyed by Louise Hortenbach and Frank J. Hortenbach to Emma K. Witchie, who conveyed again to Louise Hortenbach.

In a certain action pending in the District Court, Fred Blesi v. Frank J. Hortenbach defendant, judgment was entered against said Hortenbach upon a claim accruing after the aforesaid transfer of the property above described. Execution was issued and placed in the hands of John E. Holmberg, sheriff of Hennepin County, to proceeded to dispose of the property according to law providing for sale of property on execution.

SMITH, J. It seems to be the well settled law of this state that the sale of the property in question, of Frank J. Hortenbach's interest therein, on an execution issued on a judgment against him at the date named in the complaint would not cast a cloud on the plaintiff's title, or a stranger to the title, and the deed of the sheriff in this case could have no effect on her title as the title would appear of record without the aid of extrinsic evidence.

Baldwin v. Canfield, 26 Minn. 43.

Gelman v. Van Brunt, 29 Minn 271 and cases cited in opinion.

Maloney v. Flanegan, 38 Minn. 70 and 71.

**Nathan Ford Music Co. vs. E. Stierle.**
**(Ramsey Co. No. 64679.)**

## Forfeiture—Action on Note After.

After plaintiff has elected to enforce a forfeiture of goods, and has taken possession of the same, he cannot sue on the balance of the note given in payment for the property so forfeited.

Lewis C. Gjertsen, for plaintiff, and Williams, Goodenow & Stanton, for defendant.

The Nathan Ford Music Co. sold to defendant a piano on conditions that it should remain the property of the plaintiff until paid for, and "in case of default herein, or attempt to sell or remove said instrument, by the undersigned, all payments made on this contract shall be forfeited, and possession of said instrument given to said Nathan Ford Music Co."

Defendant was in default in her payments and plaintiff took possession by reason of said default and forfeited defendant's right under said contract.

This action is to recover payment on the note given in payment of said piano.

OTIS, J. As conclusions of law I find that defendant is entitled to judgment of dismissal on the merits and for costs and disbursements.

As I interpret the contract in suit providing as it does for a forfeiture of all payments made thereon in case of default, if plaintiff elects to retake the piano by reason of such default and to enforce such forfeiture (and taking the piano is part thereof) it cannot afterwards insist on further payments under the contract. The default when so taken advantage of works a forfeiture of possession and of payments therefore made and as an incident releases defendant from all further payments. If there were any further liability on the part of defendant to make payments then she would be liable for the whole amount of the contract, $750, for all payments made prior to default are forfeited, and no such construction is to be tolerated.

Plaintiff may waive forfeiture and enforce the payment, or stand on the forfeiture and waive further performance. It cannot do both.

* * *

I find plaintiff took the piano by reason of defendant's default. Neither the pleadings nor stipulated facts allege that the piano was so taken on default, still there was a default and a right to take it by reason thereof and no other reason is in evidence. I feel justified in inferring that it was taken under this right.

* * *

The fact that possession was taken by defendant's consent does not change the situation. In signing the contract she consented that plaintiff might take possession on default as an incident of forfeiture, and she could not lawfully do otherwise than consent to the taking.

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**In the matter of the estate of Carrie Rose Fradenburgh, deceased. Appeal of Harvey S. Bedell, executor, from an order of the Probate court allowing the claim of E. A. Fradenburgh.**
**(Ramsey County. No. 63712.**

## Expense of Last Sickness.

A husband is not entitled to reimbursement out of the wife's estate for expenses of last sickness of the wife.

Flandrau, Squires & Cutcheon, for appellant, and Jno. V. J. Dodd, for claimant.

After hearing counsel it is orderd, that the motion of said claimant is denied, and the motion of said appellant is granted.

And it is ordered that judgment be entered disallowing the claim of Edgar A. Fradenburg for $116.62 for the expenses of the last sickness of said deceased, and reversing the order of the Probate Court appealed from.

BRILL, J. The only question raised is whether the husband can recover from his wife's estate the expenses of her last sickness paid by him.

There can be no doubt that the husband is bound to support his wife. That was the rule at common law and it has not been changed by legislation in this state. Her support in case of her sickness includes medicines, medical attendance and other reasonable care. It is not expressly stated in the pleadings that the husband furnished the medicines and the attendance for which he makes claim, but it will be presumed, in the absence of anything to the contrary that he performed his duty in this regard. Certainly if the wife were living, he could not recover from her expenses incurred or paid by him in caring for her when she

was sick, and I know of no principle which would make her estate liable to him now that she is dead. Indeed, in the absence of something farther than appears in this case, the persons performing the services and furnishing the medicines could not have recovered from her even if the services and medicines had been ordered by her.

Flynn v. Messenger, 28 Minn. 208.
Wagner v. Nagel, 33 Minn. 348.

It was the husband's debt and not hers, and he having paid it has no claim against her estate. Section 4529 of the statutes of 1894, provides for payment by an executor or administrator of expenses of last sickness which were "debts against the deceased," and that provision does not affect this case. This was not a debt against the deceased. It is not necessary to hold, and it is not determined, that a case might not exist where a third party might be paid expenses of last sickness out of the estate of the wife.

A promise of the executor to pay a claim for which the estate was not liable would not in any manner bind the estate.

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**Courtland Babcock vs. Alfred J. Condit, et al.**
**(Ramsey County. No. 63906.)**

**Strict Foreclosure.**

Where a warranty deed is given to secure a guarantor, such deed will be construed to be a mortgage. A strict foreclosure will not be enforced.

Van Fossen & Frost appeared for plaintiff.

The defendants wishing to borrow a large sum of money from F. A. Chamberlain, cashier of the Security Bank of Minnesota, who would not make the desired loan on their personal promise or responsibility; but if plaintiff would guarantee the payment of said sum, he, Chamberlain, would make the loan.

To secure the plaintiff against loss by reason of said endorsement, defendants delivered to plaintiff a warranty deed, not containing a defeasance clause, but in all respects a deed in fee.

At the maturity of the note, the money was not paid to Chamberlain, which money, this plaintiff has paid, and now makes application for a strict foreclosure of the deed.

KELLY, J: After hearing counsel, it is ordered that plaintiff's application for a strict foreclosure herein be denied without prejudice to proper proceedings under said complaint to have the deed referred to therein declared a mortgage and for the usual decree of foreclosure.

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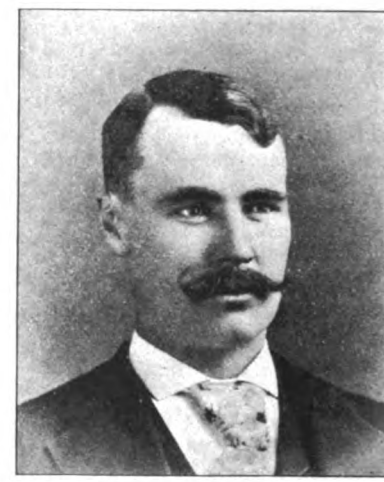
M. J. DALY was born at St. Paul, Minnesota, in 1861. When five years of age he removed with his parents to Carver County, where he lived on a farm until 18 years of age. He attended the public schools of Minneapo-



lis, and 1884 took a two years' course in the law department of the Iowa State University. He commenced the practice of law at Perham, Minnesota, in December, 1886, and has resided there ever since. He is now serving his third term as county attorney of Otter Tail County.

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**State of Minnesota ex rel, R. & W. Commission vs. Adams Express Co.**
**(District Court, Ramsey Co. No. 61973.)**

**Service of Writ on Non-resident.**

The legislature may prescribe how service of process may be made on corporations or companies composed of non-resident stockholders. The manner of service is left to the discretion of the court.

F. F. Davis, Esq., appearing in behalf of defendant and Attorney General Childs for relator.

EGAN, J.: The above entitled action being on the calendar, came on to be heard upon the motion of the defendant to quash an alternative writ issued therein. After hearing the ar-

guments of the respective counsel and upon due consideration, it is hereby ordered that the said motion be and the same is hereby denied.

The legislature of this state by Gen. Laws 1895, Chap. 152, provided, that, "every person, firm, corporation or association which shall do the business of an express company upon railroads in this state by the carrying of any kind of property for compensation, is hereby declared to be a common carrier and subject to all the laws of the State of Minnesota regulating common carriers," and empowered the Railroad and Warehouse Commission to "assume the same powers, duties and responsibilities with reference to express companies in this state that they now exercise under the law with reference to other common carriers by railroad, with the same authority and jurisdiction, and the same methods of procedure as are by law provided for in the case of such other common carriers."

Assuming to act in pursuance of such authority, the Commission sued out an alternative writ of mandamus against the respondent which was ordered by the court to be served on J. W. Owens, the general agent of respondent, who was then conducting its business in this state.

The respondent appeared specially by its counsel, and upon affidavits filed, which were not controverted, showing that the respondent is a joint stock association, all of whose members are not residents of this state, moved to quash the writ on the ground that the court acquired no jurisdiction over the respondent by such service upon its said general agent. * * *

If the contention of respondent's counsel is sound, it must follow that the said legislation of 1895 will prove ineffective in every attempt at the regulation of such business when carried on in this state by non-resident individuals and associations.

* * * * * * *

It is competent for the legislature to prescribe how jurisdiction in such a case shall be acquired. Express authority for such service is found in Gen. Laws 1891, Chap. 106, Sec. 4, amending Sec. 22 of the commission act of 1887, wherein it is provided that "the court shall have power to acquire and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such carrier, his or its agent, or servants, in such manner as the court shall direct."

Furthermore, the manner of service of the writ is left to the discretion of the court. Gen. Stat. 1894, Sec. 5979.

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**Willoughby Bros. et al vs. The St. Paul German Insurance Co., et al.**
**(Ramsey Co. No. 54397.)**

## Stockholder's Liability Action—Intervenor—Limitation of time to bring Action.

Where an insurance policy provides that no suit or action on said policy for the recovery of said claim shall be sustained in any court of law or equity unless commenced within twelve months next after the fire, an action brought thereafter is barred. An adjustment of such loss by fire is not a waiver of said limitation, and one holding claim against an insolvent insurance company of this character cannot assert it in an action to enforce the liability of the insurance company's stockholders'.

Humphrey Barton, attorney for plaintiff, and Thos. H. Goodwin, attorney for defendant.

The St. Paul German Insurance Co. issued to August Steffen the policy of insurance referred to, containing a stipulation that no suit or action on said policy for the recovery of any claim should be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. A loss occurred April 2nd, 1892, and due notice given on April 11th, 1892, and the damage adjusted at $2795. On April 14th, 1892, the insurance company made an assignment and Steffen filed his claim with said assignee, which claim was allowed by the assignee, and a dividend paid thereon Nov. 1st, 1895. No suit or action was commenced in any court of law or equity within twelve months after said loss by fire.

"As a conclusion from the foregoing, it is determined by the court, that, by reason of the one year's limitation aforesaid, contained in said policy, said Steffen is barred from maintaining any action upon said policy and

from asserting his claim in this action, and his claim is disallowed."

BRILL, J.: "I do not wish to be understood as holding that an adjustment may not be made under such circumstances that it may raise an implication of a promise to pay, so that an action may be maintained directly upon it without reference to the stipulations and conditions of the policy. But in this case the fact stipulated is merely that 'the amount of the loss and damage by said fire was adjusted at the sum of $2795.' Nothing else appears in the case regarding the adjustment. This would bind the company as to the amount of the loss and damage caused by the fire, but it is not an adjustment of the liability of the company, and without something further, it would not supercede all the other conditions of the policy, especially, in view of the provision above quoted from the policy."

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**John B. McHugh vs. The City of St. Paul.**
**(District Court, Ramsey County.)**

## Municipal Corporations—Barriers on Elevated Streets—Lights.

The city of St. Paul graded a street sixty feet wide, making a driveway of thirty-four feet, with stone gutters on each side, three feet wide, and spaces of ten feet for sidewalks. For about a block the grade was twelve or thirteen feet above the lots on each side which had not been filled up to the established grade. No lamps were maintained on the street near this point, nor had any fences or barriers been erected on the sides of the spaces left for sidewalks. On a dark, rainy night plaintiff, who was somewhat familiar with the locality, in attempting to drive up to a house, situated on a lot that had been filled up to the grade of the street, drove outside of the road way, over the gutter and space left for sidewalk, and down the embankment, receiving very serious injuries. Held that the city was not negligent, and that plaintiff could not recover.

This was an action to recover $10,000 damages for personal injuries.

The facts are stated in the head note.

After the evidence was all in defendant's counsel moved the court to instruct the jury to find a verdict for the city.

This motion was granted, and plaintiff excepted thereto, and subsequently moved on the minutes of the court for a new trial.

George C. Lambert and Thomas J. McDermott for plaintiff.

Robertson Howard for defendant.

The city of course is bound to use ordinary diligence in protecting people who use its streets, but it is never required to do more than that. Here the street was graded properly, gutters were made on each side of the driveway, and beyond, a space of ten feet was left for a sidewalk. It could not be expected that any person driving at night would go outside of the road intended for vehicles, pass the gutter, and the place laid out for a sidewalk.

The court properly held that there was nothing to submit to the jury.

Hubbell v. City of Yonkers, 104 N. Y., 434, 438.

Barnes v. City of Chicopee, 138 Mass., 67.

EGAN, J.: After hearing counsel for the respective parties, it is ordered that plaintiff's motion for a new trial be denied.

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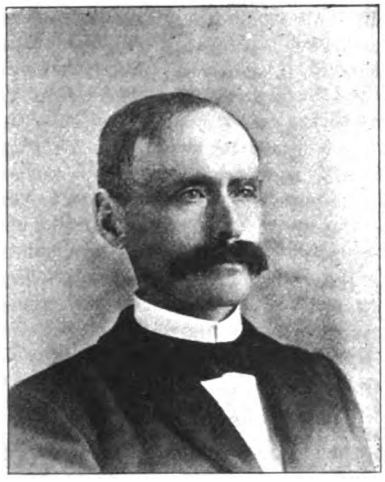
A lawyer told the other day a good story of Judge Neilson. A juror was very anxious to be excused from service but was afraid to ask the judge, who suffered acutely from the gout, to let him off. He asked a lawyer in the court room what he should do. "Tell Judge Neilson you have the gout in your right leg," said the lawyer. Up marched the juror to the bench and said: "Judge Neilson, I'd like to be excused." "What do you mean, sir?" demanded the judge in a voice of thunder, accentuated by a twinge in his leg. "Judge, I have the gout in my right leg," said the juror. "Any man who has the gout ought not to be asked to serve on a jury," said Judge Neilson. "You can go." The trial in progress went on, the judge carefully nursing his aching leg.

OLE J. VAULE was born on a farm near Stavanger, Norway, March 10, 1859, was trained for a school teacher and taught school in that country until he in 1884 immigrated to America. He attended the State Normal School at St. Cloud, Minn., from 1885 to 1888, the German Theological Seminary at



Afton, Minn., in 1889, and was graduated from the law department of the University of Minnesota in 1891. He practiced law at Fosston, Polk Co., from 1891 to 1893, since August, 1893, at Crookston, and seems to be making a good record. Last year he had 8 cases on the calendar of the Supreme Court; of these he lost two, one was settled by the adverse party, and five were decided in his favor.

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**Charles L. Johnson vs. City of Anoka, et al.**
**(Hennepin Co. No.)**

## Injunction.

An action by a citizen tax payer against the city authorities, to enjoin and restrain them from carrying out a contract with a water and light company to supply said city with water and light, will not lie, on the ground that the contract is illegal and may at any time be repudiated by either party. Substantial and positive injury must be shown to a court of equity before it will grant an injunction.

Koon, Bennett and Whalan and J. H. Wyman appearing for plaintiff and William W. Bartlett and W. E. Hale for defendants.

The facts sufficiently appear in the memorandum.

"This action is brought by plaintiff as tax payer of the city of Anoka to enjoin and restrain the city council and officers who were made defendants herein, from levying a tax to pay and from paying the defendant, the Anoka Water Works, Electric Light and Power Company for water and light furnished to the city by said company under and by virtue of the contracts made between it and the assignor of said company, as evidenced by the ordinances of said city council and the acceptance of the same by Sykes and others who were the assignors of the defendant company, and for the judgment of this court declaring said contract null and void and enjoining the city authorities from carrying out said contracts on the part of the city, in the future."

Plaintiff claims the contracts are void; that the city council had no authority to enter into contracts of this kind; that they were void as being monopolistic and exclusive in their provisions, which, if valid, in effect would give the defendant company the exclusive right to furnish the City of Anoka with water and lights for the term of thirty-one years by the terms of the contract; that the defendant company laid mains and constructed hydrants for the use of the city, and furnished lights as provided for by said contract; that the price the city is paying for the same under said contract, is exhorbitant, and as much again as it is worth or can be furnished for; that for the full period of said contract the excess would be $60,000, and the city authorities would levy a tax from year to year on the city property to pay the full amount named in the contract, and therefore the plaintiff will be damaged by having to pay as taxes more than he would otherwise be required to do for the same service. * * * The charter of the City of Anoka confers on the city council, in addition to the power generally possessed by municipal corporations at common law, power to make ordinances providing for "the safety and health of its inhabitants," "to make and establish hydrants * * * provide for and conduct water through the streets" * * * to provide waterworks, to provide for lighting the city, etc., etc., and to provide public build-

ings and public grounds; "to grant to any corporation or corporations, person or persons the right to use and occupy the streets, alleys and public grounds of said city for the purpose of maintaining and operating electric lights." These are the provisions of the charter under which the defendant company claims that the city council had authority to make the contracts with them for water and light.

"If the safety, convenience or health of the inhabitants of the city required that it should be furnished with water and lights," * * * "it was the duty of the city council to supply them."

The power to provide carried with it the power to contract with other parties to supply the water and lights.

"There are no powers granted by the charter to the city council which would authorize it to make a contract granting an exclusive privilege to supply the city with either light or water for the term of thirty-one years." The contract requires the city to accept and pay for the water and lights it may furnish each year for that number of years. "To that extent the contract in question was unauthorized and not binding on the city. That doctrine was settled in so far as the law of this state is concerned, in the case of Long vs. City of Duluth, 51 N. W. R., 913; 49 Minn., 280. It is claimed that the contract is void and unauthorized wherein it provides for the number of hydrants that should be maintained and the use of the same paid for each year for the full term, and fixing the amount to be paid yearly during the whole term. We are of the opinion that this claim is well founded, yet there is much authority opposed to it. The case of the City of Valparaiso vs. Gardner, 97 Ind., 1, holds to the contrary; it holds that the authority of the city is discretionary, but not without limitation. It authorizes the corporate officers when the wants of a city demand a supply of water to furnish it; with its discretion the courts could not interfere; "that the contract cannot be overthrown solely on the ground that it is a surrender of legislative authority * * * the power to contract for furnishing water is neither a judicial or legislative power, but a purely business power." There are decisions for and against this holding.

"We are of the opinion that the mere fact that a contract of this kind is illegal and cannot be enforced but may be repudiated at any time by either party to it, is not sufficient to authorize a tax payer to sustain an action to enjoin the city officers from complying with the provisions of the contract, if such compliance works no special injury to him, if it does not increase the taxes on his property from what it otherwise would be. Substantial and positive injury must always be made to appear to the satisfaction of the court of equity before it will grant the injunction, and acts which though irregular and unauthorized can have no injurious results constitute no ground for relief.

High on Injunctions, Sec. 9.

Rogers v. Michigan, 28 Barb., 539.

Head v. James, 13 Wis., 641.

People v. Canal Board, 55 N. Y., 390.

New London v. Brainerd, 22 Conn., 553.

Doolittle v. Supervisors, 18 N. Y., 155.

Roosevelt v. Draper, 23 N. Y., 318.

Mayor v. Gill, 31 Md., 375.

Shapeless v. Mayor, 21 Pa. St., 147.

Conery v. New Orl. W. W. Co., 2 S & R., 555.

Handy v. Same, 39 La. Ann., 107.

Davenport v. Kleinschmidt, 13 Pac. R., 249.

Sinclair v. Commers., 23 Minn., 404.

Atty. Gen. v. Detroit, 26 Mich., 264.

Mullin v. Grandy, 13 Mich., 546.

Jud v. Town of Fox Lake, 28 Wis., 583.

We have been unable to find any case where the question of the right of a tax payer to bring an action of this kind was in issue and decided by the court sustaining the right, other than where it appeared that the plaintiff would sustain some injury by way of additional taxation.

In most of the cases where the right has been recognized there was a want of any authority to appropriate money for the purposes for which

it was attempted to be appropriated by the public authorities. In the case Brainerd v. New London, 22 Conn., 552, the city authorities attempted to appropriate money for celebrating Independence Day. They had no authority to make any appropriations for that purpose. The case of Rice v. Smith, 9 Iowa, 575, is one of the same character; so is also the case of Haney v. R. R. Co., 32 Ind., 244.

In the case of Grant v. City of Davenport, 36 Ia., 396, the court held in a case like the one under consideration that where the charter of the city gave the authorities power to contract for water works, which it did, with a company for a term of years, the validity of the exclusive privilege granted by the contract would only be contested by other persons claiming the right to lay pipes and furnish water, and that there was no right of action by the plaintiff as tax payer.

In the case of Ford v. Meyer, 84 Ga., 213, and Grounder v. Town of Sullivan, cited by plaintiff's attorney, the question of the right of a tax payer to bring an action of this kind was not in issue; neither was it in the case of Long v. City of Duluth, supra.

* * * * * * *

The case of Kiichli v. City of Minneapolis, 59 N. W., 1088, came up on demurrer to the complaint, which stated that the plaintiff's taxes would be largely increased by reason of the contract. * * * The answer admitted the truth of the allegations of the complaint.

* * * * * * * * *

There is no evidence in this case that the plaintiff will be damaged by reason of the city complying with the terms of the contract. "It was necessary to show wherein the plaintiff would be damaged as alleged in the complaint, and plaintiff having failed to make such proof we think we are correct in ordering the case dismissed."

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**A Puzzling Case.**—"What was the most confusing case you ever had?" asked the doctor of the lawyer. "Case o' champaigne," returned the lawyer. "I hadn't got half through it before I was all muddled up."—Palmyra Dispatch.

**State of Minnesota, ex rel., H. W. Childs, Attorney General of the State of Minnesota vs. American S. & L. Assn.**
**(Hennepin County. No. 66741.)**

## Building and Loan Association.

Building and loan associations, notwithstanding their private character, are amenable to the remedial provisions of Sec. 12, Chap. 76, Gen. Laws of 1878.

## Same—Insolvency.

A building and loan association cannot become insolvent within the strict technica sense ofl the term. (For test of insolvency see Minn. Law Journal, vol. 4 p. 48.)

## Same—Violation of Act of Incorporation.

Where a corporation like defendant, violates its act of incorporation, such violation brings it within the expressed intent of the provisions of section 12.

H. W. Childs and George B. Edgerton appearing for the state and Francis B. Hart and Hale, Morgan and Bennett appearing for defendant.

This action is brought by the state, based upon chapter 76, General Statutes of 1878.

The state relies upon the allegations of insolvency or inability of the defendant to pay its debts, and the unlawful acts set out in the complaint.

A long and able memorandum was filed by Judge Belden, the gist of which is as follows:

The objection of the defendant that it is not amenable to or affected by the provisions of chapter 76, and that the state has no power to interfere with it, either for prevention or remedial purposes, other than those expressly prescribed in sections 2873, 2874, Gen. Statute 1894, is not well founded.

The issue involves the consideration of the character of the defendant, its object and business as public or only private rights may be affected, as well as its condition and the causes and effects of that condition.

It is not an institution exclusively private. "The state has placed these institutions upon its list of corporations, and declared that they come within chapter 76, and has determined that their object and business is such as to render it expedient and necessary to deal with them as with moneyed or quasi public corporations."

Corporate grants rest upon the implied condition that they shall be

used to effectuate their purpose and withdrawn when such user ceases, and it would be subversive of good public policy to deny the right of the state to interpose upon the ground that it has no interest in the corporation.

"Does the defendant come within the spirit and scope of section 12, chapter 76? In determining this question a narrow and technical construction is not possible. The statute being remedial it must have such broad and liberal construction as will fully reach and cover the evils to be relieved and remedied."

It is said this is not a corporation "having power to make loans on pledges" because its loans are made to its members and of the communal character of its relations of its membership. This is sufficiently disposed of by Judge Mitchell, in the case of Maudlin v. Am. S. & L. Assn., 65 N. W., 645, who says:

"So called 'building societies' operated on the plan of the defendant, have so often become the instruments of oppression and extortion as to call down the censure of some eminent courts. The original purpose of building societies, viz, to enable people of small means to build and buy homes, is entirely wanting. They are merely savings and loan associations retaining the forms and nomenclature of building societies. They still retain in form the idea that they are dealing with community funds, and that the borrower being a member, is also a lender; but this is in theory rather than in fact."

Within the strictest technical sense it may be conceded that the association cannot become insolvent, but every reason for the application of this provision of section 12 to other corporations therein mentioned exists with equal or greater force for its application to these corporations.

Judge Grosscup in Towles v. Am. Bldg., Loan & Inv. Soc., 60 Fed. Rep., 121, upon this and other questions that were involved in this controversy, on this point said: "That the relief will be afforded to stockholders and copartners, upon the proper showing, is not seriously denied."

The trial judge said: "The notion that the state in the enactment of these provisions, or in its general legislation directed to corporate restraint and control and remedy, has no longer any solicitude for the welfare or protection of its citizens or other persons after such persons enter into a quasi communal relation, such as arises from dealings with these corporations, is entirely too narrow to be seriously considered."

By section 2874, Gen. Statutes of 1894, the remedies here prescribed are applicable to these corporations. But if Sec. 12, relating to insolvency or inability to pay its debts does not apply on account of the technical objection that it cannot become insolvent, the other provisions of this section are ample to cover the case. The defendant has clearly violated the "provisions of its act of incorporation." It was organized in 1887 under Chap. 34, title 2, and that it has outstanding stock contracts, issued while it was doing business under its original as well as its amended articles of association.

Also the investment of $200,000 in the stock of the German Am. Ins. Co. in 1889 was a violation of the law, was a total loss and resulted in the present embarrassed condition of the defendant.

Also Sec. 2881 provides. "That whenever the capital stock of an association has been impaired by losses in excess of its reserve funds or profits earned, it shall be the duty of the directors to suspend sales of all classes of stock until such losses have been adjusted and distributed pro rata as a charge upon the shares of stock in force."

The defendant more than a year ago had lost all its profits, and reserve fund and thirty per cent of its capital, and still continued to sell its stock of all classes, in violation of said law, which law was binding on such corporation. "It brings this defendant literally within the clearly expressed intent of the provisions of section 12."

The privilege of scaling down the assets so that the book value will stand on a level with the actual value,

and charging the loss of capital pro rata to its members is a provision designed to apply to temporary impairment, and not to such a condition as is shown in this case. The expenses of the corporation were very large. From July 1st, 1888, to July 1, 1895, the expenses amounted to 65 per cent of its earnings. The only remaining contention is that the right of the attorney general to proceed in cases of this character against corporations like the defendant is confined to the procedure prescribed in section 2874. This section creates causes for the interposition of the attorney general not before existing, and in addition to those already provided and are designed to defend from the evil consequences of irregularities or law violating practices were persisted in.

Section 2580, relating to savings banks, contains similar provisions and section 2854, relating to trust companies is couched in identical language with Sec. 2874, and it cannot be contended that the legislature intended to relieve savings banks and trust companies from the remedial provisions of Sec. 12, Chap. 76. See State vs. Educational End. Assn., 49 Minn., 158. See also on right of state to interpose notwithstanding the private character of the Co., People v. Ballard et al., 134 N. Y. J. C., 292-296.

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A western judge, sitting in chambers, seeing from the piles of papers in the lawyers' hands that the first case was likely to be hotly contested, asked: "What is the amount in question?" "Two dollars," said the plaintiff's counsel. "I'll pay it," said the judge, handing over the money; "call the next case." He had not the patience of Sir William Grant, who, after listening for two days to the arguments of counsel as to the construction of a certain act, quietly observed when they had done: "That act has been repealed."

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NOTICE.

Your attention is called to the case of Rotzer vs. B. C. R. & N., published in the February number of the Law Journal. It has been overruled by the Supreme Court.

W. R. DUXBURY was born in Fillmore County, Minnesota, August 27th, 1866, and was educated at the Northern Indiana Normal School, Valparaiso, Indiana. He was admitted to the bar at Preston, Fillmore County, in November, 1890. He settled at Cale-

donia, Minnesota, in October, 1891, entered into partnership with Captain W. H. Harries, then congressman from the first congressional district, and remained in partnership with him until he was appointed internal revenue collector in May, 1894. Captain Harries then withdrew from the firm and Mr. Duxbury continued the business, taking in his brother as partner in October, 1895.

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In the absence of partnership assets applicable to partnership debts either at law or in equity, and in case there is no live solvent partner, it is held in Thayer v. Humphrey (Wis.) 30 L. R. A. 549, that partnership creditors may prove their claims *pari passu* with separate creditors against the estate of a partner. When a new firm assumes the debts of the old, with the intention of all parties to have the business continue and pay the debts out of it, but the new firm makes an assignment for creditors, it is held that creditors of the old and of the new firm may prove their claims pari passu, and be preferred over individual creditors of the members of the new firm.

The lumbermen are making a hard fight against the new pro rata clause and the 80 per cent clause which has been inserted in the new Standard Policy to cover lumber risks. A syndicate of Duluth firms, representing more than $1,000,000 in capital has filed a protest with the State Insurance Department, insisting that the insurance should not be limited to 80 per cent of the value of the stock insured, but they are especially opposed to the clause which provides for a pro rata insurance upon piles of lumber that may become separated more than 50 feet. The companies making the protest are the large wholesale dealers and shippers at the head of the lakes, and who own large docks, where they are constantly receiving and shipping lumber. They want a blanket insurance that will cover their entire stock, and say they cannot so arrange their work but what some piles will occasionally become separated from the others by more than 50 feet. The separation will probably not continue long at any one time, but they cannot afford to take the risk, and insist that the so-called pro rata clause is nothing more or less than a co-insurance clause, and contrary to the law passed at the last session of the Legislature. The Insurance Department has referred the matter to the Attorney General who gives in the following his opinion:

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OPINION OF ATTORNEY GENERAL.

**Pro Rata Insurance Rider—Illegal.**

An insurance clause in a policy of insurance which stipulates that in case of a fire occuring in one pile of lumber only, the insured can recover such amount as the value of such parcel or pile bears to the total value in yard or dock, is contrary to the laws of Minnesota. The insured is entitled to a contract insuring him against the whole of such a loss.

The opinion is as follows:

You call my attention to the following forms of riders or clauses proposed to be used by certain insurance companies, and request my views as to whether they are properly permissible. They are as follows:

"Permission is hereby granted for other insurance to an amount, including this policy, aggregate not to exceed 80 per cent of the actual cash value of the property; provided, however, that if it the time of the fire the total insurance on the property shall exceed said 80 per cent, this policy shall thereby become void only in the proportion of such excess to such total insurance.

"When this clause is attached to and made a part of a policy covering two or more items, this clause shall be construed as applying separately to each item of the policy.

"Should the property hereby insured be or become separated by a space or spaces, of fifty feet or more, it is hereby agreed that this policy shall attach in or on each division separated by such space or spaces in such proportion as the value in or on each division bears to the aggregate value of the subjects insured."

First—As to the first clause, the question is virtually disposed of by what was said in the opinion of this office under date of Nov. 5, 1895, wherein it was held that the use of such a clause is permissible. The reasons which conduced to that decision obtain with equal force to the use of the clause in question, and you are advised accordingly

Second—The employment of the second form, or the "pro rata clause," should not be authorized. It offends against the very purpose and spirit of the statute prohibiting co-insurance, inasmuch as the statute clearly seeks to protect the assured against an exaction on the part of the insurer, whereby the former is made to pay for what he does not actually receive; or, in other words, is designed to secure to him the right of being compensated for the loss actually sustained, with no other limitation than the amount of the policy. It would, in my judgment, be in violation of the statute to employ a provision whose observance will operate as a restriction in such respect upon him. That the use of the clause will be attended with such restriction is at once obvious where regard is had to its practical operation. It implies that the owner of lumber piled in detached parcels can recover in case of a fire occurring in one of such parcels or piles only such amount as the value of such parcel or pile bears to the total value in yard or on dock, as the case may be. It must, therefore, follow with the utmost certainty that he will receive a less

amount than his loss. As above suggested, he is entitled to a contract insuring him against the whole of such a loss.

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EDWARD LEES was born in Wisconsin in 1865. In 1881 he entered the law office of his father, Judge Robert Lees, where he read for two years. In 1886 he was graduated from the

law department of the University of Wisconsin and in 1887 located at Winona, forming a partnership with City Attorney W. A. Finkelnburg, which continued until September, 1895. Then the present firm of Webber & Lees was formed. In politics he is a democrat, and was chairman of the county and city committees from 1892 to 1894. Since 1894 he has taken no active part in political matters, however, but devoted himself exclusively to the business of his firm.

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The question as to the title of a finder of lost property does not often arise and therefore the recent decision of the court of chancery of New Jersey in Keron v. Cashman is of novel interest. It is most peculiar in its circumstances. There it appeared that one of a party of five boys found and picked up an old stocking in which something was tied up. He threw it away again and one of the others picked it up and began beating the others with it. It was passed from one to another, and finally, while the second boy was beating another with it, it broke open and was found to contain money. None of the boys had attempted to examine it or had suspected that it contained anything valuable. The father of one of the boys took charge of the money and tried to discover the former owner. Afterwards one of the boys claimed the money and the others a division of it. On a bill of interpleader, it was held, that the money was not found in a legal sense until the stocking had come into the common possession of all the boys as a plaything, and that it belonged to all of them and must be divided equally between them. In Durfee v. Jones, 11 R. I. 588, 23 Amer. Rep. 528, 35 Cent. L. J. 417, the bailee for sale of a safe, while examining it found a sum of lost money inside the casing, and was held entitled to retain it as finder against the owner of the safe because the owner never had any conscious possession of the money. The cases of Bowen v. Sullivan, 62 Ind. 281, and Merry v. Green, 7 M. & W. 623, not cited by the court in the New Jersey case, are also in point. All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal finder of such property. In Goddard v. Winchell, 35 Cent. L. J. 365, the question arose before the Supreme Court of Iowa as to the ownership of an aerolite which had fallen from the sky. The court held that it belonged to the owner of the land rather than to the person who saw it fall and secured it.—Central Law Journal.

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Frank C. Smith, the editor of the American Lawyer, read a paper before the last meeting of the American Bar Association in which he said:

"I was desirous of learning how far questions of legal procedure were actually determinative of litigations, deeming that such information would enable us to form an accurate judgment as to the real quality of the work of the bar in the trial of causes. For this purpose I have examined the cases reported for the year June 1, 1894, to May 31, 1895, with the following result: Total number of cases examined, 16,416. Of these 1.052 were originally

begun in the courts reported, leaving 15,364, which were heard on error or appeal. Of these 15,364 cases submitted to the appellate jurisdiction of these courts, 9,523 were affirmed and 5,841, or a little over 38 per cent., were reversed. Of these reversed cases, 2,302, or almost 38 per cent., were reversed upon questions of procedure. In other words, of the reversed cases, 38 out of every 100 so resulted because of the incapacity of the attorney in charge to properly present the merits of his cause for judicial determination. In 38 out of every 100 such instances, then, justice was either denied the litigant, or to gain his rights he had to submit to the anxiety, delay and expense inevitable in a new trial or in instituting a new action. And this, because the certified member of the bar to whom he intrusted his couse, did not know how to practice law."

The figures for Minnesota were as follows:

"Total cases, 348; affirmed, 220; reversed, 128; percentage reversed, 37; reversed on procedure points, 43; percentage reversed on procedure points, 34."

## PERSONALS.

**Minneapo'is—**

Lawrence, Truesdale and Corriston recently dissolved. The junior member continues to practice with offices in the Kasota block. Mr. Truesdale has removed to Phoenix, Ariz.

**St. Paul—**

Walter Holcomb removed to Connecticut last week.

Geo. L. Keefer and Henry W. Williams, formerly of St. Paul, have formed a law partnership at Los Angeles, California.

**Duluth—**

The firm of Roach & Lyons, of Duluth, is dissolved and Daniel F. Lyons has removed to Chicago.

Judge Lewis Brownell and F. E. Ebner, of Duluth, have formed a partnership and removed to Aitkin, Minn.

Frank Crosby, formerly of Abbott & Crosby, of Duluth, has moved to Hastings, Minn.

W. T. McNamara, of Duluth, has returned to New York to resume his practice there.

Judge James Spencer has removed from Duluth to Whitehall, N. Y.

E. P. McCaffrey has given up his practice in Duluth and recently returned to his home in New York.

Joseph Handlan, of the firm of Handlan & McGregor, of Duluth, has decided to remain permanently in Wheeling, W. Va.

L. U. C. Titus, of Duluth, has left his law practice to perfect his legal residence on a homestead in St. Louis County.

**Mankato—**

J. B. Ogle, the Mankato lawyer, reported as eloping, was once a resident of Alexandria. He was pastor of the Methodist church for about a year and this was his last charge, as when he left he took up the practice of law. While here he was married and it was currently reported that his father-in-law guaranteed him $1,500 a year income if he would adopt the law as a profession.

**Litchfield—**

S. A. Flaherty has withdrawn from the law firm of Spooner & Flaherty, of Minneapolis, and is now located in Litchfield. Mr. Flaherty practiced at Morris for many years and was for a long time county attorney of Stevens county.

**Madison—**

Frank Palmer, one of the leading attorneys of Madison, Minn., was lately married to Miss Mary Schomburg.

A conveyance constructively fraudulent as to creditors is held in Weare Com. Co. v. Druley, 156 Ill. 25, 30 L. R. A. 465, to be insufficient, in the absence of actual fraud, to constitute a ground for an attachment. With this case in 30 L. R. A. 465, the authorities are reviewed on the question, What intent to defraud will sustain an attachment?

Bicycle riders are to pay higher rates for their accident insurance, or, in lieu thereof, have their benefits reduced.

...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.**

### BICYCLE LAWS.

The laws for bicyclists were somewhat amended during the last session of the New York legislature, and cyclists have certainly received many benefits which, to say the least, they did not enjoy before. The first and most important change was made by Chap. 333 of the Laws of 1896, commonly known as the "Bicycle Baggage Law." It is merely an amendment to the General Railroad Law (chapter 565 of 1890), and amends section 44, relating to baggage and baggage checks, by adding the following words:

"Bicycles are hereby declared to be and be deemed baggage for the purposes of this article and shall be transported as baggage for passengers by railroad corporations and subject to the same liabilities, and no such passenger shall be required to crate, cover or otherwise protect any such bicycle; provided, however, that a railroad corporation shall not be required to transport, under the provisions of this act more than one bicycle for a single person."

The next bill of importance which was enacted is now chapter 304 of the Laws of 1896, amending the Penal Code, and is as follows:

"Whoever, with intent to prevent the free use of a cycle thereon, shall throw, drop or place, in or upon any cycle path, avenue, street, sidewalk, alley, road, highway or public way or

place, any glass, tacks, nails, pieces of metal, brier, thorn or other substance which might injure or puncture any tire used on a cycle, or which might wound, disable or injure any person using such cycle, shall be guilty of a misdemeanor, and on conviction be fined not less than five nor more than fifty dollars."—Albany Law Journal.

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LAW SCHOOL ALUMNI ASSOCIATION.

The sixth annual dinner of the University of Minnesota Law Alumni Association, held at the Hotel Nicollet in Minneapolis, Thursday evening, June 4th, was a success in every way. In point of attendance it was the largest ever held by the Association, over 150 being present. Preceding the dinner the regular annual business meeting was held; the principal business being the admission of the class of '96 to the Association, and the election of officers for the ensuing year. The following were elected: President, Arthur M. Wickwire, of St. Paul; Vice President, Chas. E. Bond; Secretary, Albert Chistillo; Treasurer, Walter N. Carroll, all of Minneapolis. Judges of the district courts of St. Paul and Minneapolis were in attendance as well as members of the bar of both cities and representatives of each class graduated from the University since the organization of the college. Daniel L. Dawley, of Northfield, as toast master, presided in a happy manner and introduced each speaker with neat and witty remarks. The most scholarly address of the evening was given by Edwin A. Jaggard, of St. Paul, who responded to the toast, 'Torts and Taxation." The "Press and Bar" was happily handled by Charles W. Somerby, of Minneapolis. Dean Pattee's response to the toast, "Our Alma Mater," closed the program of the evening.

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One against whom a default judgment was fraudulently entered is held in Merriman v. Walton, 105 Cal. 403 30 L. R. A. 786, to be entitled to an injunction against its execution, although he could resort to certiorari. A note to this case presents the numerous authorities as to injunctions against judgments obtained by fraud, accident, mistake, surprise and duress.

The supreme court of Minnesota has recently rendered a decision on the subject of usury of some interest to the commercial world. It is the case of Gale v. Birmingham et al., N. W. Rep. There is great conflict of authority among the courts of last resort of the different states as to the character of the evidence required to defeat an action by a purchaser for value before maturity of negotiable paper where the defense is usury.

One class of cases holds that usury being shown, the burden then rests upon the purchaser to show that he is a purchaser bona fide for value before maturity without notice of the usury; and that if it appears by the evidence that before the purchase he had knowledge of such facts and circumstances as would put an ordinarily prudent person on inquiry to discover the usury and didn't inquire, he is not an innocent purchaser. Another class of cases holds that knowledge of such facts and circumstances as would put an ordinarily prudent person on inquiry, coupled with a failure to inquire is insufficient to defeat an action by a purchaser of negotiable paper for value before maturity and that the facts and circumstances, knowledge of which would defeat such action must be such as would justify a court or jury in finding bad faith or actual knowledge of the usury on the part of the purchaser.

Hitherto our supreme court had specifically laid down neither of the above rules in the case of usurious paper, though it seemed to have assumed in its decisions the correctness of the former of these two conflicting views. In the case of Gale v. Birmingham, however, it squarely adopted the latter rule and held that in order to defeat an action by a purchaser of negotable paper for value before maturity, where the defence is usury, the evidence must be so direct and pointed as to amount to proof of bad faith on the part of the purchaser in the absence of inquiry. In the adoption of this rule the court has doubtless placed itself in accord with the weight of authority on the subject though it is difficult to conceive how such a rule is consistent with any rational construction of the statute relating to the particular point in question.

### GEN. MOSES E. CLAPP.

The Journal is not a political organ and in general has no opinions on political issues, or on the claims of competing candidates for public office. It is simply a lawyers' paper, designed to supply a medium for the interchange of ideas in the profession and to advance the profession's interests in Minnesota. But it thinks it keeps well within its sphere when it now openly expresses its admiration for the character and ability of Moses E. Clapp and its hope that he will succeed in his ambition to be the next governor of this state. The Journal's opinion is that lawyers make the best incumbents of public office because their training fits them to act in a representative capacity and educates them to serve faithfully and zealously those who have intrusted them with the performance of a duty. Lawyers, therefore, are working for the community's good when they help their fellow lawyers in their political aspirations. And this general principle is especially of force in its application to Mr. Clapp, who, in addition to being a good lawyer of wide experience and success in his profession, is a brave, fearless, courageous, handsome and chivalric man. The Journal's good wishes go with him in the present contest and it calls on its readers to cooperate with him in the fight he is making. The tendency of our political system is to relegate the management of affairs to a limited number of active workers, who, by trades and deals, divide public honors among themselves, and we have an extreme instance of this in the pending campaign where the politicians are undertaking to deliver the high post of governor of Minnesota as part of a complex bargain involving not this office alone but also the incumbency of two United States senatorships. It is a spectacle stimulating to popular enthusiasm to see Mr. Clapp tilting like a valiant knight against forces united under a banner of this complexion, and if the people exercise the rights the constitution gives them, the Journal predicts that the victory in the battle will be with him.

### ACTION TO DETERMINE ADVERSE CLAIMS.

In this state the statutory action to "determine adverse claims, or to quiet the title" to land is a very important action. By this action title to, interest in or lien upon real estate may be determined in all cases, except where the defendant is in possession, in which case ejectment is the proper action.

This action is authorized by G. S., 1894, Sec. 5817 (1878, c. 75. sec. 2) relating to this form of action upon which the law is fairly well settled.

There has, however, existed some mistiness upon the question of pleading, where the answer was only a general denial.

In a long line of decisions written by Judges Gilfillan, Berry, Dickinson, Vanderburg, Collins and Mitchell, the court has held:

That unless the defendant sets up title in himself he has no standing in court, and plaintiff is entitled to judgment against him.

In Walton v. Perkins, 28 M., 415, decided in 1881, the court through C. J. Gilfillan, in speaking of this kind of action, says:

"The object of the action is to force one claiming an adverse interest or lien to establish or abandon his claim. With respect to the claim of the defendant, the position of the parties as the reverse of that occupied by the parties in an ordinary action. The defendant becomes practically the plaintiff, and takes the affirmative in pleading and proof, while the plaintiff becomes practically the defendant, and defends against the claim. In an ordinary action, the plaintiff must tender the issues to defendant, and if defendant takes issue on the facts alleged, plaintiff must prove enough of them to entitle him to recover. An action under the statute is brought to compel the defendant to tender issues, unless he chooses to abandon his claim. In the particulars therefore, that the complaint need not allege any wrongful act of the defendant, and that the object of it is to force him to tender issues upon and set forth the matters sought to be litigated, the action is anomalous."

In Myrick v. Coursalle, 32 M., 153, decided in 1884, in a case where plaintiff failed to show on the trial that he was the owner and judgment was entered for defendant, Judge Berry says: "So long as plaintiff has no interest in

the property who is adjudged to be the owner is of no importance to him."

In Jellison v. Halloran, 40 M., 487, decided in 1889, Judge Dickinson says:

"The defendant was required from the nature of the action to assert his adverse claim if he made any."

In Morrill v. Little Falls Manuf'g Co., 46 M., 261, decided in 1891, Judge Collins says:

"Such answer simply put in issue the plaintiff's alleged title to the property, denying that he had any rights or interests therein. The answering defendants failed to assert title in themselves, or a claim to the property of any description, and therefore the answer merely amounted to a disclaimer, the plaintiff being entitled to judgment on the pleadings."

In Stuart v. Lowry, 49 M., 97, decided in 1891, Judge Vanderburg says:

"And in Walton v. Perkins, 28 Minn., 415, it is said that the defendants in such case "becomes practically the plaintiff, and takes the affirmative in pleading and proof;" and his pleading is in the nature of a complaint setting forth his claim against the plaintiff."

In Scofield v. Quinn, 54 M., 12, decided in 1893, Judge Dickenson says:

"In this form of action the defendant occupies, as respects the title asserted by her, the position ordinarily assumed by plaintiff."

The court put forth dicta to the contrary to the effect that plaintiff must prove his case if denied, and that he could not prevail by the weakness of the defendant's case, notably by Judges Mitchell in Herrick v. Churchill, 35 Minn., 318; and Vanderburg in Wakefield v. Day, 41 Minn., 344.

It will thus be seen that there was a conflict in the decisions of the court and it appears clear that the decision first cited could hardly be logically supported. On the other hand it appears that the proposition relied upon in the latter decisions, that he who asserts must prove, is sound.

But the court had held further upon this question of pleading to the effect that where one disclaims any interest in the land a general denial forms no issue and defendant has no standing in court.

In Perkins v. Morse, 30 Min., 13, plaintiff alleged that he was the owner and in possession. One of the defendants, first, denied each and every allegation of the complaint. Second, disclaimed any adverse title to the land. The court says: "So far as he is concerned the disclaimer is an end of the controversy. It is a solemn admission by which the plaintiff gains all that he has sought against the disclaiming party. It not only dispenses with proof upon plaintiff's part, but it shows that the disclaiming party has no interest in the subject of litigation and therefore renders any issues raised by his denials utterly immaterial. It entitles the plaintiff to judgment upon the merits, determining that such party has no estate or interest in the premises to which the action relates."

In Donahue v. Ladd, 31 Minn., 244, the defendant in his answer denied plaintiff's title and alleged title in a third party and attempted to show a lien in his favor by virtue of an attachment against that third party's title in the land. But his allegations failed to show any interest in him by virtue of the attachment even though the third party owned the land. In deciding this case Judge Mitchell says: "Therefore, inasmuch as this attachment lien is the only claim which defendant makes, his answer shows affirmatively that he has no estate or interest in the land, in legal effect it amounts to a disclaimer."

As to the point that the rest of the answer put in issue plaintiff's title, Judge Mitchell cites Perkins vs. Morse ante, as to the effect of a disclaimer in connection with a general denial as the "settled law in this court" and says, "We apprehend it makes no difference whether the answer is an express disclaimer, or whether, as in this case its allegations affirmatively show that he has no interest in the property. In either case as against him plaintiff is entitled to judgment."

It will thus be seen that the court holds in Donahue v. Ladd that an attempt to set out the facts showing one's title is an assertion that he has no other title on the principle announced in Piney v. Fridley, 9 Minn., 23 (34), and many times followed that a general allegation, as of title or foreclosure, is controlled by a special allegation of facts showing such title or foreclosure, and also that a disclaimer

even coupled with a general denial, ends the controversy as to defendant. The reasoning in these decisions of Perkins v. Morse and Donahue v. Ladd woud seem to be sound.

In Wheller v. Winnebago Paper Mills, 64 N. W. R., 920, the court in attempting to extricate itself from the mud of these former decisions cited, seem to have gotten deeper into the mire. The complaint was a regular statutory complaint to quiet title with allegations tracing plaintiff's chain of title. The answer was a general denial, with an admission of plaintiff's chain of title down to a certain point. Then the answer attempts to set up title in defendant by tacking on to the title where plaintiff left off, with an admitted failure to do so. There was a judgment against defendant on the pleadings, and defendant appealed, citing no authorities nor did appellant argue the point, but simply said the plaintiff's title was put in issue. The supreme court reversed the lower court.

The real effct of this dcision of Wheeler v. Winnebago Paper Mills is to reverse Perkins v. Morse and Donahue v. Ladd to the effect that a disclaimer coupled with a general denial gives the defendant no standing in court. It expressly overrules Donahue v. Ladd in so many words, but claims Perkins v. Morse is not in point inasmuch as plaintiff was in possession in that case. But the court overlooked the fact that in that case the answer denied the possession and it was a bare question of pleading. Pleading possession would not help plaintiff unless it was proven, therefore the court was mistaken in saying the case was not in point ror that reason.

Wheeler v. Winnebago Paper Mills was identical in points with Donahue v. Ladd. The court expressly overruled Donahue v. Ladd.

But in the syllabus and argument the decision does not go to that extent. The syllabus says: "The plaintiff is not entitled to judgment on the pleadings where the answer denies his title, but fails to show that the defendant has an interest in the premises." (The effect of this is to overrule the first line of decisions admittedly unsound). "Overruling on this point Donahue v. Ladd."

Now Donahue v. Ladd decided not, that plaintiff was entitled to judgment where defendant failed to show he had a title, but that he was entitled to judgment when defendant showed he had no title.

In its opinion the court says: "Counsel claims the denial is immaterial, because the defendant fails to show that it has any interest in or lien upon the premises and cites in support of the proposition Perkins v. Morse and Donahue v. Ladd." Counsel's claim was more than that. It was that the defendant not only fails to show title in himself, but shows title out of himself. The court further says, "it must be admittted however that Donahue v. Ladd supports the contention of counsel." That case does not support the contention of counsel as the court seems to construe the contention, because Donahue v. Ladd holds there was a disclaimer.

The court further says, "But that case (Donahue v. Ladd) has been in effect overruled by subsequent cases in this court, which hold that in an action to determine an adverse claim where land is vacant and unoccupied the plaintiff must allege and prove, if it is denied, that he has some title to or interest in the land, otherwise he has no standing in court and his actions must be dismissed," citing cases first above cited.

It will thus be seen:

1st. That the court has held by decisions and dicta that defendant in an action to determine adverse claims must set up his title in order to have a standing in court, in Walton v. Perkins, 28 Minn., 415, Myrick v. Cowsable, 32 Minn., 153, Jellison v. Halloran, 40 Minn., 261, Stuart v. Lowry, 49 Minn., 97, and Scofield v. Quinn, 54 Minn.

2nd. That the contrary doctrine was during the same time being declared either actually or in effect in Myrick v. Coursalle ante, Herrick v. Churchill 35 Minn., 318, Jellisan v. Halloran ante, Wakefield v. Day, 41 Minn., 344, Pinney v. Russell, 52 Minn., 443 and that these later decisions are sound in principle.

3rd. That the court held in Perkins

v. Morse, 30 Minn., 11, and Donahue v. Ladd, 31 Minn., 244, that where defendant in effect disclaims any interest in the premises a general denial does not avail him. This also seems sound in principle.

4th. The court in Wheeler v. Winnebago Paper Mills ante repeats what had been already said in decisions under second subdivisions that the plaintiff must rest upon the strength of his own title, and not upon the weakness of the defendant. This it does by its reasoning and citations. It expressly overrules in so many words Donahue v. Ladd, but refrains from discussing or referring to the real point decided there. What the profession is still interested in knowing is: What is the effect of a formal disclaimer coupled with a general denial.

What is the effect of an answer that shows that defendant has no title coupled with a denial of plaintiff's title.

I have paid for knowing this by suffering the ignomy of defeat, but still do not know the law on these points.

S. R. CHILD.

Minneapolis, Minn.

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### PRIVILEGED COMMUNICATIONS TO LAWYERS AND DOCTORS.

A notable change in the law of privileged communications was made at the last session of the New York legislature and will take effect on the 1st day of September.

Section 835 of the Code reads thus: "An attorney and counsellor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment."

The amendment which goes into effect at the beginning of September will make it read thus:

"An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer, or other person employed by such attorney or counsellor be allowed to disclose any such communication or advice given thereon."

The change, it will be observed, consists in the addition of the clause concerning clerks, stenographers, and other employes of lawyers. Such persons are frequently present at interviews at which confidential statements are made to counsel, and often act as the messengers of the client to transmit such statements. In these cases, the privilege and duty of the lawyer to remain silent do very little good to the client if the lawyer's clerk or stenographer or office boy may be compelled to speak; and hence it has been deemed wise to extend the requirement of secrecy to the lawyer's servants, whatever their capacity.

A similar extension would also seem to be expedient so far as privileged comunications to medical men are concerned. As the law now stands it prohibits any person "duly authorized to practice physic or surgery" from disclosing any information acquired by him in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. This obviously applies only to regularly licensed physicians and surgeons, and not to trained nurses or hospital stewards and attendants. It seems to us that they also should be compelled to keep secret their knowledge of the ailments of those under their care.

—N. Y. Sun.

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### AGISTER'S LIEN.

In the recent case of Petzenka vs. Dallimore, reported in 67 N. W. Rep. 365, the Supreme Court has announced the existence of a radical change in the law relating to the lien of stable keepers, etc.

Under the statute in force in 1886 (Sections 16 and 17 Chap. 90, Stat. of 1878 as amended by Chap. 81, Gen. Laws 1885) it was held that such lien was superior to a prior chattel mortgage. Smith vs. Stevens, 36 Minn. 303.

The court now holds in Petzenka vs. Dallimore that the act of 1891 (Chap. 91 Gen. Laws 1891, Sec. 6250 Compiled Stat. 1894) has changed the law and that by virtue of the express terms of the latter act the lien referred is made subject to prior mortgages.

With due respect to the court and to

the learned judge who writes the opinion, this decision must be characterized as a construction by sound instead of by sight.

Sec. 2 of the Act of 1891 is drawn and printed as follows:

"Sec. 6250. Same—Priority of lien. The lien in this act provided for shall have priority over all other liens and incumbrances (excepting the lien provided for in Chapter one hundred and seventy-five General Laws of eighteen hundred and eighty-five, and all acts amendatory thereof), and liens by virtue of any mortgage, bill of sale or other instrument theretofore made and duly recorded in the office of the clerk of the proper town, city or village, and no person entitled to such lien shall be deemed to have waived or lost the same by reason of said property or any thereof being out of his possession, provided the same does not so remain out of his possesion for a period exceeding ten days at any one time; and such person shall have the right to retake and reduce such property to his possession at any time within the said ten days, in whomsoever hands the same may be, and hold the same as above provided to satisfy said lien and his reasonable costs and expenses."

It will be observed that the paragraph is apt to be very misleading but if the section is to be read according to the accepted rules of construction, i. e., with the parenthetical clause omitted, it will be readily seen that the exception does not apply to prior mortgages, etc., but on the contrary prior mortgages, bills of sale, etc., become the object of the words "shall have" in the first line, and it then becomes apparent that the design of the legislature was not to change the rule in Smith vs. Stevens, but to assert it. Is it not giving undue importance to an exception contained in a parenthetical clause to say that it qualifies all the succeeding paragraph instead of only that portion contained in the parenthesis?

It is apparent that the person who prepared the bill for the printer, in its original form, did not construe this section as the court has done, because the bill as originally printed contains a marginal note opposite this section, as follows: "Priority of lien except for service of domestic animals." Chapter 175 of the laws of 1885 provides for liens for the service of domestic animals. But section 3 of the act of 1891, being section 6251 of the Compiled Statutes, would seem to clinch the matter; it reads as follows:

"Sec. 6251. Failure to notify mortgagee of sale—Penalty. If any person having heretofore conveyed any of the property above mentioned by mortgae or lien, as provided by this act, shall, during the existence of the lien or title created by such mortgage, suffer the same to be sold, as herein provided, without personal notice to the mortgagee of the time and place of such sale, at least two days before such sale, (he) shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail not exceeding ninety days."

Now the profession will recall that after the decision in Smith vs. Stevens it was generally apprehended that advantage would be taken of the law by dishonest mortgagors to divest the the mortgage lien, by permitting his property to be sold to satisfy an agister's lien. Was it not the purpose of the legislature to lessen this danger by the enactment of the foregoing penal statute? If the lien referred to in section 2 is subject to the mortgage lien and sale to satisfy it should not affect the mortgage, then there would be no necessity for the mortgagee having notice of the sale and of a stringent statute to prevent the owner from neglecting to furnish it.

This article is not written in a spirit of captious criticism, but with a view of calling attention to a possible oversight before the decision referred to shall have become a "rule of property."

F. V. BROWN.

Minneapolis, Minn.

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A receiver of a building and loan association is denied authority to foreclose a mortgage under a power of sale contained in a mortgage held by the association. Strauss v. Carolina Interstate B. & L. Asso. (N. C.) 30 L. R. A. 693. The case decides also that the affairs of an insolvent association are to be settled by charging borrowers interest on the amounts they have received, with a credit for all they have paid into the concern as dues, fines, or in other ways.

### MORTGAGEE IN POSSESSION.

How Created.—In various ways a mortgagee becomes a "mortgagee in possession." The usual manner in which this relation is created is through an abortive or defective foreclosure of a mortgage and occupation of the property by the assent of the mortgagor, express or implied, or by occupation through an absolute deed which is in fact a mortgage. Entry without the assent of the mortgagor, express or implied, constitutes the mortgagee a trespasser. Nor is the relation created when the mortgagee enters into possession without objection on the part of the mortgagor after the expiration of the time for foreclosing. Banning v. Sabin, 45 Minn., 431. In Johnson v. Sandhoff. 30 Minn., 197, the relation was implied from the entry peaceably, in good faith, without objection or opposition on the part of the mortgagor and valuable improvements made by the mortgagee. In Rogers v. Benton, 39 Minn., 39, the assent of the mortgagor was implied, among other things, from the fact that the mortgagor permanently removed from the state and abandoned possession. The mortgagee demanded possession of the wife. She testified that the mortgagee was "coming in under the mortgage, and that her husband knew it too." See also, Jellison v. Halloran, 44 Minn., 199; Russell v. Lumber Co., 45 Minn., 376; Burke v. Baldwin, 54 Minn., 514. A mortgagee holding possession is presumed to be holding in that capacity. Anderson v. Lanterman, 28 Oh. St., 104. A strictly continuous possession is not required. Burke v. Baldwin, supra.

Ejectment Will Not Lie.—With this relation established the mortgagor cannot oust the mortgagee by an action in ejectment. Pace v. Chadderdon, 4 Minn., 390; Johnson v. Sandhoff, 30 Minn., 197. Nor can a junior mortgagee after foreclosure eject a senior mortgagee in possession. Jones v. Rigby, 41 Minn., 531.

Action to Redeem.—Until redeemed from by the mortgagor or his assigns, the mortgagee in possession is the rightful owner. As such he may maintain an action of ejectment against a trespasser and even against the mortgagor. The rights of the mortgagee in possession may be extinguished by adverse possession.

The mortgagor is allowed to redeem from an abortive or ineffectual foreclosure by an action brought for that purpose. The action must have been commenced prior to 1887 within ten years after the mortgagee had taken possession of the property during the life of the mortgage and with the assent of the mortgagor, express or implied. The statutes of Minnesota do not regulate nor limit the time for bringing an action to redeem, but the courts by anology hold that the right to foreclose and the right to redeem are "mutual and reciprocal" or "reciprocal and commensurable" in the sense that they necessarily accrue and expire at the same time. Parsons v. Noggles, 23 Minn., 328; Rogers v. Benton, 39 Minn., 39; Bradley v. Norris, 65 N. W. Rep., 357; Backus v. Burke, 65 N. W. Rep., 459. In the Parsons case it was held that the possession by either the mortgagor or the mortgagee in no way affects the right of the one to redeem or of the other to foreclose.

By G. S. 1887, c. 69, the time for foreclosing was extended to fifteen years. In earlier cases it was held that the extension of the time by the Legislature had the efiffect of impairing the obligation of the mortgage contract then existing and was therefore unconstitutional. By the recent case of Backus v. Burke, supra, the earlier cases were practically overruled and the extension held constitutional, as the act took effect six months after its approval.

By analogy therefore an action to redeem must now be brought within fifteen years. After the right of action to redeem is barred the mortgagee in possession becomes invested with an absolute legal title to the mortgaged premises. Rogers v. Benton, supra. The right to redeem within the period of fifteen years is of course confined to a defective foreclosure; otherwise the statute governs by the period of one year allowed for redemption.

Duties and Rights.—The mortgagee in possession cannot permit a nuisance to be continued on the premises after taking possession without being liable in damages during the time of oc-

cupancy. Ferman v. Lombard Inv. Co., 56 Minn. 166.

Rents and profits must be applied in payment of taxes, necessary repairs and prior incumbrances to protect the title, and for payment of costs in defending the title. Hubbell v. Moulson, 53 N. Y., 225; Farris v. Houston, 78 Ala. 250. Subsequent collections are to be applied in reducing the interest and then the mortgage debt. Toomer vs. Randolph, 60 Ala. 356. Whether costs of the defective foreclosure will be allowed does not seem to be decided. If not applied as above stated the mortgagee can in an action to redeem be compelled to account for the rents and profits collected. Rogers v. Benton, supra; Holton v. Bowman, 32 Minn., 191; Stevenson v. Edwards, 96 Mo., 622; Daniel v. Coker, 70 Ala., 260. But he need not account to a junior mortgagee. Catterlin v. Armstrong, 79 Ind., 514. In 135 Pa. St., 293, in re Heffenstein's Estate, it was held that where rents and profits were not collectable the mortgagee will not be required to pay them. Hart v. Chase, 46 Conn., 247; Van Duyne v. Shann, 41 N. J. Eq., 312.

But in other cases it has been held that he should be charged with fair rental value and for the use and occupation. Sanders v. Wilson, 34 Vt., 318; Still v. Buzzell, 60 Vt., 478; Equitable Company v. Fisher, 106 Ill., 189. By taking possession, says Erskine, Chancellor, he imposes upon himself the duty of a provident owner and is bound to recover for the use and occupation such sums as a reasonable, diligent owner would receive. Hughes v. Williams, 12 Vesey, 493. In case of condemnation of the land he would be entitled to receive the amount of the award, for which he must give an account upon an action to redeem. Brame v. Towne, 56 Minn., 126. He would be liable for waste wantonly committed or suffered through his gross negligence. Stevenson v. Edwards and Daniel v. Coker, supra.

From the cases of Catterlin v. Armstrong and Hughes v. Williams, supra, it would seem that he would not be entitled to recover for improvements put upon the land after taking possession unless upon covenant in the mortgage or an express agreement to that effect. But under the Occupying Claimant's Act, Section 5849, G. S. 1894, it would seem that the mortgagee would be entitled to recover for improvements made while so occupying under that relation. Seigneuret v. Fahey, 27 Minn., 60; Hall v. Torrens, 32 Minn., 527; McLellan v. Omodt, 37 Minn., 157; Pfefferle v. Wieland, 62 N. W. Rep., 396. Notwithstanding the case of O'Mulcahy v. Florer, 27 Minn., 449. Especially see Goodrich v. Florer, 27 Minn., 97.

The respective relations being so thoroughly established in Minnesota and on recognized principles of ownership, possession, limitations, etc., it would be apparent that the usual relative rights, rights of inheritance and public rights, also apply to the mortgagee in possession and the mortgagor out of possession upon those well defined lines.

H. M. FARNAM.

Minneapolis, Minn.

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### ARE PERSONAL INJURY CLAIMS ASSIGNABLE.

In its January number (Vol. IV, p. 18) the Journal printed a memorandum by Judge Kelly of the Ramsey County District Court in the case of Melrose vs. the Railway Co., where it was held that the Supreme Court had overruled Hunt vs. Conrad, 47 Minn., 557, by its decision in Cooper vs. Railway Co., 55 Minn., 134, and that a cause of action for a personal injury after a verdict is in this state property and assignable.

A recent case in the Supreme Court of Illinois (North Chicago St. Railway Co. vs. Ackley) goes a litle further than did Judge Kelly's decision and holds in express terms that a cause of action for a personal injury may be assigned even before a verdict. The court's opinion has attracted wide attention because of its bearing on the important question of fees and the Journal thinks a brief abstract will be of interest to its readers.

A woman had been made a cripple for life by falling from a Clybourn avenue car from which she was trying to alight. In 1892 she employed

L. M. Ackley to prosecute an action for damages against the cable company and agreed to pay him one-half of whatever he might recover for his services and assigned half the cause of action to him to secure payment of the fee, and agreed to pay court costs and necessary expenses. The company refused to pay her as much as $1,000 in settlement.

Suit was begun in the Circuit Court in September, 1891, and two years and a half later was reached for trial. Just as it was about to be tried the railroad company's lawyer went to the woman's house and settled with her by paying her $3,750, and entered up a judgment against the railway company for that amount and had the record satisfied.

The attorney of the woman thereupon filed a bill in equity against the company asking for a decree that the company pay him one-half of the amount of settlement, alleging that the company had had full previous notice of his contract with his client. Judge Stein entered a decree to that effect in September, 1894.

The company having taken an appeal to the Appellate Court this decree was affirmed in an opinion written by Judge Gary.

When it was announced that the Supreme Court had affirmed Judge Gary there was great curiosity to know upon what grounds the Supreme Court based its ruling. Justice Craig, who writes an opinion, in which all the other justices concur, says whenever any cause of action is by statute made to survive to the executor or administrator upon the death of the claimant, it becomes assignable, unless there are reasons of public policy which take away the quality of assignability.

The court finds that the contract between the lawyer and his client in this case is valid and enforceable, and that the railroad company, having paid the full amount to the client, after notice, must account to the attorney for one-half of it.

The decision is so broad and sweeping in its terms as to furnish absolute protection to the attorney against any settlement being made behind his back, and enables any person who has a meritorious case and no money to prosecute it to secure the services of the best men at the bar, because he can give security for the payment of fees.

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### JUDGE STEARNS.

Judge Stearns, who died recently in California, was born in St. Lawrence Co., N. Y., in 1831, and was therefore sixty-five years old at the time of his death. He received a common school education in New York State, and when still a young man went to California, sailing around Cape Horn, and for some time turned his attention to the digging of gold, California being at that time in the midst of the gold excitement. He accumulated some money in that way and returned to the states to obtain an education. He attended Oberlin college for several years and then went to Ann Arbor, where he graduated from both the classical and law departments.

In 1860 he went to Rochester, Minn., and there began the practice of law. In the fall of 1861 he was elected county attorney of Olmsted county. In the spring of 1862 he raised a company of soldiers for the Ninth Minnesota volunteers. He was elected first lieutenant of the company and served on the frontier during the Indian troubles. He went to Missouri in 1863 and was soon after appointed colonel of the Thirty-Ninth United States, a regiment composed of colored troops. He took command of his regiment just before the battle of the Wilderness. He was at the siege of Petersburg and showed great courage, leading his regiment into the famous pit caused by the explosion of a mine. All through the war he was noted for his gallantry and courage.

He returned to Rochester in 1865 and was again elected county attorney. In the same year he formed a partnership with Judge Start, at present chief justice of the supreme court. In 1871 he was elected United States senator to fill the unexpired term of Senator Norton, who died at that time. He served in the senate for about three months.

In 1872 he went to Duluth and formed a partnership with Judge Ensign. In 1874, when the Eleventh judicial district was formed, he was appointed judge by Gov. Davis, and held the position for nineteen years, being three times re-elected without opposition. In 1894 he declined re-election on account of ill health, and the following fall moved to California, where he died.

For many years before he was appointed judge he took a great interest in politics, and after his removal to Duluth took great interest in the affairs of that city. For many years he was prominent in that city, and was ever ready to do anything in his power to further its interests.

### PRIZE LOTTERIES — REAL ESTATE GAMES.

In Lynch v. Rosenthal, 42 N. E. 1103, the Supreme Court of Indiana gave a construction to a contract for the sale of lots, whereby a "prize" lot was to be awarded to the subscribers. The Court held it void, being in the nature of a lottery. The Court said in part:

"That such contracts are against public policy, and that those who have entered into them shall have no relief in the courts, to enforce those that are executory, or to recover that which has passed under such as have been executed, is without doubt. Const. art. 8, sec. 15; Burger v. Rice, 3 Ind., 127; Swain v. Russel, 10 Ind., 438; Rothrock v. Perkinson, 61 Ind., 39; U. S. v. Olney, 1 Abb. (U. S), 275, Fed. Cas. No. 15,918; Whitney v. State, 10 Ind. 404; Crews v. State, 38 Ind. 28; Hudelson v. State, 94 Ind. 426; Riggs v. Adams, 12 Ind., 199; 13 Am. & Eng. Enc. Law, p. 1187; Rev. St. 1894, secs. 2170-2172 (Rev. St. 1881, secs. 2076-2078). The important question here is as to the character of the present contract. Does it infringe this principle of public policy? This inquiry depends upon what a lottery scheme is. In Hudelson v. State, supra, it was held that where a merchant, with each sale of merchandise to the value of 50 cents, gave the purchaser the right to guess as to the number of beans in a glass globe—the nearest guesser to receive a gold watch,—the transaction was a lottery. The Court there quoted with approval several definitions of a 'lottery,' some of which are as follows: 'Whether the enterprise * * * be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise.' Lohman v. State, 81 Ind., 15. 'Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery.' Hull v. Ruggles, 56 N. Y., 424. 'A lottery is a scheme for the distribution of prizes by chance.' Dunn v. People, 40 Ill., 465. In Rothrock v. Perkinson, supra, it was said: 'It is well settled in this state that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void as against public policy,' citing in connection with some of the cases we have cited, those of Higgins v. Miner, 13 Ind., 346; Thatcher v. Morris, 11 N. Y., 437. 'Lot' is defined to be 'a contrivance to determine a question by chance or without the action of man's choice or will.' Chavannah v. State, 49 Ala., 396; 13 Am. & Eng. Enc. Law., p. 1181. Webster's International Dictionary defines 'lot' as 'anything used in determining a question by chance, or without man's choice or will.' If the property subject to distribution possesses unequal values, so that one's good or ill luck in the scheme of distribution may determine whether he shall receive more or less for his investment, the scheme is a lottery. Dunn v. People, 40 Ill., 465. Nor is it less a lottery because the person whose property is distributed, or the person who pays, does not personally participate in the drawing. Fleming v. Bills, 3 Or., 286; Riggs v. Adams, supra."

Real estate prize lotteries have often been allowed in this city, and they will likewise appear again. There is no question that the current of the law runs just now against all manner of chance games, and they are held to be against good morals, and forbidden by public policy.—National Corporation Reporter.

# THE MINNESOTA LAW JOURNAL.

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## DISTRICT COURT.

**THE PUBLISHER**

**of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.**

**Olmstead vs. La Chance, and Fritz, Garnishee.**

**(District Court, Ramsey County. File No. 55,140.**

### Judgment—To What Extent Satisfied by Subsequent Judgment.

A judgment on a note secured by a mortgage is satisfied to the extent of the bid made at a subsequent foreclosure sale under the mortgage but it is not extinguished as to the balance by the entry of a deficiency judgment in the foreclosure suit. The deficiency judgment is merely cumulative and the original judgment stands as to the unsatisfied balance notwithstanding the entry of the deficiency judgment.

Ambrose Tighe & Charles W. Farnham for plaintiff; R. A. Walsh for defendant.

A motion to discharge the garnishee was made by the defendant and which the court denied. The point under discussion appears from the following

MEMORANDUM.

KELLY, J.—

On June 28, 1890, the defendant Cyrille LaChance, for value, executed and delivered to the plaintiff his promissory note for $6,000, payable on June 28, 1893, with interest at 7 per cent. To secure the payment of this note Cyrille LaChance and his wife, Alphonsine, made and delivered to plaintiff their mortgage of certain real property. The note was not paid at maturity, and the plaintiff brought action thereon, and on May 31, 1894, judgment by default was entered against the maker, Cyrille, for the sum of $6,388.77, being in full of principal, interest and costs.

This judgment was not paid and the plaintiff thereafter began an action to foreclose the mortgage, being file No. 55,893 of this court, wherein Cyrille LaChance, Alphonsine LaChance, his wife, and Adolph LeBrun were made defendants. The complaint is in the usual form in foreclosure, but recites in addition thereto the entry and docketing of the judgment in this action upon the note, and that the same remains unpaid. The prayer for judgment is that the mortgage be foreclosed; whatever interest defendant LeBrun might have in the premises be adjudged second and subordinate to plaintiff's mortgage debt; that the land be sold and the proceeds be applied after paying costs and expenses, upon said note and mortgage, and for a deficiency judgment against defendant Cyrille LeChance. A decree finding the amount due on mortgage debt at $6,584.17, and for the sale, etc., was entered.

Under this decree in foreclosure the land was sold for $6,000, and on the 24th of August, 1894, a deficiency of $673.21 reported, for which sum plaintiff was entitled to a judgment against Cyrille LaChance. For this deficiency a judgment was entered on the 13th

day of October, 1894, in the action No. 55,893, against defendant Cyrille.

Plaintiff subsequently began garnishee proceedings in action No. 55,140, the first judgment.

It is argued that the judgment entered in this action, No. 55,140, was by these proceedings merged and extinguished by those entered at a later date in the action No. 55,893, and that the judgment in this action being merged or extinguished the garnishee proceedings herein must fall.

The foreclosure action was not brought strictly upon the judgment rendered upon the note. It recited that judgment, but the decree of foreclosure in no sense took its place. It was obtained merely to subject the mortgaged premises to sale. So that, while defendant undoubtedly is entitled to have credited upon the judgment in this action the amount ($6000) realized by the sale of the land in the other, as of the date of the sale, the judgment here is not merged, nor satisfied, nor extinguished, but remains good for the balance, after such credit. A party may sometimes have more than one valid judgment growing out of the same cause of action. He can have, however, but one satisfaction. And a cumulative judgment in a case like this does not extinguish the first judgment. The second judgment must in fact be satisfied sufficiently to cover the first. The personal judgment for the deficiency after mortgage sale is merely cumulative. See Black on Judgments, Sec. 1013.

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**McLaughlin vs. Richardson, et al.**

**(District Court, Ramsey County.)**

## Practice—Change of Venue—Gen'l Laws 1895. Ch. 28.

Where an action is brought in one county against several defendants all of whom reside in another, the filing of the affidavit and demand prescribed by Ch. 28, Gen'l Laws 1895, by one defendant is effectual to remove the case to the county of the defendants' residence even though the other defendants do not join in the demand.

Michael & Peebles for plaintiff; A. H Hall for defendant Richardson.

This action was begun in Ramsey County against the defendants who were residents of Hennepin County. Defendant Edwards answered in Ramsey County. Defendant Richardson made the demand for change of place of trial to Hennepin County prescribed by Gen'l Laws 1895, Ch. 28, and the clerk of Ramsey County District Court forwarded all the papers to Hennepin County. The plaintiff notwithstanding this, noticed the case for trial in Ramsey County. Defendant Richardson moved to strike it from the calendar and the court granted the motion and the following memorandum was filed by

KELLY, J.—

The law regulating the place of trial of civil actions is found in sections 5182 to 5192, inclusive, of the Statutes of Minnesota, as amended by Chap. 28, Gen'l Laws 1895. Sections 5182, 5183, 5184, 5186, 5187, 5189, regulate the place of trial of the particular actions named therein. Section 5185 as far as applicable, reads as follows:

"In all other cases, except where the state of Minnesota is plaintiff, the action *shall* be tried in the county to which the *defendants*, or *any of them*, shall reside at the commencement of the action. * * * If the county designated for that purpose in the complaint be not the PROPER county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the *proper* county, and the place for trial shall thereupon be changed to the proper county by order of the Court."

Section 5188, which is section 51, Chapter 66, General Statutes 1878, provides for the change of the place of trial in substance as I have just quoted from Section 5185, with certain additions as to the power of the court to change the venue for certain named causes.

Chap. 28, Gen'l Laws 1895, amends this section No. 51, (or No. 5188) so as to read as follows:

"If the county designated for that purpose in the complaint is not the proper county, the action may notwithstanding be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county, which demand shall be accompanied by an affidavit of the defendant, his attorney or agent, as to the actual residence of the defendant

at the time of the commencement of the action, and upon filing due proof of the service of such demand and affidavit upon the attorney of plaintiff in the office of the clerk of the district court in the county in which such action is commenced such action shall thereupon be transferred and the place thereof changed to the county of which said defendant is a resident without any other steps or proceedings whatever."

"Where in any action there are several defendants residing in different counties the action shall be tried in the county upon which a majority of such defendants shall unite in such demand."

This act repeals all acts or parts of acts inconsistent therewith.

In the case at bar both defendants resided in Hennepin County at the commencement of the action. The defendant, who makes this motion, before the time for answering expired, complied with the foregoing statute and on filing proof of service of the demand and affidavit of residence with the clerk of this court, that officer transferred all the papers on file to the Hennepin County district court. The other defendant, by a different attorney, served his answer in this jurisdiction and made no demand for a change of venue. The question arises on the foregoing facts, has the venue been changed to Hennepin County?

In my opinion the case is triable in Hennepin County. *First*, because being the residence of both defendants and the demand being made, it is clearly "the proper county." *Second.*: The failure of both defendants to unite in the demand does not prejudice the right of that defendant who makes the demand. It is his *righ* and can be waived only by himself. *Third:* To hold otherwise would require all the defendants to unite in a demand for change where all are residents of the same county, while a mere majority may designate the place of trial when the defendants reside in different counties. This, for the reason that we must ordinarily read the word "defendant" to mean the plural as well as the singular number. The legislature could not have intended so absurd a distinction.

(Apropos of the foregoing, the Journal calls attention to the case of J. C. Oswald et al, vs. James Osborne et al, in which Marshall A. Spooner appeared for the plaintiffs and H. H. Hawkins for the defendants.

This was an action commenced in the district court for Hennepin county by J. C. Oswald & Co., against James Osborne and Thomas Hanley, of Carleton county. At the time the action was commenced the defendants both resided in Carleton county in the state of Minnesota. Within twenty days after the service of the summons in the case, the defendants appeared and by their attorney, H. H. Hawkins, of Thomson, Minnesota, served upon the attorneys for the plaintiffs an affidavit showing the residence of the defendants to be in Carleton county, together with a demand for a change of the place of trial of the cause from the district court in and for the county of Hennepin to the district court in and for the county of Carleton, and at the same time served their answer upon the attorneys for the plaintiff.

The complaint in the action was served with the summons and was not filed with the clerk of the district court of Hennepin county; the first paper filed with the clerk of the district court for Hennepin county was the affidavit and demand for change of the place of trial, together with proof of service as contemplated by Chapter 28 of the Laws of 1895. Before the clerk of the district court for Hennepin county had transmitted the files to the clerk of the district court for Carleton county, the attorneys for the plaintiffs applied to the district court for Hennepin county on an ex-parte application for an order directing the clerk of the district court for Hennepin county not to send the files, as provided by the chapter referred to, until the further order of the court, and thereupon immediately the attorneys for the plaintiffs prepared their application supported by affidavits for an order of the district court for Hennepin county to retain the case in the district court for Hennepin county until the said district court for Hennepin county should pass upon a motion accompanying said application for an order of the district court

for Hennepin county, declaring that the answer interposed in said action presented no issue for a trial by a jury, because the answer presented no defense and for an order striking out the answer of defendants as sham, false and frivolous.

Upon the presentation of such an application supported by affidavits, the district court for Hennepin county granted its order restraining the clerk from transmitting the files to the clerk of the said district court for Carleton county until the application of the plaintiffs could be heard and determined, and upon such application granted its order to show cause why the answer of the defendants should not be stricken out as sham, false and frivolous, and why judgment should not be granted plaintiffs notwithstanding the said answer and as for want of an answer.

The attorneys for the plaintiffs sought to contend that the law relating to change of venue referred to in Chapter 28 of the Laws of 1895, was invalid and unconstitutional, and they also proceeded upon the theory that it is only in those actions where there is an issue to try that the defendants may have a change of the place of trial, and that if it should be found that the answer presented no defense, either upon the face of it, or that it was interposed merely for the purpose of delay, and was false, that it might be stricken out as sham, false and frivolous and as presenting no issue and would not entitle defendants to a change of place of trial.

Upon the return of the order to show cause in this case no appearance was made on the part of the defendants.

It is to be regretted that the point which was sought to be raised as to the constitutionality of Chapter 28 of the Laws of 1895 could not be decided, or rather that it was not necessary to decide the same, in this proceeding; notwithstanding this, by the order made by the district court for Hennepin county it seems now to be held that if an action be commenced in the district court in one county and the defendants reside in another county, the district court will by its orders retain the case in the county where the action was commenced until a motion can be made by the plaintiffs to strike out the answer of defendants as sham, false and frivolous on the theory that until an answer is interposed which in fact raises an issue to be tried and which the defendant is under the statute entitled to have tried in the county in which he resides, there is nothing to change the place of trial of.

It would seem that the order made in the case referred to is not only sufficiently comprehensive to embrace a case where an answer interposed is upon its face insufficient but also where by affidavits the answer is attacked as false, sham and frivolous, or as having been interposed for purposes other than to secure the trial of a bona fide issue by the defendants.

The decision is right in line with the one made by Judge Smith prior to the passage of the Act of 1895, where he held that the plaintiff is entitled to have the action held in the county where it is commenced even after the notice of motion for change of place of trial, until a counter motion may be made by the plaintiff to strike out the answer as false, sham and frivolous, and where the latter motion is made returnable at the same time or prior to the time set for the hearing of the motion for a change of venue by the defendant.)

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**Cora F. Bangs vs. Frank H. Forbes.**

**(District Court, Hennepin County. 69593).**

## Public Officer—Application of Salary to Payment of Judgment.

The clerk of the Police Department of the City of Minneapolis is not a "public officer" within the meaning of the law, so as to exempt his salary from application to the payment of a judgment rendered against him.

A. F. Sweetser, for plaintiff; W. H. Morse, for defendant.

Upon a judgment duly rendered against the defendant in this action, an execution was issued and after demand was returned wholly unsatisfied. Thereupon the Court made an order for the defendant to appear before a referee and disclose in supplementary proceedings, and this order was served on the defendant on April 23rd, 1896. From the disclosure

thereunder made on April 25th, 1896, it appeared that in January, 1895, the defendant was duly appointed by the Mayor of Minneapolis as secretary to the mayor and also as clerk of the police department of that city; that said appointments were confirmed by the city council; that under said appointments the defendant had continuously performed the duties of those offices from the time thereof up to the date of said disclosure; that his salary as mayor's secretary had been fixed by resolution of the city council at $600.00 per year, and his salary as clerk of the police department at $1,100 per year; that it had been the custom of the city council to order warrants for the payment of these salaries, together with other city payrolls, monthly near the close of each month, but that at the time of said disclosure no warrant had been ordered for any salaries for the month of April or any part thereof; that defendant's said salaries had been paid in full by the city up to the 1st of April, 1896, and that defendant had assigned all of his salary as mayor's secretary for the month of April, prior to the service of the order in supplementary proceedings upon him. The disclosure and report thereof showed the specific duties performed by the defendant in these official positions, which were chiefly of a clerical or ministerial character.

The pro rata amount of defendant's salary as clerk of the police department from the 1st of April, up to the 23rd of that month, the date of the service of the order in supplementary proceedings upon him, was $70.00.

Upon this showing plaintiff moved the court for an order fixing the amount of said salary applicable to the payment of the judgment, and appointing a receiver to receive and collect the amount so fixed, and to apply the same to the payment of the judgment.

Upon this showing and motion, it was ordered by the court (Smith, J.) that a receiver be appointed, "and in case said judgment is not satisfied within ten days, he be authorized to collect said moneys (the sum of $70) and apply the same or so much thereof as may be necessary to satisfy said judgment, in payment thereof," and further requiring the receiver to give bond to be approved by the court, for the faithful performance of his duties.

(Note—See on same subject article "Can Use Oreditor's Bill." Journal, Vol. IV, p. 64, where an Illinois case is digested holding that while garnishment process can not be issued against a municipal corporation, moneys due from such corporation to a judgment debtor, can be reached by a judgment creditor by means of a creditor's bill—Editor.)

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**Reeves & Co. vs. Board of County Commissioners of Wright County.**

**(District Court, Wright County.)**

## Clerks Fees—Docketing Transcript of Judgment.

The only fee which the clerk of a district court is entitled to charge for docketing a transcript of a judgment rendered in another county is that prescribed by Gen'l Statutes 1894 and section 5538 of 25 cents where there is one judgment debtor and 10 cents for each additional judgment debtor.

J. C. Tarbox for Plaintiff, J. D. Allen for Defendant..

Under a special Statute relating to Wright County the Clerk of the court is required to pay all fees of his office into the county treasury. The plaintiff presented to the clerk of the court a transcript of a judgment from another county and requested that it be docketed in Wright county, tendering the clerk 25 cents as his fee for so doing. The clerk refused to docket the same claiming that a larger amount should be paid as fees. The plaintiff paid the additional fee under protest and brought this action to recover it. The issue arose on a demurrer to the complaint. On argument, Judge Seagrave Smith, before whom the case was tried, overruled the demurrer, holding that Sec. 5538 of the General Statutes of 1894 providing "filing and docketing transcripts of judgment from another county, or from justice court when but one judgment debtor, 25 cents and 10 cents for each aditional judgment debtor" was the only provision that gave any fee to the clerk in such cases, and that for this fee he was re-

quired to do all that was necessary to make a valid docketing of the judgment.

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### PERSONALS.

St Paul—

Hon. and Mrs. H. F. Stevens left on the 21st for New York and will sail for Europe where they expect to spend the summer.

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F. M. Dudley, attorney for N. P. land department, returned from an extended trip East and West.

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W. H. Mead removed to the Manhattan building.

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L. D. Barnard was married the 27th ult.

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Minneapolis—

C. E. Breem has been disbarred for unprofessional conduct.

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W. H. Tripp has removed to Cripple Creek, Colo.

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### STAMP SIGNATURE.

A point was sought to be made in the Illinois case of Streff vs. Colteaux, of the fact that attorneys had signed a paper only by an impression thereon of their names made by a rubber stamp. March 31, 1896, the appellate court held this sufficient, stating that it was not aware of any authority to the effect that one may not so sign his name. It is ordinarily, the court says, the act of making a paper one's own that is important, rather than the manner of so doing.—Business Law.

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An attempt to stop payment of a draft by intercepting it in the mail, where it was sent by a bank at the request of a customer to pay a draft on him, is held in Canterbury v. Bank of Sparta, (Wis.) 30 L. R. A. 845, to be ineffectual to defeat the creditor's right to the draft, although the bank sent it in ignorance of the insolvency of its customer, to whom it extended credit for the amount. This case is decided on the theory that the draft had been delivered to the payee by mailing it. A note to the case shows that the courts have generally permitted a draft or check to be intercepted.

### SPECIAL TERM IN CHICAGO.

The Journal has witnessed some extraordinary proceedings in courts of justice but its experience halts at anything as remarkable as the following discussion in a Chicago county court room. One Dahlin had been killed on the tracks of the Pennsylvania railroad and a jury had given his widow $4,500 damages. Ex-Judge Prendergast, the company's attorney, made a motion for a new trial before Judge Goggin, Mr. Bulkley, the widow's attorney appearing in opposition. Here is a full transcript of the hearing on this motion:

The Court—Judge Prendergast, the only point in your case—and I have lain awake nights dreaming over it—the only pont is that question of the admission to the jury of the verdict of the coroner's jury, and I do not want to keep you here waiting all the morning, and I might just as well tell you that, as to everything else, I am against you, and you will have to go to the appellate Court with it. Is Mr. Bulkley here?

Mr. Bulkley—I am here your honor.

The Court—He took his chances on the admission of the coroner's verdict to the jury, and there is not another thing in your case, I have concluded, and it would be cruel to keep you waiting here all the morning for a discussion of a motion for a new trial.

Judge Prendergast— How about waiving my right to be heard on a motion for a new trial? How about the coroner's verdict being admitted to the jury, and which your honor has recognized as an error?

The Court—I think it was wrong, but let the appellate court pass on that.

Mr. Bulkley—The supreme court has already passed on it.

Judge Prendergast—I understood your honor's remark to be that as to the remainder of the case, you thought the appellate court should pass on it; but, as to this point, that it was erroneous to let their verlict, your honor's mind was clear, and why should we, if that is an error, be subjected to the verdict in this case? Why should not there be a clear and impartial administration of the law? We cer-

tainly have a right to be heard, and to have a fair hearing.

The Court—You were heard here in this court, but when you put that greenhorn from the country on the stand, why that killed your case.

Judge Prendergast—Do you mean the witness Lorenstein?

The Court—I do not know his name—the livery stable boy.

Judge Prendergast—The one acting as tower-man, do you mean?

The Court—I do not know as to that; but I have investigated your case thoroughly; in fact, I have slept over it.

Judge Prendergast—I should prefer, your honor, that you should attend to it here, while you were wide awake, and permit me to argue this with you, and present my authorities and make my motion for a new trial in the regular way. I have two affidavits—one of Mr. Bradley, deputy clerk of the circuit court, and one of Mr. Cooper, referred to in my motion for a new trial, and I want to present those affidavits.

The Court—File them and let the argument be supposed to have been made.

Judge Prendergast—I except to that, your honor; I do not want to try your patience in any way, but I insist that we should be heard—

The Court—No; and I do not want to keep you all the morning unnecessarily.

Judge Prendergast—That is what I am here for; and I think we have a right to read our authorities, to present them to the court in the regular way, and that the court should listen to our reasons for a new trial.

The Court—Let me tell you, in that case, it was one of the cleanest cases—I will disclose myself to you—it was—

Judge Prendergast—What was, your honor?

The Court—It was one of the cleanest cases of personal injury ever brought before me; and you cannot bring any law here now that will change my mind.

Judge Prendergast—The instructions that you gave here, your honor, are every one erroneous, and I want you to hear my argument. Will you not hear me on the question of improper instructions?

The Court—No; go to the appellate court, and you can tell them I am bad, and will not review my own instructions.

Judge Prendergast—Your honor knows me well enough to know that I can never say you are bad, but I would say if you do not treat this matter differently that you have fallen into a very grievous legal error—

The Court—No doubt I am bad; if I were not there would not be any use for a God.

Judge Prendergast—Let me remark, your honor, the plaintiffs do not declare on the inadequacy of the tower man; that is, not an allegation or any part of the declaration upon which your honor is called to try this case.

The Court—No; the plaintiff's counsel did not try his case very well either.

Judge Prendergast—It is my opinion that your honor supposed so and was trying to help him out.

The Court—Well, you will have to go up with this case to the appellate court.

Judge Prendergast—I except to the refusal of the court to hear us. I propose that everything that has taken place in our motion for a new trial shall be incorporated in the reord.

The Court—Send that up—and I wish you good luck with it.

Judge Prendergast—Let me ask you, please—

The Court—Very well.

Judge Prendergast—You well know that I called your honor's attention to this verdict of the coroner's jury as it was sent in to the jury.

The Court—Yes, and I told Mr. Bulkley to take his chances on it. Now let the appellant court reverse it, if they please, and that ends it.

Judge Prendergast—I do not think it ought to.

The Court—That array of books you have there—

Judge Prendergast—I brought those books, your honor, for the purpose of quoting the law laid down by the supreme court and the appellate court on this case.

The Court—Let us see; today is Friday, or Saturday, which?

Judge Prendergast—Let me call your honor's attention to this point, that your action here is more than a formal matter.

The Court—No, no, it isn't.

Judge Prendergast—It is not?

The Court—No.

Judge Prendergast—You think not?

The Court—No.

Judge Prendergast—I have read in the books that the action of a trial court in denying a motion for a new trial would be regarded by the appellate court as of some weight and importance.

The Court—They don't pay a cent's worth of attention nor place a bit of value upon that. They have turned me over up there in a way that has astonished me. They pay no attention to the action of the trial court on the original trial.

Judge Prendergast—Don't your honor think that by setting them a good example now—

The Court—They wouldn't follow that—the evidence of reformation is not in the appellate court.

Judge Prendergast—No doubt.

The Court—I have tried to regulate the supreme court, but they wouldn't have it. (Laughter.)

Judge Prendergast—Your honor, the instructions given here are clearly erroneous under the decisions.

The Court—I hope so, for your sake.

Judge Prendergast—But your honor will not listen to me on that.

The Court—No, not a word. Your tower man is the man that beat your case.

Judge Prendergast—But the declaration does not proceed upon the theory that we had an improper or inefficient tower man there. That is the trouble with the court's view in this case! You are trying to help the plaintiff where the plaintiff's attorney did not help his own case. There was no allegation in the declaration of inefficiency on the part of the tower man.

The Court—That is a matter of evidence that the appellate court may pass upon.

Judge Prendergast—We were not notified by their declaration to prepare to meet any charge on that ground.

The Court—Let me be good-natured with you; I will be perfectly frank. Now, just take the case to the appellate court and let them reverse it. The verdict is $4,500.

Judge Prendergast—Forty five hundred dollars is a great deal of money to saddle on to this company, as the result of an erroneous trial.

The Court—This is where the State of Illinois limits the liability for killing a man to $5,000. I could tell you the name of the Federal Court Judge that got that act passed, and it can never be repealed. There was a line of busses running between here and Cairo, and whenever a man broke his leg or was seriously injured, the instructions given by the company to the driver was to take the king-bolt out of the wagon and knock him on the head and kill him, and they could then be allowed only $5,000 damages. And you know the Federal Judge that got that law passed.

Judge Prendergast—I have no knowledge of any action on the part of a Federal Judge.

The Court—Well, perhaps it was before your time.

Judge Prendergast—The court ought not to saddle the appellate court with this difficulty.

The Court—Let them unsaddle themselves. The man was killed.

Judge Prendergast—The man was killed, yes, sir. He ran against the fence.

The Court—By "fence" you mean the north gate, do you not? That is what your witness said? The boy said that, this 20 year old boy, the one you had in the tower, and who didn't know what a railroad signal was.

Judge Prendergast—There is no evidence that he did not know what a railroad signal was.

The Court—There is no evidence that he did.

Judge Prendergast—People young in life may be capable and efficient, notwithstanding their years. How old was Pitt when he made a mark in English history?

The Court—And they sat down upon him, too, because he was too young.

Judge Prendergast—At 20 years of age, your honor, some men have accomplished a great deal.

The Court—At 20 years of age you were a good lawyer.

Judge Prendergast—Your honor's view of that man is entirely erroneous.

The Court—The jury did not think so.

Judge Prendergast—The jury did not respond to that question. It seems your honor only dreamed on this case, while we desire a candid hearing, a review of the law and the evidence.

The Court—The jury responded to the tune of $4,500 in their verdict, and we cannot go back on what twelve men have calmly and deliberately decided upon.

Judge Prendergast—About the ver-

dict of twelve men, your honor, there was a very recent instance here where a verdict was set aside, and you went back on that, and why not on this?

The Court—They were a different class of men.

Judge Prendergast—A different class of men! Let me ask you this question: You want to be patient with me, you say, and I think you have discovered that I am a little patient myself, that I am disposed to be pleasant as well as patient.

The Court—You are mighty irritating sometimes. (Laughter.)

Judge Prendergast—I have not been during this trial, your honor.

The Court—No; it has been the most peaceful you have ever participated in before me. (Laughter.)

Judge Prendergast—Does not the court acknowledge that no counsel could have been more careful and more patient, considerate, and forbearing to all than I have been during this trial? Is not that true?

The Court—Yes. Everything else I have said about you I will take back, because that case was nicely tried on your part. You showed a great deal of zeal and ability, but the facts were aginst you.

Judge Prendergast—Should a premium be put upon bad behavior?

The Court—No; but there would be if I decided the other way. No, I would do anything I could for you, for it was one of the nicest tried cases I ever witnessed. I said the plaintiff's counsel did not try it well. He really ought to have had $500 more, the limit of the law. You tried that case nicely.

Judge Prendergast—The proof of the pudding is shown in the eating of it.

The Court—Well, I guess the other side is going to eat it. (Laughter.)

Judge Prendergast—And they have tried their case well, and this record shows that the coroner's verdict was specifically accepted in the testimony, and erroneously allowed to go to the jury.

The Court—If they reverse it on that point, let the other side assume the responsibility.

Judge Prendergast—Don't you think, your honor, you ought to set aside this verdict on that ground? You said the allowing of that verdict to go to the jury was erroneous even before the jury had the case. You said that to Mr. Bulkley, and you say so now.

The Court—No, I do not say so; I intimated it to you. There is no jury here now.

Judge Prendergast—I understood you to say this morning that in your opinion the admission to the jury of the whole of the coroner's verdict, which was rendered at the coroner's inquest, was erroneous.

The Court—No.

Judge Prendergast—What part of it, then, your honor, was erroneous?

The Court—The tail end. "Let the tail go with the hide," a bond in $5000, and bill of exceptions in thirty days.

Judge Prendergast—Then I understand the court overrules our motion for a new trial?

The Court—Yes.

Judge Prendergast—Also please note an exception for defendants, because the case has not been properly disposed of by the court. And now I make a motion in arrest of judgment. What do you do with it?

The Court—Overrule it.

Judge Prendergast—The reporter will please note an exception to your honor's ruling. Everything that has taken place here this morning will be put in the bill of exceptions I understand.

The Court—Yes, sir; everything that is proper.

Judge Prendergast—Your honor will enter judgment on the verdict?

The Court—Of course, that has been done, or you could not take an appeal.

Judge Prendergast—We except to the ruling of the court and pray an appeal to the appellate court of the First District of Illinois, October term.

The Court—All right. Bond, $5,000, and bill of exceptions within thirty days. Any time you want. I will extend it if you like. Make it sixty days.

Mr. Bulkley—I have no objection.

The Court—Sixty days for bond and bill of exceptions.

Judge Prendergast—Will your honor allow us to show in record these authorities which I was ready to submit this morning?

The Court—Oh, submit them to the appellate court.

Judge Prendergast—I wished your honor to know that I had these authorities here.

The Court—I see them. (Laughter.)

Judge Prendergast—We will ask an exception to each and every one of your honor's rulings.

Mr. Bulkley—You do not want to embody all those books in the bill of exceptions? (Laughter.)

Judge Prendergast—Oh, no.

The Court—Fix up the bill of exceptions.

Judge Prendergast—All we want is that the bill of exceptions shall show everything that has taken place.

The Court—And the remarks of the court especially on the motion for a new trial? (Laughter.)

Judge Prendergast—Yes, your honor; we shall except to every part of it.

The Court—Very well, sir.

And the case ended and the result of the verbal duel between Goggin and Prendergast to be decided by the appellate court will be watched with interest.

J. L. WASHBURN,
Duluth, Minn.

...THE..

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## CONTENTS.



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**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.**

### QUALIFIED ENDORSEMENTS.

The clearing houses of St. Paul and some of the other Minnesota cities have given notice that cheques and drafts bearing qualified or restrictive endorsements like "For collection" "For deposit" or "For credit of" will not be passed through the clearing house. This is the adoption of a rule which has prevailed for some months in Eastern cities and grows out of the decision in the case of United States vs. American Exchange Bank, handed down by Judge Brown of the United States District Court, Southern District of New York in the latter part of 1895. In this case the plaintiff brought suit to recover the amount of a pension draft which defendant had collected, as collecting agent of another bank. The name of the payee was afterwards discovered to have been forged upon the draft after her death. The defendant securing a verdict, the plaintiff moved for a new trial. Brown, district judge, said:

"The pension draft in this case was paid to the defendant bank by the subtreasury, upon the forged endorsement of the payee's name after her death. The Bellaire Bank of Ohio had previously cashed the draft upon the forged indorsement, and thereupon indorsed it 'for collection' to the defendant bank at New York. The latter was the collecting correspondent of the Bellaire Bank as regards its

funds in New York. The collection was made in good faith by the defendant bank and the proceeds remitted to the Bellaire Bank some months before the discovery of the forgery. The indorsement of the forged draft by the Bellaire bank showed upon its face that the defendant was to act as collecting agent only. The defendant never had any property in the draft or its proceeds. The later authorities sustain the proposition that in such a case where the collecting agent pays over the funds before any notice of irregularity or fraud, the remedy is against the principal alone. Bank v. Armstrong, 148 U. S. 50; Sweeny v. Easter, 1 Wall. 166; Wells, Fargo & Co. v. U. S., 44 Fed. 337; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

"In such cases the indorsement by collecting agent, who has no proprietary interest,does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the draft itself the payor cannot claim to have been misled by the indorsement of the agent, or any right to rely upon that indorsement as a guaranty of the genuineness of the payee's indorsement.

The direction of a verdict for the defendant upon the undisputed facts was, I think, cerrect, and the motion for a new trial should be denied."

The weakness of the system that has long been pursued by the banks can easily be seen in this case. The collecting bank, being merely an agent and not a guarantor, takes it for granted that if anything is wrong with the draft it will be discovered by the drawee, while the latter labors under the delusion that the draft is all right or the collecting bank would have discovered it. As a matter of fact both are woefully ignorant of the very facts they ought to know. The result is the forger gets the money and gets away before he is discovered.

To meet these dangers the new rule has been devised which requires a plain endorsement or simply "Pay to ———— or order" either of which gives to the paying bank a complete guaranty of the genuineness of all previous signatures.

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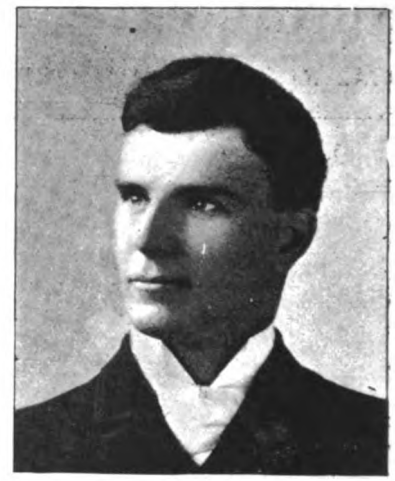
Laws will not be obeyed, harmony in society cannot be maintained without virtue; virtue can not subsist without religion.—Robert Hall.

Marshall A. Spooner was born at Lawrenceburg, Indiana, in 1859, and was admitted to the bar the day he reached his majority. He settled in



Minnesota in 1882 and located at Moorhead. Practiced law with E. D. Webster. Afterwards formed the partnership of Spooner & Larrabee.

He removed to Minneapolis in 1886. Mr. Spooner, although a young man, has been very successful in his profession. His field of practice extends throughout the state. He comes of a legal family, his father having been a successful lawyer, and he is a nephew of ex-Senator Jno. C. Spooner, of Wisconsin.

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The senate at Washington has recently passed a wise measure in the form of a bill to withdraw from the United States Supreme Court all jurisdiction in criminal cases, except those involving capital punishment, and to transfer this jurisdiction to the United States Courts of Appeals. This will be a great relief to the Supreme Court whose docket has always been encumbered with embezzlement cases and other criminal matters which have greatly impeded more important litigation. The Circuit Courts of Appeal are well able to attend to such cases and are quite as likely to do them justice as the supreme court is. It is, however, proper that cases involving the death penalty should have the right of appeal to the highest tribunal in the land.

### GET UP AND HUSTLE.

"There are some people who expect business to come to them; who sit down and wait for fortune to come their way, and complain of the hard times because they do not prosper," says the Hub News. "Such people do not deserve to succeed. Times are very much what we make them. Of course, there are periods of business depression. We all must admit that, but the man with any energy, the man who eventually succeeds, does not lose courage because calamity howlers tell him that the times are out of joint. He buckles on his armor and makes a more vigorous fight for success than he would in more prosperous times. He uses every effort possible, and every means that suggest themselves to push his business. The man who waits for business to come to him is out of place as a business man. The sooner he steps down and out and allows some more enterprising man to take his place in the commercial world the better it will be for all who have any business dealings with him, for he is sure to fail sooner or later. To everlastingly hustle is the only secret of success in these days of fierce competition. It is no use lamenting the fact that we have competitors. They do us good. They stir us up and make us put forth our best efforts—that is if we are alive. If we simply sit still and complain because somebody else has dared to go into the same business we had better lie down and die, because we have outlived our usefulness."

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Hoax—There was a fellow in court to-day charged with stealing a horse and leaving his bicycle in place of it.

Joax—What did they do? Convict him.

Hoax—No; the jurymen were all cyclers and they recommended that the prisoner be sent to an insane asylum.

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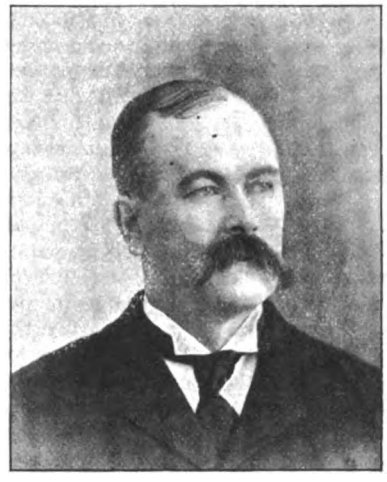
"What was the most confusing case you ever had?" asked the doctor of his lawyer. "Case o' champagne," returned the lawyer. "I hadn't got half through it before I was all muddled up."

B. H. Whitney was born December 29, 1848, at Cortland, New York. His early years were spent on a dairy farm in central New York, where he worked on the farm during the summer and attended school during the winter. Afterwards entered Cortland Academy, graduating in 1868. In 1869 he came to Minnesota and spent some



time reading law in the office of Judge C. M. Start and Col. James George, of Rochester, completing his studies in the office of Judge J. F. Pope, of Plainview. He came to Murray county in the summer of 1879 and located at Currie, where he remained until March, 1887, when he removed to Slayton. Mr. Whitney was elected county attorney in 1880 and in 1882 was chosen Judge of Probate, in which capacity he served for four years. Was postmaster from April, 1891, to November, 1893. Member of school board for three years and village attorney for a similar period and is at present clerk of the village council. Judge Whitney is a very conservative man, has a fine law practice, is highly esteemed as a lawyer, and especially as a counsellor, his opinions on questions of law being regarded as very sound and valuable.

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Two things speak much of the wisdom of a nation; good laws and prudent management of them.—Stillingfleet.

When the state is most corrupt, then the laws are most multiplied.--Tacitus.

### OUR PORTRAIT.

J. L. Washburn, of Duluth, was born December 26, 1856, near Crawfordsville, Ind. His parents removed to Minnesota in the spring of 1857 and settled on lands in Blue Earth County. Mr. Washburn received an academic education and studied law in the office of Hon. M. J. Severance, of Mankato, and later practiced his profession successfully for ten years in that city. He removed to Duluth in the spring of 1890, where he has since resided and engaged in the practice of law, to which he gives his undivided attention. His specialty is corporation law and he is attorney for several railroad companies. Mr. Washburn is a democrat but takes no active part in politics. He has never held any public office except that he was a member of the board of education at Mankato and took great interest in improving the school system of that city. He is an extremely public spirited citizen and few men do more than he in aiding the material prosperity of his community. As a lawyer he is a pronounced success and in forensic address aims to be logical and forceful rather than flowery. He is the senior member of the firm of Washburn, Lewis & Judson, which is one of the leading firms of the State. Married Miss Alma Pattee, of Mankato and has a family of two boys and three girls. Mr. Washburn is a model type of the American lawyer of to-day.

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### JOHN MARSHALL.

An address delivered before the Illinois State Bar Association by Gen. John C. Black, U. S. district attorney for Illinois.

I have often thought that the highest political function which could be devolved by Providence upon a man or a race of men was that he or they should be the founders of a State. Those who come after them may complete, amplify, improve, undo or use their work, but the work of the founders is the imperishable part of human achievement. What would we not give as we sit here in the imperial city, to know the affections, the hopes, the trials and the triumphs of the founders of the State of Illinois. The records that they have left,meagre and vanishing, assure us of their devotion to liberty, and their regard for the Republic, their affection for their adopted State and such of them whose names survive we venerate and hold in our heart of hearts.

But could we be alowed to unroll the whole story of their lives, the tragedies and triumphs of the border, we would enjoy such romance as the pen of no master has yet spread before the world.

And on that greater stage, continental in its extent, the figures now appear to us of the founders of the American Republic. How they rise in glory! There is Washington, the soldier, the statesman, the patriot, the father of his country. His Fabian qualities of mind preserved the armies from annihilation; his patience subdued the animosities and irritations of his period; his patriotism overawed the turbulent; his earnestness encouraged the despondent, stirred the laggard, breathed abroad the purposes of destiny among the scattered colonies, and the all but Divine benignity of his character drew to him the unstinted admiration and love of patriots at home and of sympathizing multitudes in the world at large. The most profound study of his character makes him easily first and greatest among the founders of the American State. He was the active, powerful element that wrought with the revolution and established the Republic.

I will not pause to mention even the long array of illustrious soldiers and statesmen who stood by his side. But after the accomplishment of peace with Great Britain came the perils of Confederation. The pressure of war had been removed—that iron chain was gone from the thirteen States and the Union was fast falling into its original constituents. Rivalries, animosities, differing interests, supersensitive regard for personal rights, were all conspiring to dissolve the bands which Washington and his compatriots had created. Then came the Constitutional Convention of 1787. Its secret history has never all been told; it is well that it should not be. While we would glory in the final result as we do, we would know too much of the smaller passions and interests, the intrigues and dissimulations, the doubts and dreads, that mark the deliberations of that historic assembly,now fortunately buried in oblivion; we have left for contemplation only the grand and majestic work which that convention did.

But the adoption of the constitution was itself only a single step toward the habilitation of the republic. That Constitution had to be made effective. It had to be so interpreted and declared, its principle had to be so expounded, that men would know that they were dealing, not with that confederation which gasped and died upon the threshold of the convention, but

with the nation which rose, full panoplied, from its midst.

He would be great among the founders of the State who, in presenting the American Constitution, which was the work of this convention, by proper declarations to his fellow-countrymen, would, while asserting all of its power and maintaining all of its dignities, yet so soften and mould it to the needs of free men, that it should be within conservative of liberty, and without, trebly strong.

This it fell to John Marshall, of Virginia, to do; and it is of him and his work that I wish briefly to speak to you tonight.

When he was nineteen years of age the Declaration of Independence was proclaimed. News traveled but slowly in those days. No lightning carried the anouncement instantly to a thrilled and sentient people, but by the slow course of the carrier, the horse and the wagon, the word was borne from hamlet to hamlet, and from State to State, until it reached the confines of all the colonies. Among those who earliest heard the tidings was this stripling lad. He at once became an active advocate of the new order of things. He entered the service of Virginia and then of the continental armies. He bore his part well in all the engagements into which the fortune of the war and his duties carried him. He learner in camps frugality, the study of men, and the relation of armies to a free government. You may have shared the feelings that animated him when the thunders of battle rolled upon the plain. He, like you, loved the country in whose cause his breast was bared. "He highly resolved that it should not perish from the earth." Unmindful and unwitting of the great destiny before him, he was doing his duty as he found it day by day.

My study of the characters of great Americans has led me to believe that they achieved greatness simply by doing, day by day, the duties which were imposed upon them by the circumstance of their country and their lives.

Greatness does not work in the future; it does not scan the future for tasks or rewards; its hands do not reach forward for coming prizes; it does its work today, in today, for today, and leaves the future with God.

He returned to the occupations of peaceful life finally, when the country no longer needed his services, and engaged in the practice of the law in a country neighborhood.

In a country neighborhood, and yet to his genious and ability it was to be the eminence where his achievements would attract the attention of his countrymen and fit him for the greater work before him. As Tennyson has said:

"And thus not once or twice, but oft
In our famed island's story,

**The path of duty proved the way to Glory.**

His ability recommended him here as his cheerfulness and fortitude had recommended him in the field, and he grew in the admiration of his fellows and obtained a firm hold upon the affection of his neighbors. He was preferred by them in local elections, being chosen member of the State legislature and sent to conventions where he met the fiercest and strongest spirits of his time. He stood in the same arena with Patrick Henry and opposed him—successfully opposed him; and thus continued to develop his character, all unmindful still of what the future had for him. But the constant doing of his duty enlarged the scope of his own intelligence, matured his judgment and strengthened his character. He soon became marked among all the brilliant men of his time, and was sent as a commissioner, to settle matters in dispute with France, to the court at Versailles. He was also elected a member of Congress for a single term from his home district, and, at last, by the partiality of President Adams, was called, in the closing hours of the last century, into the cabinet of that venerable statesman, where he remained until, on the 31st day of January, 1801, he was by Mr. Adams appointed to be chief justice of the United States. He had never held judicial position up to this time. It seems to me he must have been of rare quality of intelligence to have so impressed himself upon Washington that he was a councillor, and upon Adams that he was a beloved friend, and that that sage and patriot, who loved the country with his whole heart, should have been willing to take the risk of naming an untried man to the most influential office in that country.

Mr. President, I am a firm believer in the intervention of the Almighty in the affairs of nations. I believe that God inspires men, fits them, rounds them out, fortifies them, tests them, tries them, completes them, for the great courses that they are to run. Such an instrument of the Divine Will was Washington. Such another was Lincoln, and such another and scarce less great than either was John Marshall. Among all the words that remain spoken by him is not one that indicates a selfish purpose in his life. Not an intrigue to gain recognition or to secure appointment; not a word of request for preferment, but like some great tree that in the budding spring time spreads its branches up to the showers and drinks them and loosens its buds, up to the sunshine and catches it and opens its leaves, that sends the roots down into the earth and grows up the strength and substance of its growth, and at last, full pano-

plied and beautiful, stands in the summer's glory, so this great man, after the varied preparations of which I speak, came to the office of chief justice of the United States, with strength, perception, wisdom, patriotism, developed in equal and glorious qualities in his superb mind.

He had been a lawyer without greed; a diplomat without guile; a politician without ambition; a soldier filled with love for his country; and over all the years that had been occupied in these varied careers sketches the story of a modest, simple life. He needed every quality that he had gained in the exercise of the great office to which he was called. The republic was about to be dissolved by peaceful means. The States were quarreling upon the questions of local interest and precedence. Sectional feeling already engendered was separating the new land upon financial lines. The sword of Washington slept in its silent scabbard, and the great chief, his commanding influence withdrawn from the councils of his country, lay dead on the banks of the Potomac. There was dissension and doubt in the minds of the judges as to what the new Constitution was designed to create and preserve. Never for one instant did those doubts obscure the intellect of John Marshall.

His career on the bench lasted for thirty-four years; no other such occupancy is to be found in our annals; and during those thirty-four years he laid down the principles and declared the rules by which the government has existed, prospered and grown in greatness.

When he ascended the dais of the Supreme Court the American world was in doubt as to its existence and its character; when he ascended thence to Olympian heights, the American world knew that it was a nation.

The Supreme Court of the United States! I pause in the delineation of the great judge, to pay the tribute of a free citizen of this free republic, to this tribunal. It has been and is a fashion to inveigh against it. Those to whose ambition it sets bounds; those whom it circumvents; those filled with the lust of license; those drunken with their own ecstacies; those who hate order; those who plot rebellion; those whose hearts are filled with criminal intent toward society; those who believe the tenets of anarchy; those who are desperate, defiant and depraved; those to whom politics is a game of juggling, a method for the control of their fellows, and who look upon the institutions of a century with sullen hate—all of these attack the Supreme Court of the United States. But every lover of liberty, every man to whom the republic is dear, every man who has hopes for humanity, every man who believes in the experiment of free government, knows that it is the great barrier against which the waves of faction surge and die in vain; that it is the conserver of human liberty; that it is the conserver of domestic peace; that it is the intrenched citadel of the State; that it is the bulwark of the right and individualism of the citizen; that it stands midway between usurpation and violence on the one side, and slavery and serfdom on the other; that every right of the citizen, and that every power of the government, is regulated by and through its machinery; that without it, despotism would come, or chaos prevail; that in the true interests of the people it is today more firm-based, higher and nobler than ever before, and that, even if error has sometimes been found in its decisions, it has hastened to correct the error, and ever will; that when liberty is in its struggles, it will find refuge there, and that in the great convulsions that occasionally disturb, and always have and perhaps hereafter will disturb society, the Supreme Court has stood unmoved. In the light of its history, men know that when the writ of habeas corpus was imperiled, the Supreme Court rescued and re-established it; that when the States were prostrate, its decisions rehabilitated them; that when the mailed hand of war was stretched with direful threatenings over the land, the Supreme Court seized and bound it; that there is today no department of life in which its magnificent mandates are not firmly established in preservation of the rights of the people, the State and the government. Conscientiousness, intelligence, obedience to the law, are the ruling spirits of its forum and man's liberties are safe if they endure until destroyed by the Supreme Court of the United States.

After every civil or social convulsion, when the storm goes by and bloody waves subside and the light returns, the first rays of the sunshine of peace fall upon that superb temple where sits in solemn grandeur the justice of the free men of the Republic; and, my countrymen, if ever morning shall dawn when that temple is submerged or shaken, the Republic will have perished and ruin will fill the land. In every government, and especially in every free government, there must be a final arbiter to whom all causes may be submitted, proper respect for which is essential to the preservation of society and order, without which there can be no liberty but only the desolation of strife. The Republic can stand the clash of arms, the violence of foreign or internal contentions—it can not exist without its final great tribunal of reference and decision.

Of this mighty tribunal, without

which there is no liberty, a proper respect for which is essential to the preservation of republican institutions, John Marshall was easily foremost and greatest.

I have said that some men doubted; some doubted the perpetuity of the Republic. Listen to the words of Marshall:

"A constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it. Its course can not always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it as far as its nature will permit with the means for self-preservation from the perils it may be destined to encounter. * * * The people made the Constitution and the people can unmake it. It is the creation of their will and lives only by their will. But this supreme and irresponsible power to make or unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repealing it."

In the above extract is found the peaceful answer to every attempt at nullification and secession thereafter or in our history to be made.

Other men doubted whether the Supreme Court of the United States had any power other than a power given by sufferance. Listen to what Marshall says:

"That this court dares not misuse its power is most true. That this court dares not shrink from its duty is not less true."

"No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom, but if he has no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

It is true that this heroic declaration was made in the Circuit, but its reason and spirit animated Marshall in every decision that he rendered on the Supreme Bench.

Again, many learned men doubted how far the commerce clause of the Constitution extended the protection of the government over waters and highways crossing State lines. They believed that the jurisdiction of the State was exclusive over all of its lines of travel and within its lines of jurisdiction. They thought that the body of commerce of the country could be separated from that which originated without the Union, or which terminated without the Union. They thought that it related to the articles themselves traded in. Marshall forever settled the true rule.

"Commerce is not merely traffic, it includes commercial intercourse between nations and parts of nations in all its branches. It must include navigation. It includes all vessels, whether carrying passengers or freight, whether propelled by wind or steam. The power to regulate commerce is the power to prescribe the rule by which it is to be governed, whether it be carried on between the United States and foreign nations or among the several States. * * * This power as vested in Congress is complete in itself, acknowledging no limitations other than those prescribed in the constitution. * * * This power of Congress must be exclusive, for such a power can not be exercised at the same time by Congress and by a State. * * * Moreover, the power of Congress to regulate commerce, either with foreign nations or among the States, does not stop at the jurisdictional lines of the States, but must necessarily be exercised within their territorial jurisdiction and must include every case of commercial intercourse which it not a part of the purely internal commerce of a single State."

Those of you who were present in Chicago during the strike of 1894 will recognize that all the powers of this government which were exercised in the suppression of that strike were exercised in pursuance of this declaration which I have just quoted. No court has since exceeded the scope of this declaration and today the smallest shipper or the greatest railroad, the farmer who starts his grain to a distant market, the miller who grinds his grist for the people of a distant State, the merchant who orders a shipment of goods, all of them owe their protection to the constitution of the United States, as announced and declared by John Marshall.

At another point in this paper I speak of the advantage accorded Marshall by the character of the men who surrounded him. It is but just to refer now to the great influences which had preceded the declarations as to sovereignty and commerce which I have quoted. In the year 1786 rebellion was organized in the State of Massachusetts under the lead of a man named Shays, whose recruits assembled in numerous conventions, demanded redress for alleged grievances and called upon the legislature of the State of Massachusetts to afford the relief which they demanded. The historian states that their complaints and petitions were numerous. They complained "of the heavy poll tax, of the

cost of the court proceedings, of the excise tax, of the high valuation of farm lands, of the assumption of national obligations, of the high salaries paid public office holders, of the existence of the State Senate of Massachusetts, of the Court of Common Pleas,of certain provisions of the State Constitution, and their advocacy was for the establishment of an agrarian community." In short, all the complaints that hard times bring upon men found lodgment in the adherents of Shays. The rebellion itself assumed threatening proportions, and, although finally subdued by the State authority, it attracted the attention of the leaders of American thought through the nation. None had scanned the situation more closely than the father of his country, and in writing to Col. Lee he said:

"Let us have a government by which our lives, liberties and properties will be secure, or let us know the worst at once. There is a call for decision. Know precisely what the insurgents aim at; if they have real grievances, redress them if possible, or acknowledge the justice of them and your inability to do it at the moment. If they have not,, employ the force of the government against them. * * * Let the reins of the government then be pressed and held with a steady hand and every violation of the Constitution be reprimanded. If defective, let it be amended, but not suffered to be trampled upon while it is in existence." And in a letter of the same year and treating of the same subject, to Judge Jay, secretary of foreign affairs, he states: "I do not conceive that we can exist long as a nation without lodging somewhere the power which will pervade the Union in as energetic a manner as the authority of the State government extends over the several States."

As I have said above, Massachusetts dealt with her insurgents successfully, but eight years later, and in 1794, a far more formidable insurrection was organized, this time in the State of Pennsylvania, and then, the insurgents not being met with the State forces, Gen. Washington ordered a mobilization of troops in other States of the Union, and personally put himself at the head of the army of the United States, thus reinforced, and led the march into Pennsylvania. Speaking kindly, but firmly, to the rebels, he reminded them of their duty, at the same time that he exhibited to them the overmastering force of the nation. The rebellion was ended by the show of force, but Washington, the father of his country, had taught the American people that in his judgment the nation had a right to live and that no pretense of State rights should interfere with this supreme right. And it was long after Washington had written and acted as I have described that Marshall made the great declarations I have quoted and wrought them into the body of American law. He absorbed, he radiated the thoughts and purposes of the fathers of the republic, and when commending the great jurist, we look through his decisions to that great and matchless figure whose mind instructed all that approached him and the contemplation of whose life is a perpetual education to his countrymen.

Again, other men doubted the right of the government to exercise the powers necessary for self-preservation. They held that in some mild fashion this mighty Union might be dissolved by the withdrawal from the compact that made it, as they asserted, of any dissatisfied member of that compact. Listen to what Marshall says:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. * * * This is the authoritative language of the American people, and, if the gentlemen please, of the American States. Its marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and that of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution, and if there be any who deny its necessity, none can deny its authority."

And at another place, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Again: "The Constitution confers absolutely on the government of the Union, the powers of making war and of making treaties, consequently that government possesses the power of acquiring territory, either by conquest or by treaty."

There were many men who doubted the possibility of the continued existence of a government established by a written Constitution, and extending over a great area of country. They pointed to the fact that no free government had ever existed in the past, which exceeded the narrow confines of a city or a single State. They believed that neither human wisdom nor human judgment was capable of developing a continental power which should be free and great. There were, however, three men upon whom this

illusion did not rest: The father of his country, Thomas Jefferson and John Marshall. The words and hopes of Washington are known to the loving students of his life. The superb dreams of Jefferson and their realization by the purchase of Louisiana and the exploring expeditions of Lewis and Clark, and of Roger, conducted under his direction, are familiar to you all; but, as great as their conception or that of either of them, was the dream of Marshall. They wrought in their hour; he, working in his hour, wrought for all time. He forged and welded the mighty links which they assisted in preparing. Listen to his dreams of the future:

"That the United States formed for many and for most important purposes a single nation, has not yet been denied. These States are constituent parts of the United States, they are members of one great empire, for some purposes sovereign, for some purposes subordinate."

And again: "Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and armies are to be marched and supported. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction, unless the words imperiously require it, which would impute to the framers of that instrument when granting these powers for the public good, the intention of impeding their exercise by withholding the choice of means? The government, which has the right to do and act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

Upon still another occasion he said: "If any one proposition could command the universal assent of mankind we might expect it would be this, that the government of the Union, although limited in its powers, is supreme within its sphere of action. * * * It is the government of all; its powers are delegated by all; it represents all, and acts for all. * * * The nation on those subjects on which it can act, must necessarily bind its component parts. * * * The government of the United States then, though limited in its powers, is supreme, and its laws, when made in pursuance of its constitution, are the supreme laws of the land, anything in the constitution or laws of any State to the contrary notwithstanding."

For the maintenance of this doctrine, gentlemen, two million men marched in battle, and they have established these declarations as the supreme law of the land while the Republic shall continue worty of the support of free men. Wherever the flag advanced, law, reasserting its sway, went invisible by its folds. Every occupation of the insurgent territory was a re-establishment of these constitutional declarations. Every proclamation and every order that looked to the replacement of Federal authority, drew its inspiration from these majestic words. The battle ground upon which the Union armies won their vast triumphs was prepared by Marshall in the solitude of his chambers, in the quiet of his farm home, and announced by him in the dim light of the old Supreme Court chambers in the capitol at Washington.

I think that all profound men, who love their country and their kind, are in a sense seers and prophets; they "judge the future by the past," and to their solemn vision is often revealed the trials and glories and sorrows that wait along the crowding pathways of the time to come. I think Marshall must have had this pervision. Before him, pondering, must have risen the wonders of the new land of liberty and some of the perils that waited for our civilization, and perchance he may have foreseen, while he remembered old cities and their sieges, the new sieges of the new cities!

Was he not a seer? He knew that none other than continental government could, or can, deal with continental offences. To-day San Francisco is as near to Washington as Boston was a hundred years ago, and for the purpose of communication no man is further from his associates than an hour's time anywhere within the Union. The telegraph, the telephone, the secret signal code, make possible a conspiracy ramifying through every State and reaching into every commonwealth. The invisible empire of crime and violence may lay its secure foundations beyond the limits of any State, and yet within them all, and exhibit that empire's baleful authority by hundreds of thousands of men, actuated by a common purpose, assembling in tumultuous array, armed or unarmed, obstructing intercourse, taking advantage of the means of travel, of communication and of supplies. And now to realize what such a combination can accomplish, consider what a great city is; it does not and cannot produce the necessaries of life; these grow out in the fields; they range the pastures in the uncounted herds; they swim in the seas; they are brought to the cities by railroad and steamship lines; then labor, with its myriad hands, takes them and tolls with them and buys its daily bread; the power that near or far, either at the gates of the cities or widely removed therefrom, paralyzes communication between production and labor, lays seige to the city as surely as though it drew around it the walls of actual war and set the roaring guns against its cita-

dels; it invites famine; it starves the babe; it murders the mother; it makes a savage of the man; it compels the uprising mob; working forward it bars bread from the toiler; and working backward it destrops the sweet beauties of heaven, yeilded to working hands by the loving earth, fed by the rains and nurtured by the sun. It keeps the bread of the All Father from the starving lips of his children. State lines do not limit the cities' supplies; cities like London, New York, Chicago, are the metropolitans of continents, their bloom and fruitage; and the continents have a right, and the government of continents a duty, to raise such seiges whensoever their dread parallels are drawn. How could even a great state, like Illinois, deal with an insurrection whose ramifications extended to all the States, checked the rolling wheels of far away lines bearing daily bread, stilled the mighty engines in their roaring ways, and controlled the tame lightnings in their service of civilization? There is but one power competent to such a task—that power is the National government—its the burden—its the duty. If it went with the lonely rider on his wilderness way when this was an infant land, so it should go now, when his brave followers mount their mighty steeds of iron and steel and with the long trains loaded with labor's products and the handiwork of skill, put out on their continental journeys across the plains, through the valleys, under the mountains, through heat and cold, torrid sunshine and blackest night. Ah, those men of the rail! I never see them that I do not regard them! They are at the post of peril; they are in the front of the wildest race of time; are they not entitled to the full protection of the great government whose service they do? They, and all who journey with them? Is intermittent authority or duty possible? No! The duty and the power are ever there. It sleeps not nor pauses, and if its manifestations have been rare, it is because the occasions have been few when needed—but now "all men feel the velvet scabbard holds the sword of steel." And so I am not of those who believe, or think they believe, that this government of ours is exercising undue power, and thriving on slaughtered rights of persons or things. I look to its courts and I see justice done. I look to its executives and I see a jealous regard for the integrity of the laws. I look to its legislature and I see the will of the people, ever changing in detail, but steadfast to the great purposes of liberty and prosperity, working out sometimes blindly, sometimes with painful errors, the integrity of the Union, submission to its authority and the progress of mankind.

"Keeping our nation, while within itself
A Nation, yet the rulers and the ruled;
Some sense of duty, something of faith;
Some reverence for the laws ourselves have made;
Some patient force to change them when we will;
Some civic manhood, firm against the crowd."

I look upon this as benignant, merciful, magnificent; secure in its past and radiant with the splendid promises of the unborn and dazzling future. It has the right of self-preservation; its domain is bounded only by the will of God.

There were men who doubted whether or not the government of the United States could exercise a power of taxation commensurate with the needs of its existence. Not so with Marshall. Listen to his declaration:

"The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create. There is a plain repugnance in conferring on one government the power to control the constitutional measures of another. If the States may tax one instrument employed by the government in the execution of its power, they may tax any and every other instrument. If they tax the mail, they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial processes; they may tax all the means employed by the government in different cases which would defeat all the ends of the government. This was not intended by the American people. They did not design to make their government dependent on the States."

But why pursue the lonk list? He sat in 1,100 cases; he rendered 500 decisions, the most important that ever had been rendered by a judge in the world, unless matched by a few of the decisions establishing liberty and the rights of citizens in England by the fearless judges of that country. He found a nation in doubt; he left it without a reasonable question as to its right of self-existence, its rights of taxation, is right to control commerce, its right to preserve itself, to levy war, to conclude peace. He found a people who were groping in the dark of an experimental region and time; he left beacons blazing on their headlands by which their course through their wilderness was made as clear as though they marched in the broad sunshine of the highest noon.

You that are about me, and who drew the sword for the perpetuation of this government, drew it in the defence of the immortal truths promulgated by Marshall in his interpretations of the Federal Constitution. He

found the Federal Constitution loose brick and sand and mortar; he left it cemented and a compact pyramid, bottomed upon a continent, supported by the love, regard and sacrifices of the whole people, and rising, firm-based, immovable, majestic.

When the great Jewish law-giver and leader came in his old age to witness the struggle between the chosen people and their enemies, it is told that his hands faltered in their appointed task, and that two were called upon to uphold them while the battle raged. So to Marshall, great genius, indefatigable worker, profound and serene thinker that he was, there were given men who could counsel, enlighten and instruct his quick and comprehensive mind. About the bench where he administered law, was gathered as great a band of advocates as the world has ever known; Webster and Pinckney, Patrick Henry and Wirt, and in the fierceness of their Titanic debates he moulded and shaped those true sentiments which I have read in your hearing, and which convey hopes of the enduring life of the American people. On the bench beside him was Story, great counsellor and faithful friend. These can not be forgotten in any summaryof the man or his works, and, my countrymen, as the years go by and that epoch from 1801 to 1835 is closely studied, the characters who figured there rise into greater importance and dignity. "There were giants in those days," and among the greatest of them, greatest in intellect, greatest in dignity, greatest in purity, greatest in affectionate regard for the true interests of his countrymen, stands, and always will stand, John Marshall.

And what a figure he was personally —tall and lean and brown, angular, simple in dress, courteous in bearing, a plain man among plain men; and in the intervals of pronouncing those opinions, which were to affect the destiny and happiness of untold millions, retiring to the seclusion of his farm house and becoming the best of neighbors and the gentlest of men. The anecdotes that survive him all speak of the affection and reverence and the kindly personal regard in which he was held. Age and the majesty of his position had not stilted him, but he would bring his matchless powers into controversy with the simplest and humblest of his kind in order that thereby he might enlighten them and sustain the truth.

His habits of daily life were as unpretentious as those of Socrates when he argued at the Academy.

I have endeavored to present to you my impressions of this man. In other histories, single characters as great as his stand out like solitary peaks that dominate the horizon, but Marshall was rather like one mountain elevated higher than others but buttressed and supported by them all. The great group that stood by him were only less imposing and massive than himself, and if his work shall stand through all the ages it is not alone because of its justness, but also because of its wisdom and adaptability to the men and the times with whom and in which he was an actor.

The western front of the Capitol faces toward the city of Washington. It overlooks a broad valley to where, in the far distance and beyond the rolling Potomac, stretch the Verginian hills. In mid-distance rises the sinble shaft, without an ornament, majestic, commanding, representative, which commemorates the affection of his countrymen for Washington. In the near foreground and at the feet of the slope down which pour the marble stairs, is seated in comparative obscurity, the statue of Marshall. The thoughtful eyes look out and upon the busy street, through the prepared forest and to the pleasing gardens beyond, where the wealth and taste of the nation have grouped the floral productions of the earth. Simple, strong, majestic, modest, it is a type of the character of the man to whom it was erected by the nation. His statue looks forward to the greater monument of his more illustrious friend and chief. His hand holds the Constitution of his country. His back is to the Capitol where his decisions were rendered.

The magnificent halls and galleries contain no nobler figure, no firmer character, no grander personality, than that which, in enduring bronze, sits silent through the eternal years, while by him rolls the great tide of representatives of the people gathered from far California and Oregon, from Texas and Florida and Maine, from New York and Illinois, each coming to urge the acceptance of his peculiar plan, and the consideration of the particular wants of his people; and yet all subordinating and blending these plans in pursuance of the laws announced by those silent lips, and principles evolved by that great brain. While the republic shall endure, that figure shall sit at the base of the mount whereon the laws of this country are declared, their greatest interpreter, their wisest formulator, their serenest guardian.

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Johnny Jameson had arrived at his eighth birthday and thought that it would be real nice to write a letter to his papa, and this is the way he began:

"My Dear Papa—Whenever I am tempted to do wrong I think of you and say, 'Get thee behind me, Satan.,"

# THE MINNESOTA LAW JOURNAL.

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## DISTRICT COURT.

**THE PUBLISHER**

**of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.**

**The State of Minnesota vs. William G. Hill.**

**(District Court, Olmsted County.)**

### Jurisdiction of in Bastardy—Change of Venue in Bastardy Proceedings.

The power of the Probate Court to commit an insane person is special and without the ordinary jurisdiction of that court. The facts essential to the exercise of this special jurisdiction under L. 1889, ch. 46, subch. 14, must all appear upon the record. The presumption of jurisdiction does not attend its judgment in such cases.

1. The city justice of Rochester, Minn., has jurisdiction to conduct an examination in bastardy proceedings (1894 Gen. Stat., chap. 17) under 1891 Sp. L., ch. 48, sec. 16, providing that he "shall possess all the authority, power and rights of a justice of the peace, and sole conclusive jurisdiction to hear all complaints and conduct all examinations and trials in criminal cases within the city, cognizable before a justice of the peace.
2. In such proceedings defendant is not entitled to a change of venue.

Defendant was arrested for bastardy under 1894 Gen. Stats. sec. 2039 et seq., and upon arraignment before the city justice of Rochester, Minnesota, he objected to the jurisdiction of said city justice on the ground that the statute requires the examination to be held before a justice of the peace, not before a city justice. The objection was overruled and defendant duly excepted to the ruling. He also made an affidavit for change of venue on the ground of bias and prejudice, which was denied and he duly excepted to the ruling that the affidavit did not comply with section 50 of Rochester City Charter (1891 Sp. Laws, chap. 48 sec. 16) He also moved for his discharge for that the state had failed to show probable cause to believe him guilty of the offence charged. The motion was overruled and he duly excepted to the ruling.

At the June term of the District Court defendant moved on the records and files that the proceeding be dismissed and he be discharged from custody.

George W. Granger (County Attorney) for the state.

Thomas Frazer for defendant: (arguendo) The grounds for change of venue in this case which arose without the city, although to be conducted within the city, are those specified in 1894 Gen. Stats. sec. 4974, and the grounds for change of venue as specified in the City Charter apply only to cases arising within the city limits. (These provisions are "that the city justice is of kin to defendant;" or "is a necessary and material witness without whose evidence either party cannot safely proceed to the trial of said action, relationship and the evidence to be elicited shall be set out in full in said affidavit.")

The city justice when acting as a justice of the peace in matters arising without the city, must proceed under the general provision of the general statutes and not partly under the Charter and partly under the general

statutes to suit his own whims and fancies, and retain jurisdiction of anything and everything that comes before him, thus making the city justice court a drag net for fees.

GOULD, J.—Ordered that the defendant's motion to dismiss and discharge be denied.

I understand defendant's counsel to admit that under Sec. 16 Chap. 48 Sp. Laws 1891, the city justice of Rochester possesses "all the authority, power and rights of a justice of the peace" the language of the act itself. He may therefore take cognizance of proceedings in bastardy. Under the rule in State vs. Kemp, 34 Minn., 61 this would be so whether the cause of action arose in the city or in the county without.

The right to a change of venue in these proceedings under Laws 1889, chap. 89, are the same as in criminal cases before a justice and as to these cases it is held that this right to change of venue does not apply to a preliminary examination, but only to such criminal cases as a justice may hear and determine. In bastardy cases the justice has no final jurisdiction, but acts only as an examining magistrate, the law therefore giving a change of venue is wholly ineffectual. State vs. Bergman, 37 Minn., 407.

State vs. Bergman was reversed by Laws 1889, chap. 92, evidently overlooked by the learned judge. See also last two lines of sec. 2040, Gen. Stat., 1894. (Editor.)

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**State ex rel. Patrick Kelly vs. Arthur F. Kilbourne, Med. Supt. Rochester State Hospital for Insane.**

**(Olmsted Co., District Court.)**

## Habeas Corpus—Jurisdiction of Probate Court in Commitment Proceedings.

The power of the Probate Court to commit an insane person is special and without the ordinary jurisdiction of that court. The facts essential to the exercise of this special jurisdiction under L. 1889, ch. 46, subch. 14, must all appear upon the record. The presumption of jurisdiction does not attend its judgment in such cases.

Facts. Patrick Kelly was adjudged insane and committed on January 31, 1893, under L. 1889, ch. 46, subch. 14, p. 147, by Ramsey County Probate Court. On June 14th, 1896, he sued out a writ of Habeas Corpus.

Charles C. Willson, for relator, arguendo: The record of the proceedings does not show that Kelly had ever been brought before the probate court, in person by warrant or in custody of his friends, or appeared by attorney, or that he, his friends or his attorney were heard in the selection of the jury, or that the hearing before the jury was in open court, or that he, his friends or his attorney had had opportunity to hear the evidence adduced against him, or to cross-examine witnesses, or to object to improper evidence, or to produce countervailing evidence, or to be heard in argument upon the facts adduced, or upon the law. Hence the record shows no acquisition of jurisdiction, or that the court held jurisdiction to the end of the proceedings. This is a special statutory proceeding. In such case the accused must have opportunity to be heard. Otherwise the proceeding is not due process of law. If anything in L. 1889, ch. 46 provides that notice to the accused or his presence in court is unnecessary or that opportunity for him to be heard can be dispensed with, such provision is unconstitutional and void. But construing the statute in harmony with the constitution, the statute is sound but the proceeding under it in this case was in violation of it to that extent and the court lost jurisdiction of the proceeding and of Kelly himself, if it ever acquired any.

18 Wall., 350-366,371; State ex rel., vs. Kinmore, 54 Minn., 135; State ex rel., vs. Billings, 55 Id., 467; 1 Smith's L. Cas. No. 843 (7th Ed., p. 1129) Freeman Judg., sec. 123; 6 Wheat., 119; 7 Hill 9-24; 12 Ohio 272-3; 5 Harr & J., (Md.) 13; 16 Fed., 532; 11 Wend. 647.

W. Logan Brackinridge for Respondent, cited 6 Pa. St., 371; 39 N. H., 110 (75 Am. Dec., 213) 77 Am. Dec., 572; 21 Ga., 447 (68 Am. Dec., 465) and excepted to the rejection of a paper of questions and answers said to have been prepared at the time and as a part of the commitment pro-

ceedings, under 1894 G. S., sec. 4686, as incompetent, irrelevant and immaterial and as it was not a certified copy as required by law, and as there was no evidence that the original is on file in the Probate court.

GOULD, J.—The court finds that said relator is unlawfully restrained of his liberty at said hospital, and that he is entitled to the relief demanded in his petition.

It is ordered and adjudged that petitioner be and he hereby is released after the expiration of twenty days next ensuing the filing and entry of this order in the office of the clerk of this court.

All that is said in State ex rel., vs. Billings, 55 Minn., 467, both in the original hearing and on the re-argument seem to me to be equally applicable, if not more so, to the case at bar. More need not be said.

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**Village of Morris vs. Harris.**

**(District Court, Stevens County.**

## Village Ordinance—Sidewalks—Bicycles.

Under a charter provision authorizing a village council to prevent the incumbering of sidewalks with carriages, it may pass an ordinance forbidding the riding of bicycles on sidewalks.

R. H. Grace for plaintiff; G. E. Darling for defendant.

BROWN, J.: The action or prosecution seems to be an amicable one and for the purpose of determining the validity of an ordinance against riding bicycles on sidewalks of the village. No points are made as to the sufficiency of the proceeding before the justice, and at the hearing before this court it was agreed that the only question involved in the case is as to the validity of such ordinance. The ordinance was presented on this hearing, and is entitled "An Ordinance Prohibiting the Use of Bicycles on the Sidewalks of the Village of Morris." It provides that no person or persons shall ride a bicycle on any of the sidewalks of the village, and a penalty is fixed for the violation thereof.

The point made against the ordinance is that the village charter contains no authority for its enactment, and that it is consequently void and of no validity. A full examination of the subject leads to the conclusion that the point is not well taken. It is believed that subdivision 6 of section 16 of the charter (chapter 30, Special Laws of '81, p. 196) is sufficient authority and foundation for the ordinance, and is held valid (See also subdivision 22). Subdivision 6 expressly authorizes the village to prevent the incumbering of the streets and sidewalks with carriages, carts, sleighs, etc., etc. "Incumber" means to obstruct or overburden; and a bicycle is a "carriage" within the meaning of this statute.

State vs. Collins, 3 L. R. A. 394; (R. I.); Mercer vs. Corbin, 3 L. R. A., 221, (117 Ind. 450); Twilling vs. Perkins, 19 L. R. A., 632. (Md.), and note.

And besides, the village having the sole care, supervision and control of the streets and sidewalks, the ordinance is valid as a police regulation under the "general welfare clause" contained in the charter.

See section 16 of charter; also 15 Am. & Eng. Encyc. of Law, 1166, title "Police Regulation;" page 1167, title "Public Peace, etc.," and page 1187; 24 Am. & Eng. Encyc. of Law, 108 and 118, and State vs. Yopp, 97 N. C. 477.

The order of the court is that the judgment appealed from be and the same is hereby in all things affirmed.

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**Theodore Seamann vs. James Lyons.**

**(District Court, Olmsted County.)**

## Real Estate Agency—Liability of Landowner for Commissions.

An owner of real estate who employs an agent to sell or procure a vendee for his land, and agrees to give the agent exclusive right or exclusive agency to sell, cannot evade paying commission by himself negotiating with a person who has negotiated with the agent, and selling to such person after or at the time of discharging the agent.

The evidence was conflicting whether or not plaintiff had the exclusive right or the exclusive agency to sell or procure a purchaser. The purchaser also had by the evidence adduced positively refused to pay more than $900 for the land, and plaintiff had never offered to sell for less than $925. The opinion states all other vital facts.

Thomas Spillane for plaintiff cited 21 Pac. R., 412; 22 Id. 726, 43 Minn., 226.

C. E. Callaghan for defendant, cited

89 Minn., 363; 41 Minn., 535; 47 Minn., 34. An action for breach of contract only will lie.

GOULD, J.—(substantially says:) Plaintiff, on and prior to November 20th, 1895, was a real estate agent and broker, and defendant as owner of certain real estate, employed him to sell or bring about a sale of said real estate, and promised in case he did so to pay him 5 per cent of the price obtained, and that plaintiff should have the exclusive sale thereof until April 1st, 1896, provided the sum should net defendant $900, who agreed to sell for $925 cash or $1000 one-half cash balance on time. The plaintiff undertook the sale of said real estate, and negotiated with one Kelly whom he took to view the premises, told him the owner's name and offered the land for $950 cash or $1000 part cash balance on time. That Kelly refused to buy at that price but intended to and was prepared to pay cash, mentioning no price, and plaintiff so informed defendant giving him the purchaser's name; that defendant instructed plaintiff to try and get $900. Thereafter in December before plaintiff again saw Kelly, defendant casually, as it would appear, met Kelly and entered into negotiations with him, resulting in a sale of the lots to Kelly for $900. That on the same day or at or about the date of the sale, defendant informed plaintiff that he did not wish plaintiff to do anything more about selling said lots as he did not care to sell them; to which plaintiff replied that he would see him about it another time, and plaintiff soon after learned that Kelly had purchased the land. That defendant at the time of making the sale knew that Kelly was the person with whom plaintiff had been negotiating and made the sale without plaintiff's knowledge, and for the purpose of evading payment of any commission to plaintiff for the sale therof.

Plaintiff is entitled to the relief demanded in his complaint.

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"A receiver is a gun that is a good deal easier to fire off than it is to control after it is fired." This was the aphorism of Judge O. W. Holmes, Jr., the other day in answer to a request that he appoint a receiver.

James C. Tarbox was born in Maine in 1857 and graduated from Bowdoin College in 1879 at the head of his class. He studied law in Maine and attended law lectures at the Columbian Law School but did not graduate.

In 1881 he came to Minnesota and settled at Monticello, where he has practiced his profession ever since.

His strength as a lawyer consists in a clear, analytical preception of the vital points and principles of his cases and a logical manner of stating them. He is a strong lawyer on the right side of a cause but not so good at defending bad cases, for his clearness of thought and statement makes both the strong and the weak points of his case evident to judge and jury. As might be expected, he has been more successful in civil than in criminal practice. He is at his best in equity cases and in the argument of law points.

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**In re estate Patrick Keogh.-Bohmert, Appellant.**

**(District Court, Ramsey County. No. 55, 728.)**

## Probate Law—Contract for Services to be Performed After Death.

An agreement by which a person agrees that another shall receive compensation out of his estate for performing a wake over his body after death, is nudum pactum and not enforceable.

Frank Ford and H. B. Farwell for appellant, and C. D. O'Brien for estate of Keogh.

This was an appeal from an order

of the probate court disallowing a claim.

KELLY, J.: The question now before the court is whether an alleged promise made by the deceased, Patrick Keogh, before his death, to pay the appellant $1000 out of his estate, in consideration of the appellant's promise to keep his, Keogh's body in her house a reasonable time after death, and accord to it a "wake," creates any contract enforceable at law against the estate of the deceased, and after performance on the part of the appellant.

I will assume that the appellant in keeping the "wake" over the body of the deceased, did not violate any law, written or unwritten. A "wake" so-called, does not necessarily imply unseemly conduct or debauchery. It is, rightly understood and practiced, simply a watch or vigil with the dead during all the time intervening between death and burial. Its origin dates afar back in the remote past. These vigils were common in the days of chivalry, when the candidates for knighthood watched in some chapel. They were practiced in England, when on each anniversary of the founding of the parish church, the whole congregation kept watch; and among the Keltic people—Irish, Scotch and Welsh—they have more or less obtained with reference to the burial of the dead. That they have often been desecrated and have become subject of much scandal is immaterial here, for I will assume that over said Patrick Keogh's dead body naught was said save prayer.

The first question that suggests itself is, could the alleged contract be enforced against the appellant? If it could be what is the measure of the damage? It could not be enforced against the appellant because no consideration has passed to her, and because she was in no wise legally obligated to do anything. It is nudum pactum and her performance after Keogh's death a mere gratuity.

If it was enforceable, what measure of damage? The dead have no feelings to be outraged, or rights violated.

Mrs. Bohmert gave no consideration for Keogh's promise. She received none for her promise. She was under no legal obligation to do anything while Keogh lived, indeed under this novel arrangement she could do anything until he died.

No consideration existed between the living, none can arise between the living and the dead.

The alleged being without present consideration, either party could repudiate it at any time. When death came to Keogh, the fact of death abrogated the agreement.

This differs from that class of contracts which is enforceable even after death of the parties, made and expected to be performed between the living but prevented by death. For want of mutuality and consideration this contract is void.

But again, while Patrick Keogh living had absolute power of disposition of his own property, Patrick Keogh dead, can only dispose of it as the law provides—by will or by the statutes of descent. To permit a testator (Keogh in this case made his will), to charge his estate by parol, by alleged contracts like this, is to practically abrogate the law with reference to wills; for, if Patrick Keogh could lawfully charge his estate by parol with $1000, payable to appellant for "waking" his body, there is no reason why he might not have given her the whole of it for such services. Such ought not to be the law; such in my judgment is not the law. To hold otherwise would be to open the door to shameless frauds and perjuries and render liable any estate to be plundered.

Counsel says he can find no case analogous as an authority. This fact is one of the surest proofs that the claim is untenable.

If this was a claim for decently caring for the dead body of Patrick Keogh, pending burial, and was presented upon the question of reasonable value, it would be quite different. In this case it is admitted that the executor has fully paid all funeral charges.

For these reasons and for further reasons I might name, the objection is sustained.

**Freiderick vs. City of St. Paul.**

**(District Court, Ramsey County, No—)**

## Fellow Servant—Negligence.

Where two men work on the construction of shoring, alternating in the work of driving and digging, they are fellow servants, and one cannot recover for an accident caused by the unskillful work of the other.

O. H. O'Neil for plaintiff; E. J. Darragh and Robertson Howard for defendant.

The following remarks were made by

KELLY, J., in instructing the jury to bring in a verdict for the defendant. The facts appear in his statement.

The plaintiff, an ordinary laborer, sues to recover of the defendant, City of St. Paul, $25,000 in damages for an injury to his person received while in the city's employ as a servant, and whereby he suffered the loss of his left eye. He claims that this injury came to him through the defendant's negligence, first, in placing in charge of the work, (wherein plaintiff was hurt,) a man wholly unskilled and inexperienced in such work, and incompetent to perform such work, and who the city knew at the time was unskilled and inexperienced and incompetent to take charge of said work, and whereby the plaintiff was injured; and, second, in neglecting to furnish reasonably safe and suitable tools and materials wherewith to do the work, whereby the plaintiff was injured.

The work in question, as appears in evidence, consisted in excavating a trench in the earth,on University avenue near Dale street, in this city, for a fountain, which trench was seven feet long, two and a half feet wide, and seven feet deep. It will be seen that this, necessarily, was not an extensive undertaking. That plaintiff, in company with one Angfang, a carpenter by trade, and also in the city's employ, was engaged in doing this work, and in course of it, it became necessary to use piling or sheeting, driven down on the sides of the excavation to hold the earth in place. It does not appear precisely what sort of soil there was found at that place but it is to be presumed it was chiefly sand beneath the first loam, as it required shoring up. It appears that Angfang received orders from some one in authority to do this work, but no special directions were given except as to dimensions. Angfang (the plaintiff being with him and assisting him) procured a lot of white pine planks 2 by 6 inches and about 8 to 10 feet long, from a pile of lumber belonging to the City, and went out to the place and engaged in the work. After they had been driving these planks down for about four or five hours, and while Angfang was driving a plank, the plaintiff (being in the trench,) arose from his labor, when a splinter or sliver flew off and struck him upon the breast; and as he looked up to call out to Angfang, another splinter flew off and struck him in the eye, which accident finally caused the entire loss and removal of the eye.

Angfang and the plaintiff alternated in the work; each took a turn at shoveling and at driving the planks. The instrument used to drive the planks was a blacksmith's hammer, procured by Angfang, but how heavy or what the peculiar size or shape or dimensions of the hammer were, does not appear. And there was used, in driving, no iron rings around the heads of the planks to prevent splitting.

Now as to the first contention of the plaintiff, that Angfang was inexperienced, and that in consequence of his want of experience and care and caution, he was injured: That contention has entirely failed, because even though it be conceded that the testimony of Angfang to the effect that he had had no experience in such work would, if known to the city, make out a prima facie case, yet there is no proof in this case whatever that the city's officers knew, or that in the exercise of ordinary care they should have known, that Angfang was an inexperienced man, and it is necessary that such knowledge on the part of the city be made to appear in order to charge the city with negligence in employing an inexperienced man. Besides, it is by no means clear that Mr. Angfang was not, so far as this action is concerned, an experienced man, because he testified that he was a carpenter by trade, and the presumption is that he knew all about the character of wood, and the character of the kind of wood used here, en-

tered largely into the happening of the accident.

The second contention, that the city failed to furnish proper tools and appliances with which to do the work, is more important and somewhat more difficult. I am not sure that from the testimony in this case it could be found by the jury or by the Court,that the use of white pine plank 2 by 6, driven with an iron hammer was a use of improper material or improper tools, taking into consideration the character of the work that was being done there. The only testimony that is in the case upon that subject is that of the witness Cantwell, who testified, generally, that he was a sewer contractor engaged in the business of excavating for many years and that the ordinary material that is used in such work for sheeting, as he called it, or shoring up, is Norway pine; but he never said anywhere in his testimony that Norway pine was used because it wouldn't split or throw off splinters or anything of that kind, but he said Norway pine was used in preference to white pine because it was cheaper, in the long run; that the white pine planks would be destroyed much more quickly in such use than the Norway pine. That, of course, is a matter of common knowledge. He also testified that it was customary to use iron rings, or something of that nature, around the head of the plank to prevent it splitting and that ordinarily a wooden maul was used for driving; but he testified that white pine was used; that it was soft and it didn't pay to use it; that on small jobs, or when in a hurry, they often used white pine. But, conceding that there is sufficient to go to the jury upon the question whether this material, white pine, was the proper material to use to shore up this trench, and this blacksmith's hammer was the proper kind of a tool to be used to drive the planks into the earth, the question remains whether, under the testimony, (the undisputed testimony in the case,) this plaintiff can recover of the city.

It appears that this injury was an unfortunate and a very serious one, but we must not allow ourselves to be carried away by the character of the injury. That is the danger in a case just like this. I have no doubt that this is the first case of the kind that ever occurred in the history of excavation in the City of St. Paul, where a man has sustained so serious injury as this from the flying off of a sliver or splinter from a board being driven into the earth; and I say, we ought not to be carried away by the unfortunate circumstance that this is a very serious accident to this poor man. Had he suffered an accident from a splinter being driven into his hand, causing inconvenience and pain, he would almost have been laughed out of court had he come in asking for a judgment against the city of St. Paul for an accident of that kind. It is not every accident that may happen to men in the course of their lives to which somebody should respond in damages. The idea seems to have gone forth, every time a man stubs his toe, or anything happens out of the ordinary that he must bring a damage suit against somebody. There ought to be a limit to this kind of thing. In my judgment, this accident was caused not by the improper material that was used there, but by the fact that Mr. Angfang when he was driving that plank, used too much force and struck off those splinters. Mr. Angfang was, undoubtedly, in doing that work, a fellow servant of the plaintiff. They interchanged; one drove at one time while the other shoveled out the dirt, and vice versa.

They interchanged. They were fellow servants in the doing of that work and the accident was caused by the carelessness of Mr. Angfang, the fellow servant,and under the well-known principle of law, there can, on that ground, be no recovery in this case.

But aside from that, even conceding that there was improper material used, that there was negligence in the character of the tool used,—it wont do for this plaintiff to go upon the witness stand and state, as he did, that he does not know, or did not know at that time,—a man (as he is) of ordinary intelligence, fifty-nine years of age, a farmer, presumably accustomed to handle wood of different kinds, —that he did not know that white pine, when hammered upon the end

and driven into the ground, was liable to split off. It can be said, as a matter of common knowledge, to the ordinary man who goes about upon our streets, that such things will happen; and to hold in this case that the city of St. Paul is responsible, it seems to me would be in effect to hold that every citizen when he directs his servant to drive a lot of pine sticks around his flower-bed, takes the chances of having a splinter fly into that servant's eye and of being called upon to answer in a very heavy sum.

The plaintiff assisted in procuring these planks. He knew better than any officer of the defendant city can, in law, be presumed to know their kind and character. He handled them; and also handled the hammer, and no one could possibly know better than he did what effect the blows from the hammer upon the planks was likely to produce. Knowing these things, plaintiff assumed the risk, even if we concede that the city was negligent in furnishing such apliances for the work.

For all of these reasons the motion of defendant must be granted.

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James J. McCafferty, the subject of this sketch, was born in Massachusetts in 1854. Studied law and was admitted to practice in his native state; came to St. Paul in 1882, where

he has successfully practiced his profession with honor to himself and to the bar. "Mc." is a Democrat from the ground six feet up. He has a scholarly and impressive appearance, and while not an office seeking politician, was assemblyman of St. Paul for one term. He is a power in a convention and no man is feared more on the floor of a political meeting than McCafferty. He is a devoted husband and father, a true and loyal friend, and has a heart as big as humanity itself.

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## PERSONAL.

**Slayton—**

H. C. Grass has taken in with him Mr. L. A. Foster, a recent graduate of the University Law Department. Mr. Foster is a young man well and favorably known and should add strength to the new firm.

**St. Paul—**

Edgerton & Wickwire have removed to the 8th floor New York Life Building.

Mr. Thomas T. Fauntleroy has removed to St. Louis, Mo., and has formed a partnership with Marshall F. McDonald. They have perhaps as complete law offices as any in the United States. Their library of nearly 4,000 volumes are housed in the Wernecke Book System.

**Melrose—**

Donohue & Keefe have opened an office for the practice of law. Both are young men, recently graduates of the "U. of M." and should do well.

**Minneapolis—**

The firm of Ray, Hubacheck & Healey has dissolved.

Fletcher, Rockwood & Cairns have dissolved, Mr. Fletcher going out. The new firm will be Rockwood & Cairns, with offices in the Lumber Exchange.

**Rochester—**

Two of Rochester's prominent young attorneys, George W. Granger and George J. Allen, have recently fallen victim to the snares of Cupid. The former, who has been county attorney for two terms, was wedded last evening to Miss Ophelia Cook, while the latter has gone to New Carlisle, Iowa, where he will be married next Saturday to Miss Emma Viola Potter, who comes from one of the oldest and best families in that city.

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In the District of Columbia it is found that an old law, still unrepealed, permits a dying man to will his children away from their mother, even though she is inocent of any wrongdoing.

Thomas F. O'Hair, of Wheaton, Minn., was born in Beaver county, Pennsylvania, 43 years ago, came west with his parents when about eight years old and settled in Iowa county, Iowa. Was educated at McClain's academy, Iowa City, and later

took a course of law at the Iowa State University where he graduated with the law class of 1877; went to Delano, Minnesota, in 1880 where he practiced law for several years. Has practiced at Wheaton for the last seven years.

In 1890 received the nomination on the democratic state ticket for clerk of the supreme court and was defeated by Charles Holcomb. He is still a democrat but will cooperate with any political party that will adopt as its battle cry "free trade and direct taxation" for the support of the government.

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A crying need in some circles of alleged statesmanship is a systematic course of instruction in the art of being funny without being vulgar.

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A deacon will pass around the plate and get more buttons than dimes, but a highwayman can hold out a gun and collect everything a man has. This goes to show that a man will give up more to save his body than to save his soul.

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Every man who makes a fool or a knave of himself hates the newspapers.

**HOT STUFF FROM THE EXCHANGES.**

Straw hats show which way the mercury goes.

A man's idea of a dull time is to play cards with women and nothing up.

The average theater hat is a bird (stuffed), a whole lot of flowers (artificial) and a blooming nuisance (genuine).

Many European scions of royalty are insured for very large amounts. This is probably at the instance of creditors.

The fool killer never troubles himself about the man who rocks the boat or the one who grabs a loaded gun by the muzzle.

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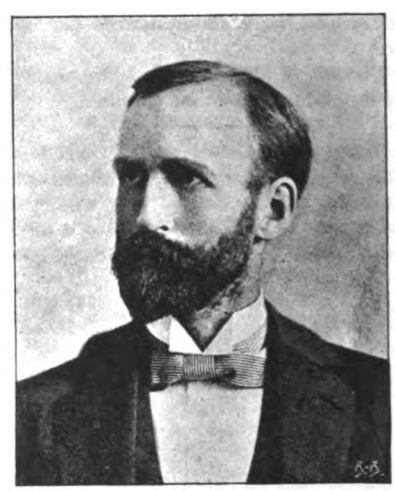
Fred W. Gail was born on a farm in Erie County, New York, in 1860, of early New England ancestry. He removed to Corry, Pa., in 1865, attended the public schools. was graduated from the High school in 1877, taught a short time, learned stenography and spent three years in newspaper reporting. In the spring of '81 he commenced the study of law in the office



of Roger Sherman Esq., of Titusville, Pa., and remained there until the fall of '82, when he came to Minnesota and was appointed court stenographer for the First Judicial District, in which position he served several years. He was admitted to the bar at Stillwater in November, 1884, and has been in active practice there ever since,—in partnership with Hon. J. W. Searles until 1893, and since then alone. He is a republican in politics, but his first devotion has always been to his profession.

...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.**

## NEW RULE.

**First Judicial District.**

Ordered. That the following rule in Insolvency Proceedings, be and the same hereby is adopted by the District Court within and for said district, to-wit:

The assignee or receiver making application to the court for any order declaring a dividend, or for the allowance of the account of such assignee or receiver, or for limiting the time for filing releases, shall with, and as a part of such application file in the office of the clerk of the proper county a summary statement showing—

First. The amount of moneys then received by such assignee or receiver.

Second. A general description of the assigned property, if any, then remaining, and the estimated value thereof.

Third. The estimated expenses of executing the trust, including all such expenses then incurred, or thereafter to be incurred.

Fourth. The amount of allowed claims against the estate.

A copy of such summary statement shall be by the assignee or receiver attached to any such order and with such order served upon any creditor whose claim has been proved.

This rule shall within that district

be a substitute for rule four of the "Code of Rules for the District Court of Minnesota" adopted by the district judges of this state August 24th, 1893.

Adopted by the District Court of the said First Judicial District this August 14th, 1896.

F. M. CROSBY,
W. C. WILLISTON,
District Judges.

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### LITERARY NOTES.

The 50th anniversary number of the Scientific American, New York, just out, is really a handsome and valuable publication of 72 pages. It reviews the progress of the past 50 years in the various sciences and industrial arts; and the various articles by the best scientific writers of the day are racily written and richly illustrated. The editors have accomplished the difficult task of presenting a compendium of information that shall be at once historical, technical and popular. The interest never flags for a moment, and the story of the half century's growth is in itself a veritable compendium of valuable scientific information for future reference. Price 10 cents per copy.

The Review of Reviews for August, while largely given over to the issues of the presidential campaign, finds space for the treatment of other important topics. Besides the character sketch of Mr. Bryan, the Democratic candidate for the presidency, the Review has illustrated articles on Harriet Beecher Stowe and Dr. Barnardo, the father of "Nobody's Children." There is the usual elaborate resume of the current magazines; and the departments of "The Progress of the World," "Record of Current Events," and "Current History in Caricature" answer the typical American demand for what is up to date and "live."

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To the Editor Minnesota Law Journal.

Is there another state in the Union where so many presiding judges are blessed with short names as in our own. How is this for a few: Buck, Start, Holt, Kerr, Brill, Otis, Egan, Pond, Moer, Ives, Jack, etc. There are others. A SUBSCRIBER.

### CAN CONTRACTS TO PAY IN SPECIFIC COIN (GOLD) BE ENFORCED?

There seems to be a great deal of confusion in many minds, even in the minds of lawyers, as to the enforceability of contracts to pay in a specific coin. It is asserted that such contracts are non-enforceable. We are told that congress has the constitutional power to annul contracts between private individuals. Some even say that our decisions authorize payment of so-called "gold contracts" in United States legal-tender notes or in any other currency made legal tender by the Federal government irrespective of its value. American courts are generally honest. Most people have profound faith in the integrity of our courts. While fraud and corruption may penetrate and possibly dominate, temporarily, some portions of the public service, it is a great comfort to all law abiding citizens, to know that our courts are generally pure and upright. In times of turmoil, the American court is a bulwark against passion and prejudice on which we can with confidence depend. If there is anything a lawyer generally feels certain of it is that courts will not make contracts for parties but will fearlessly and impartially enforce such contracts as the parties themselves have made. It certainly would be a great shock to our ideas of the sacredness of the obligations of a contract if it be true that our courts hold that they need not be fulfilled. It is certainly a grave accusation to make against our jurisprudence and against the courts which administer our laws to say that a contract can be performed by doing something in direct conflict with its provisions. For one I am glad to say the accusation is not true. It can safely be said that with the possible exception of one or two courts, there is not a court in the land today that will not enforce a contract fairly and squarely made to pay in a specific coin according to clear and unequivocal provisions of the contract. Prior to the decision of the supreme court of the United States, in Bronson vs. Rhodes, quite a number of the state courts, in deference to Federal legislation, held that a "gold contract" could be satisfied by the payment of legal

tender notes, even though greatly depreciated in value. These decisions were made in deference to the Federal government. A great war had compelled the Federal government to issue legal tender notes. A great cause was at stake. It was feared that adverse decisions on the legal tender acts might cripple the general government in the great struggle of the civil war. Hence the state courts in decisions rendered prior to any authoritative expression from the supreme court of the United States, quite generally enforced the legal tender acts of congress to their strictest letter and held that contracts to pay in coin could be paid in currency.(1) Some of the courts said that their decisions were made in deference to Federal legislation and not in accord with their own views. These decisions are now of no value except as history. They have been supplanted by decisions rendered after the decision by the Federal supreme court in Bronson vs. Rhodes, 7 Wall. 229. Nearly every state court which has had occasion to pass upon the question, since Bronson vs. Rhodes, has followed that decision.(2) I know of but one exception—Minster vs. Rogers, 50 Ala. 283—and in this case the court does not seem to have known of Bronson vs. Rhodes. It is not mentioned in the opinion. There may be others, but it is safe to say they are very scarce. The confusion on this subject is undoubtedly due to a misunderstanding of the so-called legal tender decisions. It may not be entirely unprofitable to re-examine those decisions and see what they really decide. In Hepburn vs. Griswold, 8 Wall. 603, the supreme court of the United States held that the legal tender acts passed by congress in 1862 and 1863, making United States notes a legal tender in payment of debts, public and private, applied to ordinary debts contracted before as well as after the enactment of the legal tender acts,and so far as they applied to debts contracted before the passage of this act were unwarranted by the constitution. The opinion was written by the Hon. Salmon D. Chase, chief justice. The court then consisted of eight judges. Justices Miller, Swayne and Davis, dissented from the opinion rendered by the majority of the court. Hepburn vs. Griswold was reversed by Knox vs. Lee and Parker vs. Davis, 12 Wall. 457. In this connection it may be interesting to note the change in the personnel of the court that had taken place just prior to this last decision. By the act of March 3d, 1863, the supreme court was ordered to consist of ten members. By the act of July 23rd, 1866, it was enacted that no vacancy in the office of associate justice shall be filled by appointment until the number of associates shall be reduced to six. By the act of July 10th, 1869, it was enacted that the court should consist of the chief justice and eight associate justices and that for the purpose of the act, there should be appointed an additional judge. Justice Greer, who had subscribed to the majority opinion in Hepburn vs. Griswold, resigned on the first of February, 1870. President Grant, on the 18th of February, 1870, appointed Mr. Justice Strong, and a few days later Mr. Justice Bradley, as associate justices of the supreme court of the United States. These appointments were made the subject of

1. Appel vs. Woltmann, 38 Mo. 194 (1866); Whetstone vs. Colley, 36 Ill. 328 (1865); Buchegger vs. Shultz, 13 Mich. 420 (1865); Thayer vs. Hedges, 23 Ind. 141 (1864); Brown vs. Welch, 26 Ind. 116 (1866); Sanford vs. Hays, 52 Pa. St. 9 (1866); Laughlin vs. Harvey, 52 Pa. St. 9, (1866); Graham vs. Marshall, 52 Pa. St. 9, (1866); Warmibold vs. Schlicting, 16 Ia. 243 (1864); But see Carpenter vs. Atherton, 25 Cal.564 and Dutton vs. Pallaret, 52 Pa. St. 109 (1866); where court said (page 113): "But when the parties stipulate for specific chattels and expressly exclude the legal tenders which the government has prescribed, the bargain must be presumed to rest upon an adequate consideration, and neither legislative nor judicial power can pluck the fruits that belong to one of the parties, for the mere purpose of giving them to the other." To this, Justice Strong, who wrote the majority opinion in Knox vs. Lee, must have assented, he being a judge of that court at the time.

2. Wright vs. Jacobs, 61 Mo. 19 (1875); McGoon vs. Shirk, 54 Ill. 408 (1870); Kellogg vs. Sweeny, 46 N. Y. 291 (1871); Sheehy vs. Chambers, 36 P. R. 514; Bank vs. Swain, 29 Md. 483 (1868); Stark vs. Coffin, 105 Mass. 328 (1870); Chrysler vs. Renois, 43 N. Y. 209 (1870); Hittson vs. Davenport, 4 Col. 169 (1878); Churchman vs. Martin, 54 Ind. 380 (1876); Phillips vs. Dugan, 21 O. St. 466 (1871); Walkup vs. Houston, 65 N. C. 501 (1871); Watson vs. R. R. Co. 50 Cal. 523 (1875); Foster vs. R. R. 1 Mo. App. 390 (1876); Calhoun vs. Pace, 37 Tex. 454 (1872); Mitchell vs. Henderson, 63 N. C. 643 (1869). See particularly Bedford vs. Woodward, 20 L. A. R. 593. Bronson vs. Rhodes was decided in December term, 1868; Knox vs. Lee in 1870 and Trebilcock vs. Wilson in 1871.

a great deal of unfavorable comment. It was openly charged, especially by Democratic speakers, and by the Democratic press, that these appointments were made in order to reverse Hepburn vs. Griswold. It did appear that Justice Strong, while on the supreme court of Pennsylvania, rendered several decisions (1) upholding the legal tender acts and this was cited as the reason for his appointment. As to Justice Bradley, however, it was said that while acting as counsel for a railroad company which had made a trust deed containing a "gold clause," he rendered an opinion that this trust deed could not be satisfied in currency.

The legal tender decision created a "howl." Even so great a man as George Bancroft assailed the decision unmercifully. (2). The decision was made only a few months after the appointment of Justices Strong and Bradley. The opinions of the majority of the court were written by these two new Justices. Five Justices favored the decision and four dissented. In determining the effect of these decisions it should be remembered that in Knox vs. Lee and Parker vs. Davis, no question arose as to contracts to pay in a specific coin. Mrs. Lee, a citizen of Pennsylvania, owned a flock of sheep in Texas, which on the outbreak of the rebellion, she left in charge of her shepherd. In March, 1863, the Confederate authorities confiscated and sold the sheep as the property of an alien enemy and Knox purchased them. The rebellion being repressed, Mrs. Lee brought trespass against Knox for damages. The jury found a verdict in Mrs. Lee's favor for the sum of $7,368, probably enhanced by the courts charge as to damages. The court instructed the jury to recollect that the verdict may be paid in legal tender notes. Parker vs. Davis arose on a bill in equity to compel specific performance of a contract to convey land upon payment of a given sum of money (not coin, simply money). Parker refused to execute a deed until he was paid in coin. A tender had been made in greenbacks which he refused. The inferior court ordered Parker to execute the deed upon payment by Davis of the amount in greenbacks. To reverse that decree an appeal was taken to the Supreme court of the United States. It is therefore clear that neither case required the construction of a "gold clause" in a private contract. Neither did Julliard vs. Greenman, 110 U. S. 421, another legal tender case, involve any such contract. (3) That was an action for goods sold (cotton) and decided nothing (at least so far as concerns the point we are considering) that had not been fully decided by Knox vs. Lee and Parker vs. Davis. In December, 1868, two years before the decision in Knox vs. Lee, the supreme court of the United States decided Bronson vs. Rhodes, 7 Wall. 229, holding that a contract to pay "gold and silver coin" cannot be satisfied by legal tender notes. There is not a word in Knox vs. Lee against the doctrine of Bronson vs. Rhodes. On the other hand, the doctrine of Bronson vs. Rhodes seems to be recognized. On page 548 of 12 Wall., the court says: "We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money." And on page 549 of the same case the court says:

"We have been asked whether congress may declare that a contract to deliver a quantity of grain may be satisfied by a tender of a less quanti-

1. Shollenberger vs. Britton, 52 Pa. St. 9-56. (decided 1866).

2. "A Plea for the Constitution of the United States wounded in the House of its Guardian," by George Bancroft. Money in Politics, by J. K. Upton; page 157.

3. The only question raised in this case, which was not raised in prior legal tender cases, was the question of the power of congress to direct the issue of United States notes as currency, with the quality of legal tender, in time of peace, and in the absence of any public exigency, (p. 426). This the court said (p. 450) is a political question, to be determined by congress when the exigency arises, and not a judicial question to be afterwards passed upon by the courts." There was no contract to be construed in this case. It was an action for goods sold. In no essential particular does it differ from Knox vs. Lee and Parker vs. Davis, (p. 438) ,and in no way mitigates against the doctrine of Trebilcock vs. Wilson or Bronson vs. Rhodes.

Justice Gray in Julliard vs. Greenman, 110 U. S. 430 says, "upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the legal tender cases." This should be conclusive as to effect of Juilliard vs. Greenman.

ty. Undoubtedly not. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values."

In Dec. 1871, one year after the decision of Knox vs. Lee, the supreme court of the United States decided Trebilcock vs. Wilson, 12 Wall. 687, affirming Bronson vs. Rhodes. The same judges sat in Trebilcock vs. Wilson that had sat in Knox v. Lee. Only a year had elapsed since Knox vs. Lee was decided. The criticism of Knox vs. Lee had fairly made the court stagger. They had not forgotten that case in a year, yet there is not a word indicating a conflict between it and Knox vs. Lee. The court says, p. 697:

"If we look to the act of 1862, in the light of the contemporaneous and subsequent legislation of congress, and of the practice of the government, we shall find little difficulty in holding that it was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally, and not obligations payable in commodities, or obligations of any other kind."

Bronson vs. Rhodes and Trebilcock vs. Wilson, are not the only decisions in support of this doctrine. In the Federal court we have Butler vs. Howitz, 7 Wall. 258; Dewing vs. Sears, 11 Wall. 379; The Emily Souder, 17 Wall. 666; Bronson vs. Kimpton, 8 Wall. 444; Gregory vs. Morris, 96 U. S. 619. In the state court we have nearly every case on this question decided after Bronson vs. Rhodes. It seems, therefore, plain that the legal tender cases do not support the claim made that a "gold contract" cannot be enforced. They have been misunderstood. The law is not in quite as sad a state as some think. As said by the Reporter, in a note to the case of Skinner vs. Rosa, 29 L.R.A. 512, at page 518, there seems to be a peculiar mistake on the part of the authors of text books, and on the part of some lawyers, to assert that the legal tender decisions have changed the rule laid down by the supreme court in the case of Bronson vs. Rhodes. That the legal tender decisions had no such effect is clearly shown by the Reporter in 29 L. R. A. 518. For any one who has any doubt whether Bronson vs. Rhodes is still law I advise the reading of this note. The effect of the legal tender decisions and what they hold is also very clearly set out in an article found at page 521 of volume 12, American Law Register.

The law on this subject is well summed up by the supreme court of Illinois in Belford vs. Woodward, 29 L. A. R. 593-596 in the following language: Before the decision in McGoon vs. Shirk, 54 Ill. 408, this court had held that, under the acts of congress of February 25, 1862, and July 11, 1862, known as the "Legal Tender Acts," a note or contract for the payment of a sum of money specifically in gold could be discharged by the payment of the same sum in legal tender notes, and that, in a suit upon such a note or contract, judgment could be entered up for the amount due upon the face of the instrument, and that the value of gold over legal tender notes was not a subject for consideration in an action brought on such a note or contract. But these prior decisions were overruled in McGoon vs. Shirk, supra, because, after their rendition, the supreme court of the United States decided the cases of Bronson vs. Rodes, 7 Wall. 229, and Butler vs. Horwitz, Id. 258, taking a contrary view; and the construction given by that court to an act of congress was, of course, binding upon this court. Accordingly, the Bronson Case and the Butler Case were followed in the McGoon Case. In the latter the question was whether a note payable, in terms, in American gold, and executed after the passage of the legal tender act of February 25, 1862, could be discharged by a tender of United States treasury notes, and the Bronson Case was there construed as holding that an express contract to pay coined dollars could only be satisfied by the payment of coined dollars, and the Butler Case was construed as holding that, when it appeared to be the clear intent of a contract that payment or satisfaction shall be made in gold and

silver, damages should be assessed and judgment rendered accordingly; and, after thus construing the two federal decisions, we said in the McGoon Case: "The note was payable in American gold, and in that medium alone, without the consent of the payee, could it be paid and satisfied. The court erred in holding the tender of treasury notes sufficient, and a compliance with the contract, and for this error the decree must be reversed." In Hapburn vs. Griswold, 8 Wall. 603, the supreme court of the United States held that the legal tender acts of 1862 and 1863, making United States notes a legal tender in payment of all debts, public and private, was unconstitutional, so far as it applied to debts contracted before the passage of those acts; that before February 25, 1862, all contracts, not expressly stipulating otherwise, were in legal effect, contracts for the payment of coin; and that, under the constitution, the parties thereto were respectively entitled to demand, and bound to pay, the sums due, according to their terms, in coin, notwithstanding the provision in the legal tender acts making United States notes a legal tender in payment of such debts. Following the Hepburn Case, this court held in Morrow vs. Rainey, 58 Ill. 357, and Chamblin vs. Blair, Id. 385, that contracts for the payment of money, made before the passage of the legal tender acts, had reference to coined money, "and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin." Subsequently, the Legal Tender Cases (Knox vs. Lee and Parker vs. Davis), 12 Wall. 457, overruled the case of Hepburn vs. Griswold, supra, so far as it held the legal tender acts to be unconstitutional as applied to contracts made before the passage of those acts; and, by consequence, the decisions in 58 Ill., also so holding, were rendered nugatory as authorities upon that point. The Legal Tender Cases, 12 Wall. 457, held that the legal tender acts were constitutional as applied to contracts made before, as well as to contracts made after, the passage of those acts; but we do not understand that the decision in the Legal Tender Cases, so called, overruled the cases of Bronson vs. Rodes and Butler vs. Horwitz. The Legal Tender cases decided that contracts payable in money, whether made before or after the passage of the legal tender acts, could be discharged by the tender of United States treasury notes, popularly known as "greenbacks"; but they did not decide that contracts specifically payable in gold and silver coin could not be enforced as such. It was only contracts payable in money generally, without specifying gold and silver coin, which were therein referred to. The decision in those cases recognizes two kinds of money as legal tender in the payment of debts—First, gold and silver coin; second, treasury notes made legal tender by act of congress. It was therein held that all debts which the contracts of the parties did not make payable in coin could be discharged in legal tender notes, but the right to make and enforce contracts for payment in coin was not denied. Mr. Justice Strong, who wrote the opinion in the Legal Tender Cases, expressly says: "We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money."

The case of Bronson vs. Rodes, supra, is recognized as authority in Trebilcock vs. Wilson, 12 Wall. 687, decided a year after the Legal Tender Cases were decided. In Trebilcock vs. Wilson the question arose whether a note payable by its terms in specie could be satisfied, against the will of the holder, by the tender of notes of the United States, declared by the act of February 25, 1862, to be a legal tender in payment of debts, and it was there held that the use of the term "in specie" did not assimilate the note to a note payable in chattels, but that those words were descriptive of the kind of dollars in which the note was payable, "there being different kinds in circulation recognized by law"; and, after stating the meaning of the words "in specie" to be "that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States," the court says: "This being the meaning of the terms 'in specie,' the case is brought directly within the decision of Bronson vs. Rodes, where it was held that express

contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in the payment of debts. The several coinage acts of congress make the gold and silver coins of the United States a legal tender in all payments according to their nominal or declared values. As the act of 1862 * * * has been sustained by the recent decision of this court (Legal Tender Cases, 12 Wall. 457) as valid and constitutional, we have, according to that decision, two kinds of money, essentially different in their nature, but equally lawful. It follows, from that decision, that contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement. * * * We shall find little difficulty in holding that it (the act of 1862) was not intended to interfere in any respect with existing or subsequent contracts, payable by their express terms in specie; and that, when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally. * * * The twentieth section of the act of 1792 * * * has reference to the coins prescribed by the act, and when, by the creation of a paper currency, another kind of money, expressed by similar designation, was sanctioned by law, and made a tender in payment of debts, it was necessary, as stated in Bronson vs. Rodes, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought." Accordingly, in the Trebilcock Case, the judgment of the supreme court of Iowa, holding that a tender of greenbacks or United States legal tender notes in payment of the note payable in specie, was legal and sufficient, was reversed. Still later, in Gregory vs. Morris, 96 U. S. 619, the supreme court of the United States again recognize the case of Bronson vs. Rodes, and refer to it as holding that a contract for the payment of gold coin is "an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight," and that judgment may be rendered upon such a contract payable in coined dollars; and it was held in the Gregory Case that an instruction telling the jury that "no agreement or contract to pay a certain number of dollars in gold can be enforced" was properly refused, as being in conflict with Bronson vs. Rodes. Hence, any language used in Reinbach vs. Crabtree, 77 Ill. 182, which can be construed as holding that a contract payable in gold may be paid, at the option of the debtor, and against the will of the creditor, in any currency which the general government has declared to be a legal tender in the payment of debts, must be regarded as being in conflict with the federal decisions, and is not binding as authority. Such language was used inadvertently, and was in conflict with the case of McGoon vs. Shirk, supra, which was evidently overlooked. We conclude that "express contracts to pay coined dollars," where creditors insist upon their enforcement, "can be satisfied only by the tender of payment of coined dollars, and judgment in suits brought on such contracts may be entered for coined dollars, and parts of coined dollars, such contracts not being within the legal tender acts." 15 Am. & Eng. Enc. Law, p. 705, and cases in notes; 1 Freem. Judgm. (4th Ed.) section 3, and cases in notes."

The decisions in some of these cases would be instructive reading to those who claim that legislation can create value and to those who believe that congress has been invested with that omnipotent power by the clause in the constitution authorizing it "to regulate the value of coin." The same constitution provides that congress shall "fix weights and measures." It may be interesting to know if congress can double the wheat crop by declaring that a bushel shall be thirty pounds instead of sixty pounds in weight. The chief justice in the Bronson case says:

"The design of all this minuteness and strictness in the regulation of coinage is easily seen. It indicates

the intention of the legislature to give a sure guaranty to the people that the coins made current in payments contain the precise weight of gold or silver of the precise degree of purity declared by the statute. It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values,and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them."

"The propositions just stated are believed to be incontestable. If they are so in fact, the inquiry concerning the legal import of the phrase 'dollars payable in gold and silver coin, lawful money of the United States,' may be answered without much difficulty. Every such dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint of the United States. and therefore declared to be legal tender in payments. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number."

"Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count.

"We cannot suppose that it was intended by the provisions of the currency acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or of the coined dollars. Our conclusion. therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful. * * * What reason can be assigned now for saying that a contract to pay coined dollars must be satisfied by the tender of an equal number of note dollars, which will not be equally valid then, for saying that a contract to pay note dollars must be satisfied by the tender of an equal number of coined dollars? * * * Another illustration, not less instructive,may be found in the contracts of the government with depositors of bullion at the mint to pay them the ascertained value of their deposits in coin. These are demands against the government other than for interest on the public debt, and the letter of the acts certainly makes United States notes payable for all demands against the government except such interest. But can any such construction of the act be maintained? Can judicial sanction be given to the proposition that the government may discharge its obligations to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?"

In Butler vs. Horwitz, 7 Wall. 258, the court says:

"A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness. to be ascertained by count. * * * But the obvious intent, in contracts for payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment, warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after judgment, only by tender of coin, while the absence of any express stipulation. as to description, in contracts for payment in money generally, warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money."

In Gregory vs. Morris, 96 U. S. 619, the court says:

"In this case, the finding for the defendant is, under the pleadings, in effect, that Morris was the mortgagee of the property in possession after condition broken, and that Gregory had by the replevin wrongfully deprived him of his possession. That rendered Gregory liable for such damages, in consequence of his wrongful act, as were "right and proper" under the circumstances. The obligation se-

cured by the mortgage or lien under which Morris held was for the payment of gold coin, or, as was said in Bronson vs. Rhodes (7 Wall. 229) "an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight," and is not distinguishable "from a contract to deliver an equal weight of bullion of equal fineness." In that case it was held that judgment might be rendered upon such a contract payable in coined dollars; but here the suit is not upon the contract to recover the amount agreed to be paid, but, in effect, for damages on account of the wrongful detention of property mortgaged to secure the debt. Gregory asked the court to charge that "the jury must compute damages and return their verdict in dollars and cents." (1).

This was undoubtedly correct, and it was done; but he further asked the court to say that "no agreement or contract to pay a certain number of dollars in gold can be enforced. The national currency is by law a legal tender at its face value for all debts and demands, public or private, except duties on imports and interest on the public debt." This was in conflict with Bronson vs. Rhodes, and therefore properly refused.

But the court did say to the jury, that, if they found the contract on the part of the plaintiff was to pay a certain sum of money in gold, they should compute the difference between gold and currency, and render their verdict in dollars and cents in currency; and in this we see no error. While we have decided that a judgment upon a contract payable in gold may be for payment in coined dollars, we have never held that in all cases it must be so. While gold coin is in one sense money, it is in another an article of merchandise. Gregory was required to discharge his debt in gold before he could rightfully take the property into his possession under the replevin. If the payment had been so made, Morris would have had his coin at that time to use as money or merchandise, according to his discretion. But it was not made; and Gregory, by his wrongful act in taking the property, subjected himself to damages. If the contract had been in terms for the delivery of so much gold bullion, there is no doubt but the court might have directed the jury to find the value of the bullion in currency, and bring in a verdict accordingly. But we think, as was thought in Bronson vs. Rhodes, such a case is not really distinguishable from this. The question is not whether Gregory had the right to pay in gold dollars after his debt had become due, but whether, having wrongfully got the property into his possession without payment at all, the damages he is required to pay on account of this wrongful act must, as a matter of law, be estimated in gold, or whether they may be in currency. We think it clear, that, under such circumstances, it was within the power of the court, so far as Gregory was concerned, to treat the contract as one for the delivery of so much gold bullion; and, if Morris was willing to accept a judgment which might be discharged in currency, to have his damages estimated according to the currency value of bullion. Certainly, if Morris had in good faith sold the cattle under his power of sale for currency, and receive payment in that kind of money, he would have been entitled to convert the currency into gold before crediting it upon his debt. So, here, if, with the approbation of the court, he takes a judgment that may be discharged in currency, the judgment should be for an amount which would be equivalent in currency to the specified amount of coin as bullion. This was the rule adopted by the court and is correct we think."

Justice Miller in his dissenting opinion of the legal tender case (Knox vs. Lee), says:

"Now, does making the notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This certainly does not improve the value of its notes. It is an element of depreciation. In addition, it creates a power-

1. Plaintiff requested entry of judgment in currency. If this was error, it was error in defendants favor, of which he could not complain.

ful interest in the debtor class and in the purchasers of bonds to depress to the lowest point the credit of the notes. The cheaper these become the easier the payment of debts, and the more profitable the investments in bonds bearing coin interest. On the other hand, the higher prices become, for everything the government needs to buy, and the greater the accumulation of public as well as private debt. It is true that such a state of things is acceptable to debtors, investors and speculators. It is their opportunity of relief or wealth. And many are persuaded by their representations that the forced circulation is not only a necessity but a benefit. But the apparent benefit is a delusion and the necessity imaginary. In their legitimate use the notes are hurt, not helped, by being made a legal tender. The legal tender quality is only valuable for the purposes of dishonesty. Every honest purpose is answered as well and better without it."

That it is the law of American courts today that contracts to pay in specie can be enforced seems to be beyond honest controversy. That the courts will enter judgment for the specific coin mentioned in the contract is doubtless beyond question.(1). How far congress has the power to alter this by legislation may possibly be the subject of honest conflicting opinion. It is said that the Supreme Court of the United States in the legal tender cases held that congress can at will and outside of any governmental purpose, destroy private contracts. No such question has ever arisen and whatever has been said by the court on the subject is at best mere obiter dictum. There is, however, nothing in the legal tender cases which warrants any inference that congress can directly impair the obligations of private contracts. If any inference at all on this subject can be drawn from the legal tender cases, that inference is against and not in favor of the existence of any such arbitrary power. (2). It was contended by those who asserted the unconstitutionality of the legal tender acts that private contracts were thereby impaired. How did the court answer this contention? If the court had intended to hold that congress had the right to destroy contracts how would it, naturally, have met the objection? Naturally it would have said squarely and plainly,—congress has the power to destroy private contracts —that is no objection to the legislation. It certainly would not spend page after page in showing that the contract was not violated. What did the court say? Note the caution it displays apparently lest its language should be construed as meaning that congress can directly annul contracts. On page 548 of 12 Wall. Justice Strong says: "The argument assumes two things,—first, that the acts do, in effect, impair the obligations of contracts, (3), and second, that congress is prohibited from taking any action which may indirectly (notice the significant use of the word indirectly) have that effect. Neither of these assumptions can be accepted." It is true that, under the acts, a debtor,

1. Bronson vs. Rhodes, 7 Wall. 229; Trebilcock vs. Wilson, 12 Wall. 687; Butler vs. Horwitz, 7 Wall. 258; Dewing vs. Sears, 11 Wall. 379; Morris vs. Gregory, 96 U. S. 619; Stark vs. Coffin, 105 Mass. 328; Belford vs. Woodward, 29 L. A. R. 593; Chesapeake vs. Swain, 29 Md. 483-506; Kellogg vs. Sweeny, 46 N. Y. 291; Hittson vs. Davenport, 4 Col. 169; McGoon vs. Shark, 54 Ill. 408; Chrysler vs. Renois, 43 N. Y. 209; Phillips vs. Dugan, 21 O. St. 466; Sheehy vs. Chambers, 36 P. R. 514; The Emily Souder, 17 Wall. 666.

2. For a strong historical argument against the existence of any such power in congress, see "A Plea for Constitution of United States Wounded in House of its Guardian," by George Bancroft.

3. If the contract is to pay, as the court says, in the money of the date of payment and not in money of the date of the contract, of course the contract is not violated when it is paid in legal tender notes. The conflict, therefore, was not whether congress can destroy contracts but whether a contract to pay money generally referred to the money of the date of payment or to the money of the date of the execution of the contract. Justice Strong says further (page 551): "The objection misapprehends the nature and extent of the contract obligation spoken of by the constitution." And in regard to the allied power of condemnation he says (page 551): "That provision has always been understood as referring only to a direct (notice use of word direct) appropriation and not to consequential injuries resulting from the exercise of lawful power." From this we can plainly see what the court means. It is, that in enacting the legal tender laws congress exercised the governmental power of borrowing money (a lawful power) and the fact that private contracts are incidentally affected thereby cannot prevent the government from exercising that lawful power. And it is, of course, plain that it is not every incidental destruction of contract obligations that is unconstitutional. War will destroy the fruits of contract, yet congress is not thereby prevented from levying war.

who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim, but whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) (4). * * * But the obligation of a contract to pay money is to be that which the law shall recognized as money when the payment is to be made. On page 566 Justice Bradley, in a concurring opinion, says: "If it is a bona fide contract for so many carats of diamonds, or so many ounces of gold as bullion, the specific contract must be performed." And on page 549 of the same volume, the court says: "We have been asked whether congress may declare that a contract to deliver a quantity of grain may be satisfied by a tender of a less quantity? Undoubtedly not."

In Bronson vs. Rhodes, and Trebilcock vs. Wilson, the court, in effect, at least, held that a contract to pay in specie is a contract to deliver a quantity of gold bullion as a commodity. This the court says, in the quotation just given, cannot be avoided. A contract to pay gold as bullion or so many carats of diamonds, the court says "must be performed." This suggests, at least, that a contract to pay in specie cannot be avoided even by congressional legislation.

On page 565 Justice Bradley says: "Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed."

It does not seem possible that a court would spend so much time and energy and occupy so much space in its opinions to show that congress by the legal tender acts did not destroy contracts, if the court believed that congress possessed any such power. It would seem that if the court believed that congress had the power to destroy contracts at will, it would not have wasted all its time in showing that the contract was not violated. It would have gone right to the point and said that congress can destroy the obligation of contracts and that it is no objection to this legislation that it impairs the obligations of private contracts. So far, the Supreme Court has never said that congress has such arbitrary and unjust power and it would be the purest assumption, without reason for its foundation, to say that the Supreme Court would hold an act of congress declaring that "specie contracts" can be paid in depreciated currency, to be within the constitutional power of the general government. It may be within the range of possibility that the court would so hold, but it is difficult to believe that the Supreme Court will ever commit such an outrage.

The majority opinion in Hepburn vs. Griswold, states strongly and clearly the position of those who deny the power of Congress to pass legal tender acts.

In this connection it may be further suggested that the state court, in the greater number of cases, are the final tribunals to determine the validity of contracts. Generally speaking, the Federal courts have no jurisdiction except of controversies arising between citizens of different states. There is nothing which compels a state court to adopt the decision of the Federal court. True it is, that as a matter of deference to the Federal government, and to secure harmony in the decisions relative to Federal legislation, the tendency of the state courts has generally been to adopt the rule of the Federal courts. (1) This, however, is not necessarily so. It may be doubted whether the state courts would feel compelled to follow the decisions of the supreme court "as it may hereafter be constituted," if it adopts any rule directly violating the obligations of private contracts.

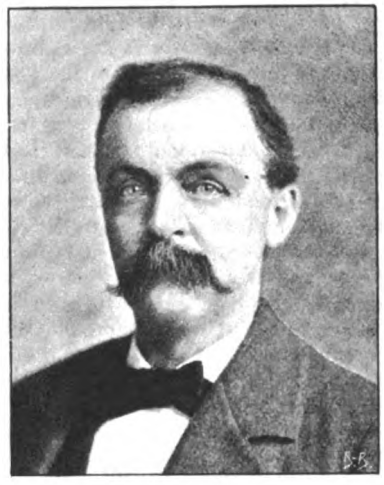
N. M. THYGESON,

St. Paul.

4. Why this reservation if the court intended to say that congress can directly destroy the obligations of private contracts.

(1) Kellogg vs. Page, 44 Vermont, 356; Smith vs. Smith, 1 Thompson & C. 63; Barringer vs. Fisher, 45 Miss. 200.

Henry B. Farwell was born in Stephenson County, Illinois, on a farm near Freeport. He was graduated from the High school of Freeport and



then read law in the office of Col. Thomas J. Turner in that city.

He attended college at the Michigan State University at Ann Arbor, and afterwards took the course of the Law Department of that University. He first practiced his profession at Rockford, Illlinois.

He came to St. Paul in the fall of 1883 and was admitted to the bar of Ramsey county in the spring of 1884. He was in partnership with Hon. John B. Brisbin, afterwards in company with Judge John B. Olivier but for the last five years has been attending to his practice alone.

### THIS YEAR'S STATE FAIR.

The Minesota State Fair this year is to be a great Exposition of Northwestern products and resources. It is now anticipated that the National Encampment of the G. A. R. at St. Paul, and the Knights of Pythias at Minneapolis the week of the State Fair, August 31st to September 5th, will attract at least two hundred thousand visitors to the twin cities, possibly more. The visitors do not come from adjacent states, but from all parts of the country owing to the rate of one cent a mile made by the railroads, with a thirty day limit, and without limitation as to purchaser.

It is certain that quite a large proportion of people, especially those from Eastern and Southern states, are coming not merely to attend the Encampment, but to see the Northwest and learn of its soil, climate, mines, timber and manufacturing. The State Fair, therefore, affords the Northwest a great oppotunity to do valuable work for the promotion of immigration. Realizing this, Oregon, Washington, Montana, Idaho, North and South Dakota, will send state exhibits of their products. Minnesota, spurred on by this friendly rivalry, is expected to make a greater showing than ever before, and many of the agricultural counties will make a county exhibit.

### NEW LAWYERS.

When comes the early summer, then also come commencement season and the graduating classes of young lawyers. And with them the floodgates are opened for good advice from the experienced and the sages.

Judge Dillon has been interviewed and he says:

"When my advice is asked by a young man or his parents, whether he should study law, I endeavor, in view of the crowded state of the profession, to dissuade him from it, unless it is seen that he has abilities that in a marked degree demonstrate that he is especially fitted for the law.

"The successful practice of the law in modern times requires very much more than a mere technical knowledge of the practical affairs of the world. Most cases do not present mere abstract legal problems, but concrete problems —what is the best thing to do—which involves a knowledge of business, of usages and the practical affairs of life. If, however, you cannot dissuade him, the next question I ask is, Is he a man of strong physical vigor?

"Successful lawyers are hard-working machines, and unless they have a good physical constitution they will fail of eminent success. No lawyer can succeed, or long succeed, unless in addition to the requisite intellectual qualities, he has also the requisite moral qualities.

"Integrity in the broadest sense, as well as in the most delicate sense of the term, is an indispensible condition to success in the law. Intellectual qualifications, fitness and integrity will not alone insure success. The successful lawyer must also have industrious habits. The successful lawyer is the lawyer who works and toils.

He must have a genius for work. These are fundamental conditions. But all these exist and yet fail to bring any marked success, because success comes from a happy combination of physical and intellectual qualities, including will, power of decision, moral qualities, integrity and saving common sense, so that the advice which the lawyer gives shall be seen to be wise; that is, the advice he gives shall be practically demonstrated to be wise, as shown in the results. The modern client wants good results;" while Cortland Parke, in an address before the Ohio State Bar Association, states this from his observation:

"I have known a few expert advocates who never had to wait for success in acquiring practice; and in later life they were tolerable lawyers, and retained a fair share of profit and of fame. But I never knew or heard of a great lawyer that was not, in the beginning, compelled to wait. And I am inclined to think that, other things being equal, the greatest lawyers were those whose waiting was the longest. Therefore, my young friends, do not be in haste for business. Do not anxiously seek it. Scorn doing so. Do not discourage it, but still, let it seek you. Do not be afraid to wait. Do not be envious as the hares race by you. Do not be disgusted when you see men whom you believe to be your inferiors getting business and apparently rising, while you have a lack of clients. But, mind, labor while you wait. Dig into the foundations of legal science—dig to the very bottom and work upward. Imbue your minds with legal principles. Study natural law, civil law, and above all, sound every depth of common law. Study English history, and especially the history of English law. Do everything you have to do thoroughly, and with faith, never flagging, that one day your labor will be rewarded. Instead of repining at want of business, be glad of it, if you can live for at least five years. I tell you that when you have been at the bar twenty years you will wish the five had been ten. For, hard as you have studied before you were licensed, that was no more than enough to fit you to be capable attorneys. Many more years and much more study is required if you are resolved to be lawyers."

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### LIMITING FEES IN DAMAGE ACTIONS.

A bill was introduced in the last New York Legislature to limit the fees of lawyers in damage cases to one-tenth of the amount recovered, instead of the one-third to one-half of the judgment which now usually goes to the lawyers. It is said that this bill was inspired by the Brooklyn trolley car companies and other corporations who suffer from damage suits, and was intended to discourage the lawyers who are continually on the lookout for opportunities to stir up damage suits. A contingent fee of ten per cent., in view of the expenses often necessary in preparing for trial and in obtaining expert testimony, would be too little inducement for the majority of the present damage case lawyers. The bill did not pass.—Law Student's Helper.

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### THE REMARKABLE CASE OF QUINCY.

#### The Rugged Genius of Maine Presents a Case Which Involves More Questions Than a Case of Wine.

A little, unnamed town in Maine is a bidder for legal fame. Three characters form the syndicate unconsciously seeking the world's big eye. Miss Amanda Emacia Limpate is the complainant in what will prove one of the freaks of legal genius. The inciting object of her strange proceeding in a court of whiskers and barefaced justice is a rampageous member of the genus Felidae, a husky, devilish Tom cat, in many mysterious ways a formidable preserver of the family Felis domestica. This cat was a native of Madagascar and belonged, as he still belongs, to the species proudly bearing a twisted tail, probably, like the modern screw propeller craft, used for steering purposes at emergent times. The defendant in this case is a Mr. Quintillian Quincy, chiefly noted for living long after man's allotted time, so as to save funeral expenses. Miss Limpate's counsel, having youth to overcome and experience to acquire, I will shield with a magnanimous pen. Quincy's answer was drawn by a lawyer in Phillips, Me., but filed as an appearance by the defendant in person.

Digesting the pleadings—to do which requires some pepsin—I learn the facts to be as follows:

Plaintiff, a spinster of rare staying powers as to age and the rust of time, holds and publishes herself a nurse for the care of those whose health has been lost—strayed or stolen. Her

farm lies within a mile of defendant's. About February 15, 1896, sans the instance and request of plaintiff, there came to her premises the robust feline heretofore indicated. He had on a black coat, but no vest or trousers. Pendent from the suburbs of his audacious anatomy was the aforesaid tail or tiller, together with evidences of a mature sex—emblems of the Inky Dink Order of Nocturnal Nudgers. Plaintiff, at all times moved by the benevolent impulses of life, opened her establishment and admitted the stranger, who forthwith explored the premises and appropriated what of pie and comfort he could find. Soon a friendship ripened between host and intruder. The former now coveted proprietary possession of her feline visitor. Readily with the thought, —some days since his advent having elapsed—she adopted him into her household. Then its disruption began. After several obstinate signs of his moral delinquencies, Tom's premises were renovated and his gearing lowered by the removal of some bolts and other impedimenta. His saddle thus adjusted to the better conduct of life, there was, thereafter, not so many manifestations of midnight cat-a-leptic fits in plaintiff's neighborhood.

So Tom lived on—though he stayed off. His domicile with plaintiff continued until June 29, 1896, when his former owner, the defendant herein, suddenly beseiged plaintiff's home and triumphantly bore away the cat, amidst the threats and lamentations of the aforesaid Miss Amanda.

Now comes Amanda Emacia Limpate in an action to recover for professional services as a nurse. Her alleged items set forth that due to the cruel and inhuman treatment of defendant, his cat sought succor in her house. (Defendant thinks the cat found one!) That she thereupon sheltered and fed said cat and improved his premises by removing certain useless and irritating malformations, for which surgical operation and other requirements she states charges as follows in her bill of peculiars:

| | |
|---|---|
| Milk, daily, from Feb. 15 to June 29, | $3.42 |
| Meat (Lamb, veal & sausage).. | 1.50 |
| Team to find lawyer, (one horse) | .75 |
| Legal advice, | 2.00 |
| Changing Tom into plain cat, Dr. Beel, | .25 |
| | $7.02 |

To this complaint, when served, defendant offered the following answer:

Defendant gladly admits that he is and always has been the owner of the black Tom cat indicated in plaintiff's complaint, and admits that plaintiff impounded said cat and held him in duress and deprived him of his liberty and desire to return to this defendant, said cat's lawful owner. Defendant denies that plaintiff is a professional nurse of cats and he is surprised that she has unwittingly alleged herself so mean a thing. Defendant denies that plaintiff provided milk and meat for said cat, but alleges that the cat was denied all forms of sustenance save what he purloined from the tables and pantries. That by reason of said enforced habits the said Tom cat is now and ever will be a menace to the larder of defendant's own household, a disreputable larcenist, so adept in his foraging practices that he has learned to steal the holes out of doughnuts. Defendant denies any knowledge of a one-horse team and legal advice for which plaintiff alleges she expended money in seeking the services of a lawyer and counseling with him as to certain changes in the plans and specifications of said cat.

Defendant denies all allegations of indebtedness in plaintiff's complaint, but avers that he owes her nothing save to act upon this opportunity and present his cause for injury and damages to his own property.

Defendant, as a cause of action against plaintiff, complains and alleges that plaintiff maliciously and unlawfully enticed the black Tom cat heretofore described from and off the premises of defendant, that she lured him to her so-called nursery and as she pleads, nursed him, contrary to the instinct, needs or desires of said cat, as defendant verily believes from information and belief; that to further her diabolical plot, she thereupon deliberately set about to divest said cat of his natural character as a Tom cat, and by bungling operations of pain and cruelty by a young and

unskilled veterinarian rendered said cat neither a stud cat nor a dam cat, but reduced him to a nonentity.

Defendant further alleges that before plaintiff carried off and detained his cat the said cat was strong, active, foxy and fascinating to all of his kind; a picture in the eye of defendant's wife and children, an object of admiration everywhere, a perennial quarry of dogs, a victor in a thousand wars, a great favorite among defendant's neighbors, a wakeful, watchful sportsman at night, and a demure, poet-eyed companion by day; but by reason of plaintiff's dastardily meddling with the ramparts of said cat, he or it is now disabled in body, weak in spirit, with no style of carriage, no charm of enterprise, no qualities for enlarging and cultivating the sphere of cats generally, no influence and no standing whatever; but said cat by reason of plaintiff's maltreatment has become a mangy, decrepit animal devoid of all interest in anything, and therefore a burden and a care to this defendant.

Defendant alleges that said cat was highly bred, but that plaintiff's malicious waste upon the premises of said cat, has utterly ruined him for profitable purposes, or for any purpose whatsoever, except the transportation of fleas. All to the damage to this defendant in the sum of seventy-two dollars and sixteen cents ($72.16.)

Wherefore defendant prays that plaintiff take nothing by her action, but that defendant have judgment for the sum of $72.16 with costs.

* * * *

Note.—The grave questions involved above will be apparent to the bar. The account is true of an action now pending in Maine, before a justice of the peace, who, being noted for a versatility of judgments will undoubtedly render a decision of interest.—Ed.

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### JEFFERSON'S LETTER ABOUT FOOLISHNESS.

Thomas Jefferson, in one of his letters to Governor Langdon, of New Hampshire, thus explains one of the secrets of Bonaparte's success in conquering, or nearly conquering Europe:

"The practice of kings marrying only into the families of kings," he says, "has been that of Europe for some centuries. Now, take any race of animals, confine them in idleness and inaction, whether in a sty, a stable, stateroom or palace, pamper them with high diet, gratify all their sexual appetite, immerse them in sensualities, nourish their passions, let everything bend before them, and banish whatever might lead them to think, and in a few generations they become all body and no mind; and this, too, by a law of nature, by that very law by which we are in the constant practice of changing the characters and propensities of the animals we raise for our own purpose. Such is the regime in raising kings, and in this way we have gone for centuries.

"While in Europe I often amused myself with contemplating the characters of the then reigning sovereigns of Europe. Louis XVI. was a fool, of my own knowledge, and in despite of the answers made for him at his trial. The King of Spain was a fool, and of Naples the same. They passed their lives in hunting, and dispatched two couriers a week one thousand miles to let each other know what game they had killed the preceding days. All these were Bourbons. The queen of Portugal, a Braganza, was an idiot by nature, and so was the king of Denmark. Their sons, as regents, exercised the powers of government. The king of Prussia, successor to the great Frederick, was a mere hog, in body as well as mind. Gustavus of Sweden and Joseph of Austria were really idiots, and George of England, you know, was in a straight waistcoat. There remained, then, none but old Catherine of Russia, who had been too lately picked up to have lost her common sense. In this state of things Bonaparte found Europe, and it was this state of its rulers which enabled him to win in almost every conflict with them, until Waterloo. These animals had become without mind and powerless, and so will every hereditary monarch be to a more or less extent after a few generations. Alexander, the grandson of Catherine, is yet an exception. He is able to hold his own; but he is only the third generation. His race is not yet worn out. And so endeth the book of kings, from all of whom the Lord deliver us and have you, my friend, and all other good men and true in His holy keeping."—The American Lawyer.

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The hand that rocks the boat is the hand that is in a fair way to leave the world.

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The Lord helps those who help themselves. That is probably the reason he is not more lavish with his favors.

# THE MINNESOTA LAW JOURNAL.

Communications in regard to the Contents of the Journal should be addressed to the Publisher, FRANK P. DUFRESNE, St. Paul, Minn.



## DISTRICT COURT.

**THE PUBLISHER**
**of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.**

**Stendel, Administrator vs. Boyd.**

**(District Court, Ramsey County. No. 64112)**

### Death by Wrongful Act—Nuisance.

When the land of a private owner is in a thickly settled city adjacent to a public street or alley and he has upon it or suffers to be upon it, dangerous machinery or a dangerous pit or pond of water, of such a character as to be attractive to children of tender years, he is under obligations to use reasonable care to protect them from injury when coming upon said premises even though they may be technical trespassers.

John L. Townley for plaintiff; Walter L. Chapin for defendant.

KELLY, J.: This action is brought under the statute to recover $3,050.00 damages for the alleged negligent killing of an infant child, Clarence Eugene Standal, who died at this county on 3rd May, 1895, and is prosecuted for the benefit of his next of kin by his duly appointed administrator.

The complaint alleges that the defendant now is and for many years prior to the date of the accident had been the owner of a certain lot of land described as lot 15 of block 4, Asylum Addition No. 2 to St. Paul, which lot is on the east side of Canton street, between Scheffer street and Otto avenue, and which abuts upon the sidewalk on Canton street. That Canton street is a public graded street, with sidewalks laid on each side thereof, which are much used by the people. That these premises lie in a thickly settled portion of said city of St. Paul. That many citizens and their families reside in that neighborhood, including plaintiff and his family.

That during 1890-1 the defendant, being then the owner of said lot of land, opened and operated on said lot a quarry for stone, and excavated it to a great depth, said excavation or pit averaging from five to eight feet in depth, seventy feet long east and west, and from 35 to 40 feet wide, north and south, "thereby constituting a large hole or pit in the front part of the said lot, a portion of which (extended under the sidewalk on said Canton street." That from that time this excavation was left unfilled—open, unprotected and unguarded in any way. That defendant "has negligently and carelessly suffered and allowed the same to be and become a nuisance in that the same * * * * for many years before the injury became and remained almost entirely to the top thereof, filled with filthy, stagnant water and covering in part and floating thereon were boards and sticks and planks, and wherein ducks, geese and goslings "were found by day."

That the place was in such condition as to be attractive to children of tender years and was of such nature as to lure and entice young children to play thereabouts and thereat. That

in fact it did lure and entice many young children, including plaintiff's intestate, and who could not appreciate ite danger.

That the water in said pit and pond during the summer months of each year was from four to seven or eight feet deep "and extending up to under a portion of the sidewalk,and to the sides of said excavation and pit and near the street and perpendicular from the edges thereof" and was suffered by defendant, knowingly, thus to remain for many years unguarded and unfenced. That defendant has due notice and knowledge of all these facts,—the condition of the excavation; that it was filled with water; that it was attractive to children of tender years to play thereat; that during the spring and summer seasons children were lured and enticed to go there for amusement and to see the water fowl therein; that it was unguarded in any way and as such dangerous to the lives of children; that it was contiguous to the sidewalk and that its banks were steep. That on several occasions before this accident small children had strayed from the sidewalk on Canton street, and attracted by this pool had fallen into it, of which defendant had due notice and knowledge.

That on May 3rd, 1895, the deceased, Clarence Eugene Stendal, then four and one-half years old. was walking, in the evening, with some other children of about his age and size, upon this sidewalk on Canton street, opposite the land of the defendant, and that they were attracted by the sheet or pool of water thereon and stepped off the sidewalk upon a stone ledge "beside said unfenced and unguarded . . . water . . . and began playing thereon" . . . and that without fault on his part said Clarence Eugene Stendal fell from said ledge into said water where it was seven feet deep and was drowned.

That the child was strong, healthy and intelligent and had been absent from his home, "which is situated from a short distance from said premises" but a very short time.

Now this demurrer admits all the material allegations of the complaint to be true, and the question arises upon this state of facts, can the plaintiff recover?

In my opinion the alleged facts bring this case squarely within the reasons of the "turn table" cases, and these reasons are so clearly, ably and justly stated in Keffe vs. Chi. Mil. & St. P. Ry. Co., 21 Minn., 207, and O'Malley vs. St. P. M. & M. Ry. Co., 43 Minn., 289, it is out of place that I restate them. It may be said that the complaint in the case at bar, states facts sufficient to make this pond a nuisance, and dangerous not alone to children but to adults using the street. The child was non sui juris, being but four and one-half years old and unattended. And while the child did not fall from the sidewalk into the water but had gone upon defendant's land, it is alleged it was lured off to the water's edge by its childish curiosity or natural impulse, fell in and was drowned. In the O'Malley case the "turn table" (for an injury for which the defendant was held liable), was situate on defendant's land, in the centre of a block, the nearest street being 125 feet away. The child killed was six years old. In the Keffe case the child was aged seven years and was technically a tresspasser, if such a child can ever be a tresspasser in the real sense. In neither case was the inhuman doctrine that the land owner owes no duty of care to a mere tresspasser applied. On the contrary it is distinctly repudiated by our court, at least in cases of injuries to children, non sui juris, and in my opinion upon the highest grounds of reasonable responsibility and of true humanity. The landlord may own the earth, but he should not be permitted, knowingly, to maintain traps and pitfalls upon his land to the destruction of children to whom, through lack of discretion which can only come with years, those very pitfalls are objects as enticing as they are dangerous.

It is proper to say that authority of the highest respectability, like the supreme judicial court of Massachusetts may be found to say that he cannot recover. In Grindley vs. McKechnie, 163 Mass., 494 (40 N. E. Rep., 764) will be found a case which in its facts is strikingly similar to the case at bar. That eminent court disposed of the

matter adversely to the plaintiff in an opinion of eight lines, merely citing its opinions in other cases. Tracing those citations back as useful in this, because we find the reason why that court holds as it does.

See Gay vs. Essex &c., Railway Co., 159 Mass., 238 (34 N. E. Rep., 186).

Daniel vs. N. Y. & N. E. R. R. Co., 154 Mass., 349 (28 N. E. R. 283).

Had it agreed with the Supreme Court of the United States in R. R. Co. vs. Stout, 17 Wall, 657, or the Supreme Court of Connecticut, in Birge vs. Gardiner, 19 Conn., 507, or the Supreme Court of Minnesota in Keffe vs. Mil. Ry. Co. supra, and O'Malley vs. St. P. M. & M. Ry. Co., supra, the so-called "turn table" cases, its decision in Grindley vs. McKechnie would have doubtless been the other way, for it evidently recognizes that the facts there pleaded bring Grindly vs. McKechnie within the same rule.

It is, for the reasons I have suggested, perhaps not necessary to go outside our own state for a reaffirmance of the law as held here in the "turn table" cases. But quite recently the Supreme Court of Illinois, in City of Pekin vs. McMahon, 39 N. E. Rep., 484, applies the rule as we understand it, to a state of facts identical with the case at bar. It is well reasoned and reviews most of the decisions, either way. The Courts say: "Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it or suffers to be upon it, dangerous machinery or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligation to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical tresspassers." And they apply the doctrine of the "turn table" cases and say they can see no substantial difference between them.

There was in the Illinois case, it is true, the fact that by ordinance of the city creating or maintaining of excavations on private lots, which were sources of annoyance or dangerous to the people thereabouts, was declared a nuisance. That does not affect the decision, for maintaining such excavations, where they interfere with the reasonable, comfortable enjoyment of life and property by the neighbors, is a nuisance at common law.

The learned counsel for defendant has cited me to several decisions in other states which controvert the Minnesota rule. These I need not go over for obvious reasons. He claims, however, that the opinion in Ratte vs. Dawson, 50 Minn., 450, has shaken if not overthrown our earlier decisions in the "turn table" cases. In this he is mistaken. The distinctions between the cases are many, and are pointed out by the court. The courts say: "There was nothing in the nature of the work going on or upon the land nor anything kept or used thereon, which can be said to have been especially inviting or attractive to children, or calculated to entrap them into danger, so as to bring the case within the rule established in the 'turntable cases.'" . . . "The young girl who had charge of the deceased was sui juris and responsible for the care of the latter. . . . Children residing in the neighborhood were accustomed to visit the place and play there, but it does not appear that defendant's attention had been called to this fact,—though he knew that the excavation for sand had been going on for considerable time." . . . But under the facts in that case the decision is based upon the absence of negligence on defendant's part. It is true the Court refuses to apply the maxim "sic utere tuo," &c., and say: "If the rule were otherwise, a land owner could not sink a well or dig a ditch or open a stone quarry on his land, except at the risk of being liable for consequential damages, which would unreasably restrict its enjoyments." All of which is both true and just. But it does not reach a case like this where it is alleged that this land owner after exercising his right to quarry stone from his land and excavating a large and deep pit thereon up to and under the public sidewalk, knowingly permits it to fill with water and become a place natur-

ally attractive to children, and where children to his knowledge did go and play and sometimes fell therein, and with all this knowledge and warning takes no steps to abate such nuisance, or guard its approaches.

On the other hand, parents living in the neighborhood of such dangerous places should be held to stricter accountability for permitting very young children to wander unattended upon the streets. I cannot force from my mind that it is not just that a parent who neglects his or her duty in keeping under watchful eyes a child of such tender years and harm comes, should be permitted notwithstanding to recover, in the name of the child's estate, damages from a stranger. But each case depends on its own peculiar facts, and this complaint alleged that this little boy came to his death "without any fault on his part or on the part of anyone, save and except the negligence and carelessness of the defendant as aforesaid." And this allegation must be taken as true.

After my best thought I am constrained to hold that this demurrer, which is, that the complaint does not state facts sufficient to constitute a cause of action, must be overruled.

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**GREAT STROKE.**

Bilkins (of Kansas City)—Come, have a drink with me, old man. This is my lucky day.

Filkins—What's up?

Bilkins—You know that 160 acres I own out in western Kansas?

Filkins—Yes.

Bilkins—Well, a granger came into my office to-day and wanted to trade a horse and wagon for 80 acres of it. In making out the papers, I found the fool couldn't read or write, so (gleefully) I shoved the whole 160 on to him.—Town Topics.

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Said a judge in a western police court; "And you say you did not strike the plaintiff until he became abusive?"

"That's it, jedge."

"Tell the court what he said?"

"He called me a hoss thief."

That won't excuse your conduct. A man might call me a horse thief all day but"—

"Yes," interrupted the defendant, "but I guess you've never been one, jedge, and you don't know how it riled me."

Few lawyers have had so much legal experience crowded into a comparatively few years of active life as William A. Kerr, one of the judges of the municipal court of Minneapolis.

He was born on a farm in New Brunswick, Canada. After graduat-

ing from the university of N. B. he studied law at St. John, N. B., with Weldon & McLean, one of the leading law firms of Canada. During his course of study there he received a complete insight into the theory and practice of the English common law.

Coming to Minneapolis in 1888, Mr. Kerr entered the office of Russell, Calhoun & Reed. When Judge Russell retired from this firm prior to going on the district court bench, the business was continued by Louis A. Reed and Mr. Kerr, under the firm name of Reed and Kerr—the firm becoming later Reed, Kerr & Dougherty.

Mr. Kerr was elected one of the judges of the municipal court of Minneapolis in 1894. He is known as a conscientious and fearless judge. Cases heard by him are disposed of promptly.

The judge is an active member of several social and athletic organizations.

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"To men pressed by their wants, all change is ever welcome."

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"Why do you wish to be excused?" asked the judge of the unwilling juror. "I'm deaf, your honor; so deaf I really don't believe I could possibly hear more than one side of the case."—Harper's Bazaar.

## PERSONAL.

**St. Paul—**

Pierce Butler, present County attorney, has gone into the firm of Eller & How, with offices in the Gilfillan Block.

Robertson Howard, who recently resigned the position of assistant City attorney to devote his whole time to private practice, has opened an office at 217 Manhattan Building.

Hon. Seymour D. Thompson, of St. Louis, is in the city visiting his niece, Mrs. H. M. Thygeson.

**Minneapolis—**

Judge J. H. Steele of the Municipal Court and David Simpson, City Attorney, were nominated by the Republicans for District Judges. The present incumbents, Judges Pond and Smith, were nominated by the Democrats and Populists.

First Assistant County Attorney Peterson will run on the Republican ticket for County Attorney.

**Duluth—**

J. E. Green of Cloquet, has located in this city.

H. R. Spencer has removed to room 614 Board of Trade.

**Mankato—**

H. L. Schmidt and S. B. Wilson, have formed a law partnership.

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Lyman J. Gage, president of the First National bank of Chicago said recently in regard to the reported withdrawal of gold from the United States treasury:

"What has been done in this regard has been published, and what may be done, being founded solely on imagination, one person can guess as well as another. The popocrats can well afford to pay $1,000 a line for articles like some that have recently appeared in some of the newspapers.

"The report that people are made to pay 1 or 2 per cent for gold by the New York banks under pretense of having to get it from the sub-treasury is all nonsense. The sub-treasury is convenient, and any one who wants gold can get all the gold he wants without anybody's help.

"Let me say further, that even if people should make the attempt to exhaust the reserve they will never do it. The reason is they have not and cannot get the treasury notes to do it with. The government has got $200,000,000 of them locked up, and the banks have got hold of a large amount, and there is a large amount in circulation which it would be impossible to get together.

"I do believe it possible to break down the national credit. If any one is foolish enough to buy gold at a premium, in expectation that Bryan would be elected, and silver will be worth only 50 cents on the dollar, he will certainly lose money, not only because the government can stand any run that can be made on the treasury, but because Bryan will never come within a mile of the presidential chair."

No, sonny—should even free silver win, no one will be coming around with a silver tray full of silver dollars and ask you to "help yourself." Hard work only will secure them—or rather, harder work!

---

## HOT STUFF FROM THE EXCHANGES.

Judge—Have you anything to say before sentence is pronounced against you?

Convicted Burglar—The only thing I'm grumblin' about is bein' identified by a man as kept 'is 'ead under the bedclothes the whole time. That's wrong.

---

Getting Justice—"All I demand for my client," shouted the atorney, in the voice of a man who paid for it. "is justice!"

"I am very sorry I can't accommodate you," replied the judge, "but the law won't allow me to give him more than fourteen years."—Cincinnati Enquirer.

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That a mayor can vote only to break a tie, and not to make one, in the election of a city officer "by joint convention of the city council," is decided in Brown vs. Foster (Me.), 31 L. A. R. 116, where the charter provides that he shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote, although another provision declares that the mayor, aldermen, and common council shall constitute the city council.

...THE ..

# MINNESOTA LAW JOURNAL.

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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.

### EASEMENT—HOW ACQUIRED.

We call attention to the decision of our Supreme Court in the cases of Swan and others against Munch, reported in this number of the Journal.

The Supreme Court very clearly defines the law of easements, and particularly that governing the right to flow lands by the operation of sluicing and other logging dams that are not operated during every month in the year.

In these cases the lands were only flooded during the three months of the year, when a full head of water was maintained on the dam to sluice the logs that came down the stream.

The question was, whether this amounted to such a continuous use of the easement claimed, that the right to flow the lands was acquired by the operation of the dam in that manner every sluicing season for more than fifteen years. The court held that defendant had acquired an easement to flow, although the lands were dry during nine months in each year.

The effect of this decision is far-reaching, as its doctrine is applicable to other easements, as well as that of flowage. Although the court refers to only two cases, there are many other authorities that sustain its position, as will appear by reference to the brief of counsel for the appellant.

While the principle involved may be

well settled, the difficulty is in its application to the various cases that arise, but we think that in the decision of our court the rule has not been too rigidly applied under the circumstances controlling the cases before it.

---

Lord Russell's visit to America reminds the London Chronicle of an ancient story. It says that during Lord Russell's previous tour in this country with Lord Coleridge, he came in contact with many members of the bar, including Mr. Evarts. It was while walking with Mr. Evarts one day along the banks of a stream that his attention was called to a point at which Washington, according to tradition, had thrown a dollar right across. The water was wide, and Lord Russell looked doubtful. "You know a dollar went further in those days than it goes now," the American lawyer blandly insinuated. "Ah," said Lord Russell, quite equal to the occasion, "and it may have been easy enough to Washington; it is well known that he threw a sovereign across the Atlantic."

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### LITERARY NOTES.

There will appear in the September Atlantic two articles that suggest and (in a sense) contain the most eventful chapter in modern history. One is "The Story of Uncle Tom's Cabin," by Charles Dudley Warner, who tells the unprecedented history of this book: and the other is "The Awakening of the Negro," by Booker T. Washington. The most daring prophet could not have foreseen Tuskegee Institute in Alabama forty years ago; in fact nothing conceivable would have seemed so improbable.

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### AN ACTION ON NOTE PAYABLE IN GOLD COIN.

In the recent case of Mathew vs. Dean, in the District Court of Hennepin County, Judge Elliott ordered a judgment by default in an action on a promissory note, which by its terms was made payable "in gold coin of the United States of the present standard of weight and fineness," with interest thereon payable "in like gold coin," to be entered in the exact words of the note. This is the first decision, so far as we are aware, in this state as to the validity of such contracts, and as to the form of judgment to be entered.

That such contracts are valid, and enforcible by actions in the courts is well settled. The cases so holding are collected and commented on in the article by Mr. Thygeson published in the July numebr of the Journal (ante 122.) That article so ably and fully discusses the question of their validity, that nothing more need be said upon that point.

The manner of pleading, however, is not discussed, and we desire to refer briefly to that matter. In Matthew vs. Dean the complaint set out the note in full, and demanded judgment in gold coin as therein provided. The court therefore properly ordered judgment as demanded.

It would have been otherwise, however, if the complaint had not been so drawn. This has been decided in the following cases: Lamping vs. Hyatt, 27 Cal. 99; McComb vs. Reed, 28 Cal. 281; Watson vs. San Francisco and H. B. R. Co., 50 Col. 523; Lillie vs. Sherman, 39 Howard Pr. 287; Beeford vs. Woodward, 158 Ill. 122.

When a mortgage, or note, or other contract by its terms requires payment to be made "in gold coin," or "in gold coin or its equivalent," this manner of pleading the kind of money in which payment is to be made, and asking judgment specifically as set out in the instrument must always be resorted to.

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### ERRONEOUS DICTA IN ACTIONS TC DETERMINE ADVERSE CLAIMS.

In Alt v. Croff et al., 68 N. W. R. 10, Judge Mitchell, in speaking of the action to quiet title with approval, says: "The object of an action under the statute to determine an adverse claim to real estate, was stated in Walton v. Perkins, 28 Minn. 413, to be, to force one claiming an adverse claim or lien to establish or abandon his claim; that with respect to the claim of the defendant, the position of the parties is the reverse of that occupied by the parties to an ordinary action; that the defendant becomes practically plaintiff, and takes the affirmative in pleading and proof, while the

plaintiff becomes practically the defendant, and defends against the claim."

I had occasion, a short time ago; to review and criticise the dicta to the effect above cited. The review may be seen in Minnesota Law Journal, vol. IV., No. 5, p. 83. I there showed that our Supreme Court had followed the above by like dicta in Jellison v. Haloran, 40 Minn. 487; Morrill v. Little Falls Mfg. Co., 46 Minn. 261; Stuart v. Lowry, 49 Minn. 97 and in Schofield v. Quinn, 54 Minn. 12. I also called attention to the fact that these dicta had already been overruled in effect many times as follows: In Myrick v. Coursalle, 32 Minn. 154, the court says:

"In the action given by the statute for the determination of adverse claims to 'vacant and unoccupied' land, the plaintiff must allege in his complaint, and in case of contest, show upon trial some title to the land, otherwise he does not put himself in position to attack any claim of any other person to the same."

In Herrick v. Churchill, 35 Minn. 319, Judge Mitchell, speaking for the court says: "The contention of plaintiff, plainly stated, is that, under the literal wording of this statute, any person who says that he claims title, without either alleging or proving that he has in fact any title to, or interest in, the real estate, may maintain an action against any other person who claims an interest in it, and compel him to prove his title, or to be adjudged to have none. If the statute means this, it certainly established a most unreasonable and anomalous rule. We think it was never before heard of, in judicial proceedings, that one person, who has no interest whatever in the property, may maintain an action against another who claims some interest in it, and compel him to prove the validity of his claim. We do not think that the statute was intended to establish any such rule."

In Jellison v. Halloran, 40 Minn. 487, the court says: "One who is neither in possesion of land, nor shows any right or interest therein, he cannot by this action under the statute compel another to maintain or to renounce any claim which he may have. The statutory conditions entitling the plaintiff to relief must be alleged and if put in issue must be proved."

In Pinney v. Russell & Co., 52 Minn. 443, the court says: "In such case (where neither plaintiff nor defendant proved title in himself) the action should have been dismissed."

In Wheeler v. Winnebago Paper Mills, 64 N. W. R. 920, the court went further and held that, it was not only necessary for plaintiff to prove his case where there was a general denial, but that where the defendant attempts to set out his title but fails to show any title in himself, but also couples with it a general denial, even then plaintiff was put upon his proof, overruling Donohue v. Ladd, 31 Minn. 244, in so many words, and in effect Perkins v. Morris 30 Minn. 111 and Jellison v. Halloran ante, not however upon the part cited above, from the last decisions.

The statement of Judge Mitchell, in Alt v. Groff, 68 N. W. R. 10, as above shown, is not the law in this state, and even if it were, has no special application to the case in which it was cited. Judge Mitchell had in a former decision, Herrick v. Churchill ante, shown the absurdity of such a proposition.

It will thus be seen that this citation is not true in any respect.

The object of an action under the statute to determine an adverse claim to real estate, is not, "to force one claiming an adverse claim to real estate to establish his claim." Such a party may neither establish nor abandon his claim and still plaintiff not succeed.

Then, in such an action, "with respect to the claim of defendant the position of the parties is" not "the reverse of that occupied by parties to an ordinary action." On the contrary, the rule is the same as in other actions.

"The defendant" does not "become practically plaintiff and take the affirmative in pleading and proof." It is true that defendant may become such if he desires to establish his claim, but in no sense other than in any civil action. Such dicta tend to increase litigation and bring discredit upon courts and lawyers.

S. R. CHILD.

Minneapolis, Minn., August 22, 1896.

## ADDRESS ON INTERNATIONAL LAW.

### By the Lord Chief Justice of England.

E. Q. K. in an editorial published in the New Jersey Law Journal says: The recent meeting of the American Bar Association is memorable because of the presence of the Lord Chief Justice of England and of the address which he delivered. His theme, International Law, was appropriate to the occasion and his discussion of the application of it by international arbitration was especially welcome at this time. His appeal for peace and law was received with an instant and heartfelt response in the minds of not only those who heard it but also of the English-speaking people throughout the world wherever the address was published. In the meeting of the Association the appeal was taken up and re-echoed by every speaker. It gave the keynote to every speech at the dinner which closed the meeting and the tone to the deep feeling which pervaded the whole body of lawyers gathered from all parts of the United States.

Taking Bentham's title, "International Law," he met the objection that the rules by which civilized nations govern themselves are not entitled to be called law, because law implies a lawgiver and a tribunal capable of enforcing it, and said, that this view of law, based on Austin's definition, was too narrow, and that as government becomes more frankly democratic, resting broadly on the popular will, it becomes evident that the views of Hooker and Savigny are nearer the truth, and that all law, in the words of the latter, "is first developed by usage and popular faith, then by legislation, and always by internal, silently operating powers and not mainly by the arbitrary will of the lawgiver," and he said: "I claim, therefore, that the aggregate of the rules which nations have agreed to conform to in their conduct toward one another are properly to be designated 'International Law.'" In answer to the question, "What is international law?" he said: "I know of no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another." It had been insisted that the law of nature and the law of morals formed a part of international law; on this point he had had some controversy with his friend, Mr. Carter, before the Paris Tribunal of Arbitration in 1893, but, after mature reflection, he held to the proposition which he had contended for then, "that international law was neither more nor less than what civilized nations have agreed shall be binding on one another as international law. The law of nature is, in the beginning, the law of arbitrary force, and natural right is often used as opposed to legal right. What is natural law is a question of opinion, and those who seek to base a system upon that commit the fault, as Prof. Woolsey says, "of spinning the web of the system out of their own brain, as the legislators of the world, and of neglecting to inform us what the world actually holds to be the law by which nations regulate their conduct." With respect to the appeal to morality, he said: "It cannot be affirmed that there is a universally accepted standard of morality. Then what is the standard? The standard of what nation and of what age? Human society is progressive—progressive, let us hope, to a higher, a purer a more unselfish ethical standard," but the law is not coincident with the morality of any one age or nation, and there are many instances in which nations are agreed upon the immorality of certain practices, and yet have not straightway proceeded to condemn them as international crimes. It cannot be said of either international law or municipal law that they include the moral law, nor accurately or strictly that they are included within it. They ought not to offend against it, they may adopt the precepts of it, but, while the conception of the moral law or the law of nature excludes the idea of dependence upon human authority, it is of the essence of municipal law that its rules have been enacted or recognized by some authority of the state, and, so, also, it is of the essence of international law that rules have been recognized as binding by the nations

constituting the community of civilized mankind."

After speaking of the sources of the rules of international law and tracing briefly the history of its development, he turned from this to consider, first, the part played by the United States in shaping the modern tendencies of international law and next whither those tendencies run, and said: "It is not too much to say that the undoubted stream of tendency in modern international law to mitigate the horrors of war, to harmonize or make less inhuman its methods, and to narrow the area of its consequential evils is largely due to the policy of your statesmen and the moral influence of your jurists. The United States were born in the life of the world into the family of nations. It is substantially true to say that, while to earlier writers is mainly due the formulation of the rules relating to a state of war, to the United States—to its judges, writers and statesmen—we largely owe the existing rules which relate to a state of peace and which affect the rights and obligations of powers which during a state of war are themselves at peace." Turning to the consideration of what characterizes the later tendencies of international law, he said: "In a word, it is their greater humanity." He discussed this in some detail and then showed that in spite of this there is war in the air. "Nations armed to the teeth prate of peace, but there is in no sense peace." And he showed how the industry of the nations of Europe was burdened and pressed down by the cost of standing armies and of the debts incurred in war and said:

"When will governments learn the lesson that wisdom and justice in policy are a stronger security than weight of armament?
'Ah! when shall all men's good
Be each man's rule, and universal peace
Lie, like a shaft of light, across the land?'

"It is no wonder that men—earnest men—enthusiasts, if you like, impressed with the evils of war, have dreamt the dream that the millenium of peace might be reached by establishing a universal system of international arbitration."

"The cry for peace is an Old World cry. It has echoed through all the ages, and arbitration has long been regarded as the handmaiden of peace."

He showed how arbitration was provided for in days of Archidamos, King of Sparta, and how the Roman emperors and, after them, in fuller measure, the popes, by their arbitrament, often preserved the peace of the Old World and prevented the sacrifice of blood and treasure, and then gave an account of the efforts that are now being made by peace societies all over the world, and even by legislative bodies, to devise some peaceful means for settling international troubles. He said "Experience has shown that, over a large area, international difficulties may honorably, practically and usefully be dealt with by peaceful arbitrament," and referred to the treaties under which this was done, and also to a large class of treaties which contained an arbitration clause.

From this, however, he did not conclude that the millenium of peace had arrived, and, though a friend of peace, he "would yet affirm that there may be even greater calamities than war, the dishonor of a nation, the triumph of an unrighteous cause, the perpetration of hopeless and debasing tyranny." * * * "It behooves then all friends of peace and advocates of arbitration to recognize the difficulties of the situation, and to discriminate between the cases in which friendly arbitration is and in which it may not be practicable." He showed wherein the analogy of private litigation failed, and said that there are differences in which, even between individuals, arbitration is inapplicable.

"Again, a nation may agree to arbitrate and then repudiate its agreement. Who is to coerce it? Or, having gone to arbitration and been worsted, it may decline to be bound by the award. Who is to compel it?"

"These considerations seem to me to justify two conclusions—the first is that arbitration will not cover the whole field of international controversy, and the second, that, unless and until the great powers of the world, in league, bind themselves to coerce a recalcitrant member of the family of nations, we have still to face the more than possible disregard by powerful states of the obligations of good faith and of justice. The scheme of such a combination has been advocated, but the signs of its accomplishment are absent. We have, as yet, no league of

nations of the Amphictionic type."

"Are we then to conclude that force is still the only power that rules the world? Must we then say that the sphere of arbitration is a narrow and contracted one?"

"By no means. The sanctions which restrain the wrong-doer—the breaker of public faith—the disturber of the peace of the world, are not weak, and year by year they wax stronger. They are the dread of war and the reprobation of mankind. Public opinion is a force which makes itself felt in every corner and cranny of the world, and is most powerful in the communities most civilized. In the public press and in the telegraph it possesses agents by which its power is concentrated and speedily brought to bear where there is any public wrong to be exposed and reprobated. It year by year gathers strength as general enlightenment extends its empire, and a higher moral altitude is attained by mankind. It has no ships of war upon the seas or armies in the field, and yet great potentates tremble before it and humbly bow to its rule."

"Again, trade and travel are great pacificators. The more nations know of one another, the more trade relations are established between them, the more good will and mutual interest grew up; and these are powerful agents working for peace."

"But, although I have indicated certain classes of questions on which sovereign powers may be unwilling to arbitrate, I am glad to think that these are not the questions which most commonly lead to war. It is hardly too much to say that arbitration may fitly be applied in the case of by far the largest number of questions which lead to international differences. Broadly stated, (1) whereever the right in dispute will be determined by the ascertainment of the true facts of the case; (2) where, the facts being ascertained, the right depends on the application of the proper principles of international law to the given facts, and (3) where the dispute is one which may properly be adopted on a give-and-take principle, with due provision for equitable compensation, as in cases of delimitation of territory and the like—in such cases, the matter is one which ought to be arbitrated."

With regard to the question, what ought to be the constitution of the tribunal, he said he greatly doubted the wisdom of making it a permanent tribunal with permanent membership, not only because the men should be chosen with reference to the kind of question to be decided, and men holding permanently such great powers might gradually assume intolerable pretensions, but also because the very existence of such a tribunal would offer a temptation to put forward, with little cost and no risk, pretensions and unfounded claims.

He then referred to mediation as an influence which, by the law of nations, may legitimately be exercised by the powers in the interests of peace, and showed how, in certain important cases, it had been so used, and suggested that there is perhaps no class of cases in which mediation may not, time and occasion being wisely chosen, be usefully employed even in delicate questions affecting national honor and sentiment.

The closing sentences, which thrilled and inspired the great audience which heard them, may well be read over and over again, and they must be given in the very words of the speaker.

"Mr. President, I come to an end. I have but touched the fringe of a great subject. No one can doubt that sound and well-defined rules of international law conduce to the progress of civilization and help to insure the peace of the world."

"In dealing with the subject of arbitration, I have thought it right to sound a note of caution, but it would, indeed, be a reproach to our nineteen centuries of Christion civilization, if there were now no better method for settling international differencs than the cruel and debasing methods of war. May we not hope that the people of these states and the people of the mother land—kindred peoples—may, in this matter, set an example of lasting influence to the world? They are blood relations. They are indeed separate and independent peoples, but neither regards the other as a foreign nation."

"We boast of our advance and often look back with pitying contempt on the ways and manners of generations gone by. Are we ourselves without reproach? Has our civilization borne the true marks? Must it not be said, as has been said of religion itself, that countless crimes have been committed in its name? Probably it was inevitable that the weaker races should, in the end, succumb, but have we always treated them with consideration and with justice? Has not civilization too often been presented to them at the point of the bayonet, and the Bible by the hand of the filibuster? And, apart from races we deem barbarous, is not the passion for dominion and wealth and power accountable for the worst chapters of cruelty and oppression written in the world's history? Few peoples—perhaps none—are free from

this reproach. What, indeed, is true civilization? By its fruit you shall know it. It is not dominion, wealth, material luxury; nay, not even a great literature and education widespread—good though these things be. Civilization is not a veneer; it must penetrate to the very heart and core of societies of men."

"Its true signs are thought for the poor and suffering, chivalrous regard and respect for woman, the frank recognition of human brotherhood, irrespective of race or color or nation or religion, the narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom, abhorrence of what is mean and cruel and vile, ceaseless devotion to the claims of justice. Civilization in that, its true, its highest sense, must make for peace. We have solid grounds for faith in the future. Government is becoming more and more, but in no narrow class sense, government of the people, by the people, and for the people. Populations are no longer moved and manoeuvred as the arbitrary will or restless ambition or caprice of kings or potentates may dictate. And, although democracy is subject to violent gusts of passion and prejudice, they are gusts only. The abiding sentiment of the masses is for peace—for peace to live industrious lives and to be at rest with all mankind. With the prophet of old they feel—though the feeling may find no articulate utterance—'how beautiful upon the mountains are the feet of him that bringeth good tidings, that publisheth peace.'

"Mr. President, I began by speaking of the two great divisions—American and British—of that English-speaking world which you and I represent today, and with one more reference to them I end."

"Who can doubt the influence they possess for insuring the healthy progress and the peace of mankind? But, if this influence is to be fully felt, they must work together in cordial friendship, each people in its own sphere of action. If they have great power, they have also great responsibility. No cause they espouse can fail; no cause they oppose can triumph. The future is, in large part, theirs. They have the making of history in the times that are to come. The greatest calamity that could befall would be strife which should divide them.

"Let us pray that this shall never be. Let us pray that they, always self-respecting, each in honor upholding its own flag, safeguarding its own heritage of right, and respecting the rights of others, each in its own way fulfilling its high national destiny, shall yet work in harmony for the progress and the peace of the world."

## HUMOROUS ADDRESS TO YOUNG LAWYERS.

We give below a part of the pertinent, practical and humorous address, delivered by Hon. Henry Woolman to the graduating class of the Law Department of the Missouri State University: "Disappointment will be the fate of those of you who expect, on your return to your homes, to find the mayor, board of aldermen and a large concourse of prominent citizens awaiting you at the railroad station to welcome back a man who is to fill a long-felt want. The chances are that no railroad president or bank cashier will walk up to you within a week, or a month, or possibly even a year, after your return and enthusiastically exclaim: 'Smith, you have no idea how anxiously we have been waiting for you to get back. We have some very important legal matters that we have been waiting so long to have attended to, and now, we repeat, we are so glad you are back.'

"Those of you who take a Utopian view of the future will be the victims of hopes delayed. There will probably for a long time be but one man in the community who will realize that a great light has broken forth. * * * After awhile you have been engaged in the trial of a very important case. You have summed it up, in your own view, with thrilling and convincing eloquence. You listened to the address of your opponent in the case, and are startled at its want of power, effect and eloquence. There is some merit in it, but, on the whole, compared with yours, it is 'stale, unprofitable and flat,' and you are gratified and proud of the manner in which you demolished his speech in your reply. You are sure of a heavy verdict in your favor. The judge charges the jury; you think it slightly against you; the jurors retire and return after an hour's deliberation with a verdict against you, and, if you are made of the right material, you will then begin to study what your mistakes were, and this will be a profitable study. The lawyer who watches himself that he does not make the same mistake twice will find that year after year his methods before the judges and the jury will become better, and his self-control will rapidly improve; his mistakes grow less and his capacity to win will rapidly increase. While the early years of nearly every lawyer are dark and clouded, if he is studious and industrious and loyal to his clients, he will find that year by year his standing at the bar will improve, until, in

due time, it will almost surprise him to see how strong and powerful is his position in the profession. An honorable, capable lawyer is always respected, and he ranks with foremost men in the state."

## INCIDENTS CONNECTED WITH JUDGES AND LAWYERS.

### Webster's Quarrel With Pinkney in United States Court—How Webster Brought Pinkney to Terms.

After Webster's sharp controversy with Calhoun he was informed by a friend that Calhoun intended to challenge him. "If he does," asked the friend, "will you accept?" He replied that he had sent Col. Benton to him to know if "I really meant certain things I had said. I do not choose to be called to an account for anything I have said, but then he really did mean everything he had said. It is very evident Benton desires to have trouble with me."

"Then you would not accept a challenge from him?"

"Of course not. I despise the whole thing. I have given him something more disagreeable than buckshot, and now we'll see what he proposes to do about it."

"The nearest I ever came to a duel was with William Pinkney, of Maryland. He was the acknowledged leader of the American Bar—a lawyer of extraordinary accomplishments. But, with all that, there was something about him that was very small. He did things that one would hardly think it possible for a gentleman and a lawyer of his high standing and culture could do. He was an exceedingly vain man. This was seen in every motion he made. When he came into the court-room he was usually dressed in the very extreme of fashion, almost like a dude. He wore white kid gloves that he put on fresh every morning. He usually rode from his house to the Capitol on horseback, and he showed, in all his appearance, that he considered himself the great man of the times. He had a great many satellites, who flattered him and hated him. Such was Mr. Pinkney when I began my practice before the United States Supreme Court.

"I was largely dependent on my income from my profession for the support of myself and family. I was aware that I could not argue my cases as well as Pinkney could. But I did as all lawyers should, when their clients employ them—give them their best possible efforts. I determined—Pinkney or no Pinkney—to argue my own cases in the Supreme Court. Perhaps in a few very important cases in my early practice Mr. Pinkney has assisted me, and it soon became apparent that he expected me to become one of his most ardent admirers. In this he was soon mistaken, and when he realized this, his manner toward me became overbearing and insulting. In a very early case he was opposed to me and treated me with open contempt, and assumed airs that plainly showed that he thought me quite beneath his notice, and considered me a very cheap lawyer. He spoke of me as the man from New Hampshire. Chief Justice Marshall presided at the time, and was evidently pained at Pinkney's treatment of me. It was very difficult for me to restrain my anger. It was apparent that he construed my apparent humility into want of what he called spirit in resenting his treatment, and as a sort of acquiescence in his domineering manner over me, and this insolent conduct continued to increase until the end came. The argument was not finished when the court adjourned until the next morning. Mr. Pinkney threw his cloak over his arm, took up his whip and began to walk leisurely away. Thinking it time to have an end of this kind of treatment from him, I met him at the principal door of the court-room.

"Can I see you, Mr. Pinkney, alone in one of the lobbies?" I asked.

"'Certainly, sir.'

"The look he gave me rendered it apparent that he thought I was going to apologize to him, or at least creep to him in some way, as others did. We came to the Grand Jury room, which was then vacant. As we entered I turned the key in the door and put it in my pocket. Pinkney regarded this with some surprise.

"'What does this mean?" he asked.

"It means this, Mr. Pinkney. You grossly insulted me this morning in

the courtroom, and you have done so before. In deference to your high position, and out of respect for the Court, I did not resent it then and there. He began to say that I had misconstrued him; that—'You know, sir,' I said, interrupting him, 'that you did, and that it was done intentionally, contemptibly and with premeditation. Now, sir, I have called you here to say that this conduct must come to an end, and that you must publicly apologize here for what you did, and in the courtroom tomorrow morning. Promise me you will do so, else you or myself will be carried out of this courtroom. He regarded me at first as though it was doubtful whether I was really in earnest, and began a sort of ambiguous explanation.

"'Have done with all parrying here, sir. I will listen to nothing but a recall of what you have said and done, and a solemn promise that you will do me justice in the courtroom tomorrow morning. He again began a sort of dilatory plea, trembling like an aspen leaf, for he saw I was exceedingly in earnest.

"'Mr. Pinkney, 'this interview must end one way or the other immediately. I will not listen to anything you say, except what I have asked you to say. Will you or will you not say it at once? The crisis has come," I said.

"'Mr. Webster,' he said, 'I do here acknowledge that I have treated you in an insulting manner, and have made insulting remarks concerning you which I deeply regret, and I ask your pardon for what I have said and done.'

"'That is sufficient here,' I said, except your promise that tomorrow morning you will say to the Court that you have said things which wounded my feelings, and that you regret it.'

"'I certainly will do so,' he said.

"I then unlocked the door, and we passed out.

"The next morning when court opened, Mr. Pinkney rose and stated to the court that a very unpleasant circumstance had occurred the morning before, as Their Honors had no doubt observed; that his friend, Mr. Webster, had felt grieved at some things that had dropped from his lips in the heat of the argument before Their Honors; that his zeal for his client had led him to say some things which he ought not to have said; that he deeply regretted all this; that he desired to retract all that he had said injurious to Mr. Webster's feelings."

From that day until the day of Mr. Pinkney's death the friendship between Webster and him was close, warm and uninterrupted, until it was closed by the death of Pinkney, which took place in the United States Supreme Court room, at Washington, during the argument of a great case in which they were opposed to each other.—The American Lawyer.

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### NEW BOOKS.

Element of the Law of Torts by Melville M. Bigelow—Students Series—Little, Brown & Co. 6th edition, 416 pages; 12 mo. $2.50 in cloth, $3 in law sheep.

Jurisdiction of United States Courts by Benjamin R. Curtis—Students' Series—Little, Brown & Co.; 2nd edition revised by Henry Childs Marwin 341 pages—12 mo.—$2.50 in cloth, $3 in law sheep.

There are two volumes in the well and favorably known Students' Series, another of which, Sedgwick on Damages, was recently reviewed by the JOURNAL. The books are primarily designed for the use of beginners and do not aim to provide an index to all the cases as do the large treatise on the subjects they cover. They are in general, however, valuable to the practicing lawyer because they state important principles in a condensed and analytical way, guide the readers to the leading decisions on the points discussed and by ommitting the consideration of exceptional instances add to the clearness of those of more frequent application. The JOURNAL has not before it the previous editions of Mr. Bigelow's work and therefore is not in position to state in which particulars this one differs from them. But in itself it contains first an extended exposition of the scientific nature of torts, followed by chapters on specific sorts of the same offences. Judge Curtis' lectures on the United States Courts were first delivered 25 years ago and were afterwards revised for publication in 1880. Since then the new remodel act has been passed and the Circuit Court of Appeals brought into existence. Mr. Childs has undertaken to work the new material suggested by these and other changes into the body of the original text. The Journal has read the book with care and has no hesitancy in commending it to the profession as an extremely useful and economical compendium of information on the matter of practice in the U. S. Courts. A great many questions

which the large books seem to regard as unworthy of notice but which are nevertheless very obscure and confusing to the inexperienced are here fully covered and its recent date of compilation enables it to give the latest views of the courts.

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### HOW CHARLES O'CONNOR LOST A CASE IN A VERY PECULIAR WAY.

Charles O'Conor was one of the greatest lawyers in America. By his great ability he planted himself firmly at the head of the bar. Once, however, he was nicely beaten by James W. Gerard, who was his opponent in an important case.

When Mr. O'Conor produced his first witness Mr. Gerard rose and said: "Mr. O'Conor, what do you propose to show by this witness?" Mr. O'Conor told what he wished to prove. "It is useless to waste the time of the court and jury in proving that," said the other; "I admit it." Mr. O'Conor then called his next witness, and the same question and answer were repeated. "I admit it," said Mr. Gerard; "do not let us waste time." Another witness began, and Mr. Gerard interrupted: "I admit all you say you are going to prove. Let us hurry along."

With a rapidity which almost took O'Conor's breath away all the facts which he had accumulated were accepted wholesale. Then he rested his case, and Gerard, for the defense, called no witnesses, but at once began his address to the jury.

"Gentlemen of the jury," said he, "some of you know me personally. I have no doubt those of you who are not personally acquainted with me know me by reputation. Now, gentlemen, you know that if my client had been guilty of any fraud, I should be the last man on earth to admit it. I should hide it from you, I should cover it up, I should fight. Fight—and I know how to fight—against the proof of it getting in evidence. If my client had been guilty of fraud do you think I would admit it? No! No! Never! Never! Never!" Here he looked at his watch. "Gentlemen, excuse my brevity. I have an engagement to dine to-day and my time is almost up; I will detain you no longer."

He won his case.—The Law Students Helper.

### RECENT DECISIONS.

The duty of a railroad company as to the safe condition of a depot and waiting room is extended in Jordan vs. New York, N. H. &. H. R. Co. 165 Mass. 346, 32 L. R. A. 101, to the case of a toilet room opening out of a waiting room, and the company is held liable for injury to a lady who fell through a dangerous hole in such toilet room when it was not lighted.

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A mistake of the ticket agent in a union depot, in giving a passenger a ticket for a different road from that which was desired, is held, in Scott vs. Cleveland, C. C. & St. L. R. Co. (Ind.) 32 L. R. A. 154, to be a mistake for which the railroad company whose ticket was given by mistake was not liable, although the agent had authority to sell tickets for both companies, since his breach of duty was that of the company whose ticket was desired.

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Where a light, gauzy dress of a lady passenger on an open street car was set on fire by a match carelessly thrown by another passenger after lighting a cigarette, it was held, in Sullivan vs. Jefferson Ave. R. Co. (Mo.) 32 L. R. A. 167, that the street railway company was not liable, if the servant in charge of the car was not chargeable with any negligence.

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The failure of a person to look in both directions for the approach of a car before attempting to cross a street-railway track at a street crossing is held, in Cincinnati St. R. Co. vs. Snell, 53 Ohio St. 172, 32 L. R. A. 276, to make a question for the jury as to his negligence, but not to constitute negligence per se.

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The power of selectmen to cut and trim trees overhanging a highway without the consent of the owner, for the purpose of changing the location of telegraph or telephone wires, is held, in Bradley v. Southern N. E. Telph. Co. 66 Conn. 559, 32 L. R. A. 280, to be denied by the Connecticut statute prohibiting telegraph or telephone companies to injure any tree without the owner's consent.

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## DISTRICT COURT.

THE PUBLISHER
of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.

**Peter McHardy vs. John Rost.**

**(District Court, St. Louis County.)**

**Appeal from Justice Court—Affidavit.**

Chester McKusick, for plaintiff. T. W. Murphy, for defendant.

Moer, J. Defendant appealed from a judgment rendered against him in justice court, and in filing the affidavit of appeal required by Sec. 5068, G. S. '94, the justice before whom such affidavit was sworn to, failed or neglected, inadvertently or otherwise, to attach his signature to the jurat, and the affidavit was filed without the name of the justice who administered the oath. Plaintiff and respondent made a motion to dismiss the appeal in district court for the reason that no proper affidavit of appeal had been made and filed. The defendant showed by affidavits that such failure to affix the name of the justice was an oversight and asked leave to "amend" the return. Held, that such affidavit was fatally defective, and the proper affidavit being a jurisdictional prerequisite to a valid appeal, the motion to dismiss appeal must be granted. And that it is impossible to amend such error.

**A. J. Milner et al., vs. Anna W. Martin.**

**(District Court, St. Louis Co. 12467.)**

### Supplementary Proceedings—Trust Estate.

Appointment of receiver to take rents and profits due a beneficiary of an express trust. Refused.

O. L. Young, for plaintiffs; S. T. & Wm. Harrison, for defendant.

C. L. Brown, (acting) Judge. Upon the disclosure of the defendant in supplementary proceedings before a referee, the plaintiffs made a motion to have a receiver appointed for defendant. The report of the referee showed that defendant had an interest in real estate in several southern states, which interest was held by a trustee outside of the state and the rents and profits of this property were given to defendant as the beneficiary of the trust. That these rents amounted to about $40.00 per month, but that they were not more than was necessary for the support and maintenance of defendant. Plaintiffs demanded a receiver upon the ground that such moneys were not exempt under the provisions of Sec. 5459, G. S. '94, and that property outside of the state could be reached by this procedure, citing Towne vs. Goldberg, 35 Minn. 231, S. C. 28 N. W. 254. Defendant contended that, under Sec. 4286, G. S. '94, relating to uses and trusts, exempted all such proceeds of a trust estate necessary for the support of the person for whose benefit the trust was created. That this last section allows defendant such sum, notwithstanding the fact that the real

estate is situate in another state where uses and trusts may be governed by a different statute than ours, and the motion for appointment of receiver must be denied.

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**Sam Russell vs. Peter Larson.**
**(District Court, St. Louis Co., 10707.)**

## Executions—Renewals After Return Unsatisfied.

J. B. Richards for Plaintiff. Eckman & Stevenson for defendant.

Brown, C. L. (acting) Judge. Plaintiff recovered judgment against defendant on July 26th, 1896, and on the same day issued execution thereon. Thereafter the sheriff made demand under such execution, for the payment thereof, and upon payment not being made, and finding no property upon which to levy, the sheriff returned the execution as wholly unsatisfied and "no property found." This execution together with such return was filed in the clerk's office on August 1, 1896. On August 25, the clerk, at the request of the plaintiff's attorney, extracted the old execution from the files and endorsed a renewal for sixty days on the back thereof and delivered it to the sheriff. The sheriff on the next day proceeded to levy upon various tracts of real estate under and by virtue of the old execution thus renewed.

Defendant made a motion to recall, vacate, and quash such writ of execution and to dismiss the levy thereunder. Held, that such execution was a good and valid execution properly issued; that under Sec. 5445, G. S. '94, an execution that has been returned unsatisfied, may always be renewed within sixty days of its former issue or renewal; and that defendant's contention that such renewal must be made "on the return," or on return day, was not the correct interpretation of that section. Defendant cited State vs. Boettger, 39 Mo. App. 684.

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Young Lightpate—How long does a man have to study if he wants to be a good lawyer?

Lawyer Sharpe—Why do you ask that question?

"Because I am thinking of studying law myself."

"Five hundred years."

**Henry Lamb and Sons vs. Augusta S. Pope.**
**(District Court, Ramsey County.)**
**(No. 65257.)**

## Supplementary Proceedings—Trust Funds—Income Exempt.

Where real and personal property is devised and bequeathed to trustees absolutely, with a direction to pay over the income derived therefrom to a daughter, during her life, for the support of herself and family, and at her death to convey, pay over and deliver said property to her lawful issue, if any, and if no such issue, then to the surviving children of the testator, such income in the hands of the trustees cannot be reached in supplementary proceedings by a judgment creditor of the daughter.

This cause came before the Court and was heard upon a motion made by the plaintiffs for an order appointing a receiver in this action and directing the above named defendant to give to said receiver an order on the St. Paul Trust Co., and the other trustees under the will of her deceased father, the late Henry H. Sibley, to pay to said receiver out of the first moneys coming to the possession of said trustees in the month of Oct., A. D. 1896, as trustees under said will for defendant's use, a sum sufficient to pay the balance of the plaintiff's judgment, and the cost of these supplementary proceedings and the fees of such receiver, and that said receiver be ordered to collect said moneys.

J. W. Finch, Esq., for motion. John B. Sanborn, Esq., contra.

Kelly, J. The important question raised by this motion is, can the trust fund, or the trust estate, set apart by the last will of the late Hon. H. H. Sibley, for the support during life of his daughter, (the defendant,) and her family, to go to her children after her death, be reached in supplementary proceedings by the creditors of the daughter?

So far as this jurisdiction is concerned, it is a question of first impressions, no adjudicated case on the point being found on the Minnesota reports. And the Courts of other states are somewhat divided.

By his last will, Gen. Sibley provided substantially as follows:

After the payment of his debts, expense of administration, etc., all the rest and residue of the estate, personal and real, is bequeathed and devised to the St. Paul Trust Company and others named, as trustees and to their

successors as such, and unto their assigns in trust as follows: To have the absolute and immediate posession and control of all of said rest and residue, to lease the same or any part of it, to collect rents and incomes thereof, to grant, bargain, sell and convey the same, or any of it, in their discretion, to invest and reinvest the same, and the proceeds thereof in such securities, real or personal, as they shall deem best. The trustees are directed as soon as practicable to divide the estate in their hands into as many parts as there are lawful children surviving at the date of his death (including a share for a dead child's children,) as nearly equal in value as may be, and apportion the particular share, as so divided, which shall appertain to each of said children of the testator or to the lawful issue of any deceased child. The share apportioned to any lawful issue of any deceased child is to be immediately paid over and conveyed to the beneficiary guardian.

In case the testator's daughters, Augusta A. Pope and Sarah J. Young, or either of them, be living at the time of the above division, the will says the trustees, "shall continue to hold their said respective shares for and during the natural lives of said daughters, respectively and the trustees are given the same full and absolute control of each said share and with full power to sell and convey the same, or any thereof, at their pleasure and discretion as is given to the trustees with reference to the whole undivided residue of the estate in the first instance. They are, however, directed to pay over to such daughter "the entire net incomes and profits which shall be by them collected for her share, for and during her natural life." At the death of either daughter the trustees must "convey, pay over and deliver * * the share of said rest and residue apportioned to deceased daughter and all the securities pertaining to the same, to the lawful issue of such deceased child, if any;" if no such issue, then said share of such deceased daughter is given absolutely to the surviving children of the testator.

Then follows these provisions: "Provided, however, that the trustees may in their discretion use, not to exceed $5000 of the principal of either share, in buying a home for either daughter * * * to be occupied by her free of rent during life."

"And provided further, that said trustees may, in the exercise of their sound judgment and discretion, advance and pay over to any of my said daughters, any part of said principal so apportioned to her share, including the home so purchased, if any, in the event that such advancement or advancements shall, in their judgment be found necessary for the economical support of such daughter. But in no event shall such advancements be made when the income from such share shall be sufficient, in the judgment of said trustees, for the prudent and economical support and maintenence of such daughter."

It is entirely plain that the testator intended to make provision from his own estate for the prudent and economical support of the defendant, his daughter, during her life; and that the principal from which this income was to be gathered should be preserved, if possible, and go (1) to the lawful children of the deceased daughter, and this failing, (2) to the surviving children of the testator.

The trust is valid under the rule in Minnesota, both as to the personal and the real property involved.

In Re Tower's estate, 49 Minn. 371.

It is an active trust. The entire estate is vested in the trustees, with absolute power of alienation at any time and within their discretion, subject, of course, to the purposes of the trust. The defendant takes no title, legal or equitable to the principal estate, certainly none in this state by statute, so far as the real property is concerned. Sec. 4289. Stats. of Minn., 1894. Barnett's appeal. 46 Pa. St. 392, (86 Am. Dec. 502.)

But it is claimed that this defendant is entitled by the will as a matter of right to receive from the trustees the "entire net income and profits which shall be by them collected for her share," of her father's estate for and during her natural life, and this income and these profits become her property the moment they come into the trustees hands, and like any unexempt property may be reached by her creditors. And it is argued, with force and plausibility, that as the testator in

this regard has left nothing to the discretion of the trustees, and as he has failed to say, in so many words, in his will, that his bounty to his daughter shall be free from demands of creditors, or her own improvidence, the cause at bar fails to come within the rules laid down in the American cases, and particularly in Nichols vs. Eaton, 91 U. S. (1st. Otto) 716-730, relied on by defendant's counsel.

This argument though plausible is fallacious. The defendant may enforce the performance of the trust, but she has no such absolute right to the income arising therefrom,as it reaches the hands of the trustees, as is here claimed. If she had, she could assign it. If she can assign it at all, she can anticipate the whole income for life, and sell and assign the whole, and by so doing defeat the object of the trust. So far as the income arises from real property she is forbidden by statute to assign. Sec. 4292, Stat. Minn. 1894, reads:

"No person beneficially interested in a trust for the receipt of rents and profits of lands can assign, or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created is assignable."

I can see no reason why the Court should not apply the same rule as to personalty that the legislature has made for realty. If defendant's interest in the income is not such as she may assign, then clearly her creditor cannot invoke the Court's authority to compel her to do that which the policy of the law forbids her to do voluntarily. And moreover, in the case at bar the income arises both from real and personal property. I hold, therefore, both from principle and by authority cited herein, the defendant cannot lawfully assign any of the income of the trust estate while in the hands of the trustees.

Now I know it is the duty of honest people, when they are able, to pay their debts. People who are not honest recognize no duty, and are not worth mentioning. And I believe it to be the duty of the courts to aid in the collection of debts by all proper means, in all proper cases. But if it becomes necessary, when the Court's aid is invoked, to violate a principle of justice as sacred as is the right of any creditor to be paid, then the Court will hesitate. And in this case I hesitate, because the testator, Gen. Sibley, was under no obligation, legal or moral, to pay the defendant's debts—past or future. He was morally obligated to provide as far as he could, for her support and the support of her children. He had the absolute right, however,to dispose in any lawful manner, of his surplus estate, as he pleased. And the disposition he has made of his own—being lawful—should not be thwarted.

To apply this income in any manner contrary to the testator's will, the terms of which violate no law is to deny to him the right to dispose of his own property. And that right should be as sacredly guarded as the right of his daughter's creditors to be paid.

To compel the application of the income and profits arising out of the parcel of the testator's estate, set aside by his will for the defendant's support is, by the inexorable logic of the case, to take the principal estate. For the reason, if this creditor can subject it, so can others. If part of the income can be taken, all may be taken. The income failing entirely the trustees must, if they carry out the provisions last quoted of the will apply more or less of the principal for the support of the defendant. Thus, not only will the testator's bounty to his own daughter fail of its object as to her, but the testator's grand-children will be deprived of what is intended for their use.

In any event the effect of an unconditional application of this income to defendant's debts will defeat the will of the testator, and substitute for it the order of the Court, which ought not to be done.

The sole object of the trust created by the testator was to provide a support for the defendant and her children, which was to be secured to her and them in any event. Otherwise he would not have given and devised this estate in trust at all. The precise object of the trust was to prevent, among other things, what is sought to be here accomplished. And it seems to me lame logic, to argue that be-

cause the testator did not say in exact words that his bounty was intended to be applied solely for defendant's support and that no creditor could take it, therefore a creditor may take it, although by so doing the trust itself lawfully created by the testator is defeated.

The doctrine contended for by plaintiffs has its origin in the English Courts, where it has been held that a will which is designed to secure to a beneficiary an income from real or personal property free from liability for his debts, is void from public policy as a fraud on the rights of creditors. Brandon vs. Brandon, 18.

But the English rule is not supported by sound reason and has been distinctly repudiated by the Supreme Court of the United States in Nichols vs. Eaton, supra; to the reasoning of which I confidently refer.

The trend of American legislation and the weight of authority in the State courts of last resort is also to the same effect. (See extended note to Garland vs. Garland, 24 Am. St. Rep. 686.)

Particularly applicable to the case at bar is the opinion of the Court of Appeals of New York in Campbell as Receiver etc., vs. Mary K. E. Foster, et al., 35 N. Y. 361, where the facts are similar and one of the statutes considered almost identical. While this decision might be grounded on the language of a New York statute not found in our laws, yet the Court placed it also upon the general reasoning arising from the facts. And that portion of opinion beginning on page 370 sustains the view here taken. The conclusion reached is that on principle the cestui qui trust has no such interest in the trust fund, or the income arising therefrom while in the hands of the trustee, which could be lawfully assigned by her or appropriated by her creditors. It will be seen that we have a statute like New York forbiding the beneficiary in a trust for the receipt of rents and profits of lands, from assigning or in any manner disposing of such interest. Sec. 4292 Stat. Minn. 1894. And the Court by analogy reasoned that the same rule should apply to the income where the trust fund was personal property. In the case at bar the principal from which the income arises is both personal and real property.

It will not do to say that a person in receipt of an income from a trust estate thus held exempt, wrongs his creditors by refusing to pay his just debts out of it although able. The same thing may be said as to those who hold and use homesteads and other property exempt by law. The question is not one of morals, but one of law. And no creditor is wronged in law when forbidden to enforce his judgment against his creditor's homestead because he knew or ought to have known the homestead was exempt when he extended the credit. So also as to estates and their income held in trust. The instrument creating the trust is of public record, to be examined by those interested, and all men are charged with a knowledge of the law.

Of course there are exceptions to the rule I have announced.

A trust fraudulent as to creditors in its inception is also fraudulent. And it may be, that even in the case of a valid trust, where the income provided for the support of the beneficiary is grossly excessive for that purpose, a court of equity should compel the beneficiary to apply the excess, or a portion of it, to the payment of his or her debt. Sec. 4286, Stat. Minn. indicates the legislative view in this respect as to the rents and profits of lands held in trust under certain conditions. But the case at bar does not come within either exception.

As to $20.00 moneys in defendant's possession from other sources when the order was served, there is no need to go to the expense of a receiver. That may be paid and applied as indicated in the order.

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Criticism, although severe and caustic, of a book placed before the public, is held, in Dowling v. Livingstone (Mich.) 32 L. R. A. 104, to be lawful so long as it is directed to literary composition and theories, and not to the personal character of the author.

## Decision of Supreme Court.

**Swan vs. Munch, Johnson vs. Munch. Holtn vs. Munch, C. T. Carlson vs. Munch, A. C. Carlson vs. Munch.**

**Prescription—Title to Land.**

A wrongful entry upon land under a claim of right, inconsistent with the title of the true owner, with continued possession and the exercise of acts of ownership hostile to the rights of the owner, but without any pretense of paper title, may ripen into title by prescription. Village of Glencoe v. Wadsworth, 48 Minn. 402, followed.

**Same—Easement—Continuous Use.**

This rule applies to an easement in real property, and where the claimant needs the use of the property from time to time, and so uses it, this is a sufficiently continuous use to be adverse, although it is not constant.

**Same—Flowage of Land by Sluicing Dam.**

Rule applied and held, that the building of a dam across Snake river, and the continued adverse use of the dam, whereby the water of the river was obstructed, and thereby overflowed plaintiff's land during the months of April, May and June in each year, for the purpose of sluicing logs, for a period of fifteen years, was sufficient to create an easement in plaintiff's premises by prescription during the said three months in each year.

These five cases by stipulation were tried together before Hon. F. M. Crosby and a jury in the District Court of Pine County. At the conclusion of the testimony defendant moved the Court to instruct the jury in each case to find a verdict for the defendant. This motion was denied and the jury in each case found a verdict for the plaintiff. Defendant moved for new trials and the motions were denied. From the orders refusing new trials these appeals were taken.

Robertson Howard and S. G. L. Roberts for Appellant.

It is a well settled rule of law that the use of an easement for more than the period prescribed by the statute of limitations will be presumed to be under a claim of right and adverse, and sufficient to establish a right by prescription, and that a party disputing such right must rebut and overcome this presumption of law by proving that the user was by actual license or permission. Cox vs. Forest, 60 Md. 79-80; Williams vs. Nelson, 23 Pick. 141-147; O'Dowd vs. O'Daniel, (Ky.) 10 S W. Rep. 639; Blake vs. Everit, 1 Allen, 348; Hammond vs. Zennar, 21 N. Y. 118; Bollovar Mfg. Co. vs. Neposit Co., 16 Pick 241; Colburn vs. Marsh, 22 N. Y. Supt. 990, 993; Olney vs. Fenner, 2 R. I. 211; Garrett vs. Jackson, 20 Pa. Stat. 33; Wagner vs. Hippler, (Pa.) 13 Alt. Rep. 81; Grace Chuch vs. Dobbins, (Pa.) 25 Atl. Rep. 1120; Rogerson vs. Shepard, (W. Va.) 10 S. E. Rep. 632-635; Holly vs. McCall, 37 Ala. 21-30; Perry vs. Garfield, 37 Vt. 310; Union Water Works vs. Crary, 25 Cal. 509; School District vs. Lynch, 33 Conn. 334; Carmody vs. Marooney, (Wis.) 58 N. W. Rep. 110; Costello vs. Edson, 44 Minn. 135; Village of Glencoe vs. Wadsworth, 48 Minn. 402; Dean vs. Goddard, 55 Minn. 298.

In these cases the very existence, and use of the dam, and the resulting flowage were so open, notorious and hostile, that knowledge on the part of the land owners must be presumed as a matter of law, and if they slept on their rights for more than the statutory period the right to flow was acquired. Perrin v. Garfield, 37 Vt. 311; Arbuckle v. Ward, 29 Vt. 551.

The acquisition of this right was not affected by the lowering of the water by droughts, leakage, or destruction of the dam. Indeed, the repairing and rebuilding of the dam was an open and hostile assertion of a right to continue to flow the lands. Wood v. Kelly, 30 Maine, 47; Geranger v. Summers, 2 Ired. 229; Hoag v. De Larm, 30 Wis. 591, 595.

What constitutes a requisite continuity of enjoyment to gain thereby a prescriptive right to an easement depends upon the character and nature of the right claimed. Carr v. Foster, cited Washb, Easement,* p. 103; 2 Greenleaf Evid. sec. 544; Winnipisogee Lake Co. v. Young, 40 N. H. 436; Alcorn v. Saddler, (Miss.) 14 So. Rep. 444, 445; Bodfish v. Bodfish, 105 Mass. 317; Cox v. Forrest, 60 Md. 79-80; Mnfg. Co. v. Swift, 89 Mich. 503; Water Co. v. Rogers, 83 Cal. 10.

The easement here claimed is the right to flow the lands whenever necessary to raise a sufficient head of water to sluice logs. It is only during April, May, and June that logs are sluiced, and if during those months every year for more than fifteen years such a head has been raised as did flood the lands, the ease-

ment was acquired by such yearly flowing.

The evidence on behalf of defendant, which plaintiffs have not even attempted to rebut, shows such flowage, and the district judge should have granted defendant's motions to direct verdicts in her favor. There was no question of fact to submit to the jury.

L. J. McKusick and J. C. Nethaway, for respondents.

The court properly submitted to the jury the question as to whether defendant entered upon plaintiff's lands under color of right or title with an intention upon her part to oust the plaintiffs of possession. To constitute a right by prescription it must be shown by the claimant that he entered upon the property under claim of right or title with an intention to oust the owner, and that is a question of fact to be submitted to the jury. Whitney v. Powell, 1 Phin. (Wis.) 115; Harvey v. Tyler, 2 Wall. 349; Wazetta v. Great Northern Ry. Co., 46 Minn. 505; Bedell v. Shaw, 59 N. Y. 46; Pepper v. Dowd, 39 Wis. 528; St. Paul & D. Ry. Co. v. Hinckley, 54 N. W. Rep. 588; Harper v. Morse, 21 S. W. Rep. 517; Goss v. Walwood, 90 N. Y. 638; Ayres v. Riddle, 54 N. W. Rep. 588; Arnold v. Stevens, 24 Pick. 106; Tyler Eject., p. 859-874; Hacker v. Hortumes, 74 Wis. 25; Armijo v. Armijo, 13 Pac. Rep. 92.

The rule is that evidence of adverse possession must be strictly construed, and the party asserting a prescriptive right, has the burden of proof. Snyder v. Palmer, 29 Wis. 226; Barfield v. Barrette, 73 Wis. 468; Tyler Eject. 874, 875; Bedell v. Shaw, 59 N. Y. 46; Smith v. Estell, 87 Tex. 264; Sargent v. Ballard, 9 Pick. 251; White v. Long, 24 Pick, 319; Stevens v. Taft, 11 Gray, 33; 2 Greenleaf Evid. sec. 539; Davies v. Stevens, 7 C. & P. (Eng.) 570; Jarvis v. Dean, 3 Bing. 447; Polly v. McCall, 37 Ala. 20.

Buck, J. Five separate actions were brought by different plaintiffs all against the same defendant, Munch, to recover damages caused by the overflowing of a portion of the lands owned by each of the respective plaintiffs by the operation of the Chengwatona sluicing dam on Snake river, which was originally built in 1849. The material allegations in each complaint are as follows: "That on or about the month of September, A. D. 1876, the defendant erected a dam to a great height across the Snake river, at the town of Chengwatona, in said county and state, and below the plaintiff's land above described, and ever since has kept the same up, and has thereby obstructed and stopped during all that time the natural flow of the water of said river, and raised it up in the bed of said river, and backed it up upon said land during the months of April, May, and June in each year, and at other times, injuring, destroying, and rendering said land unsuitable for agricultural purposes, for which said lands are chiefly adapted." By reason of the facts alleged, each plaintiff claimed damages for the years 1891, 1892, 1893, 1894, and 1895. Defendant, in her answer, put in a general denial, and then alleged as follows: "That the dam mentioned in the complaint was erected in the year 1849, and has ever since been maintained and operated; that said dam, for more than twenty years prior to 1890, and up to the present time, has been owned by her, and has been so maintained and operated by her; that during all of said time the waters of said Snake river have been raised by said dam and set back so as to cause that portion of the land described in the complaint which it is alleged therein has been injured by the operation of said dam to be continuously, uninterruptedly, adversely to the owners thereof, and under claim of right on part of defendant so to do, submerged and overflowed." By stipulation the five cases were tried together and a separate verdict rendered in each case in favor of the plaintiff. In the months of October and November, 1877, the dam had become rotten, and was rebuilt, and substantial repairs made upon it, in 1887, and considerable improvements made upon it in 1889, and the north wing rebuilt about the winter of 1894. More or less repairs were made upon the dam annually. The testimony on the part of the defendant showed quite conclusively that she or her predecessors have been in the open, visible, hostile, notorious, and continuous posses-

sion of the dam for more than fifteen years prior to the commencement of this action, and that this condition applied to the portion of the premises of the different plaintiffs in controversy during the months of April, May and June of each year during that period of time by reason of the natural flow of the water in Snake river having been obstructed and stopped by the dam, which caused the water to overflow the natural channel of the river, and flow back upon the plaintiff's lands, destroying the grass thereon growing, and rendering the land unfit for raising crops. In the case of Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060, this court said: "The intent to claim by adverse possession may be inferred from the nature of the occupancy, and the possessory acts necessary to constitute adverse possession depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. Actual residence upon the premises is not necessary, nor is it incumbent upon the adverse possessor to make oral declarations of his adverse claim. The mere fact that time may intervene between successive acts of occupancy while the party is temporarily absent, engaged in business,—as in cutting logs to be sawed into lumber to be piled and stored on the premises by such party,—will not destroy his continuity of possession." A wrongful entry upon land, with continued possession, without any pretense of paper title, but under a claim of right inconsistent with the title of the true owner, and the exercise of acts of possession hostile to his rights in the land, may ripen into title by prescription. Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377. Such use or adverse possession must be enjoyed by actual entry, and under such circumstances as will indicate that it is claimed as a matter of right. The true owner's rights must be invaded by such hostile acts as would constitute grounds for action against the adverse claimant or intruder, and under such circumstances as to make the possession appear to be for the benefit of the claimant. Is this doctrine applicable to an easement in real property, where the essential elements necessary to constitute adverse possession exist only three months in the year, and where during the other nine months of the year the premises are in the actual use and possession of the owner in fee? We answer this question in the affirmative. During the months of April, May, and June in each recurring season there has been a continuous use of the premises by the defendant or her predecessors by overflowing them with water for the purpose of floating logs down the Snake river to the sawmills and to the markets of the country. Where the claimant needs the use of the easement from time to time, and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant. Manufacturing Co. v. Swift, 89 Mich. 503, 50 N. W. 1001; Water Co. v. Rogers, 83 Cal. 10, 23 Pac. 196. It is evident that the building of this dam in 1849, and its use since then for raising water three months in each year for sluicing logs, indicates that such purpose was intended not to be temporary, but permanent, and is greatly for the benefit of the public in assisting it to thus have their logs conveyed from the great pine regions of the state to the mills and markets of the country. Its use for such purpose would not be either practicable or profitable more than the three months named, with each recurring year. It is a matter of public notoriety, as well as a matter of evidence in this case, that these great log drives are moved during the months named in each year, and to keep up this flow of water during this entire period would be useless to the public, and expensive to the defendant. Other than during the three months named the plaintiffs have the use and benefit of the premises, and as the defendant uses it only when her needs and public necessity requires her to do so, this is a continuous use, and an omission to use it when not needed would not disprove a continuity of use, or defeat her right to an easement by prescription. The premises are situated several miles distant from the dam in question, and, notwithstanding their annual overflow by reason of the erection of the dam, none of the plaintiffs appear to have raised any objections

thereto, but seem to have acquiesced therein. They well knew of the hostile acts of the defendant, by thus overflowing their lands, and who thus unmistakably indicated an assertion of right to enjoy the use of the premises, and the purpose for which it was so used. When defendant assumed possession and use of the premises the plaintiffs would stop using it, and only resume its use when defendant's occupancy again ceased. There was no trick or artifice on the part of the defendant, but an open and notorious taking possession of the premises by the defendant for her use and needs, and whereby the public were also benefitted. These acts were notice to the owners that defendant was occupying the premises under a claim of right. When there has been a continuous use of an easement for 20 years, unexplained, it will be presumed to have been under a claim of right, and adverse, and will be sufficient to estab a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained. Washb. Easem. (4th Ed.) p. 156, par. 31, and cases cited in note 5. Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. 1109. Under the laws of this state the 20-years use has been changed to 15. There was no controversy as to the use of the premises by the defendant for the period of 15 years, using them when she saw fit during the three months named, without asking leave of the plaintiffs, and without objection; and such uninterrupted enjoyment for that period gives a title or easement by adverse possession for the three months each year. If there was any serious question whether the claimant entered upon the property under claim of right or title with intent to oust the owner, that question would doubtless have to be submitted to the jury. But the actual entry and continuous use of the premises by defendant for a period of 15 years were admitted or conclusively proven. The plaintiffs contend that defendant's entry was tortious, and therefore could not be under claim of right; but, as we have already stated, this is immaterial. There was no evidence introduced which tended to rebut the presumption arising from the 15-years use of the premises by defendant that she was in possession and so using it under a claim of right and adversely; hence there was no controverted question of fact upon this point to be submitted to the jury. Order reversed.

## PERSONALS.

**Duluth—**

L. E. Judson has severed his connection with the firm of Washburn, Lewis & Judson, and has gone to New York City to locate. The firm is now Washburn, Lewis & Bailey, the new member being W. D. Bailey.

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The candidates for the two district judgeships have all been selected. The Republicans having chosen J. D. Ensign for re-election, and Wm. A. Cant as Judge Morris' successor. The Democrats and Populists have nominated Alfred Jaques and Rodger S. Powell.

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A. E. McCordic, formerly of McCordic & Crosby, has gone to Chicago to accept a position as attorney for a bank.

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**Minneapolis—**

The undersigned announce that they have formed a copartnership for the general practice of law, under the firm name of Welch, Hayne, Hubachek & Conlin, with offices at 612-615 Bank of Commerce building. Victor J. Welch, Marcus P. Hayne, Frank R. Hubachek, Henry Conlin.

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Judge F. B. Bailey, a prominent and well known practitioner of Minneapolis, died at his home in that city of paralysis on September 30th.

Judge Bailey was born in Portland, Me., in 1839, and was of Puritan descent. He came to Minnesota in 1875, and settled in Minneapolis, entering the office of Lochren, McNair & Gilfillan. He served several terms as municipal judge.

Judge Bailey was widely respected and in every sense an honor to an honorable profession. The Bar Association of which he was an active member will take suitable action in respect to his memory.

**St. Paul—**

H. V. Rutherford will remove to New York City soon.

J. L. McDonald, P. M. Quist and T. R. Kane have formed a partnership with offices in the Globe building.

F. M. Dudley, land attorney of the N. P. R. R. has removed to Tacoma, Wash.

Thomas T. Fauntleroy of St. Louis, Mo., has been attending court in the Twin Cities. His calls upon his many friends were short. Always glad to see you, Thomas.

Horton & Denegre, of N. Y. Life Building, have removed to their old quarters in the Gilfillan Block.

Palmer & Dickinson have removed their offices from the Globe Building to the St. Paul Fire and Marine Building.

J. L. McDonald is in Washington where he has a case before the supreme court.

Judge Kerr has entirely recovered from his recent severe illness and has returned to his home and his work.

F. D. Rice, of the late firm of Kueffner, Fauntleroy & Rice has opened an office in the N. Y. Life Building. Mr. Kueffner will occupy the offices lately vacated by Horton & Denegre in the same building.

**Renville—**

R. T. Daly, the leading attorney of Renville, was recently married to Lily J. Johnson of that place.

A statute making it unlawful for any person to consign by common carrier to any commission merchant or sale market at any time any elk, moose, caribou, or deer, or any part thereof, except the head or skin, is held, in State, Corcoran, v. Chapel (Minn.) 32 L. R. A. 131, to be a valid exercise of the police power; and the right of one who kills game is held not to be unlimited, but subject to all police laws of the state.

The Law as a Little Joker.—With an evident fancy for jokes that are reversible a judge in a recent case says: "Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile. The law discountenances deceit, even practiced under the form of a jest, if the weak, immature, or confiding are thereby imposed on to their injury."

The right of a person to accumulate surface waters on his own land, and by means of a ditch discharge them in a volume upon the land of another, is denied in Jacobson vs. Van Boening (Neb.) 32 L. R. A. 229, and an injunction against an attempt to do so is sustained.

An appraiser chosen by an insurer who demands that an umpire be selected who does not live in the vicinity of the property is held in Hickerson vs. German-American Ins. Co. (Tenn.) 32 L. R. A. 172, to constitute in effect a waiver of arbitration, because the demand is unreasonable.

A person attempting to cross a railroad track when his view of an approaching train is obstructed only by the smoke from a train which is going in the opposite direction is held, in Oleson vs. Lake Shore & M S. R. Co. (Ind.) 32 L. R. A. 149, to be guilty of contributory negligence notwithstanding the smoke concealed the coming train.

A stringent law governing the business of junk dealers and pawnbrokers and dealers in secondhand goods is sustained in Grand Rapids vs. Braudy (Mich.) 32 L. R. A. 116. This required not only a license, but a bond of $2,000 from a junk dealer or secondhand dealer, and one of $5,000 from a pawnbroker and also required an indorsement by twelve freeholders upon an application for a license. A note to this case collates the authorities on police power over business of this kind.

...THE...

# MINNESOTA LAW JOURNAL.

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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.**

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As a result of the recent election, Hon. O. B. Lewis, of St. Paul, will occupy the seat now held by Hon. J. J. Egan on the district court bench of Ramsey County. Hon. David F. Simpson takes the place of Hon. C. M. Pond in the 4th Judicial District, and Hon. A. H. Snow, succeeds Hon. O. B.

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### CONSTITUTIONAL AMENDMENTS AND REVISION.

The returns have not yet been canvassed by the secretary of state, but it is assured that all of the constitutional amendments proposed to the people at the last general election were ratified. But the act proposing a convention to revise the constitution was lost. A majority of the people voting upon the question of revision were in favor of such revision, but in order to carry, it had to receive a majority of all the votes cast at the election. It did not receive quite one hundred thousand votes and the total number cast for the electors for president reached more than three hundred and forty thousand.

The amendments to the constitution only require a majority of the votes cast upon the particular amendment in order to carry.

The constitutional provisions are as follows:

Art. XIV, Sec. 1. Amendments to the Constitution. "* * * And if it shall appear, in a manner to be provided by law, that a majority of the voters present and voting shall have ratified such alterations or amend-

ments the same shall be valid to all intents and purposes as a part of the Constitution."

In construing this provision the Supreme Court held that an amendment is ratified if it receives a majority of all the votes in its favor, though it be less than a majority of votes cast at the same election for other purposes.

Dayton vs. City of St. Paul, 22 Minn. 400.

Art. XIV, Sec. 2. Constitutional Convention. "* * * And if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall, at their next session, provide by law for calling the same. * * *"

This, as construed by the Supreme Court, requires a majority of the electors voting at the general election at which the law is submitted.

Taylor vs. Taylor, 10 Minn. 107.

Dayton vs. City of St. Paul, supra.

It is very doubtful if we shall ever have a revision of the Constitution unless the question is brought before the people more prominently than it was at the last election. A very small proportion of the voters knew anything about the matter and the fact that more votes were cast for than against it does not show anything, for large numbers of voters simply voted "yes" to each Constitutional question, without knowing anything about it. This election shows conclusively that some measure should be adopted for bringing constitutional amendments before the people for discussion, so that an intelligent vote can be cast upon them.

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We call attention to the decision of our Supreme Court in the case of State ex rel. H. W. Childs, attorney general, Richard L. Gorman et al., relators, vs. John Copeland, which has just been handed down and which is reported in this number of the Journal.

The Supreme Court goes very exhaustively into the constitutionality of local option laws. It also very clearly defines what is and what is not special legislation.

Speaking of the latter portion of Sec. 33, Art. 4, of the Constitution, which provides that the legislature may repeal any existing special or local law, but shall not amend, extend or modify the same, the Court says: "This allows a special law to be totally repealed by a special law, and, as held in the Sullivan case, it allows the partial repeal or modification, by a general law, of all special laws so far as inconsistent with it. Such a general law is not special legislation at all. But as before stated this constitutional provision does not permit a special law to be partially repealed or modified by special law. * *

Hon. Homer C. Eller, of the Ramsey County bar, died at his home in St. Paul, on the third of November after a very short illness. On the 7th of November the regular business on the special term calendar of the District Court was dispensed with and the bar of Ramsey County met to pay tribute to his memory. The meeting was a very impressive one and many eloquent and just eulogies were delivered by attorneys who had practiced at the bar with Judge Eller for a great number of years. The closing address was made by Judge H. R. Brill, as the representative of the bench and was as follows:

"Sympathy for the living and the desire to speak well of the dead often lead to the use of extravagant phrases on an occasion like this. It is rare indeed, when, without any mental reservation we may use only words of praise in speaking of the character and life of any man living or dead. The memory of Homer C. Eller needs no fulsome flattery. To speak the whole truth concerning him is to pronounce his eulogy. My acquaintance with Mr. Eller began when he came to St. Paul. In the common struggles and hardships incident to that early period of our professional lives, we were brought into close relations. I early came to admire his character and qualities, and as the years have gone my regard for him has steadily strengthened, and to me as to many of us, his death is a personal loss.

Judge Eller was always a close and thorough student, he was always unselfish and helpful; he was always the soul of honor. He was early fitted to take high rank in the profession, but he lacked the self-assertion and push of many less capable men, and his advancement came comparatively slowly. But the years of waiting were not wasted, as is too often the case in such circumstances. He was continually enriching his mind with the learning of the profession, and the work he had to do was done so well that the bench, the bar and the community came at last to realize that he was no common man. By patient industry and force of character, without the adventurous aids which have raised so many men to prominence, the drummer boy of the Civil War came to occupy the front rank of a learned and powerful profession. He was a leader at a bar noted for its ability. Success came slowly, but it was a success of which any man might have been proud, and it was a success based upon merit alone.

With a wondrous capacity for work, an unusual acquaintance with the precedents, a clear perception, the ability to apply principles to facts with celerity, and a conscientious judgment, no safer counsellor ever advised client or addressed the court. His char-

acter was so correct and his manner was so kindly that he had not an enemy. More than that he had the regard of all who knew him, and the affection of all who knew him well.

As simple and unaffected as a child, as modest and gentle as a woman, as wise as a sage, as brave as a lion, as loyal to the truth as the needle to the pole, we earnestly commend our departed brother to the young men of our profession as a model upon which they may safely shape their lives and character.

"He needs no tears who lived a noble life;
We will not weep for him who did so well,
But we will gather round the hearth and tell
The story of his strife."
Such homage suits him well,
Better than funeral pomp or pealing bell."

The bench heartily concurs in all that has been said by members of the bar, and it is ordered that the memorial presented be spread upon the minutes of the court.

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NOTE.

The United States Supreme Court awarded $5000 damages to Harriet Monroe from the New York World for surreptitious publication of her World's Fair Ode.

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Judge Baker, of the United States Court at Indianapolis recently granted a restraining order to S. C. Bramkamp, of Cincinnati, against the American Wire Nail Trust.

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The woman suffrage amendment to the constitution was defeated in California at the recent election.

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In the address of Judge Thompson before the Texas Bar Association, it is said in substance, that the Fourteenth Amendment was never adopted by the voters of the legislatures of three-fourths of the states, concurring at the same time; but that, before a quorum of three-fourths of the states had been made up, the legislature of the state of Ohio withdrew its ratification; but that nevertheless, Mr. Seward, the Secretary of State, issued his proclamation declaring the amendment ratified. Since the preparation of that somewhat hurried address, the author of it has taken pains to inquire of the Hon. Edw. I. Renick, the chief clerk of the Department of State, as to what the fact really was, and Mr. Renick has courteously sent the following data, compiled by Mr. Hamilton from the records of the Department of State:

"Secretary Seward, in his certificate dated July 20, 1868, sets forth the ratification of the Fourteenth Amendment by the several state legislatures, including Ohio and New Jersey; and further, that the legislatures of those two States passed afterwards, resolutions withdrawing their consent to the aforesaid amendment. The concluding paragraph of the certificate is as follows: 'Now, therefore, be it known that I, William H. Seward, etc., etc., etc., * * * do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those states which purport to withdraw the consent of said states from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentiond, and so has become valid to all intents and purposes as part of the Constitution of the United States.' Congress by concurrent resolution decided that the legislatures of the several states named, including Ohio and New Jersey, had ratified the Fourteenth Amendment, and therefore declared it to be a part of the Constitution, directing the Secretary of State to promulgate it as such. This was done July 28, 1868."

It will thus be seen that the presence of that amendment in the Constitution has no better foundation than a proclamation by the Secretary of State and a joint resolution passed by a partisan Congress, deciding a question of law in opposition to what every sound lawyer knows to be the way it should be decided. It is an elementary principle with reference to that concurrence of minds which constitutes a contract, that where a proposal for a contract is made, the proposer can withdraw before the other party accepts. So in the case of a contract having numerous parties, which is to become complete when a given quorum is made up, it is believed to be a principle that any subscriber can withdraw before a quorum is made up. Is not this the rule with reference to private contracts? Is there any reason for a different rule with reference to public compacts?—American Law Review.

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NEED THAT JUDGE.

(St. Paul Dispatch.)

So far as can be ascertained there is no intention on the part of the members of the legislature from this district to demand the abolishment of one of the judges of the district court of the Second Judicial district. The business of the courts of this district, it has been alleged by the two or three gentlemen who have the "movement" in charge, can be done by five judges and the county saved an annual expense of $1,500, the amount paid by the county

in addition to the salary paid by the state. This is the only argument that has been made by the parties who have inaugurated the movement, and it is all the argument that will ever be offered. It is not a good argument for several reasons, the first of which is that it is not true. The business of the courts of this district can not be expeditiously disposed of by five judges, and it is well known that, while business has occasionally been slack during the past few years, it is picking up daily, and there is every indication that before the close of another year the courts of this county will be clogged the same as they are in many of the other districts where litigants are forced to await the exasperating experience of "the court's delay." It is the poor man who can not afford to wait for continuances on account of a crowded calendar, and it is the poor man, who is generally something of a tax payer himself. The petty consideration of the saving of $1,500 is not to be taken into the account at all, for it is so trifling compared to the interests that might, and certainly would, suffer by the abolishment of one of the judges that it certainly becomes utterly insignificant. It looks as though the consideration which has most weight with the men who are engineering the proposed deal is a pontical, rather than a business one, and as such it will be closely investigated before it is permitted to pass.—St. Paul Dispatch.

### CHECK HOLDER'S RIGHT TO SUE THE BANK.

The Supreme Court of Ohio, in Cincinnati, H. & D. R. Co. v. Metropolitan National Bank, 42 N. E. Rep. 700, for the first time considered the question of the right of a check-holder to sue the bank, and gave the authorities an exhaustive review. The Court recognized the divergence of judicial judgment upon the question and the want of uniformity or consistency of the precedents.

The Court made the following resume of the conclusions of the courts: Because of the universal usage of banks to cash checks drawn by a depositor, where he has sufficient funds standing to his credit, a duty is implied on the part of the bank to pay, and the holder takes a check relying upon this usage. Serious injury may result to the holder of a check by the refusal of a bank to pay a check drawn against funds, for, while he may have an action against the drawer which might prove delusive in the frequent instance of the drawer's insolvency, the wrongful action of the bank in refusing to pay such a check would be the real cause of the loss. The law, therefore, implies a contract on the part of the bank with its depositors to pay their checks as presented, as long as the fund of each depositor is sufficient to meet the checks drawn by the respective depositors, and it should, for these reasons, imply a contract with the check holder to pay the same on presentation. The check is treated as an equitable assignment pro tanto, of the depositor's funds in the hands of the bank, and by the act of presentation the check holder is brought in privity with the bank, his right to sue made complete, and he may sue the drawer of the check and the bank in one action, the former as drawer and the latter as implied acceptor. He may also sue the drawer on the dishonor of the check, or the bank, in an action for money had and received.

The Supreme Court of Ohio, however, took side with those tribunals which deny the right of action to the check holder, unless the check has been certified or accepted by the bank, in which case it is well understood a different aspect is given to it, and on the ground that there was a privity of contract between the check holder and the bank, giving the former a right of action against the latter in case of default in the payment of the check.

The arguments supporting the right of the holder to maintain an action are forcibly presented in Morse on Banking, and in 2 Daniel Neg. Inst., sec. 1638, where the conflicting views are clearly stated, and the decisions collated.

### HUMOROUS SIDE OF LAW.

Judge Brewer, of the United States Supreme Court, in an address to the law students of Maryland University, thus exhibited the humorous side of the lawyer's character:

It is a blesed thing to be a lawyer,

providing always that you are the right kind; and I take it that no one is permitted to graduate at this law school unless he is of the right. It is the rule of our profession to work hard, live well and die poor. And to such a life I most cordially invite you.

Never sign your own name as plaintiff or defendant, but only as counsel.

One class of persons would as soon expect to find a baby that never cried, a woman that never talked, a Shylock loaning money without interest, a Mormon advocating celibacy, a gentleman without a cent opposed to the income tax, or a candidate for the presidency hurrying to express himself on the silver question, as an honest lawyer.

I admit that lawyers do not support themselves by planting potatoes or plowing corn, though there is many an attorney who would bless himself and bless the bar and bless all of us if he struck his name off the court rolls and entered it on the books of an agricultural society.

We are not, as a profession, physically speaking, like Pharaoh's lean kine. Those pictures which Dickens, that prince of slanderers, and others like him, draw and call attorneys, are nothing but atrocious libels.

From time immemorial, size, physical as well as mental, has been considered one of the qualifications of a judge. Justice and corpulence seem to dwell together. There appears to be a mysterious and inexplicable connection between legal lore and large abdomens. I do not know why this is, unless it be that in order Justice may not easily be moved by the foibles and passions of men, she requires as firm and as broad a foundation as possible.

George Washington's hatchet is not popularly regarded as one of the heirlooms of the legal family. I can say, that for over thirty years I have been a judge, and of the many thousands of lawyers who have appeared before me, I have never found but a single one upon whose word I could not depend.

While other professions and vocations are constantly putting on striped clothes, how seldom does any lawyer respond to a warden's roll-call.

The business man needs us to draw his contracts, the laborer to collect his wages, the doctor to save him from the consequences of his mistakes, the preacher to compel the payment of his salary, the wife to obtain a divorce, and the widow to settle her husband's estate.

The people need us in the legislature and in congress to hold the offices and draw the salaries. Every convention and public meeting needs us to fill the chair and occupy comfortable seats on the platform. Every man accused of crime needs us to establish his innocence through the verdict of twelve of his peers.

In short, it may be said of us, in the language of the itinerant vender of soap, "everybody needs us," and, like that very useful article, nothing tends to keep society so clean as the presence of a lawyer.

Blot from American history the lawyer and all that he has done and you will rob it of more than half its glory. Remove from our society to-day the lawyer, with the work that he does, and you will leave society as dry and shiftless as the sands that sweep over Sahara.

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### THE ACT KNOWN AS THE TORRENS LAW UNCONSTITUTIONAL AND VOID.

Supreme Court of Illinois. Opinion filed November 9, 1896.

The People ex rel. The State's Attorney v. Samuel B. Chase.

Appeal from County Court of Cook County.

The Torrens law governing the transfer of land and the registration of land titles has been declared by the supreme court of Illinois to be unconstitutional, and therefore void.

The opinion, written by Justice W. Wilkin, and filed in Ottawa, considers only one of the half dozen contentions raised in the appeal from the lower court, namely, that the act confers judicial powers upon the registrar of titles or county recorder, in contravention of article 6, section 1 of the state constitution, which provides that judicial powers shall be confined exclusively and without exception to the courts. This contention is wholly sustained.

The decision is unanimous, Justices Magruder, Craig, Carter, Baker, Phillips and Cartwright concurring in the opinion as written by Justice Wilkin.

The case is remanded to the circuit court and judgment of ouster is ordered to be entered against Samuel R. Chase as registrar of land titles under the act. Thus the effects of the Chicago real estate board, assisted by the best legal talent, persistently exerted for more than five years and brought to bear on a commission of inquiry, two sessions of the general assembly, a county election and the state courts, end in defeat.

### HOW THE SUPREME COURT DECIDES CASES.

Justice Harlan, of the Supreme Court of the United States, at a banquet in Cincinnati, Ohio, Oct. 3d, gave the following interesting account of the methods pursued by that body in deciding cases before it:

"In my intercourse with members of the bar I have found to my great surprise that the impression prevails with some that cases, after being submitted, are divided among the judges, and that the court bases its judgment in each one wholly upon the report made by some one judge, to whom the case has been assigned for examination and report. I have met with lawyers who actually believed that the opinion was written before the case was decided in conference, and that the only member of the court who fully examined the record and brief was the one who prepared the decisions.

It is my duty to say that the business of our court is not conducted in any such mode. Each justice is furnished with a printed copy of the record and briefs at his chambers before the case is taken up for consideration. The cases are thoroughly discussed in conference—the discussion in some being necessarily more extended than in others. The discussion being concluded, and it is never concluded until each member of the court has said all that he desires to say—the roll is called and each justice present and participating in the decision votes to affirm, reverse or modify as his examination and reflection suggests. The chief justice, after the conference, and without consulting his brethren, distributes the cases so decided, for opinions. No justice knows at the time he votes in a particular case that he will be asked to become the organ of the court in that case, nor does any member of the court ask that a particular case be assigned to him.

The next step is the preparation of the opinion by the justice to whom it has been assigned. The opinion, when prepared, is privately printed, and a copy placed in the hands of each member of the court for examination and criticism. It is examined by each justice and returned to the author with such criticisms and objections as are deemed necessary. If these objections are of a serious kind, affecting the general trend of the opinion, the attention of the justices is called to them and they may be passed upon. The author adopts such suggestions of mere form as his views. If objections are urged to which the writer does not agree, they are considered in conference, and are sustained or overruled as the majority may determine. The opinion is reprinted so as to express the final conclusions of the court, and then filed.

Thus, you will observe, not only is the utmost care taken to make the opinion express the views of the court, but that the final judgment rests, in every case decided, on the examination by each member of the court of the record and briefs. Let me say that, during my entire service on the supreme court, I have not known a single instance in which the court has determined a case merely upon the report of one or more justices as to what was contained in the record and as to what questions were properly presented by it. When you find an opinion of the court on file and published, the profession have the right to take it as expressing the deliberate views of the court, based upon a careful examination of the records and briefs by each justice participating in the decision."

### BOOK REVIEWS.

Studies in Civil Law and its relation to the Law of England and America. By William Wirt Howe, Late Justice of the Supreme Court of Louisiana. 12mo. 320 pages. Little Brown Co., Boston, Mass., 1896, $2.50 cloth; $3.00 sheep.

This valuable book was especially designed to meet the requirements of students, being the result of a course of exceptionally able lectures on the study of the Civil Law delivered by its author in Yale University in 1894.

The first part of the volume is devoted to the growth and condition of the Roman law, its evolution and perfection, and subsequent introduction and influence in England. Then follows a very clear exposition of the workings of the Civil Law, with its division as to persons, things, rights, etc., and the Roman mode of procedure. The book also contains a sketch of the famous Louisiana jurist, Judge Francois-Xavier Martin, and closes with eleven appendixes containing the twelve tables of the Roman law, the Institutes of Gaius, and essay on the Canon law, an account of the reception of the Roman law in Germany, etc.

The author has eminently well succeeded in his purpose, as stated in the

dedicatory preface, "to make the work interesting, if possible, to the student, and especially to show how in the law as in every other department of human thought what we call the new has been continually developed from what we call the old." As a whole it is a most valuable work for the student as an introduction to the study of the civil law.

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Federal Jurisdiction and Procedure. By William A. Maury. Lowdermilk & Co., Washington, D. C., 1896. Paper $1.00.

The object of this little volume is to place before the lawyer in a convenient form the Act of March 3rd, 1891, C, 157, (26 Stat. 829), and acts amendatory thereof, establishing the Circuit Court of Appeals, and defining and regulating the jurisdiction of the Circuit Courts of the United States. It also contains the several provisions of the Constitution bearing on the judicial power, and certain provisions of the Revised Statutes appertaining to that power, and regulating the original and appellate jurisdiction of the Supreme Court of the United States, together with the rules of that court which supplement the last mentioned provisions.

The appendix contains an excellent selection of forms for Federal practice, prepared by the clerk of the Supreme Court.

Lawyers with Federal practice will find this little work very useful. An index would, perhaps, make it more convenient.

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### WHAT KANSAS MAY DO.

Washington, Nov. 20.—Should the Kansas Populists enact a law making Mexican dollars a legal tender, a constitutional question of prime importance will arise for decision by the United States Supreme Court, which unquestionably would have a case brought before it to test such a law. The constitution, section 10, declares that no state shall "coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts."

It has been contended that under this provision Kansas could make Mexican silver dollars a legal tender within her borders, but generally it has been believed that under this and other constitutional provisions, including that forbidding the impairment of contracts, any such law would be held invalid by the courts.

### PERSONALS.

**St. Paul—**

George B. Edgerton, Arthur M. Wickwire and Frederick D. Rice have formed a partnership for the practice of law under the firm name of Edgerton, Wickwire & Rice, with offices at 804 New York Life Building.

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Mr. John A. Larimore, has removed his office to rooms No. 505-506 Oneida Block, Minneapolis, Minn., where he will continue the practice of law.

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The Globe Building in St. Paul is fast filling up with lawyers. W. G. White, S. P. Crosby, M. R. Tyler and Thompson & Thompson have recently moved into it.

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J. D. Kerr, partner of ex-Senator John C. Spooner, of Wisconsin, has accepted the position of land attorney for the Northern Pacific road, with headquarters in this city.

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George Bealz and Michael J. Costello took the oath of office before the Supreme Court recently, and were admitted to practice law in the courts of this state.

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The following persons passed the legal examination given by the state board, and will be admitted to practice law: L. Sperry, Owatonna; J. A. Anderegg, Kasota; J. T. Jones, George E. Dickson, Minneapolis; W. E. Dampier, Geo. Bealz, St. Paul; A. E. Clark, Montevideo.

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Samuel M. Davis of the firm of Davis & Pierce was recently married to Miss Mabel Keith.

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**Minneapolis—**

The engagement is announced of Robert S. Kolliner, of the firm of Peterson & Kolliner, to Miss Otille Newmann.

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**Fairmount—**

Shanks & Rooney have dissolved partnership. M. E. L. Shanks succeeding to the business.

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**Madison—**

Frank Palmer of this place and T. J. McElligott, of Bellingham, Minn., have formed a partnership, with offices here and at Bellingham.

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**Stewartville—**

O. E. Hammer succeeds the old firm of Whitney & Hammer.

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Thomas T. Fauntleroy, who removed to St. Louis in July, has been appointed Provisional Judge of the Court of Criminal Correction. How is this for five months?

### LITERARY NOTES.

The frontispiece of the November Review of Reviews is a map of the Hon. W. J. Bryan's wonderful stumping tour of 20,000 miles up and down the country, from the Missouri River to the Atlantic seaboard.

This magazine also publishes several important and interesting articles on the latest phases of the Eastern Question, especially from the British point of view. Mr. W. T. Stead's survey of the subject, entitled "The Eastern Ogre; or, St. George to the Rescue," is extremely characteristic and suggestive; the Review also offers a remarkable symposium of current thought on "What should be done with Turkey?" as the pressing problem of the hour.

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Jacob A. Riis, the author of "How the Other Half Lives," publishes in the November Atlantic a series of realistic and pathetic sketches of tenement life in New York City. He groups them under the title "Out of the Book of Humanity," and in each one of them there is dramatic power enough for a two-volume novel.

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### CONTRIBUTORY NEGLIGENCE.

The doctrine of contributory negligence as applied in the courts, has more frequently defeated justice and shielded the wrong doer, than any other so-called principle known to American judicature. It is positively refreshing that in one instance it has been denied recognition. Some weeks ago a policeman in Pittsburg, Pa., while patroling his beat, in trying to remove a live wire from the sidewalk, where people were passing, was killed. His widow sued the Electric Company, obtaining a judgment of $5,000 for damages. The company's attorneys filed a motion for a new trial, claiming contributory negligence. Judge McClung rendered a brief but conclusive opinion denying the motion, in which he raised the unorthodox and novel point that it was the duty of the police officer to protect the lives of the pedestrians, by removing the wire, even though it meant death to him, and the law would not say to him that his primary duty was to consider his own safety.—Chicago Law Journal.

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### EXPECTANCY, RELEASE BY HEIR APPARENT.

A covenant by an heir apparent to relinquish his expectancy in certain property is sustained in Re Garcelon's Estate (Cal.) 32 L. A. R. 595, and it is held that Code provisions against transferring a mere possibility, not coupled with an interest, do not apply. In a note to the case are found the authorities as to the validity of transactions between an heir and his ancestor relative to the former's expectancy.

### CLIPPINGS.

Members of a mutual insurance company who have lawful policies on the assessment plan are held, in Corey v. Sherman (Iowa) 32 L. R. A. 490, to have a good defense against assessment for losses on cash policies which were unlawfully issued, even if they knew of such issue, if they did not do anything to estop themselves from denying such liability. The whole subject of liability of members of mutual fire insurance companies is treated in a note accompanying this case.

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The right of an employee to waive the protection of a statute requiring cog wheels to be guarded is sustained in Knisley v. Pratt (N. Y.) 32 L. R. A. 367, and it is held that where the risk is obvious it is assumed by engaging in the work.

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The duty of insulating electric light wires running on the outside of a building is held, in Griffin v. United Electric Light Co. (Mass.) 32 L. R. A. 400, to be due to every person who for purpose of business is rightfully upon the premises. With this case is a note collecting the authorities as to negligence in respect to electric wires in or upon buildings.

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Injury to an employe of a telegraph company caused by accidental contact of the telegraph wires with electric-light wires attached to the same poles was held, in Western Union Teleg. Co. v. McMullen (N. J.) 32 L. R. A. 351, to raise questions for the jury as to the negligence of the employer and of the employee. The annotation to the case reviews the authorities on liability of an electric company to its employees for injury caused by an electric shock.

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The bad, dilapidated, and ruinous condition of a railroad and its engines, on account of which it is prevented from running a train on a return trip at stipulated time is held, in Hansley v. Jamesville & W. R. Co. (N. C.) 32 L. R. A. 543, to render the company liable to a passenger whom it is unable to carry on his return trip for compensatory damages but not for punitive damages, in the absence of any personal insult, indignity, or intentional wrong to him. A note to this case reviews the authorities on the liability to a passenger for default or delay in running a railroad train.

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Mandamus to compel the officers of a corporation to call a special meeting of stockholders is held proper in Bassett vs. Atwater (Conn.) 32 L. R. A. 575, when they had refused to call the meeting as requested in accordance with a by-law and as required by statute. The cases in which mandamus to enforce corporate by-laws has been considered are found in a note to this case.

A promise to pay an expert witness a reasonable compensation in addition to statutory fees, when he is engaged in advance of the trial, is held, in Barrus v. Phaneuf (Mass.) 32 L. R. A. 619, to be based on sufficient consideration and the right thereto is held not to be waived by afterwards testifying on receipt of statutory fees, without first claiming the promised compensation, even if he is not asked any questions calling for his opinion as an expert.

Promises made in jest to a minor living with a near relative other than a parent, in respect to compensation are held, in Plate v. Durst (W. Va.) 32 L. R. A. 404, to be binding on the promisor when they have been accepted in good faith and services rendered in reliance upon them.

The right of a parent to advise a son to separate from his wife is sustained in Tucker v. Tucker (Miss.) 32 L. R. A. 623, provided the advice is given through proper parental motives for the son's welfare and happiness instead of through malice.

The mere existence of cross easements in stairs, hallways, skylight, and heating apparatus situated partly on the premises of adjoining owners who erected a common building thereon is held, in Barr v. Lamaster (Neb.) 32 L. R. A. 451, to give no right to partition, but such reciprocal easements may be enforced in equity when the remedy at law is insufficient.

A promise to extend the time for payment of an instalment due on a conditional sale or lease of goods is held, in Cole v. Hines (Md.) 32 L. R. A. 455, to be a waiver of forfeiture for default which will prevent asserting it before the expiration of the extended time.

### CALIFORNIA IRRIGATION LAW.

In the supreme court of the United States the irrigation law of California has been upheld. Decision was in the case of the Fall Brook Irrigation Company against Maria King Bradley, and it reverses a late ruling of the United States district court for California. Chief Justice Fuller dissented.

### TELEPHONE.

One's right to direct through a telephone that his name may be signed to a bond by another is sustained in Long v. Goodwin (C. P.) 5 Pa. Dist. R. 335, in a case where a signature to the bond was thus directed by the plaintiff in an attachment case.

### LEGAL POINTS.

Rivers—And so, if you caught a man in the act of robbing your chicken house you would shoot him, would you? How do you get around the commandment, "Thou shalt not kill?"

Brooks—That was an ex-post-facto law. It is unconstitutional.

Must Bathe in Public—Much has been said recently about the right of privacy, but now comes a big law book which says "public baths are also necessary to health." This seems to place a hygienic but bashful person between the—public—and the deep sea.

Descriptive Names—The spirit of litigation finds fitting expression in the title of the recently reported case of Damm v. Damm. In this case both parties were women, but the controversy may not have been less spirited on that account.

Judge E. H. Gary, one of the managers of the Chicago Bar Association, loves a quiet jest. A man came into his office in the Rookery Building the other day and said he would like to get a divorce.

"What are the grounds?" asked the lawyer, who doesn't like divorce cases anyway.

"Well, my wife makes me get up in the middle of the night and pack that blooming, yelling baby up and down the room by the solid hour. It's not right. There is no reason nor law—"

"Ah, but there is law," said Judge Gary.

"What, I would like to know?"

"The law of common carrier," said the counselor calmly. "And it runs against all fathers of crying babies, I guess."

In North Carolina liquor may not be sold Sunday except on a physicians prescription. A dentist gave a prescription, the liquor was sold, the druggist was arrested, and the supreme court has just passed upon the case. The court holds that "if dentists came within the term 'physician,' as used in the code, section 11, 'toothache' would become alarmingly more prevalent than 'snake bite.' The very first dental surgeon's prescription for toothache coming before us is for 'one pint of whisky.' And there are thirty-two teeth in a full set, each of which might ache Sunday.

## LIABILITY OF A LUNATIC FOR NEGLIGENCE.

The case of Williams v. Hays, which has been appearing in various New York Courts at irregular intervals during the last two years, and which probably has not even yet been finally decided, is remarkable for the human as well as legal interest that attaches to it. The facts of the case are refreshingly unusual. The defendant, who was one of several joint owners in a vessel, contracted with his co-owners to sail her under certain conditions, not necessary to be here detailed, but which, the court decided, made him not an agent but a charterer, or owner pro hac vice. On a voyage south the vessel met with severe storms, and her captain, the defendant, for more than two days was almost constantly on duty. Finally, becoming exhausted, he went to his cabin. The mate who had been left in charge, having found that the rudder was broken, went down for the captain and brought him on deck. The latter refused to recognize that the vessel was in danger, and declined the aid of two tug-boats, the masters of both of which offered to tow him to safety. In consequence, the vessel drifted on shore in broad daylight, and became a total wreck. The assignee of the rights of the company that insured the vessel brought suit. The defendant captain's sole defence was that from the time he entered his cabin till he found himself in the life-saving station he was totally unconscious and insane.

In November, 1894, the case came before the Court of Appeals squarely on the question: Is one, insane by act of God, liable for torts of negligence? By a bare majority, the court decided in the affirmative, but added: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case, we do not now express any opinion." Williams v. Hays, 143 N. Y. 442. After a new trial, this reserved question came before the Supreme Court, which held that, applying the principle stated by the Court of Appeals, it could make no possible difference how the defendant became insane, or "what caused the disease or mental condition that prevented him from exercising the care or skill that he was bound to exercise." Williams v. Hays, 37 N. Y. Supp. 708.

The position of the Supreme Court is undoubtedly logical and necessary. If the general rule holds liable one rendered insane by act of God, it would require an unwholesome exercise of ingenuity to make an exception in favor of one rendered insane by extra and commendable effort. The proposition laid down by the Court of Appeals, on the other hand, seems hardly defensible. It is a subject on which there is a wide disagreement of the authorities (see 10 Harvard Law Review, 65), and which therefore may well be settled in the pure light of reason. The Court of Appeals rested its decision on two grounds. First, that public policy required that a lunatic should be liable, which view appears to be largely fanciful; and second and chiefly, that if where one of two innocent persons must bear a loss, he must bear it whose act caused it." This last proposition clearly belongs to the doctrine of absolute liability, which was never to be defended with adequate reason, and which is now generally discredited. Even the Court of Appeals, in the principal case, while laying down a rule of absolute liability showed an unwillingness to stand squarely on such a doctrine by reserving opinion on a possible phase of the case before them. A theory, the advocates of which are forced to striking inconsistencies, does not commend itself to reason. The modern and enlightened view is thus stated by Beven, Vol. 1, p. 52, 2d ed.: "Liability for trespass is not absolute and in any event, but dependent on the existence of fault." (Also Brown v. Kendall, 6 Cush. 292. Holmes on the Common Law, 77 et seq.) If blame or fault is indeed the basis of liability in tort, how can one blamelessly and totally insane be liable for the consequence of his negligence? To hold that he is, certainly is a step in the wrong direction.—Harvard Law Review.

# THE MINNESOTA LAW JOURNAL.

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## DISTRICT COURT.

**THE PUBLISHER**

**of the Minnesota Law Journal is anxious to extend the usefulness of the magazine in the state, and it is our aim to report as many District Court decisions as possible. But to ensure this end we look to our subscribers throughout the state. We shall be glad to receive memoranda of cases deciding new or doubtful points, and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases**

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**Schirmer vs. Lettau.**

**(District Court, Ramsey County.)**

### Costs in Partition.

S. C. Olmstead, Esq., for plaintiff.

Otis, J. Under Gen. Stat. Minn. 1894, section 5815, providing that in partition proceedings, "the costs, charges and disbursements of partition shall be paid by the parties respectively entitled to share in the land," reasonable allowance for the services of plaintiff's attorney, above taxable costs, is authorized.

(Ed. The same ruling was made by Judge Williston in the case of Young vs. McDonald in the District Court of Washington County. See, also, Grausel vs. Smith, 48 N. W. Rep. 616 (Mich.)

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**Mary E. Markoe vs. Ralston J. Markoe.**

**(District Court, Ramsey County. No. 65691.)**

### Divorce—Desertion.

E. S. Durment, Esq., for plaintiff.
Charles Conradis, Esq., for defendant.

Complaint alleged wilful desertion on 12th of February, 1895. Answer denied desertion, but alleged that defendant left home, with full consent and at the solicitation of plaintiff, for the purpose of improving his financial circumstances.

Otis, J. This action having been tried and submitted, the Court finds as facts:

1. The names, ages, marriage, residence and cohabitation as husband and wife of plaintiff and defendant are as alleged in folios 1 and 2 of the complaint.

2. At the time of said marriage plaintiff was a widow with an infant child, who after said marriage was by legal proceedings in this court duly adopted by plaintiff and defendant and its name changed to Stanley E. Markoe.

3. On Feb. 12, 1895, with plaintiff's full knowledge and consent and upon her urgent solicitation, defendant went to the Pacific coast, leaving his wife and child in St. Paul, for the purpose of improving his financial condition and earning a livelihood for himself and his said family and with like privity and consent has ever since been absent and remained away with like purpose, but intending to return to his wife and family as soon as he should accomplish said purpose, which he had hoped and expected would soon be brought about, and has been always anxious, ready and willing to return to his wife whenever she should desire it. Defendant never at any time deserted plaintiff, nor has he lived apart from her save under the conditions herein set forth.

As conclusions of law, the Court finds that plaintiff is not entitled to any relief in this action. Let judgment be entered accordingly.

November 10, 1896.

**State vs. Lisbon.**

**(District Court, St. Louis County.)**

## Indictment — Forgery — Alteration — Variance.

In the trial of an indictment charging forgery in the second degree, it appeared that the signature to the instrument was genuine but that the instrument had been altered. Held, a fatal variance between the pleading and proof.

Georga Arbury, Esq., for the state; John H. Norton, Esq., for defendant.

Defendant was indicted by the grand jury of the crime of forgery in the second degree, in fraudulently and feloniously uttering and disposing of, as true, to J. R. Carey & Co., with intent then and there to defraud said J. R. Carey & Co., a certain false and forged instrument in writing purport ing to be an order for the payment of money, and purporting to have been issued by J. R. Carey & Co., &c. Upon the trial it appeared from the evidence that the signature to the instrument was genuine, but that the instrument had been altered in form. Defendant moved to strike out the State's evi dence on the ground that the indict ment charged forgery and the proof showed merely an alteration, and that the variance was fatal. The motion was granted, Judge Moer remarking that the State's case was a complete failure to prove that the original pa per as signed by Crosby was not of the same legal effect as the one claimed to be a forgery. The defendant had a right to know what he was charged with, and it put him in a bad position to charge him with a forgery without making specifications which could be defended. The forgery consisted in the alteration, and it was incumbent upon the state to show how it was altered.

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**Ellen C. Washington vs. J. C. Mathews, et al.**

**(District Court, Ramsey County. No. 85775.)**

## Sale Under Execution of Several Distinct Tracts of Land—When Sale May be Vacated.

Ambrose Tighe, Esq., for plaintiff; W. G. White, Esq., for defendant, Ware.

On Feb. 24th, 1892, S. C. Trowbridge platted certain lands into Trowbridge's Addition to St. Paul, and on the same day conveyed to plaintiff lots 15 and 16 and to one N. P. Lamprey lot 17 in said addition. Lots 15 and 16 are contiguous and adjoining, but lot 17 does not touch or adjoin either of the other lots. April 24, 1890, a judgment was rendered in the Municipal Court of St. Paul, in favor of defendant Mathews and against said S. C. Trowbridge. Transcript was taken to the district court and upon an execution issued from said district court a part of the judgment was collected. Sept. 28, 1892, an alias (or third) execution was issued, and on August 29, 1895, delivered to the sheriff of Ramsey County, who levied upon and sold the three lots above described as one parcel.

Kelly, J. The plaintiff's counsel points out many things from which he contends this execution should be held void, but as I will place this decision upon one ground, which to me seems conclusive, I will not discuss or decide the others. The judgment against Trowbridge attached as a lien upon all of Trowbridge's addition on Feb. 24, 1892, when the title was put in him. But the owner of the judgment in 1895 sold to satisfy his execution thereon three parcels, all distinct and not owned by the same person. Lots 15 and 16 were owned by the plaintiff and lie contiguous, but lot 17 was owned by one Lamprey and lies entirely separate and remote from the others I know it has been held, despite the statute requiring separate parcels of land to be sold separately, a sale of separate parcels as one tract is not void unless prejudice or injury to the owner, by such manner of sale, is shown or appears. Lamberton vs. Bank, 24 Minn. 287-288. In this case injury appears conclusively from the facts. Because plaintiff cannot redeem her two lots without redeeming also Mr. Lamprey's, so Mr. L. cannot redeem his lot without redeeming plaintiff's. The judgment creditor had notice of this state of the title from the records in the office of the register of deeds. Being charged with such notice, if for no other reason, because he proceeded to sell irregularly, he proceeded, at his peril, to sell in the manner pursued. The owner of the judgment can still enforce the same so that no one will be prejudiced.

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**Mary E. Cheever vs. John Cheever.**

**(District Court, Ramsey County.)**

## Divorce Judgment—Motion to Vacate.

Motion to vacate default judgment in divorce, under section 5276 Gen. Stat. 1894, for excusable neglect, &c., denied.

Morphy, Ewing, Gilbert & Ewing, attorneys for plaintiff, and Geo. W. Granger and H. J. & A. E. Horn, attorneys for defendant.

Plaintiff brought her action for di-

vorce wherein the defendant appeared, served his answer and was duly served with a notice of trial thereof for the November, 1896, term, but did not appear at the trial, and judgment by default was taken against him. He thereupon obtained an order to show cause why such judgment should not be vacated, which order was based upon affidavits wherein he sought to excuse his default by showing that one of his attorneys residing at Rochester, Minnesota, inquired of plaintiff's attorneys who resided at St. Paul, Minnesota, as to the manner of setting the cases for trial in Ramsey County, and was informed as to the same, and was further told that this case might not be reached until after the middle of the month. Defendant's attorney believing that the case would not be reached until after the middle of the month was not present at the call of the calendar when the case was set for November 4th, and no one appeared for defendant at the trial.

Upon the hearing of the order to show cause, the following decision was filed.

Otis, J. Whether Sec. 5267, Gen. Stat. 1894 inhibits the Court from vacating a judgment of divorce and relieving a party from mistake, inadvertence, surprise or excusable neglect may be questioned, although it is difficult to give the exception of this class of cases from the operation of the section any force unless it receives construction.

It certainly does contemplate at least that a party to obtain such relief must make out a much stronger case than is required in an ordinary civil action; and that in the absence of fraud, vis major, or the like intervening cause, domestic relations once established or disestablished shall not be disturbed.

The motion was denied, and the order to show cause discharged.

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**Albertine Abel, as Administratrix, etc. vs. Butler-Ryan Company.**

**(District Court—Ramsey County.)**

## Struck Juries—Sheriff Must Personally Select the Names and do the Striking.

Humphrey Barton for plaintiff.
McLaughlin & Morrison for defendant.

BRILL, J.:—After hearing counsel for the respective parties, it is

Ordered: That the motion of the plaintiff to quash the struck jury venture in the above entitled action is gaanted, and the struck jury is set aside.

The first point made upon the motion is that the sheriff of Ramsey County did not strike said jury; did not participate in the striking of the same; did not attend upon the said striking, and did not select the names from which said striking was done." The facts in this regard are that the sheriff did not in person participate in any of the proceedings for obtaining the struck jury; he was not present, and made no selection of persons, everything in that behalf having been done by deputy. It is claimed by plaintiff that the duties enjoined upon the sheriff by the statute relating to struck juries must be performed by him in person.

The statute relating to sheriffs provides that the sheriff may appoint deputies, but there is no statutory provision which defines the general powers or duties of such deputies. In the absence of specific statutory provision, the deputy of a public officer may perform all the ministerial duties of his principal. But he cannot perform any judicial duties which the law casts upon his superior.

The statute relating to struck juries, after providing that a demand in writing shall be filed with the Clerk of the Court and that he shall deliver a copy to the sheriff, who shall give to both parties four days notice of the time of the striking of the jury, proceeds as follows: "At the time designated, said sheriff shall attend at his office; and in the presence of the parties, or their attorneys, or such of them as attend for that purpose, shall select from the number of persons qualified to serve as jurors within the county, forty 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 twelve. If either party shall not attend in person, or by attorney, the sheriff shall strike for the party not attending." The sheriff is then required to make a list of the names of the sixteen persons remaining, "and certify the same under his hand" and to deliver the same to the clerk, who shall issue a venire for the persons named in the list and deliver it "to the sheriff or other officer," "and such sheriff or other officer" shall summon the persons named. In case the sheriff is an interested party, or related to either party, or does not stand indifferent between them, the judge shall name "some judicious and disinterested person to perform all the duties of the

sheriff relating to the striking of the jury."

The general jury lists throughout the state are made up by the county commissioners of each county, with the exception of a few counties containing the larger cities, and in these counties the duty is devolved upon other officers. In the County of Ramsey the jury lists are made by the Judges of the District Court, the County Assessor, and the Chairman of the County Commissioners. The struck jury is a special jury to try a particular case.. And the theory of the legislature in providing for struck juries, apparently was, that in particular cases a jury better qualified to try the issues could be secured by the means specially provided for obtaining these special juries, than from the regular panel. Naturally it would be expected that the duty of selecting the persons from whom such a jury was to be drawn, would be confided to a person of sound judgment, of wide acquaintance in the community , and of familiarity with the qualifications of persons to act as jurors. The ancient office of sheriff is one of the most important in the government. The sheriff is chosen by the electors of the county at large, and his duties bring him into close contact with the people of his bailiwick. Naturally he becomes somewhat familiar with the procedure of the courts, and it is to be expected that he will be a man of discretion and judgment. For these reasons it is fair to infer that the legislature designated the sheriff as the person who should perform the duty of selecting a jury of special qualifications. But if the duty is to be performed by deputies, then there is no assurance, not even a presumption, that it will be performed by a person qualified for the work,—and this is said without any disparagement of the character or abilities of any deputy. The deputy is not chosen by the electors, but is appointed by the sheriff alone. He is not expected to possess the degree of discretion required of his superior; he exercises his duties under direction of the sheriff; his work may be, and usually is, restricted to a part only of the many duties pertaining to the office of his principal. He may be, and often is, merely an office man or bookkeeper. Now the law as quoted above requires that the sheriff shall select forty such persons as he shall think most indifferent between the parties, and best qualified to try the issue. The language used indicates quite clearly an intention to designate the person who is to perform this duty. The duty required of the sheriff in this particular is not a ministerial duty; he is not liable for any mistake he may make in judgment in his selection. The duty is quasi judicial, and it is a duty that he cannot delegate to another. The parties are entitled to the discretion and judgment of the sheriff himself. The law evidently contemplates that the mind of the sheriff shall act. He must do the thinking, and it cannot be done by deputy. The further provision before referred to for the appointment by the Court "of some judicious and disinterested person" to act when the sheriff is disqualified, adds strength to this view. In other cases the coroner is to act where the sheriff is disqualified to perform the duties pertaining to his office.

The only case cited by counsel (and I have not been able to find any other) where the question at issue here directly arose, is the case of Hulse vs. The State, 35 Ohio State, 421. In that case it was held that a deputy of the officer designated by statute to select the names of persons for a struck jury could not act in that behalf, but that the duty must be performed by the officer in person. The Ohio statute provided that a duty enjoined by statute upon a ministerial officer, or permitted to be done by him, might be performed by his lawful deputy. And the law in relation to struck juries, while it cast the duties upon officers other than the sheriff, was not essentially different from ours so far as the principle here invoked is concerned; except, that the provision for the appointment of a person by the Court embraced the contingency of absence or sickness of the officer named in the law.

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It was suggested by counsel, at the argument, that this question had been raised in another case at a previous term, and that the judge who heard this motion had then held that the law did not require the action of the sheriff in person. But counsel was unable to point out the case, and I cannot recall any such ruling. If such ruling was made, the question could not have been fully argued or considered. I feel quite clear at this time that the objection should be sustained. It is not to be understood, however, from this, that other functions relating to struck juries devolved upon the sheriff by the law, may not be performed by deputy.

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**DECISION OF SUPREME COURT.**

**"State ex rel. H. W. Childs, attorney general; Richard L. Gorman et al., relators, vs. Joseph Copeland, respondent.**

"Held, a local option law granting charter powers to all the cities of a certain class, to take effect in each city only upon the adoption of the same by such city, contravenes sections 33 and 34 of article 4 of the constitution, prohibiting special legislation as to cities and requiring all laws as to the same to be uniform in their operation throughout the state.

"Held, further, a special law relating to cities cannot be partially re-

pealed by a special law, and the same result cannot be accomplished by a local option law which has merely the same effect.

"Held, accordingly, that chapter 228, Laws of 1895, is unconstitutional.

"The distinction noted between such a local option law, granting such charter powers, and a local option law granting power to adopt a mere by-law or ordinance, the provisions of which are prescribed by the legislature.

"Writ of ouster granted."

Original writ of quo warranto.

Eller & How, attorneys for relators.
Walter B. Chapin, attorney for respondent.

CANTY, J.:

Chapter 223. Laws of 1895, is an act general in form, entitled "An act to provide for departments of public works and the making of public improvements in cities of over one hundred thousand inhabitants." It provides that such department shall consist of three branches (1) an engineering department (2) a commissioner of public works and (3) a board of park commissioners.

It provides that the head of the engineering department, or city engineer, shall be appointed by the mayor on the second Tuesday in June each even numbered year. shall hold his office for two years and shall appoint his assistants and the other employes under him. (Sec. 2.) It provides also that the commissioner of public works shall be appointed by the mayor on the same Tuesday and shall hold his office for two years. (Sec. 3.) This commissioner is to have charge of all improvements which the city council may order. Under the provision of the statute he is a standing arbitrator or referee to award all damages in condemnation proceedings instituted by him for the city and to assess a special tax on property specially benefitted to pay such damages. The act provides for the condemnation of property for many different city uses and provides the mode of procedure. It also provides for the collection of all taxes assessed for benefits which may become delinquent, by proceedings in the district court. (Sec. 4, 155.)

It is also provided that the

BOARD OF PARK COMMISSIONERS

shall consist of four members, to be appointed by the mayor, and whose term of office shall be four years, one to be appointed each year.

This board is to have charge of the parks and parkways of the city and the improvements thereon. (Sections 115-145.) Section 146 provides: "This act shall be enforced in any city whenever the common council of such city embraced within its provisions shall adopt the same by a majority vote of all members, * * * and all acts and parts of acts in any charter or special law relating to said city shall be thereby as to said city repealed in so far as the same relate to the subject matter of this act; * * * all general acts and parts of acts relating to the subject matter of this act so far as they apply to any city affected by this act are hereby repealed."

The only two cities in this state having 100,000 inhabitants have been operating under charters consisting of various special laws enacted before the amendments to the constitution prohibiting special legislation were adopted.

The city of St. Paul has for many years had a board of public works provided for by some of these special laws, which board consisted of five members, whose duties were somewhat similar to those imposed upon the commissioner of public works by said chapter 228, Laws of 1895.

On July 27, 1895, the common council of St. Paul adopted this act in the manner provided by section 146 thereof. The mayor appointed respondent commissioner of public works under the act. But four of the members of the old board of public works (being all relators herein, except the attorney general) refused to surrender their office. A writ of quo warranto was issued herein out of this court, to determine by what warrant the respondent claims the office of commissioner aforesaid.

It is claimed by relators that said chapter 228 is

A SPECIAL LAW

and contravenes the constitutional amendment of 1891 (Sections 33 and 34, article 4), and is unconstitutional for the reason that it applies only to such cities as adopt it and may be adopted by some cities of the class and not by others, therefore, may not be of uniform operation throughout the state as required by said amendment.

In order that the decision in this case may not be misleading it is necessary to examine somewhat carefully the question of the constitutionality of local option laws.

It is generally held that a law cannot be passed to take effect if the voters of the whole state so decide and that such a law cannot be upheld on the theory that it is a law passed to take effect upon condition; the passing of such a law is merely an attempt to delegate legislative power; Cooley Congressional Law, marginal, page 120-124. See also State vs. Young, 29 Minn. page 552.

But except where it is held to be prohibited by constitutional provisions prohibiting special legislation it is generally held that where municipalities have a special or peculiar interest in the law it may be passed to take effect in such a municipality when accepted by some authorative body representing the municipality.

Cooley, Con. Law, marginal page 118-120.

Said constitutional amendment of 1891 provides:

"Sec. 32. * * * The legislature shall pass no local or special law regulating the affairs of or incorporating, erecting or changing the lines of any county, city, * * * provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws or any of the subjects enumerated. The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.

"Sec. 34—The legislature shall provide general laws for the transaction of any business that may be prohibited by section 1 of this amendment, and all such laws shall be uniform in their operation throughout the state."

Under these constitutional provisions, is a local option law which gives to each of a class of cities the right to accept or reject certain charter powers constitutional? Is such general local option law one having a uniform operation throughout the state? How can a law which goes into effect in one city and does not go into effect in another

HAVE A UNIFORM OPERATION

throughout the state?

It seems to us that the legislature cannot bring about diverse charter powers in different cities by enacting any such local option law which may result in giving different cities different charter powers, unless the same result can be accomplished by a direct constitutional law. The mere possibility that all cities of the class may adopt the law will not save it. It must appear at the time the law is passed that it will have a uniform operation throughout the state; that it will take effect in all cities of the class, and that the class is a proper one. The uniform operation of the law cannot be left to any future contingency.

Let us now consider the nature of local option legislation with reference to this constitutional amendment.

There is a vast difference between delagating to some local body the power to adopt the charter and the power to adopt by-laws or ordinances. Suppose for instance that a law, general in form, was passed as the charter of the city of a certain class; that this law created some local body in each city, and gave it generally a large number of designated powers, (such as a charter), and authorized this local body to exercise these powers as it saw fit, and to define their powers and manner of election or appointment, but provided nothing more in detail. Such a charter, even for the class of larger cities, might be written on four or five pages. But would such a nebulous, skeleton charter be constitutional? Would it not be likely to result in a greater diversity of local laws, be less uniform in its operation, and far less a limitation on the local authorities than a law, or three or four laws, general in form, which provided three or four different kind of charters and left it to each local body to adopt which it saw fit? Yet it is universally conceded that the latter method of providing charters or charter powers is a

MOST PALPABLE EVASION

of the constitutional provisions prohibiting special legislation. Then if the latter method of providing city charters is unconstitutional, surely the former method must be.

Certainly the legislature delegates less to the local body when all the provisions of the charter or local law are prescribed, and the local body has only the power to accept or reject it, than when the whole subject is delegated generally to the local body. Then it is clear that, while the general power to adopt ordinances or by-laws may be delegated to such a local body, no general power to adopt a charter or charter provisions can be so delegated. It also follows that if the legislature can by general law delegate to the local body the general power to adopt by-laws or ordinances on a particular subject, it may by general law limit that power by prescribing the provisions which the by-law shall contain, and leaving to the local body merely the power to accept or reject the by-law. Then whether or not it is constitutional to delegate by general local option law the power to adopt or reject a prescribed charter or charter provision, it is clearly constitutional to delegate in this manner the power to adopt or reject a prescribed by-law or ordinance.

It is a well established principle that the constitution will be interpreted with reference to the laws and customs prevailing at the time of its adoption and the distinction between what is a delegation of power to adopt a charter or charter provisions and what is a delegation of power to adopt a by-law or ordinances must be determined largely by ascertaining what had usually been the custom in this state up to and at the time this constitutional amendment was adopted. Undoubtedly the line of this distinction is somewhat ill defined. But

IF THERE IS A DOUBT

as to the constitutionality of a law, that doubt must be resolved in favor of its constitutionality. Therefore, if by reference to the practice heretofore prevailing it is doubtful whether the delegation of power is one to adopt charter provisions or one to adopt by-laws or ordinances, that doubt must be resolved in favor of holding the law delegating such power constitutional.

There is another distinction to be considered, and that is the distinc-

tion between what the legislature can practically do and what it cannot. The main reason for the existence of ordinances and by-laws has always been that they regulated local subjects and matters of detail which the legislature could not directly or properly regulate by the passage of permanent laws, either general or special. This old principle must be applied to new instances which will continually arise under the constitutional amendments prohibiting special legislation. The regulation of such matters may always be delegated in general terms to local bodies, and it necessarily follows that more limited powers may be thus delegated by the passage of local option laws for the regulation of these matters. These are distinctions which have sometimes been overlooked in the decisions of those states having similar constitutional provisions. Let us notice some of these provisions and the decisions under them

The constitution of New Jersey provides that "the legislature shall not pass private, local or special laws regulating the internal affairs of towns (held to include cities) and counties." It is held by the courts of that state that those restrictions were not intended to secure uniformity in the operation of laws and that local option laws, otherwise general in form, giving to municipalities the right to accept or reject the provisions of the law, are constitutional Paul vs. Gloucester Co., 50 N. J. L. 585. Warner vs. Hoagland, 51 Id., 62, 72. In re Cleveland, 52 Id., 188.

The constitution of Pennsylvania provides that "the general assembly shall not pass any local or special law * * * regulating the affairs of counties, cities, townships." Under this provision it is held unconstitutional to delegate to municipalities the right to accept or reject such a local option law. Scranton School District appeal, 113 Pa. St., 176; Frost vs. Cherry, 122 Id., 417; Com. vs. Densworth, 145 Id., 172.

Neither the constitution of Pennsylvania or New Jersey expressly requires that the law shall have a uniform operation throughout the state, but the Pennsylvania court regards the prohibition of special legislation as equivalent to a

REQUIREMENT OF UNIFORMITY,

while the New Jersey court does not.

The constitution of Florida provides: "The legislature shall not pass special or local laws in any of the following cases * * * regulating county, township and municipal business; regulating the election of county, township and municipal officers.

"In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."

"The legislature shall establish a uniform system of county, township and municipal government."

Under these provisions the supreme court of that state has held repeatedly that a general local option law for the organization of cities is not a law of uniform operation throughout the state, and therefore unconstitutional. McConihe vs. State, 17 Fla., 258; State vs. Stark, 18 Fla., 255; ex parte Wells, 21 Fla., 280.

The constitution of Iowa and Indiana each prohibit special legislation as to certain matters and provide that all laws relating to these matters "shall be general and of uniform operation throughout the state."

In Maize vs. State, 5 Ind., 342, it was held that by reason of such constitutional provisions a local option law which by its terms went into effect and prohibited the sale of intoxicating liquor in such townships as adopted it is unconstitutional. This decision was approved in Lafayette, etc., R. Co. vs. Geiger, 34 Ind., 226-7.

The supreme court of Iowa held likewise under their constitution prohibitions, in State vs. Geebrick, 5 Ia., 492.

In Dalby vs. Wolf, 14 Ia., 228, the court sustained a law authorizing the people of the several counties to decide by a majority vote to restrain hogs and sheep from running at large. The court distinguished the case from that in the 5 Ia., on the ground that "they (the voters) only determine whether a certain thing shall be done under the law, and not whether the law shall take effect," as was provided by the law held invalid in the 5 Ia. From what has been said, it will appear that there is but

LITTLE IN THE DISTINCTION.

The position of the Indiana and Iowa courts that a law which can only take effect in each municipality on being adopted by the same contravenes these constitutional provisions is, in our opinion, undoubtedly correct as applied to a proper matter. But we are of the opinion that the prohibition or licensing of the sale of intoxicating liquors is not such a matter. These constitutional provisions do not require the legislature to do what is impracticable, what they have never been able to do, to effectually regulate the liquor traffic without regard to locality or local sentiment. Experience has demonstrated that prohibition can only be enforced where there is a strong public sentiment behind it, and there is a great difference in the amount of this sentiment in different localities in the same state. Again, this sentiment changes from time to time in the same locality. Then the legislature has a right to say that the question of license or prohibition in each locality is not a matter for them to decide, or a matter to be settled by any statute fixing absolute-

ly or permanently the status in this respect of the whole state or of the different localities. In the case of Frost vs. Cherry, 122 Pa. St., 417, the court held a local option fence law, to take effect in each county when adopted by the voters of that county, unconstitutional as special legislation. It seems to us that the same reason of impracticability applies to a fence law as to a license or prohibition law. It is often utterly impracticable for the legislature to enact an expedient unconditional fence law. Whether the farms should be fenced and the stock allowed to run at large in any particular locality depends wholly on very complex local conditions, which determine what is for the best interests of the majority of the people of the locality, and is a question which each locality should usually be allowed to settle for itself.

The distinction is between what is properly legislation and what is properly or necessarily a local by-law. That is not a

DELEGATION OF LEGISLATIVE POWER

to grant to some designated body powers which the legislature cannot themselves practically or efficiently exercise is laid down in State vs. Ry. Co., 38 Minn., p. 298-301, and in Anderson vs. Manchester F. Ins. Co., 59 Minn., p. 194-5. This distinction between what the legislature can do and what they cannot exists in the nature of things, and has not been eradicated by the constitutional provisions prohibiting special legislation of uniform operation. It seems to us that several of the courts above mentioned have been misled by ignoring this and failing to consider that legislation containing a local option provision may in fact be merely a grant of power to each local body to adopt or reject a prescribed law, and, that by prescribing the contents of the by-law, the legislature have really granted less power to each local body than if they granted the power to pass any by-law the local body saw fit concerning the particular subject matter.

Let us now proceed to apply these principles to the case at bar. The most of the powers provided for by said chapter 228, Laws of 1895, are distinctively charter powers; that is, they pertain to matters which are almost invariably regulated by city charters and not by the by-laws passed under such charters. Then the legislature cannot do indirectly what they cannot do directly, and this act is not constitutional unless the diverse results which may be brought about by the adoption of the act by one city and the rejection of it by another can be brought about by direct, unconditional legislation. There are two cities in the state having more than 100,000 inhabitants. Can the legislature by a direct act, provide that said chapter 228 shall apply to the one city and not to the other? That part of section 146 above quoted provides that when the act is adopted by any city "all acts and parts of acts in any charter or special law relating to said city shall be thereby repealed as to said city, so far as the same relate to the subject matter of this act." Will not the adoption of this act by one city and not by the other have the effect of a partial repeal of a special law? Clearly such a special law, partially repealing such a special law, is unconstitutional.

It will be readily seen by any one familiar with the charter laws of the two cities in question that the adoption of chapter 228 by either city will, if the law is valid,

REPEAL A PART OF EACH

of several of the special acts which make up the charter of that city, leaving the other part of each special law to stand, and leaving all of the special laws of the other city on the same subject wholly unaffected. The legislature may, by a general, unconditional law, expressly repeal all special laws so far as inconsistent with it, though this may have the effect of leaving the other part of one or more special laws in force and unrepealed. State vs. Sullivan, 6 N. W. R., 813.

A general law is also constitutional which does not by implication otherwise repeal the special laws in conflict with it. In re Opening Linwood Place, 67 N. W. R., 77. The reason of this is that, although the constitutional amendment requires the general law to be uniform in its operations, the amendment does not, as this court construes it, require this uniformity to be brought about immediately. Every step taken must be in the direction of a general law of uniform operation, but the legislature need not at once or at any one time take all the steps necessary to bring about this result.

Again, the amendment provides that "the legislature may repeal any existing special law, but shall not amend, extend or modify the same."

This allows a special law to be totally repealed by a special law, and, as held in the Sullivan case, it allows the partial repeal or modification by a general law of all special laws so far as inconsistent with it. Such a general law is not special legislation at all. But as before stated, this constitutional provision does not permit a special law to be partly repealed or modified by a special law.

Then the legislature cannot, by a direct, unconditional special law (either included in a general law or enacted alone), repeal the parts of the special laws pertaining to St. Paul attempted to be repealed by the enactment of chapter 228 and the adoption of the

same by the council of that city. As before stated, if the legislature cannot do this directly by unconditional legislation, they cannot do this directly by legislation containing such a local option provision.

Then, it is our conclusion that chapter 228 aforesaid is unconstitutional and void, and therefore the claim of respondent that he holds an official position under it cannot be sustained.

Let a writ of ouster issue.

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**Walter R. T. Jones and James A. Whitlock, co-partners as Jones & Whitlock vs. The Erie and Western Transportation Company.**

**District Court, Hennepin County, No. 71,671.)**

## Consolidation of Action--Removal to U. S. Court.

Edward C. Gale, Esq., for plaintiffs.
Messrs. Palmer & Dickinson, for defendant.

ORDER.

The above entitled action came before the Court at a special term thereof, held on the 21st day of November, 1896, on a motion of the defendant for an order of this Court consolidating the two actions now pending in this court entitled as above. The summons and complaint, in each of which said actions were personally served on the Erie and Western Transportation Company, the defendant in said actions, on the 2nd day of November, 1896, by handing to, and leaving with C. A. Clawson, the Minneapolis agent of the said defendant, true and correct copies thereof. The said motion was made upon the affidavit of C. A. Clawson and certain Exhibits marked "A," "B," and "C" attached to the notice of motion, and the summons and complaint in each of the said entitled actions.

Now, after hearing the arguments of counsel, and duly considering the same, together with the affidavits and exhibits and pleadings hereinbefore mentioned, and being fully advised in the premises, it is ordered, that the said motion be, and the same hereby, is granted.

November 23rd, 1896.

Memorandum.

ELLIOTT, J. It is admitted by both sides that these actions might properly have been joined in one complaint; and that they are proper actions to be considered by an order of the court. It is also frankly admitted by the plaintiff, that he brought the actions in the form he did, in order that the defendant might not be able to avail himself of the right of removing the same to the Federal court. The defendant as frankly states that his purpose in seeking a consolidation of the actions, is to enable him to remove them to the Federal court. It seems to me that this court should recognize the general principle of consolidating actions, in order to avoid a multiplicity of suits, disregarding the fact, that the defendant may subsequently avail itself of the right of removal. That is a matter with which this court has nothing to do, and should not be taken into consideration. It is a proper case for consolidation, and if the defendant has the right of removal thereafter, it is its privilege to avail itself of that right.

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## NOTES OF RECENT DECISIONS.

Corporations — Issue of Stock—Sale below Par — Insolvency—Preference to Directors.—In Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 75 Fed. Rep. 554, the United States Circuit Court of Appeals for the Sixth Circuit, decided some interesting questions of corporation law, the holding being that when a corporation, not for the purpose of restoring its capital, impaired by losses in business, but for the purpose of providing new capital to carry on or extend its business, issues and sells stock at less than its par value, the purchasers of such stock take the same subject to the contingency that, in the event of the insolvency of the corporation, they would be liable to creditors, who had become such in ignorance of the terms of the purchase, for the difference between the price actually paid for the stock and its par value. The leading case of Handley v. Stutz, 139 U. S. 417, was distinguished. It was also held that in the absence of statutory or charter provisions, however, a corporation may agree with a subscriber to its stock to receive less than the par value therefor; and a creditor of the corporation, who becomes such with knowledge of such an agreement between the corporation and the subscriber, cannot require the subscriber, upon the insolvency of the corporation, to pay his stock in full; that while the mere insolvency of a corporation does not, either under general principles of law or the law of Michigan, render invalid a preference given, while insolvent, to its directors, who are also creditors of the corporation, yet, to sustain such a preference, the utmost good faith must appear, not only in respect to the bona fides of the debt, paid, but in respect to all the steps taken to secure the preference. Accordingly, held, that where three directors, who constituted a majority of the board, and whose votes were necessary to the action taken, transferred to themselves, in payment of an antecedent debt, all the available assets of the corporation, though they had previously assured a creditor that his claim should be paid before that of the directors, the preference so obtained by the directors was invalid, and the assets so transferred to the directors should be ratably distributed among all the creditors of the corporation.

...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.**

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We publish in this number of The Journal the case of Pierson vs. Tribune Company et al., decided in the Superior Court of Cook County, Illinois, and recently reported in the National Corporation Reporter. The case is particularly interesting because there are very few decisions upon the question—nearly always the judge against whom an affidavit of prejudice is filed grants the motion for change of venue without so much as looking at the affidavit. Judges are human and naturally feel the sting of such an insult. It must be very humiliating to a judge to have some person of whom he has perhaps never heard, file an affidavit that on account of bias or prejudice on the part of such judge he believes he cannot have a fair trial. The law passed at the last session of our legislature has been invoked in a number of cases, and in many of them very unjustly. The law may be properly applied sometimes, but it is more often abused. There have been cases where it was used for the purpose of gaining a delay in the trial of the case or a continuance. And in many cases, were it not for the seriousness of the question, the filing of such an affidavit would appear extremely ridiculous and absurd. For instance in the case now pending in the District Court of Ramsey Coun-

ty in the suit of certain citizens of Kandiyohi County to have an injunction issued restraining the State Capitol Commissioners from proceeding with the construction of the new capitol, at the opening of the December term of court, a motion was made to have the case tried before some judge outside of Ramsey County. The motion was based upon affidavit of prejudice filed against the whole bench of the 2nd Judicial District. And the moving parties even suggested the name of the judge to be called in to try the case.

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The decision of Judge Otis in the case of Wallace vs. Carpenter Electric Heating Manufacturing Company et al., reported in this number of The Journal is an extremely important one and decides a question that we believe has never been raised in our Supreme Court. In the very recent case of Hastings Malting Co. (Fay Armstrong Cork Co., et al., intervenors) vs. Iron Range Brewing Company et al., reported in 67 N. W. Rep. 652, the Supreme Court held the stockholders liable for the unpaid balance on their stock under circumstances very similar to those in the Carpenter Electric Co. case. In that case though the attention of the Court was evidently not called to Sec. 3415, Gen. Stat. 1894. They based their decision upon the broad principle that where the stock of a corporation is issued as fully paid up, without, in fact, having been paid to its full par value, equity will hold the shareholders liable for the amount not actually paid, in favor of creditors who can be presumed to have given credit to the corporation in reliance upon its apparent paid up capital. They hold that where, to the full knowledge of constructing parties, they turn into a corporation property at a material over-valuation in payment for its full paid stock the transaction is a fraud as to subsequent creditors of a corporation, without notice, and if it becomes insolvent, the stockholders so paying for their stock will be charged, in equity, to the extent necessary to pay such creditors, with the difference between the real value of the property and the par value of their stock.

The Supreme Court in that decision reviews the subject very fully and cites a number of its former decisions holding to the same effect.

In the last number of The Journal we published a note of a recent decision of the United States Circuit Court of Appeals (in Rickerson Roller Mill Co. vs. Farrell Foundry & Machine Co., 75 Fed. Rep. 554) in which the same doctrine was laid down as in the Malting Company case.

Judge Otis finds that the value of the patents, etc., turned into the Carpenter Elec. Company was purely speculative, and not worth the par value of the stock received for them and were it not for Sec. 3415, Gen. Stat. 1894, it seems to us that he would undoubtedly have held the transaction fraudulent as to subsequent creditors without notice, but he holds that said section gives to the corporations therein enumerated the privilege of issuing and disposing of, for less than par value, any number of shares of full-paid stock that their directors may deem advisable. As the section in question mentions, not only manufacturing corporations and railroad and navigation companies, but also corporations for buying, holding, improving, selling and dealing in lands, tenements, hereditaments, real, mixed and personal estate and property, the effect of the decision will be very far reaching.

Another very pretty question was decided by Judge Otis in the same case. It was found that while the American Electric Heating Corporation bought the Carpenter stock with full knowledge of how it came into the hands of the original holders, still the parties from whom it directly purchased did not know of the original transaction. And the Court applied the rule of law that governs negotiable paper, to the effect that when a negotiable instrument has once reached the hands of a bona fide holder, without notice, any one purchasing from such bona fide holder takes all the title that he had.

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By a majority of two the Alabama senate has passed a bill permitting women to practice law in that state.

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Judge Jenkins has ratified the recent sale for $8,000,000 of the Chicago and Northern Pacific Railroad.

### REVISION OF THE STATUTES.

A bill for the revision of the statutes was before the last legislature but failed to pass for several reasons, the chief one probably being the fact that a constitutional amendment providing for a revision of the constitution was then pending and to be voted on at the recent general election. In view of the efforts made to get that bill through, and the fact that the constitutional amendment failed to carry. Another bill for the same purpose will undoubtedly be presented to this session of that legislature. Believing the question to be one of great importance not only to the lawyer and litigant but to the tax payer as well, the Journal has solicited the opinions of several members of the Bench and Bar of this state as to the advisibility of a revision of the statutes at this time, and if advisable, the best methods of accomplishing the same. We have received answers from several of the gentlemen and herewith publish them. We regret that more did not respond to our request as those heard from radically differ on the subject.

The rightful solution of this problem lies largerly with the members of the profession as they are familiar with the statutes and should know wherein they are defective and how they should be remedied.

In order to bring out a full discussion of the matter The Journal offers its columns for that purpose.

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Minneapolis, Minn., Dec. 15th, 1896.
Minnesota Law Journal,
St. Paul, Minn.

Gentlemen: In answer to yours of the 10th inst., will say that I am opposed to any legislation the coming session providing for the revision of our statutes. The Compiled Statutes of 1894, now generally in use by the profession, are good enough, and will answer until we revise our constitution, which it is hoped will take place as soon as that prosperity arrives that is promised with the McKinley administration. I voted against the calling of a constitutional convention at the last election solely on the ground of the expense attending the same. Many of our people are unable to pay their taxes now, and I am opposed to increasing the burden of taxation until times are better. I believe that the legislature should exercise the strictest economy, and not appropriate one dollar more than is absolutely necessary to carry on the state government in the most economical manner.

Yours respectfully,
SEAGRAVE SMITH.

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December 14th, 1896.
Minnesota Law Journal,
St. Paul, Minnesota.

Gentlemen: Yours of the 10th inst., asking my opinion as to the advisability of a revision of the statutes of Minnesota, is received.

I do not believe that any general revision is necessary or desirable at the present time, because the General Statutes of 1894 furnish all I think trat is necessary for present working purposes; but I think that chapters 34 and 76 on Corporations, and chapter 10 on Township Organizations, Towns, Cities and Villages, might be revised and re-arranged much to the advantage of the bar and courts. Both the subjects of corporations in general and municipal corporations are in a state of great complication and uncertainty, and create a great amount of litigation.

My plan would be, the appointment by the legislature of two committees, either members of the legislature or otherwise, but men thoroughly expert with reference to the subjects committed to them, and let them each work on one of the subjects which I suggest and report it to the next legislature. Otherwise, I think the statutes are in a fairly good condition.

Very respectfully, your obedient servant.

CHAS. E. FLANDRAU.

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Rochester, Minn., Dec. 15th, 1896.
Minnesota Law Journal,
St. Paul, Minn.

Gentlemen: Your letter of the 10th inst., came while our term of court was sitting, hence the delay of this answer.

The statutes should be revised by competent men, familiar with the history of the legislation in this state, able to write precise and accurate sentences. It is now thirty years since the former revision. The revisers should have liberal pay. This will be difficult to obtain from the legislature. If obtained it will attract a swarm of incompetent applicants.

I drafted and urged the enactment of Laws 1891, ch. 152, providing for a revision, but the justices were unable to induce competent men to accept the appointment, as the pay was left to the generosity of succeeding legislatures.

A similar act should be passed in 1897, with the addition of another section, giving the revisers each $5,000 a year salary. As the writer would not then, and will not now accept a place on such commission he can properly say, that the justices might stand off the importunity of the incompetent, by announcing that any one who

should do more than send in his name, should be thereby rendered ineligible.

Yours truly,
CHAS. C. WILLSON.

Red Wing, Minn. Dec. 26,1896.
Minnesota Law Journal,
St. Paul, Minn.

In reply to your communication of 10th inst., I am decidedly of the opinion that a revision of the statute law of this state is advisable and that such revision should be made by a commission appointed, either by the Governor or the Supreme Court—should prefer the latter.

Yours respectfully,
W. C. Williston.

## BOOK REVIEWS.

A treatise on the law of Circumstantial Evidence. By Arthur P. Will, of the Chicago Bar. T. and J. W. Johnson & Co., Philadelphia. 1896. $5.00.

The growth and development of the law, with its many refined distinctions, has produced innumerable text books. It would, indeed, seem that every subject and branch of the law had already been fully covered, but it appears it is far from being the case, as new books are coming out every day, some for use and some—to sell.

There have been many works written upon the general subject of evidence, but none, we believe, treating especially of circumstantial evidence. Mr. Wills' book treats entirely of the rules of circumstantial evidence, as applicable to criminal cases, a field not heretofore developed. The work of analyzing and clearly presenting this branch of the law of evidence, together with an ample citation of authorities, has been well done by the author.

The volume contains 570 pages, and is divided into six parts, as follows: Part I, Preliminary Considerations; II, Inculpatory Indications; III, Exculpatory Presumptions and Circumstantial Evidence; IV, Rules of Induction Specially to be observed in cases of Circumstantial Evidence; V, Proof of the Corpus Delicti; VI, The Force and Effect of Circumstantial Evidence.

The text is written in a clear and refined style, and shows the results of thorough scholarship and deep research.

Members of the profession engaged in the practice of criminal law will find this volume a useful addition to their libraries.

The Atlantic Monthly promises a lot of good things for the coming year. Among others will be a series of articles on:

"The Social Results of Liquor Laws," by President Charles W. Eliot, setting forth the results of the original investigations made by the Committee of Fifty,—the most remarkable sociological investigation ever undertaken in the United States. "The Social and Economic Results of Modern Suburban Transportation," by Professor Arthur T. Hadley, of Yale University, author of "Railroad Transportation and its Laws." "The Fallacy of the Present Unrest: Are the Poor becoming Poorer?" showing the extraordinary fallacy that lurks in the assumption of increasing poverty in the United States," and "The Necessary Changes of our Banking System."

## HE UNDERSTOOD

A Chinaman was once "hauled up" before a magistrate in Sydney, New South Wales, and charged with some offense. In reply to his worship's usual query as to whether he pleaded guilty or not, he would only answer:

"Me no sabee! Me no talkee Englishee!"

The magistrate, however, who was quite accustomed to this proceeding on the part of many celestials who came before him, turned to him and said:

"That answer won't do for me. You know English well enough, I'll be bound."

"Me no sabee—me no sabee!" were the only words to be drawn from obstinate Chinkey; and no Chinese interpreter being in court, the magistrate, taking the matter into his own hands, directed the case to be proceeded with as if the accused had pleaded "not guilty."

After hearing the evidence of the witnesses the accused was fined $10 and costs.

The clerk to the bench, who was a bit of a wag, called out to the accused:

"John, you are fined $25 and costs."

"No, no!" promptly replied the non-English speaking Chinese; "he say me fined only $10 and costs."

Death from asphyxiation by illuminating gas while the insured was asleep was held, in Fidelity & C. Co. v. Waterman (Ill.) 32 L. R. A. 654, to be not covered by a clause excluding injuries from poison "or anything accidentally or otherwise taken, administered, absorbed, or inhaled."

### NATURALIZATION LAWS.

The reckless abuse, the monstrous indifference to the rigid enforcement of the naturalization laws of this country, the violation of the exercise of a faithful discretion on the part of those to whom are delegated the powers of admitting to citizenship, through the channel of naturalization laws, those who make application for suffrage, is one of the crying evils of the period, one that calls loudly for a speedy reformation. From appearances, the illiterate foreigner who can neither read nor write, who knows nothing except that he exists, and is not sure of that, whose ignorance is the basis upon which the crown of priceless citizenship is placed, is given the right, power, representation and equal voice in shaping the destiny of a country that he knows nothing of and cares less for. Thousands of these people have and are now applying for citizenship. An Italian recently applied to a Cleveland judge for naturalization papers. He was asked:

"Who makes the laws?"

"Myron T. Herrick," came the reply."

"Who is mayor of this city?"

"Columbus."

"Tell me the name of the President, if you can?"

"Washington."

Still another Italian applied for citizenship papers, this time to a Chicago judge:

"What is your name?" asked the judge.

"McKinley," replied the Italian.

"Can you read or write the English language?"

"McKinley," answered the Italian.

"If you can neither read nor write, how do you expect to vote?" persisted the court.

"McKinley," replied the Italian.

Perhaps the last reply was correct, at least so far as answering the question is concerned, but it was evidently made from force of habit, instinct or training, fresh from the school of some ward politician rather than any knowledge of the English language, or intelligent understanding of the question.

The reform day of the naturalization laws is coming, and the continued permitted abuse of the law will be its impetus.

It is possible that the enormous vote polled in some of our larger cities at the recent election may be accounted for by the abuses of the naturalization laws of which these cases afford striking illustrations. That a reform in these laws is sadly needed, there can be no serious question; and it is to the judiciary that we must look for it. We venture the assertion that had the applications referred to been made to any justice of the Supreme Court of this District, they would have been promptly denied.

The above clipping from the American Lawyer is worth reading and pondering over.

It is certainly high time a halt was called in the mad methods of confessing citizenship heretofore practiced by some of the judges of our courts. This matter is one requiring full and careful investigation by the judicial officer to whom this great responsibility is entrusted so that the applicant's qualifications for citizenship may be rightfully determined. It is a matter fraught with graver consequences to the well-being of our country than three-fourths of the matters that occupy the time of our courts, juries, counsel and clouds of witnesses, in long and costly trials, and yet how extremely tax is the system of enforcing our naturalization laws. Who ever heard of a careful investigation upon the merits of an applicant's qualifications for citizenship? In a majority of cases the applicant is not the real party in interest; he is captured by some enterprising ward politician, carried before the judge, and made a citizen without much knowing or caring what is happening to him.

We are always glad to welcome to this country intelligent and honest foreigners, such as will make good citizens. But we owe it to our country, ourselves and our posterity to insist that they become familiar with our methods of government and the genius of our institutions before they have a post in the affairs of government. Unreasonable things should not be required of an applicant for citizenship

as was recently the case in Kansas where an eccentric judge of that eccentric state refused to grant citizenship papers to a person who had resided and been engaged in business there for many years, because he could not give the names of all the United State Senators.

Minnesota has taken an advanced position on this question by an amendment to its constitution requiring all electors to be citizens of the United States, which makes necessary a residence of five years in the Unittd States and three months in the state or territory where application is made, instead of enjoying the privilege of voting after one year's residence in the United States, without being liable to the burdens of citizenship, as has heretofore been the case. While to some this may seem a hardship, yet they cannot much complain, for if they desire the right to vote and a voice in the management and control of our governmental affairs they should be willing to become obligated by the duties of full citizenship to defend our country in its hour of peril.

### ONE ON CONKLING.

Chief Justice Waite once told me this story about Evarts and Conkling:

Roscoe Conkling came into Mr. Evars' office one day, when he was a young lawyer, in quite a nervous state.

"You seem to be very much excited, Mr. Conkling," said Mr. Evarts.

"Yes, I'm provoked—I am provoked," said Mr. Conkling. "I never had a client dissatisfied about my fee before."

"Well, what's the matter?" asked Mr. Evarts.

"Why, I defended Gibbons for arson, you know. He was convicted, but I did hard work for him. I took him to the superior court and he was convicted, then on to the supreme court, and the supreme court confirmed the judgment and gave him ten years in the penitentiary. I charged him $3,000, and now Gibbons is grumbling about it—says it's too much. Now, Mr. Evarts, I ask you if I really charged too much?"

"Well," said Mr. Evarts, very deliberately, "of course, you did a good deal of work, and $3,000 is not a very big fee; but, to be frank with you, Mr. Conkling, my deliberate opinion—is—that—he—might—have — been — convicted—for less money."—Eli Perkins.

### FALSE ACKNOWLEDGMENT BY NOTARY.

The Supreme Court of California, in Heidt v. Minor, 45 Pac. R. 700, has held that where a notary certifies that mortgagor duly acknowledged the execution of a mortgage which in fact is a forgery, the measure of damages, in an action against the notary or his sureties, brought by one who has parted with value on the faith of such certificate, is the amount which would be the value of the mortgage, if genuine. The value of a mortgage is the amount which can and will be collected thereon, and it matters not whether that amount is obtained by a sale of the mortgaged premises or by the enforcement of a deficiency judgment. If the mortgagor has no interest in the mortgaged premises, the property may bring nothing, or only a nominal amount on the sale; but in that case the plaintiff has an absolute right to a judgment for the deficiency against the maker of the note, and if he is solvent that deficiency will be collected. The value of the mortgage, therefore, depends not merely on the value of the mortgaged property, but, in case of the insufficiency of that property, upon the solvency of the mortgagor.

In the case in question the notary, who was also engaged in negotiating loans, represented to the plaintiff that a certain person desired to borrow money. On the faith of a mortgage, presumably executed by the borrower and acknowledged by the notary, the plaintiff gave the latter money to be delivered to the former. The mortgage proved to be a forgery. The notary converted the money to his own use and absconded. Plaintiff then brought suit on the bond against the sureties.

As it appeared that the plaintiff, had the mortgage been genuine, would have been able to collect the whole amount named therein, the court held he was entitled to recover that amount without regard to the value of the mortgagor's interest in the mortgaged property. Judgment was therefore rendered for full amount of principal and interest recited in the mortgage, as damages caused by the false certificate of acknowledgment.—The Washington Law Reporter.

### ANCIENT JAPANESE LAWS.

(Lafcadio Hearn in the December Atlantic.)

Private conduct was regulated by some remarkable obligations entirely outside of written codes. A peasant girl, before marriage, enjoyed far more liberty than was permitted to city girls. She might be known to have a lover; and unless her parents objected very strongly, no blame would be given to her; it was regarded as an honest union,—honest, at least, as to intention. But having once made a choice, the girl was held bound by that choice. If it were discovered that she met another admirer secretly, the people would strip her naked,—allowing her only a shuro leaf for apron,—and drive her in mockery through every street and alley of the village. Afterward the girl was sentenced to banishment for five years. But at the end of that period she was considered to have expiated her fault, and she could return home with certainty of being spared further reproaches.

The obligation of mutual help in time of calamity or danger was the most imperative of all communal obligations. In time of fire, especially, everybody was required to give immediate aid to the best of his or her ability. Even children were not exempted from this duty. In towns and cities, of course, things were differently ordered; but in any little country village the universal duty was very plain and simple, and its neglect would have been considered unpardonable.

This obligation of mutual help extended to religious matters. Every body was expected to invoke the help of the gods for the sick. For example, the entire village might be ordered to make a sendo-mairi on behalf of some one seriously ill. On such occasions the Kumi-cho (each Kumi-cho was responsible for the conduct of five or more families) would run from house to house, crying, "Such and such a one is very sick; kindly hasten all to make a sendo-mairi!" Thereupon, however occupied for the moment, every soul in the settlement was expected to hurry to the temple,—taking care not to trip or stumble on the way, as a single misstep during the performance of a sendo-mairi was believed to mean misfortune for the sick.

### TRIAL BY JURY.

J. E. R. Stephens of London has a most exhaustive study of "The Growth of Trial by Jury in England." The article appears in the current number of the Harvard Law Review, and from that journal the following data are taken:

"The national origin of trial by jury, its historical development, and the moral ideas on which it is founded, have all been discussed by a variety of writers with the acute penetration of philosophical research. The foundation of the institution of trial by jury was not laid in any act of the legislature, but it arose silently and gradually out of the usages of a state of society which has forever passed away.

"Reeves, in his 'History of English Law,' gives it as his opinion that when Rollo led his followers into Normandy they carried with them this mode of trial from the north. He says that it was used in Normandy in all cases of small importance, and that when the Normans had transplanted themselves into England they endeavored to substitute it in the place of the Saxon tribunals.

"Mr. Serjeant Stephen says: 'We owe the germ of this (as of so many of our institutions) to the Normans, and it was derived by them from the Scandinavian tribunals, where the judicial number of twelve was always held in great reverence.'

"With respect to criminal trials, we meet, in the ordinance of King Ethelred II. (978-1016), with a kind of jury of accusation, resembling our grand jury, and possibly its direct progenitor. In the gemote of every hundred the twelve senior thegns, with the reeve, were directed to go apart and bring accusation against all whom they believe to have committed any crime. But this jury did not decide the guilt or innocence of the accused; that had to be decided by compurgation of the ordeal. This primitive grand jury probably continued in use after the Norman conquest, until it was reconstituted by Henry II.

"On one occasion the conqueror ordered the justiciars to summon the shire moots which had taken part in a suit touching the rights of Ely; a number of the English who knew the state of the lands in question in the reign of Edward the Confessor were then to be chosen; these were to swear to the truth of their depositions, and action was to be taken accordingly.

"The Normans generally abolished trial by compurgators in criminal cases, and though the trial by ordeal long continued in force, it began to be looked upon as an impious absurdity. In the year 1215, the year of the granting of Magna Charta, the ordeal was abolished throughout western Europe.

"The jurors founded their verdict

on their personal knowledge of the facts in dispute, without hearing the evidence of witnesses in court. But there was an exception in the case of deeds in which persons were named as witnessing the grant of other matter testified by the deed. And thus an important change was made, whereby the jury, ceasing to be witnesses themselves, gave their verdict upon the evidence brought before them at the trials.

"The difficulty that was found of procuring a verdict of twelve caused for a time the verdict of the majority to be received. In the time of Edward IV., however, the necessity for a unanimous verdict of twelve was re-established.

"Juries were for a long time entitled to rely on their own knowledge in addition to the evidence. In the first year of Queen Anne the court of queen's bench decided that, if a jury gave a verdict of their own knowledge, they ought so to inform the court, that they might be sworn as witnesses. This and a subsequent case in the reign of George I, at length put an end to all remains of the ancient functions of juries as recognitors.

"The right of being tried by his equals, that is, his fellow citizens, taken indiscriminately from the mass, who feel neither malice nor favor, but simply decide according to what in their conscience they believe to be truth, gives every man a conviction that he will be dealt with impartially and inspires him with the wish to mete out to others the same measure of equity that is dealt to himself.

"With regard to trial by jury in civil cases, we cannot speak in such high commendation, for it has many and grave disadvantages which prove that it is wholly unsuitable for the settling of disputes in courts of law at the present day."

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### CHANGE OF VENUE LAW.

(Supreme Court, Cook County, Ill.)

## Objections—Petition by Corporation—Prejudice by Recital.

**Henry Pierson v. Tribune Co., et al.**

1. When an application is made for a change of venue, and no objection is made thereto, it is usually granted forthwith, but when there are objections, the court is bound to examine the petition and see if it contains all the requirements.

2. Since none but the party seeking the change is permitted to file affidavits, and since those affidavits must be taken as true, courts will, where there are objections made, before granting a change of venue, require a strict compliance with the provision of the statute.

3. A petition which avers that the petitioner fears it will not receive a fair trial, "because" the judge is prejudiced, is not sufficient. It should aver in direct and positive terms, and not by way of recital, that there is in fact prejudice.

4. A petition by a corporation that "it" fears it will not receive a fair and impartial trial, and which is sworn by the president to be true, is insufficient. The president cannot swear that the corporation fears; it should have alleged that the corporation and its officers feared.

5. An application for a change of venue must be made at the earliest possible moment.

6. A president of a corporation would be presumed to have authority to consent to an application for a change of venue, by joining therein with the co-defendants, but no such presumption can be indulged in favor of one who styles himself an "Auditor," he being an officer of whose powers and duties the court cannot know judicially.

STEIN, J.—This is a suit against three defendants, the Tribune Company, the Inter-Ocean Publishing Company and the Chicago Herald Company.

On the 19th of November the Tribune Company presented its petition, accompanied by what purported to be the consent of the other defendants, praying for a change of venue on account of alleged prejudice on the part of the Judge on whose calendar the suit is pending. For reasons hereinafter set forth, the prayer of the petition was denied.

Afterwards the Inter-Ocean Publishing Company presented its similar petition accompanied by what purported to be the consent of the other defendants. Both applications were strenuously resisted by the plaintiff. The one last made is now before the court for decision.

At the outset, it is proper to say that where an application of this nature is not opposed it has been the uniform practice of this court to grant it as a matter of course without any inquiry into the sufficiency of the petition. If both parties prefer that the trial take

place before another judge and he is willing to hear them, I know of no reason why their wish should not be respected. This course was followed in another suit against the Tribune Company on the same day that it applied for a change of venue in this case. Plaintiff's counsel not objecting,the order granting a change was entered forthwith. But when there is objection, it is the duty of the Court which it has no right to shirk—to pass upon the application and the grounds urged against it, and determine whether is complies with the statutory requirements.

As a mere private individual, the Court would have greatly preferred, notwithstanding the objection of plaintiff's counsel, to have granted the motion in this case and have it tried elsewhere. A natural feeling of delicacy makes it unpleasant for any man to preside over the trial of a case in which one of the parties charges him with unfitness and does not want him to try it.

It is the well established law of this state that in an application of this kind the party making it is the only one entitled to submit papers in its support. The only thing the other party can do is to endeavor to point out defects in them. It matters not how false are the grounds upon which a change of venue is asked; he is not allowed to show their falsity. Both he and the court, where the application is in form, are absolutely helpless. Although the court may know (as it does in the present instance) that it is wholly free from prejudice and although it believes that the affiants to the petition (who are honorable men and of the highest standing in the community) have in undertaking to allege the existence of prejudice been imposed upon by somebody for his own oblique purpose—yet the change of venue must be granted in the absence of valid objections to the petition and affidavit.

As early as 1845, in Crowell v. Maughs, 2 Gil. 419, our Supreme Court said:

"It is to be feared that this statute has been frequently perverted to the great detriment of suitors," and a few years later, in Moss v. Johnson, 22 Ill. 633, they used this language:

"We know too well,when such applications are made at the term, they are made for the most part for a sinister purpose,and it should be the endeavor of the courts to frustrate their accomplishment."

It is therefore a general rule that courts, before they will grant a change of venue, will require and enforce a strict compliance with the provisions of the statute in that behalf.

Under Section 1 of Ch. 146 of the Revised Statutes a change of venue may be had

"where either party shall fear that he will not receive a fair trial in the court in which the suit is pending, because * * * the judge is prejudiced against him."

The statute, it is important to notice, does not prescribe a form of petition; it only designates what conditions shall entitle parties to a change of venue. Section 3 requires the application to be

"by petition, setting forth the cause of the application, * * * which petition shall be verified by the affidavit of the applicant."

The petition at bar does not set forth in direct or positive terms "the cause of the application;" it contains no positive or direct allegation either of fact or belief, that the judge is prejudiced. Following the words of the statute, it simply says by way of recital that the petitioner fears it will not receive a fair trial because the judge is prejudiced. It does not positively allege that the Judge is prejudiced or believed to be prejudiced, and that therefore petitioner fears it will not receive a fair trial. Is this literal compliance with the statute an actual, substantial one? The case intended to be provided for by the Statute is one in which the judge is prejudiced (or possibly only believed to be so), and by reason thereof the party fears he will not receive a fair trial. In this respect the petition is defective. It fails to allege prejudice, whether as a fact or upon belief, in such a way that the party swearing to the petition could be prosecuted for perjury because he falsely swore that there was prejudice or that he believed there was. You cannot assign perjury upon a recital. The

allegation must be positive and direct. And the Statute, as we have seen, expressly requires the petition to be verified.

There are two early cases, McGoon v. Little, 2 Gil., 42, and Burroughs v. The People, 11 Ill., 121, in which petitions similar in the respect mentioned to the one before the Court were held sufficient. But in neither of these cases does it appear that the point here dwelt upon was made, and later cases, notably Kelly v. Downs, 29 Ill. 74. Walsh v. Ray, 38 Ill., 30, and Woodhall v. Kelly, 10 Brad., 455, show that the petitions in all of them contained an express and positive allegation of prejudice. This in Walsh v. Ray, supra ,it was averred

"that the judges of this Court are all prejudiced against your petitioner so that he fears and verily believes that he will not have a fair and impartial trial."

The same form of allegation is found in Woodhall v. Kelly, supra, and of this petition the Court says it "was in strict conformity with the statute."

While a corporation has the same right as a natural person to apply for a change of venue, it does not follow that the language, proper and apposite in the one case, is so in the other. Here the petitioner, a corporation, "fears it will not receive a fair trial," and its president swears that the petition is true. That is, he swears the corporation fears. This is impossible. A corporation cannot fear. It has no soul and no feelings. It exists only in the eye of the law. A physical existence it has not. The petition should have alleged that the corporation and its officers feared. Upon such an allegation perjury can be assigned. The same is true of the statement

"that the knowledge of said prejudice did not come to it, your petitioner, until 3:30 P. M. of November 24, 1896."

Non constat but that such knowledge had come to its officers long before. There is no allegation to the contrary. applications should be made at the earliest opportunity after the cause for them becomes known. Moss v. Johnson, 22 Ill., 633; Kelly v. Downs, 29 Ill. 74; R. R. Co. v. Maxfield, 72 Ill., 95; Hudson v. Hamson, 75 Ill., 198. The same person that swore to the present petition, that is to say, the president of the corporation, gave his consent to the former application at least as early as November 19th on which day the consent was filed, six days before the present motion was made. Although the corporation is sworn to have had no knowledge until November 24th, yet its president must thus be regarded as having had it from the time he gave his consent, which was at least five days earlier. How long before the consent was filed he signed the same does not appear. Upon the authority of the cases last cited, the present application comes too late.

The paper purporting to be the consent of the Herald Company to the first application was signed by its attorneys and F. H. Nonnsiler, "its Auditor." It will hardly be claimed that an attorney empowered to appear for a party, is thereby authorized to make a petition for a change of venue or consent to its being made. What the functions, powers and authority of an "Auditor" are, this Court, as a Court, cannot and does not know. While the president of a corporation might be presumed to have the requisite authority for executing a consent paper in its behalf; yet in the absence of all proof, the like presumption cannot be entertained in respect of a person signing as "Auditor." All corporations have presidents, but very few auditors. If these views are correct, the first application was not consented to by one of the defendants, and this constituted an additional reason for its denial.

I have taken the trouble of reducing these words to writing, not because the questions involved are important or difficult, but in order to afford an opportunity to counsel, if he again wants to continue the discussion in the newspapers and quote the utterances of the Court, to do so without making any mistakes. Other and aditional reasons might be assigned for overruling the present motion; but the foregoing are deemed sufficient.

The prayer of the petition of the Inter-Ocean Publishing Company for a change of venue is denied.

C. C. Arnold, for plaintiffs; A. S. Trude, for defendants.

## THE TEACHING OF ENGLISH LAW AT UNIVERSITIES.

(Address by J. B. Thayer before the American Bar Association.)

We, in America, have carried legal education much farther than it has gone in England. There the systematic teaching of law in schools is but faintly developed. Here it is elaborate, widely favoured, rapidly extending. Why is this? Not because we originated this method. We transplanted an English root, and nurtured and developed it, while at home it was suffered to languish and die down. It was the great experiment in the university teaching of our law at Oxford, in the third quarter of the eighteenth century, and the publication, a little before the American Revolution, of the results of that experiment, which furnished the stimulus and the exemplar for our own early attempts at systematic legal education. The opportunities and the material here for any thorough work of this sort in the offices of lawyers were slight. 'I never dreamed,' said Chancellor Kent, in speaking of the state of things in New York, even so late as the period when he was appointed to the bench of the Supreme Court of the state in 1798, 'of volumes of reports and written opinions. Such things were not then thought of * * * There were no reports or State precedents. I first introduced a thorough examination of cases, and written opinions.' But wisdom, skill, experience, and an acquaintance with English books were not wanting in the legal profession here; and Blackstone's great achievement awakened the utmost interest and enthusiasm on both sides of the water—his success in the really Herculean task of reducing to orderly statement and to an approximately scientific form the disordered bulk of our common law. 'I retired to a country village,' Chancellor Kent tells us, in speaking of the breaking up of Yale College by the war, where he was a student in 1779, 'and, finding Blackstone's Commentaries, I read the four volumes. * * * The work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer.' As a student in the office of the Attorney-General of New York, in 1781, and later, he says that he read Blackstone 'again and again.' Blackstone's lectures were begun in 1753, when the author, then only thirty years old, a discouraged barrister of seven years' standing, had retired from Westminster, and settled down to academic work at Oxford. On the death of Viner he was made, in 1758, the first professor of English law at any English university; and he published his first volume of lectures in 1765. 'There is abundant evidence,' if we may rely upon the authority of Dr. Hammond, whose language I quote, 'of the immediate absorption of nearly twenty-five hundred copies of the commentaries in the thirteen colonies before the Declaration of Independence. * * * Upon all questions of private law, at least, this work stood for the law itself throughout the country, and * * * exercised an influence upon the jurisprudence of the new nation which no other work has since enjoyed.' This great result, it should be observed, was the work of a young enthusiast in legal education, a scholar and a university man, who had the genius to see that English law was worthy to be taught on a footing with other sciences, and as other systems of law had been taught in the universities of other countries.

Blackstone's example was immediately followed here, and was soon further developed in the form which he had urged upon the authorities at Oxford, but urged in vain—that a separate college or school of law. In 1779—the year after Blackstone had published the eighth and final edition of his lectures, and only a year before his death—a chair of law was founded in Virginia, at William and Mary College, by the efforts of Jefferson, then a visitor of the institution; and in the same year Isaac Royall, of Massachusetts, then a resident in London, made his will, giving property to Harvard College for establishing there that professorship of law which still bears his name. In 1790 Wilson gave law lectures at the University of Pennsylvania. The Litchfield Law School, established about 1784, was not a university school; yet if it be true, as is not improbable, that it was the natural outgrowth of an office overcrowded

with students, it may well be conjectured that Blackstone's undertaking chiefly shaped and sustained it. At any rate, his lectures appear to have been the chief references of the instructors at Litchfield. Hammond, in referring to a collection of verbatim notes of lectures at the Litchfield school in 1817, representing, as he concieves, 'the exact teaching' of the professors of that time, says 'that the references to Blackstone not only outnumber those of any other book, but may be said to outnumber all the rest together.'

In England little progress was made for a century. Blackstone's plan for a law college at Oxford was not carried out, and he resigned, disappointed, in 1766. The conservatism of a powerful profession, absorbed in the mere business of its calling, itself untrained in the learned or scientific study of law, and unconscious of the need of such training, did not yield to or much consider the suggestions of what had already been done at Oxford. The old method of office apprenticeship was not broken up. The profession was contented with Blackstone's Commentaries, as if these had done all that could be done, and had made the full and final restatement of the law. The student simply added to his ordinary work the reading of these volumes.

But the more enlightened members of our profession in England have keenly felt the backward state of things there. One of the greatest of them, Sir Richard Bethel, afterwards Lord Chancellor Westbury, on taking his seat as president of the Juridical Society forty years ago, lamented the neglect of legal science in England, and the strange indifference of the profession to the pursuit of it. Lawyers, he says, 'are members of a profession who, from the beginning to the end of their lives, ought to regard themselves as students of the most exalted branch of English knowledge, moral philosophy embodied and applied in the laws and institutions of a great people. There is no other class or order in the community,' he adds, 'on whom so much of human happiness depends, or whose pursuits and studies are so intimately connected with the progress and well-being of mankind.' In enumerating the causes of this failure to appreciate the dignity of their calling, he names as one of the chief of them 'the want of a systematic and well-arranged course of legal education.*** It belongs, he adds, 'to the universities of England and to the Inns of Court to fill the void; but for centuries the duty has remained unperformed. It still remains very imperfectly performed. But England is moving in the direction that Blackstone pointed, and in its own way will yet solve the problem. Admirable work is going forward there now; and how full a sympathy the leaders in it entertain for our own efforts is shown by the coming of Sir Frederick Pollock this summer to take part in the exercises at Harvard on the occasion of the celebration of Dean Langdell's twenty-fifth anniversary. He crossed the ocean for that mere purpose, and returned as soon as it was accomplished.

On this side of the water, while the training of our profession continued for a long time to be the old one of office apprenticeship and reading, the new conception—new as regards English law—of systematic study at the universities, has had continuous life, and has borne abundant fruit. If it has sometimes languished, and here and there been intermittent, it has always lived and thriven somewhere; and at last it has so commended itself that there is no longer much occasion to argue its merits. Few now come openly forward to deny or doubt them.

This, then, is our American distinction, to have accepted and carried for a century into practice the doctrine that English law should be taught systematically at schools and at the universities. President Rogers, the chairman of this section last year, told us that there were then seventy-two schools of law in this country, of which sixty-five were associated with universities. I am informed upon good authority that the number is now not under seventy-five or seventy-six, and that the proportion of university schools is about the same as that just indicated.

It behooves us now to look squarely at the meaning of these facts, and at the responsibilities that they lay upon us. The most accomplished teachers

of law in England have seen with admiration and with something like envy the vantage-ground that has been reached here. We must not be wanting to the position in which we find ourselves. Especially we must not be content with a mere lip service, with merely tagging our law schools with the name of a university, while they lack entirely the university spirit and character. What, then, does our undertaking involve, and that conception of the study of our English system of law, which, in Blackstone's phrase, 'extends the pomoeria of university learning and adopts this new tribe of citizens within these philosophical walls?' It means this, that our law must be studied and taught as other great sciences are studied and taught at the universities, as deeply, by like methods, and with as thorough a concentration and lifelong devotion of all of the powers of a learned and studious faculty. If our law be not a science worthy and requiring to be thus studied and thust taught, then, as a distinguished lawer has remarked, 'A university will best consult its own dignity in declining to teach it.' This is the plough to which our ancestors here in America set their hand, and to which we have set ours; and we must see to it that the furrow is handsomely turned.

But who is there, I may be asked, to study law in this way? Who is to have the time for it and the opportunity? Let me ask a question in return, and answer it. Who is it that studies the natural or physical sciences, engineering, philology, history, theology, or medical science in this way? First of all, those who for any reason propose to master those subjects, to make true and exact statements of them, and to carry forward in these regions the limits of human knowledge; and especially the teachers of these things. Second, not in so great a degree, but each as far as he may, the leaders in the practical application of these branches of knowledge to human affairs. Third, in a still less degree, yet in some degree, all practitioners of these subjects, if I may use that phrase who wish to understand their business, and to do it thoroughly well.

Precisely the same thing is true in law as in these or any other of the great parts of human knowledge. In all it is alike beneficial and alike necessary for the vigorous and fruitful development of the subject, for the best performance of the everyday work of the calling to which they relate, and for the best carrying out of the plain, practical duties of each man's place, that somewhere and by some persons these subjects should be investigated with the deepest research and the most searching critical study.

The time has gone by when it was necessary to vindicate the utility of deep and lifelong investigations into the nature of electricity and the mode of its operation, into the nature of light and heat and sound and the laws that govern their action, into the minute niceties of the chemical and physiological laboratory, the speculations and experiments of geology, or the absorbing calculations of the mathematician and the astronomer. Men do not now need to be told what it is that has given them the steam-engine, the telegraph, the telephone, the electric railway and the electric light, the telescope, the improved lighthouse, the lucifer match, antiseptic surgery, the prophylactics against small-pox and diphtheria, aluminium, the new metal, and the triumphs of modern engineering. These things are mainly the outcome of what seemed to a majority of mankind useless and unpractical study and experiment.

But as regards our law, those who press the importance of thorough and scientific study are not yet exempt from the duty of pointing out the use of it and its necessity. To say nothing of the widespread scepticism among a certain class of practical men, in and out of our profession, as to the advantages of anything of the sort, there is also among many of those who nominally admit it and even advocate it, a remarkable failure to appreciate what this admission means. It is the simple truth that you cannot have thorough and first-rate training in law, any more than in physical science, unless you have a body of learned teachers; and you cannot have a learned faculty of law unless, like other faculties, they give their lives to their work. The main secret of teaching law, as of all teaching, is what Socrates declared to

be the secret of eloquence—understanding your subject; and that requires, as regards any one of the great heads of our law, in the present stage of our science, an enormous and absorbing amount of labour.

Consider how vast the material of our law is, and what the subject-matter is which is to be explored, studied, understood, classified, and taught in our schools of law. It lies chiefly in an immense mass of judicial decisions. These, during several centuries, have spelled out in particular instances, and applied to a vast and perpetually shifting variety of situations, certain inherited principles, formulas, and customs, and certain rules and maxims of good sense and of an ever-developing sense of justice. It lies partly also in a quantity of legislation.

What does it mean to ascertain and to master, upon any particular topic, the common law? It means to ascertain and master, in that particular part of it, the true outcome of this body of material. In an old subject, like the law of real property, such an inquiry goes far back. In a new one, like constitutional law, not so far; but still, even in that we must search for more than a century, and if we would have a just understanding of some fundamental matters it means much remoter and collateral investigation. As regards a great part of our law it is not comprehensible, in the sense in which a legal scholar must comprehend his subject, unless something be known, nay, much, of the great volume of English decisions that run back six hundred years to the days of Edward I., when English legal reporting begins. This is the period which is fixed, in the two noble volumes of 'The History of the English Law,' just published by the English professors, Sir Frederick Pollock, of Oxford, and Mr. Maitland, of Cambridge, as the end of their labours—viz. the time when legal reporting begins. In giving the reasons for dealing with this as a separate period, they say 'so continuous has been our English legal life during the last six centuries that the law of the later Middle Ages has never been forgotten among us. It has never passed utterly outside the cognizance of our Courts and our practicing lawyers.' Such is the long tradition that finds expression in the law of this very day, and of this place in which we sit. The volumes just mentioned, ending thus six centuries ago, themselves throw light on much which concerns our own daily practice in the Courts; and they indicate the value and importance of much remoter investigation. You remember, perhaps, that the judicial records of England carry us back to the reign of Richard I. in 1194, seven centuries ago, and that there are scattered memorials of earlier judicial proceedings for another century, gathered for the first time by one of the most learned of our brethren in this association, Professor Melville M. Bigelow.

Much of this vast mass of matter is unprinted, and much is in a foreign tongue. The old records are in Latin. As to the reports, for the first two hundred and fifty years after reporting begins, it is all in the Anglo-French of the Year-books, and mostly in an ill-edited and often inaccurate form. To all these sources of difficulty must be added the generally brief and often very uninstructive shape of the report itself. A few of the earlier Year-books have been edited in thorough and scholarly fashion, accompanied by a translation and illustrations from the manuscript records. But most of them are in a condition which makes research very difficult. The learned historians just quoted have said that 'the first and indispensable preliminary to a better legal history than we have of the later Middle Ages is a new, a complete, a tolerable edition of the Year-books. They should be our glory, for no other country has anything like them; they are our disgrace, for no other country would have so neglected them.' The glory and disgrace are ours also, for English law is ours. Efforts on both sides of the water to accomplish this result have as yet failed; but they should succeed, and they will succeed. I wish that my voice might reach someone that would help in securing that important result. It would bring down the blessing of legal scholars now and hereafter. After the Year-books come three centuries and a half of reported cases in England; and one of these centuries, more or less, includes the multitudinous reports of our

own country and of the English colonies, which continue to pour in upon us daily in so copious and ever increasing a flood.

Now, will it be said, perhaps, that in bringing forward for study all this mass of material, past, present, and daily increasing at so vast a rate, I am recommending an impossibility and an absurdity? No, I am not; I speak as one who has seen it tried. It is not only practicable, but a necessary preliminary for first-rate work. One or two things must be observed here. Of course no one man can thus explore all our law. But some single thing or several connected things he may; and every man who proposes really to understand any topic, to put himself in a position to explain it to others, or to restate it with exactness, must search out that one topic through all its development. Such an investigation calls for much time, patience, and labour, but it brings an abundant harvest in the illumination of every corner of the subject. Another thing is to be noticed. Not all our law runs back through all this period. This great living trunk of the common law sends out shoots all along its length. Some subjects, like the law of real property, crimes, pleading, and the jury, go very far back; others, like the learning of perpetuities or the Statute of Frauds, not so very far; and others still, like our American constitutional law, the learning of the Factors Acts, of injuries to fellow-servants, and other parts of the law of torts, are modern, and perhaps very recent. But be the subject old or new, or much or little, every man in his own field of study must explore this mass of material—viz. all the decided cases relating to it—if he would thoroughly understand his subject.

Before I pass on, let me say, as if in a parenthesis, a word or two more about the Year-books. These great repositories of our medieval law have been the subject of many cheap and foolish observations, as to their mustiness and mouldiness; but never, so far as I know, from persons who had any considerable acquaintance with them. It has dwarfed and hurt our law that research has usually that about three centuries back; as to what went before, it has been the fashion to accept Coke as the epitome, or to take the summaries in the Abridgments. Back of Coke, these ill-printed, unedited, untranslated folios, the Year-books, have stood like a wall, repelling for most men any further search. But not all scholars have been deterred; and those who have gone through these volumes have found a rich reward. Amidst their quaint and antiquated learning is found the key to many a modern anomaly; and the reader observes with delight the vigorous growth of the law from age to age by just the same processes which work in it to-day in our latest reports. There, as well as here, together with much that is petty and narrow, one remarks not only well-digested learning and thoughtful conservatism giving its reasons, but also growth, the vigour of original thought, liberal ideas, and the breaking out of what we call the modern spirit.

Coming back to the task of the student of our law, is spreads far beyond what I have yet set forth; it has been wisely said that if a man would know any one thing, he must know more than one. And so our system of law must be compared with others; its characteristics only come out when this is done. As to the examination of medieval and modern continental law, we have hardly made a beginning. When we trace our law far back, the only possible comparison with anything long-lived and continuous is with the Roman law. If anyone would remind himself of the flood of light that may come from such comparisons, let him recall the brilliant work of Pollock's predecessor at Oxford (Sir Henry Maine) in his great book on Ancient Law. That is the best use of the Roman law for us—as a mirror to reflect light upon our own, a tool to unlock its secrets. And so the recent learned historians of our law have used it. In writing of the English system of writs and forms of action, for instance, they put meaning into the whole matter in pointing out that all this, beginning in the middle of the twelfth century, finds a parallel in Rome 'at a remote stage of Roman history. We call it distinctively English, but it is also in a certain sense very Roman. While the other nations of Western Europe were begining to

adopt as their own the ultimate results of Roman legal history, England was unconciously reproducing that history.'

Of the value of such comparative studies, and their immense power to lift the different subjects of our law into a clear and animating light, no competent person who has once profited by them can ever doubt. But, again, observe what this means. It means adding to the wide and difficult researches already marked out another great field of investigation. If it be said that our teacher of English law may profit by the labour of others, and has only to read his 'Ancient Law' and his 'History of English Law,' I reply that the field is still largely unexplored; and, furthermore, that, for the scholar, such books are helps and guides for his own research, and not substitutes for it.

So much for this head of what I have to say. Over these vast fields the competent teacher of law must carefully and minutely explore the history and development of his subject. I set down first this thorough historical and chronological exploration, because in this lie hidden the explanation of what is most troublesome in our law, and because in this is found the stimulus that most feeds the enthusiasm and enriches the thought and the instruction of the teacher. The dullest topics kindle when touched with the light of historical research, and the most recondite and technical fall into the order of common experience and rational thought. Sir Henry Maine's book, like that of Darwin in a different sphere, at about the same time, created an epoch. Such books have made it impossible for the law student ever again to be content with the sort of food that fed his fathers, with that 'disorderly mass of crabbed pendantry,' for instance, as our recent historians of the law have justly called it, 'that Coke poured forth as institutes of English law.' Never again can he receive the spirit of bondage that once bent itself to teach or to study the law through such a medium.

And now comes another labour for the legal scholar. After such researches as I have indicated, in any part of the law, the outcome of it is certain to be the necessity of restating the subject in hand. When things have once been thus explored and traced, many a hitherto unobserved relationship of ideas comes to light, many an old one vanishes, many a new explanation of current doctrines is suggested and many a disentangling of confused topics, many a clearing away of ambiguities, of false theories, of outworn and unintelligible phraseology. There is no such dissolver and rationaliser of technicality as this. A new order arises. And so when the work of exploration has been gone over, there comes the time for producing and publishing the results of it. Admirable work of this sort, and a good bulk of it, has already been done—work that is certain to be of inestimable value to our profession. In some instances it is but little known as yet; in others, it appears already in our handbooks on both sides of the ocean, and in the decisions of the Courts.

The publishing of these results by competent persons is one of the chief benefits which we may expect from the thorough and scientific teaching of law at the universities. In no respect can more be done to aid our Courts in their great and difficult task. There are many useful handbooks for office use and reference, and some excellent ones. But the number of really good English law treaties—good, I mean, when measured by a high standard—is very few indeed. They improve and yet, to a great extent to-day, the writers and publishers of law-books are abusing the confidence of the profession, and practicing upon its necessities.

If I am asked to specify more particularly the sort of thing that may come out of the researches to which I have referred, and that has already been produced from the universities, I am tempted to refer first to a foreign book about one of our English topics—a book which is a little remote from our every-day questions, but full of value in any deep consideration of the subject—the admirable 'History of the Jury,' by Brunner, professor of law at Berlin, published in 1872. That is a book of the first class, superseding all others upon the subject; and yet, to the disgrace of the English-speaking

race, it has not yet been translated into our language. English and American scholars have supplemented the work of Brunner, and the material for a true understanding of the history and uses of the jury system, and for a wise judgment as to continuing or modifying the use of it, were never anything like so good as now.

Then there is that masterly 'History of the English Law' by two English law professors of our own time, of which I have already spoken. In mentioning this book, it is only just to Professor Maitland, one of the finest scholars of our time, that I should quote the remark of his distinguished associate, where he says in the preface that 'although the book was planned in common and has been revised by both of us, by far the greater share of the execution belongs to Mr. Maitland, both as to the actual writing and as to the detailed research which was constantly required.' Of other English work to be credited to the universities, I have already mentioned the great performances of Blackstone and Maine, and I need only allude to the important works, well known among us, of Dicey, Holland, Markby and Pollock. Less well known, but masterly in its way, is Maitland's editing of that selection from the judicial records of the thirteenth century, which is known as Bracton's Note Book, and of other unpublished material brought out by the Selden Society.

As to this country, I will not mention names. I need not refer to the famous and familiar books from our university schools of law, by our leaders, living and dead. I will simply say this, that in recent times the researcnes and contributions of our own teachers of the law, at the universities in various parts of the country—and I include now not less than seven of these institutions—have produced most important material, which is already finding its way into the current handbooks of the profession, here and in England—material which not only illuminates the field of the student's work, but lightens the daily drudgery of the Bench and Bar. The true nature of equitable rights and remedies; the doctrine of equitable defences; the history and analysis of the law of contract, torts, trusts, and evidence; the nature and true theory of the negotiability of obligations; the nature of the common law itself; the whole doctrine of quasi-contract; the doctrine of perpetuities—these things make only a part of this material. As I said, I do not speak of work done at any one institution or in any one part of the country merely.

But now suppose some one says, What is the use of carrying on our backs all this enormous load of the common law? Let us codify, and be rid of all this by enacting what we need, and repealing the rest.

Well, I am not going to discuss codification. There is not time for that. And the word is an ambiguous one; some good things and some bad ones are called by this name. I will only say that as yet we do not well understand our law; it is our first duty to understand it. The effort to codify it, or systematically to restate it for purposes of legislation—for any purpose other than a merely academic one—should come later, if it come at all. To codify what is only half understood is to perpetuate a mass of errors and shallow ambiguities; it is to begin at at the wrong end. Let us, first of all, thoroughly know our ground. I can say this with confidence, that as regards one or two departments of law with which I have a considerable acquaintance, I have never seen any attempt at codification, here or abroad, which was not plainly marked by grave and disqualifying defects. Goodwill, strong general capacity, courage, sense, practical gifts, are indeed not wanting in some of these attempts; but a competent knowledge of the subject is wanting.

My honoured friend, Judge Dillon, in his excellent address last year, said a word or two in connection with this subject, which should be supplemented, I think, by a word or two more. In speaking of law reforms, he remarked that 'no mere doctrinaire or closet student of our technical system of law is capable of wise and well-directed efforts to amend it. This must be the work of practical lawyers. If the expression 'mere doctrinaire

(To be continued.)

# THE MINNESOTA LAW JOURNAL.

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## DISTRICT COURT.

**C. P. Marvin vs. W. H. McDonald, et al.**
**(District Court, Ramsey County.)**

### Struck Jury—Selection by Sheriff—Must be Made in Presence of Parties or their Attorneys.

Jno. L. Townley, Esq., for plaintiff.
Henry C. James, Esq., for defendants.

Plaintiffs made a motion to quash struck jury on the ground that the selection had been improperly made.

BRILL, J.—The selection of a struck jury is out of the ordinary course of proceeding. The power to select a jury to try a particular case is vested in one man.

The provisions of the law in so far as they are for the benefit of the parties, must be strictly followed. The law provides: "At the time designated, the sheriff shall attend at his office and in the presence of the parties or their attorneys * * * shall select from the number of persons qualified to serve as jurors in the county, forty such persons as he shall think most indifferent between the parties and best qualified to try such issue."

The law is imperative that the selection shall be made in the presence of the parties. The reason for this provision undoubtedly is that the important function given to the sheriff will be exercised more carefully when the parties are present, and he will be less liable to be subject to improper influences in making the selection.

If the selection be made prior to the time appointed and not in the presence of the parties, the law is not complied with. Of course, it is not improper for the sheriff to canvass the names of persons in his mind prior to the time appointed, and when the parties are not present, and it is, perhaps, not improper to make a memorandum beforehand; but the selection of the forty persons must be made as the law provides. In this case it appears that the sheriff made the selection prior to the time appointed and not in the presence of the parties or their attorneys. He had determined the persons beforehand and had made the list and simply submitted the result of his previous action. I do not think this was a substantial compliance with the language or spirit of the law. The plaintiff having made his objections and the sheriff having overruled them I think the subsequent action of the plaintiff was not a waiver.

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**Thauwald vs. Galvin.**
**(District Court, Ramsey County.)**

### Supplementary Proceedings — Contempt—Salary of Policemen Exempt.

Geo. J. Flint, for plaintiff.
L. J. Dobner, for defendant.

Order to show cause why defendant should not be punished as for a contempt, in disobeying order made by court in supplementary proceedings. Order discharged.

KELLY, J.—The defendant is a police officer of the City of St. Paul. In proceedings supplementary to execution the usual order of the court restraining defendant from disposing or in any way interfering with any of his property, not exempt from execution, was made and served on the defendant. The day after this service defendant drew from the city treasury his salary, $71.75, for his services as such policeman, and applied the whole of it for clothing, house rent, groceries, etc.,

in other words, to the support of his family. Defendant has filed herein an affidavit to the effect that all his salary is necessary to the support of himself and family.

The court is asked to punish this defendant for thus disposing of his property in violation, as it is claimed, of the restraining order before described.

The question arises, can the salary of a police officer of the City of St. Paul be reached by his creditor in proceedings supplementary to execution. I am of opinion it cannot. In Roeller vs. Ames, 33 Minn. 135, the supreme court decided that the salary of a municipal officer cannot thus be reached. And the decision was placed on the ground that public policy forbids any interference, directly or indirectly, with the payment of his salary into the hands of such officer. This exemption, and practically for the same reason, has been held to embrace an employe of a municipality engaged in hazardous lines of duty, such as fireman. Sandwitch Mfg. Co. vs. Krake, 68 N. W. R. 606. In this case the court says: "If he (the defendant) was an officer, the rule laid down by Roeller vs. Ames would be directly in point. Why, then, should not the services of a fireman be deemed as important and as much of a public employment as that of a policeman or other municipal officer," thus indirectly recognizing a policeman to be a public officer in the strict sense.

Now, a policeman is a public officer in the strict meaning of the term. The usual indicia of a public office are oath, tenure, duration, emolument, powers and duties regulated and prescribed by law. One conclusive test seems to be where the rights and duties of the office involve the exercise of some part of the sovereign power. He is not alone a public officer, but, like a fireman, his duties may be often extra hazardous. So that under the holding in Roeller vs. Ames and Manufacturing Co. vs. Krake, the salary of this defendant, while in the possession of the city, was exempt from execution and cannot be reached in these proceedings.

It is not necessary to decide whether at all, or under what circumstances, after the salary has been paid into such officer's hand, and while he retains possession of it, the service of an order in supplementary proceedings will create a lien on such moneys so that disposing of it by the officer would be a contempt, for the reason that in this case the order served on defendant affected only his property which on Oct. 14, 1896, was "not exempt from execution." This money was then in the city's possession and was in its then condition clearly exempt.

But I will say, that as public policy protects the salary while in the city treasury in order that it be paid promptly and with certainty to the officer so that the public may have from him efficient and unharrassed service, certainly to take that salary from his hand the moment after it is paid to him will defeat the very object of the rule. Of course the rule as to the exemption of the money while in the city's possession is not founded upon the idea that the municipality should not be annoyed with answering garnishee or other trustee processes. It stands on the higher idea that to deprive the officer of his salary will in effect deprive the public of his efficient service.

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**Charles F. Leland vs. Reuel L. Hall, Edith Hall, C. S. Guderian, et als.**

**(District Court, Hennepin County.)**

## Demurrer—Improper Joinder of Actions.

Alford and Hunt, for plaintiff.
Savage and Purdy, for defendants Hall and Guderian.

Plaintiff brought an action against defendants, asking that he be subrogated to the legal right of Guderian and the Anoka National Bank, which Guderian was alleged to represent, in a certain mortgage in which Guderian was the mortgagee, and for the transfer of the mortgage to him; and in the same action he asked that the mortgage be foreclosed. Defendants Hall and Guderian demurred to the complaint, upon the ground that two causes were improperly united, claiming that Guderian was interested in the first question, but if that were decided against him, not in the second; while defendants Hall were proper parties to the cause of action for foreclosure, but were not proper parties to the first cause of action.

ELLIOTT, J.—Ordered, that the two

causes of action are properly united, and that defendants' demurrer be and is overruled, with costs to plaintiff.

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**Thos. Wallace, Jr., vs. Carpenter Electric Heating Manufacturing Co., and American Electric Heating Corporation.**

**(District Court, Ramsey County.)**

## Manufacturing Corporations—Right Right to Issue Full Paid Stock and Sell for less than Par.

C. R. St. John for plaintiff.
Kueffner, Fauntleroy & Rice for defendants.

Plaintiff recovered judgment against defendant Carpenter Electric Heating Man. Company, which was insolvent, and then brought this action against defendant American Electric Heating Corporation, which owned nearly all of the stock in the first named corporation, claiming that the stock had been issued by the corporation for less than its par value, and that the American Electric Heating Company purchased the stock with full knowledge that it had never been paid for in full.

Findings of the Court:

1. Defendants are and were corporations duly organized and incorporated as alleged in the complaint. Said defendant, Carpenter Electric Heating Manufacturing Company, which is a manufacturing corporation of this state, was not served with summons and does not appear in this action, but all objection for want of such service or appearance was expressly waived on the trial by said defendant.

2. Plaintiff commenced an action and recovered a judgment for $5587.71 against said Carpenter Electric Heating Manufacturing Company which was duly entered and docketed October 31, 1895, in this Court and the same is wholly unpaid and remains in full force and effect.

3. The nominal capital stock of said Carpenter Electric Heating Manufacturing Company was and is $400,000, divided into shares of $100 each, and prior to the entry of said judgment and on or about the 1st of July, 1893, said defendant, American Electric Heating Corporation, purchased and became the owner of 3946 shares of said capital stock and ever since has been and still is such owner.

Immediately thereafter said Carpenter Electric Heating Manufacturing Company, for full value sold and delivered all and singular its assets and property consisting of stock on hand, patents, machinery, fixtures and goodwill, to said defendant, American Electric Heating Corporation.

4. The said Carpenter Electric Heating Manufacturing Company was organized and the shares of stock thereof originally issued in the manner and under the circumstances following, viz: shortly prior to the month of May, 1891, one Geo. H. Finn, entered into an agreement with a certain corporation known as the Carpenter-Nevins Electric Heating Company, then owning certain letters patent upon devices used in manufacturing electric heating apparatus, whereby he secured the exclusive right to manufacture and sell, and also to sell to others the right to use the said devices, and also all other like patented devices which said Carpenter Nevins Company might thereafter acquire, and in consideration thereof, among other things agreed to organize a corporation under the laws of the State of Minnesota for the purpose of manufacturing such patented devices, with a nominal capital stock of $400,000, to which, when so incorporated, he would transfer the license so obtained from said Carpenter-Nevins Company, and which license was coupled with a condition that the holder thereof should pay to said last named company a royalty of twenty-five per cent of the list prices on all goods manufactured thereunder. Said Finn further agreed to pay to said company so to be organized, the sum of $5,000 in cash to aid in developing said patented devices, and carrying on the business thereof, for which he, or those named by him, should receive 1,500 shares of the full paid capital stock of said corporation so to be organized, and to cause 1,000 shares of full paid stock of said corporation to be issued and delivered to said Carpenter-Nevins Company. The residue of said shares, to-wit, 1,500 to be held in trust and sold for the benefit of said corporation so to be organized.

Thereupon, pursuant to said agreement, said Finn, with certain others associated with him as promoters thereof, in the month of May, 1891, proceeded to form such corporation

and to become and did become incorporated as the Carpenter Electric Heating Manufacturing Company, one of the nominal defendants in this action.

Immediately upon the organization of said last named company and in pursuance of his said agreement with the said Carpenter-Nevins Company, said George H. Finn transferred to said corporation, Carpenter Electric Heating Manufacturing Company, all and singular said license and all the rights by him acquired under his said contract with the Carpenter-Nevins Company, and also paid to said Carpenter Electric Heating Manufacturing Company the sum of $5,000 in cash; and in consideration thereof said last named company issued and delivered to said Finn all and singular its 4,000 shares of its capital stock, the same being issued as and purporting to be full paid stock of said corporation, upon condition that said Finn should transfer 1,000 shares thereof to said Carpenter-Nevins Company in accordance with his agreement with it, as aforesaid, and should transfer 1,500 shares thereof to one N. C. Thrall, as trustee, to be known as Treasury stock and sold for the benefit of the company so issuing the same, as it should from time to time direct; all of which conditions were duly complied with by said Finn.

The residue of said stock, amounting to 1,500 shares, said Finn received and retained for himself and his associates, of whom the promoters, incorporators and members of said corporation were at the time part and parcel; and said corporation received no other consideration for its shares of stock than as aforesaid.

The value of the license and rights so transferred to said corporation were problematical, depending on the validity of the patents covering said devices and the practical utility thereof, which was yet to be demonstrated, and the same were worth no more than said Finn had so agreed to pay therefor. Said patents were thereafter adjudged invalid, and said license and rights acquired under said contract with the Carpenter-Nevins Company became of little or no value.

5. The said 1500 shares of stock so transferred to said N. C. Thrall was thereafter by him sold and disposed of for the benefit of the said Carpenter-Electric Heating Manufacturing Company, as by it directed, and there was realized therefor as the proceeds of said sale, the sum of $25,000 and no more.

6. Said defendant, the American Electric Heating Corporation, at the time it acquired title to said 3946 shares of the capital stock of said Carpenter Electric Heating Manufacturing Company, and still so owned by it, had full notice and knowledge of the circumstances under which said original 4,000 shares of stock were so issued, and the consideration paid therefor; but it does not appear that it acquired title to any of said stock, from the persons who originally so took the same, save that it did so acquire title through one Eastman, acting in its behalf, of said 1,000 shares so transferred to said Carpenter-Nevins Company for said license; nor does it appear that any of the persons or parties from whom said defendant, American Electric Heating Company so acquired title to its stock, except said Carpenter-Nevins Company, had any notice or knowledge of the circumstances under which said 4,000 shares of said capital stock was originally issued, nor that they did not suppose, and in good faith believe, that the said shares of stock were paid for in cash at their par value at the time of their issuance.

Save as aforesaid, the allegations of the pleadings are not established by the evidence and are not true.

As conclusions of law, the Court finds that the plaintiff is not entitled to any relief in this action, and defendant is entitled to a dismissal thereof on the merits, with its costs and disbursements.

OTIS, J.—While section 3415 of the General Statutes of 1894 as it now reads is not clear, I am of the opinion that it operates to allow a manufacturing corporation to issue its stock as full paid and dispose of the same for less than par, and on such terms as its board of directors may deem advisable. This section, without the proviso, is the same as section 163 of chapter 34, General Statutes of 1866. The proviso has since been added by a-

mendments, from time to time made, and unless it has the effect of taking this class of corporations out of the operation of the statute as originally enacted, it is impossible to give it any force, and we are to assume that there was some purpose in adding the proviso.

The fact that afterwards, section 2743, General Statutes, 1894, was enacted, gives a legislative construction to this proviso the same as I have given it; for, otherwise, a substantial portion of this section 2743 would seem to be quite unnecessary.

That the classes of corporations entitled to the privileges of this proviso have been from time to time by successive amendments extended, shows that it was not considered meaningless, and as I believe the construction I have adopted is in accordance with the general understanding of the bar.

It follows that the Carpenter Company could dispose of its stock in the manner found without making purchasers thereof liable for any further assessments.

Further than this as the stock was issued and disposed of as full paid, and passed from hand to hand as such, it seems to me a person taking it without notice that it was so in fact, would be protected; and there is no allegation or evidence that the parties from whom defendant acquired such stock were not such good faith purchasers and thereby fully protected.

If they were the defendant would be likewise protected without regard to such knowledge as it might be charged with.

## REASON ENOUGH.

Even a lawyer, who is generally supposed to know exactly what to do with his tongue, may make a slip occasionally. In a certain court, not long ago, one of the attorneys demanded permission to introduce the testimony of two witnesses who had not been duly cited.

"Do you suppose," said the court, "that they will materially assist us in getting at the facts?"

"I think so," answered the lawyer. "I have not had an opportunity to communicate with them."

An audible smile ran around the court-room.

"Let them be called at once," said the judge, and the smile grew in volume.

## PERSONALS.

**Minneapolis.—**

Mr. A. C. Clausen has removed from Worthington to Minneapolis and has taken offices in the Harrison & Smith building.

Messrs. Rea & Healy, of the Phoenix building, have removed to Temple Court.

James Robinson has also removed from the Phoenix to Temple Court.

Ace P. Abell, of the law firm of McHale & Abell, has been selected by Ald. Harvey as chief clerk in the probate court office after it passes under the new regime, Jan. 1.

**St. Paul—**

The engagement is announced of Hon. Jno. W. Willis, of the Ramsey County District Court, to Mrs. Margaret W. Fitzgerald, of St. Paul.

Messrs. John Cavanagh and E. J. Cannon have taken offices together in the Globe building.

The painful circumstances under which the life of a member of the Montreal bar came to an end on Sunday, the 1st instant, suggest the inquiry whether the profession of the law is not in danger of becoming overcrowded. The coroner's jury found that the deceased terminated his life by poison, while suffering under temporary discouragement. There is reason to fear that, at the present time, too many young lawyers of fair ability and education do not find the prospects of the profession very encouraging. The facilities provided by the universities and law schools have been useful in the spread of knowledge; but, on the other hand, this smoothing of the path to callings in which a certain amount of preliminary knowledge is requisite, tends to attract a large number of young men to the professions which seem to offer the most ready, or perhaps the only avenue to advancement. The danger is that the number within the legal profession may become so great that a living wage will be beyond the reach of the majority. A similar complaint has recently been the subject of discussion in England, where solicitors often find it hard to obtain the means of existence.—Legal News.

**HON. O. B. LEWIS.**

**Judge Second Judicial District.**

...THE..

# MINNESOTA LAW JOURNAL.

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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.**

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The New York Court has recently, in the case of Mitchell v. Rochester Ry. Company, 45 N. E. Rep. 354, passed upon what is known as the Texas doctrine, i. e., the recovery of damages for mere mental suffering or shock. This question has been passed upon in recent years by nearly every one of our State Courts of last resort, and the courts are about evenly divided upon it. The question came before the Supreme Court of Minnesota in Francis v. Western Union Co., 59 N. W. 1078, and it placed itself among the Courts opposed to the "doctrine." The opinion in this case was written by Justice Mitchell and is a very exhaustive one. But the N. Y. Court has gone further than any of the other courts, which have opposed the "doctrine" and holds that no recovery can be had for physical injuries occasioned by the mental shock or fright. They say, "if it be admitted that no recovery can be had for fright occasioned by negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had from injuries resulting therefrom. That the result may be nervous disease, blindness, insanity or even a miscarriage, in no way changes the prin-

ciple." These results merely show the degree of fright, or the extent of the damages. The facts in the case were:

While plaintiff was standing upon the crosswalk of a city street, awaiting an opportunity to enter one of the defendant's cars which had stopped upon the street at that place, another of defendant's cars came down the street at such speed that its driver was unable to stop it before it reached the car which plaintiff was about to take. The horses attached to the approaching car turned to the side where plaintiff was standing, and before they were checked had come to her so that their heads were on either side of her and she was almost run down by them. The fright and excitement made plaintiff unconscious, and she suffered a miscarriage and was ill for a long time.

The reasoning of the Court may be logical and correct, but we think they need not have gone so far and yet have remained within the principles laid down by the Courts opposed to the Texas doctrine. The main reason always advanced by these Courts has been that to allow damages for mere mental suffering would open up a vast field of speculative litigation, and that difficulties would always arise in deciding whether the injuries were merely simulated or real; and that it would be almost impossible to measure such damages. But all of these difficulties are done away with where physical injuries result from the shock, such injuries could be measured just as easily as could injuries resulting from a physical shock or wound. It seems inconsistent that the defendant should be allowed no damages in this case while if the car had gone a little further and she had been struck, however slightly, and the same injuries had resulted, she would have been entitled to heavy damages.

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## MINNESOTA STATE BAR ASSOCIATION.

The following letter was mailed by Hon. E. H. Ozmun, secretary of the State Bar Association, to all the members of the Association and has met with very general response from all over the state. Nearly three hundred letters favoring reorganization of the Association were received. It is a matter of great moment to the bar and should be followed up by some active measures. The members should all strive to make the Association a live and progressive one, and the equal of the very best in the country:

Dear Sir: The State Bar Association, I regret to say, has not, since 1884, the year it was first organized, been able to get up interest or enthusiasm among its members sufficient to have an annual meeting with appropriate exercises and a publication of the proceedings. The only meetings which have occurred since that time, with the exception of the September meeting in 1895, which was well conducted but most meagerly attended, have been those brief meetings of a few minutes each on the first day of the October or April terms of the Supreme Court, where no business has been transacted save that of electing officers.

In almost every state and territory of the Union there exists a well organized Bar Association which holds annual meetings, prints and publishes its proceedings, exchanges them with other Bar Associations and, seemingly at least, wields that power and influence which is expected of organizations of this kind which contain among its members many of the most learned and able of its citizens as well as those of the highest character.

As secretary of this association I have received in years past from nearly all of the other state Bar Associations bound copies of their proceedings, and they are not confined to the Eastern states, for Washington and Utah hold and publish regularly their annual proceedings.

In response to the inquiries why we do not reciprocate with our published procedings, I have been forced to admit that there has not been, since 1884, a sufficient amount of interest taken in our asociation to get up a respectable, well attended Bar Association meeting.

There are many lawyers, however, who would be glad to see this association take the position which like associations take in other states; who believe that it has an important and useful part to play in Minnesota and that

it should at least be a powerful influence in shaping wise legislation, but there is nevertheless a well grounded feeling that unless the association receives the hearty co-operation of the members of the Bar it will be best to drop it altogether.

To that end it is now proposed that a final effort be made toward establishing this association so that it will be something besides a mere name and, if it meets with that reception from the members of our profession it is believed it should, there is no reason why Minnesota should not have as influential and progressive an association as any state in the Union, but if it does not meet with the co-operation of the Bar the whole matter will be dropped, probably not to be revived again at least for many years.

If the following meets with your approval, will you kindly inform me whether you feel able to attend and whether you feel a sufficient interest in the Bar Association, to contribute $2.00 yearly dues. That a meeting be held in St. Paul in January, 1897, during the session of the legislature. That an address be delivered by some distinguished member of the Bar from some sister state invited to attend for that purpose. That other exercises of an appropriate character be had including the report of a committee on legislation, to be appointed at once on the settlement of the question as to whether this Association shall continue. The meeting to close with a banquet in the evening, with appropriate exercises.

An early response will oblige

E. H. OZMUN,
Secretary.

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### JUDGE O. B. LEWIS.

Hon. O. B. Lewis, of the district court, is well known to the citizens of St. Paul. It may be truly said of him that he is a self-made man, having at the age of thirty-five years won the approbation of his fellow citizens and their confidence to such a degree that he was selected for this position of responsibility and trust. Mr. Lewis was born March, 12, 1861, in Weyauwega, Wis., and in his native state received his education. After graduating from the high school at Omro, Wis., he entered the Wisconsin state university in 1879 from which he graduated in 1884 in the classical course with honors.

He paid his way through the university by teaching school. After leaving the university he studied law, being in the mean time an instructor in chemistry at the university. Mr. Lewis located in St. Paul, in 1889, engaging in the practice of law. He was elected to the assembly of the common council in 1894, and fulfilled his stewardship in the position in a manner which secured him a re-election in 1896, and was elected to the office of district judge at the fall election in 1896, having been placed on the bench Jan. 1st, 1897.

In the professional life Mr. Lewis has been respected by his fellow lawyers as a gentleman of knowledge and culture, a man having high regard for the proprieties of the profession, a skillful and forcible reasoner before a jury. He has at all times depended on his own efforts and his acquaintances, and has many warm friends. Mr. Lewis is particularly gifted for the office of district judge. He is strong minded, fearless, honest, and a good lawyer.

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### THE TEACHING OF ENGLISH LAW AT UNIVERSITIES.

(Concluded from last number.)

or closet student' refers to any class of pedants and incompetent persons who do not appreciate the nature of what they are studying, I should not wish to qualify that portion of the remark just quoted which reaches them. But if it may be supposed to allude to the class of legal scholars as such, to the Experts in legal and juristic learning, this remark, at the best, is but half a truth. The practical work of carrying through any considerable measure of reform, of getting it enacted, is, indeed, peculiarly a task for the practical lawyer. His judgment also is important in the wise shaping of such a measure; as his authority and influence will be quite essential in gaining for it the confidence of legislators and their constituents. But no 'wise and well-directed efforts' of this character can dispense with the approval and co-operation of the legal scholar. I am

speaking, of course, of competent persons, in both the classes referred to, and not of pedants or ignoramuses; and am assuming on the part of the systematic student of law, as on the part of the judge or practioner, a suitable outfit of sense, discretion, preliminary professional education, and capacity to understand the eminently practical nature of the considerations which govern the discussion of legal questions. Perhaps I may be permitted to speak on this subject with the more confidence, as having been a busy practitioner at the Bar of a large city eighteen years before beginning an experience as a professor at the Harvard Law School, which has now continued for twenty-one years.

Professor Dicey has remarked, I believe, of the jurist's work in England, of the sort of work which he himself has so admirably done, that it 'stinks in the nostrils' of the average English practitioner; and Sir Frederick Pollock, in his inaugural lecture twelve years ago as Corpus Professor of Jurisprudence at Oxford, in speaking of his associates here, Dicey and Bryce and Anson, says, with dignity, that they are 'fellow-workers in a pursuit still followed in this land by few, scorned or depreciated by many—the scientific and systematic study of law.' That state of things is slowly disappearing in England as well as here with the gradual improvement in the legal education of the Bar. One of the best and most important results of this improvement will be a more cordial respect and a closer co-operation between the different parts of our profession, the scholars, and the men of affairs. Nothing is more important to the dignity and power of our common calling.

Let me now finally come down to this question: If what I have been saying as to the scope of the work of the university teaching of law be true, what does it mean as regards the outfit and the carrying on of these schools?

It means several things: (1) Limiting the task of the instructors. Instead of allotting to a man the whole of the common law or half a dozen disconnected subjects at once, it means giving him a far more limited field—one single subject perhaps, two or three at most; if more than one, then, if possible, nearly related subjects—to the end that his work of instruction may be thoroughly done, and that, as the final outcome of his studies, some solid, public, and permanent contribution may be made to the main topic which he has in hand.

It means (2) that instructors shall give, substantially, their whole time and strength to the work. In mastering their material and qualifying themselves for their task, they have in hand, say, for the next two generations much formidable labour in exploring the history and chronological development of our law in all its parts. On this, as I have indicated, a brave beginning has been made, and it is already yielding the handsomest fruits. They have also, of course, all the detail of their difficult main work of teaching; and this, when the work is fitly performed, calls for an amount of time, thought, and attention bestowed on the personal side of a man's relation to his students which instructors now can seldom give.

It means (3) that the pupils also shall give all their time to the work of legal study while they are about it. There is more than enough in the careful preliminary study of the law to occupy three full years of an able and thoroughly trained young man. It is, I think, a delusion to suppose that this precious seedtime can profitably be employed, in any degree, in attendance upon the Courts or in apprenticeship in an office. I do not speak, of course, of an occasional excursion into these regions when some great case is up or some great lawyer is to be heard, or of the occasional continuous use of time in such ways during these long vacations which are generally allowed nowadays. Nor do I mean to deny that attendance upon Courts to witness the trial of a case now and then will be a good school exercise. I speak only of systematic attempts to combine attendance at law schools with office work and with watching the Courts. The time for all that comes later, or perhaps, in some cases, before.

It means (4) that generous libraries shall be collected at the universities suited to all the ordinary necessities of

careful legal research; and it also means gathering at some one point in the country, or at several points, the best law library that money can possibly buy.

And (5), in saying that proper university teaching of law means all this, I am saying in the same breath that it means another thing—viz. the endowment of such schools. The highest education always means endowment; the schools which give it are all charity schools. What student at Oxford or Cambridge, at Harvard, Yale, Columbia, Ann Arbor, or Chicago pays his way? We must recognize, in providing for teaching our great science of the law, that it is no exception to the rule. Our law schools must be endowed as our colleges are endowed. If they are not, then the managers must needs consult the market, and consider what will pay; they will bid for numbers of students instead of excellence of work. They will act in the spirit of a distinguished but ill-advised trustee of one of the seats of learning in my own State of Massachusetts, when he remarked 'We should run this institution as we would run a mill: if any part of it does not pay we should lop it off.' They will come to forget that it is the peculiar calling of a university to maintain schools that do not pay, or, to speak more exactly, to maintain them whether they pay or not; that the first requisite for the conduct of a university is faith in the highest standards of work; and that if maintaining these standards does not pay, this circumstance is nothing to the purpose—maintained they must be, none the less. It has been justly said that it is not the office of a university to make money, or even to support itself, but wisely to use money.

If, then, we of the American Bar would have our law hold its fit place among the great objects of human study and contemplation; if we would breed lawyers well grounded in what is fundamental in its learning and its principles, competent to handle it with the courage that springs from assured knowledge, and inspired with love of it—men who are not, indeed, in any degree insensible to worldly ambitions and emoluments, who are, rather, filled with a wholesome and eager desire for them, but whose minds have been lifted and steadied and their ambitions purged and animated by a knowledge of the great past of their profession, of the secular processes and struggles by which it has been, is now, and ever will be struggling towards justice and emerging into a better conformity to the actual wants of mankind—then we must deal with it at our universities and our higher schools as all other sciences and all other great and difficult subjects are dealt with, as thoroughly, and with no less an expenditure of time and money and effort.

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### WHY HE NEEDED A GUN.

It was in a Western town and the young fellow had been arrested for carrying a concealed weapon. Fresh from the East he imagined that bad men lurked in the shadows and he had bought a pistol that had a bore as large as a cough-drop. When arraigned before the police judge he had no defense to make and the magistrate said: "I shall have to fine you."

"Please let me off," said the young fellow. "I have no money to pay a fine and if you fine me I shall have to go to jail and that would disgrace me. I have done nothing wrong except carry the revolver and I am sorry for that. I have no friends from whom I could secure the money to pay the fine."

"What did you carry the artillery for?" asked the judge.

"Why, er—er—to protect my valuables."

"To protect your valuables? What valuables have you? You say you have no money to pay a fine. What else have you of value?"

"Why, you see—that is—er—I have the gun. It cost me $12."

He went to jail.

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### JUSTICE PERSONIFIED.

First Lawyer—I must say that I cannot see the point of my learned adversary's argument.

Second Lawyer—You ought to be on the bench, then, for justice, they say, is blind.

### JUDGE KERR.

Hon. Charles D. Kerr, one of the judges of the District Court for Ramsey County, died December 23rd at San Antonio, Texas, where he had gone hoing that a warmer climate would benefit his health.

The judges of the Ramsey County bench and attorneys of the bar assembled at special term, January 2nd to pay tribute to his memory—Judge Williston, of Red Wing, sat with the other judges.

As soon as the judges had taken their places and court had been opened, while the members of the bar stood respectfully, W. D. Cornish addressed the court, stating the object of the meeting in appropriate words, making feeling references to Judge Kerr.

The memorial prepared by the committee appointed by the court was read by Harris Richardson, a former law partner of Judge Kerr. The memorial was in the following terms:

It is customary, when death lays its chilly fingers upon a member of this bar, for those of us, who remain, to pause in the midst of our busy lives and cease, for a time, our labors, in order fittingly to mourn over the dead, and give expression to our grief.

We are gathered here today for that purpose. As the mouthpiece of those who have been selected to perform the sad duty of making the proper announcement and presenting the proper memorial, I say to you that our honored judge, brother and friend, Charles D. Kerr, is dead. The last sad rites of earth, which, sooner or later, must be performed for each one of us, have been performed for him.

Thirty-one years ago he became a citizen of this commonwealth. Poor and unknown, worn down by the hardships of four years of active service in the War of the Rebellion, he took up his life work. Integrity, courageous manhood and a full appreciation of the responsibilities of life speedily brought him to the front rank among the citizens of this state. Industry, intellectuality and eloquence created for him an enviable position at the bar, and finally brought him to the bench of this court, where he has administered justice for eight years in such a manner that each one of us can conscientiously say he was an upright judge and a brave man.

Not a few of us know of the great purity of his character; of the breadth and depth of his learning; of his affection for his fellow men; of his love for his country; of his thoughtfulness; of his wisdom. His life stands out as one of the few of those whose every page is open to the multitude. From it may be drawn precedents for the guidance of the young, of the old, and of the middle-aged, no matter what walk in life they occupy.

As a boy, we behold him supporting a widowed mother; as a youth, gaining his education through his own efforts, and at the same time maintaining four fatherless children; as a young man, offering his life for the nation, at the first call for troops; throughout his manhood, performing every public and private duty with fearlessness and probity. The records of this court already abound in sufficient evidence; yet, in further testimony of these things; of the bereavement which we feel, and the position among men and affairs which we accord him, we present this memorial and ask that it be spread upon them, that, so far as may be in this world of everlasting change, our appreciation of him and of his life work may be perpetuated; that his kith and kin, too, may know, in some small degree, how we honored him, we ask that a copy be transmitted to his sorrowing family, with our condolement.

Following the reading of the memorial, appropriate words of eulogy were spoken by C. D. O'Brien, M. D. Munn, James E. Markham, Judge Willis and Judge Brill.

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### ROENTGEN RAYS IN COURT.

Denver, Col., Dec. 4.—Judge Lefevre has given a decision in the district court admitting Roentgen ray photographs as secondary evidence that may be shown to the jury in illustrating the testimony of experts. The decision was given in the trial of the suit of James Smith against Dr. W. W. Grant, for alleged malpractice in his treatment of a fractured hip.

**JOINT TORTS BY SEPARATE DOGS.**

An amusing case, bearing upon the liability of owners of dogs for torts committed by them, is that of State v. Wood, 25 Atl. Rep. 654. Nierenberg and Zukugman each owned dogs by separate and distinct titles. The said dogs, at one and the same time, and probably with the same malicious intent, or in a mad chase after the same rabbit, broke and entered Wood's close, and crushed to earth and trampled upon, bruised and beat sundry vegetables therein growing, to-wit, beans, cabbages, etc. Thereupon Wood, in a fit of righteous indignation, sued both Nierenberg and Zukugman to recover compensation for his wounded feelings and broken cabbage plants. Unfortunately he sued both in the same action.

It was urged that there was a misjoinder of defendants, and this theory was sustained by the reviewing court, which said: "The theory upon which this suit was tried and judgment rendered seems to have been that, as the loss suffered by the plaintiff was the result of the joint act of the two dogs, their respective masters stood in the same position, so far as liability to respond for the damage done was concerned, as if they personally had broken and entered the plaintiff's close, and destroyed his growing plants. But the reason which makes one who personally aids or abets the wrong done by another liable for the whole amount of the injury done does not apply in a case like that under consideration. In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional; and the law as a punishment for his wrongdoing, as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But, in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case exists only by reason of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has therefore always been held, when the question has come before the courts, that a joint action will not lie against separate owners of dogs which unite in committing mischief."

The incisive logic of this decision is simply overwhelming. The court also referred to the following language from Russell v. Tomlinson, 2 Conn. 206. It is written in such a serio-comic strain, and there is such an evident undercurrent of mirth in it, that it is worth repeating: 'Owners are responsible for mischief done by their dogs; but no man can be liable for the mischief done by the dog of another unless he had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining together in doing mischief, could make the owners jointly liable. This would be giving them a power or agency, which no animal was ever supposed to possess."

It might be added that this latter case is the leading case on the subject and has probably been cited in all subsequent decisions. The same point was decided in Auchmuty v. Ham. 1 Denio 495, and Buddington v. Shearer, 20 Pick. 477.

In all these cases the court held that the mere fact that damages were difficult of apportionment was not sufficient to overthrow the rule.

In Van Steenburgh v. Tobias, 17 Wend, 561, the court very forcibly pointed out the dreadful consequences of allowing a joint action, saying: "In a case like the one before us, the dog of one may be young, feeble and incapable of mischief, and yet, if a joint action lay, his master might be made accountable for the injury caused by the large and ferocious dog of his neighbor." The bare suggestion that "Puggie," with his dainty little feet, could trample down as much cabbage at the Great Dane of the next door neighbor, with a foot as big as a dish-pan, is simply heart-rending. Compensation is the first rule for measuring damages, and, as a supplemental rule for its application, we propose the following: Damages should be proportioned to the size of the dog.

Nat'l. Corporation Rep.

### JOHNSTOWN FLOOD.

One of the numerous actions which grew out of the famous Johnstown flood has only now reached final decision in the Supreme court of one of the states (Illinois, not Pennsylvania,) and the syllabus is as follows: "1. The Johnstown flood, caused by the breaking of a dam which retained a large volume of water at a high elevation, due to extraordinary and unprecedented rains, thereby letting into a narrow valley a volume of water twenty to thirty feet in height, was an act of God. 2. Where a carrier, through its negligence, fails to send a passenger's baggage by the same train with the passenger, it is liable for the loss of the baggage if destroyed, due to such delay, by an act of God." We do not suspect that any one would controvert the first part of the syllabus, and it is only the opinion laid down in the second part that might find opposition among some good lawyers. It is no part of the printed contract on railway tickets that a trunk will be forwarded on the same train which carries the passenger, and it seems to us doubtful if there can be even an implied contract to that end. A passenger certainly supposes that checked baggage will either follow him on the same train or be sent pretty soon afterward. But is it not always understood that the baggage may, or may not, come at the same time,according to the amount of business transacted in the baggage room of the railway company, and which may, or may not, prevent its agent from hastening the carriage. In the case in question the owner of the trunk went by limited express train from Chicago eastward. The trunk was placed in the baggage-car attached to the particular train, but at Pittsburg, where there was a transfer of baggage, it did not reach the ordinary connecting car, but was placed in a car which went upon the following train, and this happened to be the one which, with its contents, was destroyed at Johnstown. The court says: "The delay (at Pittsburg) did not result simply from a halting or stopping in the movement of a train which was carrying the trunk in pursuance of the contract of carriage, but it resulted from negligence in failing to keep an implied contract to carry the trunk upon a particular train, and in violating that contract by carrying the trunk upon a different train from the one agreed upon; that is, upon the assumption that the facts would show no excuse for not keeping the contract. It is like a deviation from the usual course by the master of a vessel, during which a cargo is injured by a storm at sea. In such case the deviation is regarded as a sufficiently proximate cause of the loss to entitle the freighter to recover, as it brings the vessel in contact with the storm, in itself the act of God. Davis v. Garrett, 6 Bing. 716." This may be good law, but we doubt if any railroad company will think so.—New York Law Journal.

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### DISSATISFIED WITH THE PONY.

The opinion of Judge Wilkes in a late Tennessee case describes a tragedy and its consequences: It was a suit on a note for a Texas pony described as "a small pony mare, well formed, with bright eyes and a remarkably active pair of heels." It appeared that on making the trade defendant was in the act of leading the pony away with an ordinary halter "when the plaintiff suggested that a 'slip halter' would suit the temperament and disposition of the animal better," and advised defendant "not to turn her loose or put her into a stable, but to tie her to a post until she was gentle." Strictly following directions, defendant next morning "came around to see if the pony was making any progress toward getting gentle and found her very quiet—in fact she was dead." He says that he does not certainly know what caused her death. but thinks it was because 'she could not get her breath.' This seems quite probable, as the 'slip halter' was found to have 'slipped' down and "become tightened around her nostrils." The defendant claimed that "he only took the pony on 'probation' for six months and by the contract had the right, at any time he was dissatisfied to rescind the trade and deliver up the pony," and that while he did not offer to return the pony because he was prevented "by the act of God," "that when he saw that the pony had committed suicide he did not care to keep her

any longer, and he therefore exercised his option to rescind the trade." Plaintiff insisted that it was the "act of the pony" which prevented the return, but the defense was held good, and the court said: "We think the weight of the proof was that the defendant was to have the right to rescind the trade at any time within six months, if he became displeased with his bargain, and, having exercised his option, we cannot say that he acted arbitrarily in becoming displeased after the pony had put an end to her further usefulness by means of the device furnished by the plaintiff."—Case and Comment.

## BOOK REVIEWS.

Commentaries on The Laws of England in four books, by Sir William Blackstone. Knight, one of the justices of His Majesty's Court of Common Pleas, with notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and others; and in addition, notes and references to all text-books and decisions wherein the Commentaries have been cited, and all statutes modifying the text. By William Draper Lewis, Ph. D. Dean of the department of law of the University of Pennsylvania. Book 1. Philadelphia; Rees, Welch & Co., 1897.

Blackstone needs no introduction. No other law book has been so widely read or so much studied. Its form is fixed. The student of law is supposed to read it, and the lawyer to be familiar with it. Not to have read Blackstone is not to have finished a preliminary study of the law.

Much labor and care have been bestowed upon this edition to make it attractive and useful to both student and lawyer. The editor, in his preface, says: "By making copious extracts from the notes of former editors, I have tried not only to preserve the learning which has accumulated around Blackstone's work, but to give the student of legal development a picture of the best thoughts suggested by the statements in the text taken at successive periods since the publication of the first edition. Carrying out this idea in my own notes, I have attempted to reflect the thought of the last part of the nineteenth century rather than to present my own opinions. In this respect it is proper to state that I have retained some of the notes of prior editions on statutes since repealed. This has been done wherever necessary to the proper understanding of the statute law as it exists today. By citing thousands of cases and hundreds of textbooks I have sought to make the Commentaries with the arrangement and text of which all lawyers are familiar, a mine of references to which one can readily turn when in search of information upon a given point of law."

The editor of this edition has added the dates of the cases referred to in his notes.

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"Private orporations," with a number of leading and illustrative cases, by C. B. Elliott, Ph. D., LL. D., one of the judges of the District Court of Minnesota, Fourth Judicial District. Second edition, revised and enlarged. Minneapolis, Minn. Goodyear Book Company.

In writing this book Judge Elliott has conferred a great boon upon the law student, for whom it is more especially intended. Judge Elliott was for a number of years lecturer on corporation law at the University of Minnesota, and while there learned the needs of the student. The first edition of his work was published during his connection with the university and used by him in his course of lectures. He has very much extended its scope in the second edition and made it of value to the practitioner as well as the student. The principles are stated in a clear and terse style and the citations are well chosen and quite numerous. The leading cases contained in the latter part of the book are selected with much care and help make the book of great value to students who have no access to large libraries.

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## HON. W. J. BRYAN'S BOOK.

All who are interested in furthering the sale of Hon. W. J. Bryan's new book should correspond immediately with the publishers. The work will contain an account of his campaign tour; his biography, written by his wife; his most important speeches; the results of the campaign of 1896; a review of the political situation. Agents wanted. Mr. Bryan has announced his intention of devoting one-half of all

royalties to furthering the cause of bimetallism. There are already indications of an enormous sale. Address W. B. Conkey Company, Publishers, 341-351 Dearborn St., Chicago.

### ALLEGED HUMOR.

A cracker from the mountains was on trial for shooting and wounding a "nigger." He was arrested, and, having no money, the judge appointed a broker, who was present, to defend him. The broker was not a lawyer in the legal sense of the word, but the judge, who was an old college mate of his, said he was an idiot because he wasn't one; in other words, that he was a lawyer by instinct. The broker cross-questioned the witness briefly, sending in now and then a sarcastic and discomforting trajectory. When he came to make a speech he said: "Gentlemen of the jury, I have taken great pains to show you that my client was a respectable citizen. Ten witnesses have asserted—on oath, mind you—that he stands high in this community." The defendant was 6 feet 3 inches tall, and the jury smiled.

"He stood high in the community, and that is sufficient. Now for the law. We find in the thirtieth verse of the sixteenth chapter of "Chitty on Pleadings"—Chitty, gentlemen, was one of the bravest generals in the confederate army—this well-established principle of law."

Here the broker snaps his eyes together and adjusts his glasses, holds the book far off, elevates his chin, and reads:

" 'No respectable white man can be guilty of crime."

"That, gentlemen, is enough. I leave the case in your hands."

Each juror changed his quid, looked at his neighbor, nodded, and, without leaving their seats,, rendered a loud and emphatic verdict of "Not guilty," and then joined in three cheers for the defendant and his lawyer.

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A Chicago University professor holds that Americans are fast becoming Indians. The Chicago Law Journal adduces some facts that seem corroborative. We of the West, particularly, are making great strides in the rapid-fire divorce gun. We are getting so we can divorce a Chicago woman in two minutes. A judge of the circuit court at Logansport, Ind., last June severed the matrimonial bonds in forty-five seconds. But we have only approached, we have not quite equaled, the expedition of the Indians. place when the tribe is assembled at The Journal continues:

"On the reservation the divorce takes a dance. The chief makes a formal announcement (calls the case), and when the circle is formed the discontented warrior strikes a drum, gives away two or three presents (often one to the squaw he intends to take next) and makes a short speech—i. e., his complaint against his wife—ending by giving her over to another brave. Often as many as half a dozen divorces are thus obtained at a single dance in an hour."

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An Up-to-Date Defense.—"We propose to show, gentlemen of the jury," said counsel for the defense, in Judge Chetlain's court the other day, "that it is impossible for the defendant to have committed this crime.

"In the first place we will prove that the defendant was nowhere near the scene of the crime at the time the crime was committed.

"Next we will offer the indisputable testimony of persons who saw the defendant on the spot and who did not see the defendant commit the crime.

"We will show that no poison was found in the body of the deceased.

"Not only that, but we will prove that it was put there by the prosecution in this case.

"We will, furthermore, show that the deceased committed suicide.

"And last, but not least, we will prove beyond the shadow of a doubt that the deceased is not dead.

"In view of which corroborative facts, gentlemen of the jury, we respectfully ask for an acquittal."—Chicago Law Journal.

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In West Virginia, where it is not larceny to take a dog, a dog-taker was indicted for stealing the chain to which the dog was fastened. The defendant pleaded guilty and was sentenced to 100 seconds in jail.

***The free interruption of counsel by the judges of the United States supreme court is a well known fact, which has brought fear and trepidation to many a stout-hearted lawyer. But, according to the advice of the late Justice David Davis, given to a young lawyer, the terror of interruption is considerably mitigated. "You need not be afraid" (said Judge Davis, as reported), "to speak before the supreme court. If one of those duffers in a toga interrupts you in the midst of an argument, by some irrelevant question, don't get frightened and spoil your argument by stopping and answering him. Just say, quietly, 'Excuse me, your honor, but I'll reach that by and by;' and if you don't reach it, it won't matter. You need not be afraid that you will be called on to answer it after you have taken your seat."

Perhaps it was this selfsame young man whom Judge Davis in his big toga interrupted three distinct times in his argument, insisting, each time, whether or not, "this isn't the exact point in the case?" (stating it). The young man, each time, with charming self-possession, answered: "No, your honor, that is not my point." Whereat Judge Davis leaned back in his ponderosity and, sotto voce, was heard to say to the neighboring toga, "Well, what in the h—l is his point anyway?" The young man is said to have concluded his argument without the interruption of any other "duffer," big or little.

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Attorney (examining a witness)—"You say you saw the shots fired?"

Witness—"Yes, sir."

"How near were you to the scene of the affray?"

"When the first shot was fired I was about ten feet from the shooter."

"Ten feet. Well, now, tell the court where you were when the second shot was fired."

"I didn't measure the distance."

"Speaking approximately, how far should you say?"

"Well, it approximated to half a mile."—Texas Sifter.

### A JUDICIAL ANECDOTE.

One of the older members of the Cincinnati bar was once pleading a case before Judge Sage, and had talked incessantly for two hours. Suddenly and unexpectedly the longwinded man stopped short and coughed.

"I would like a glass of water," said he to the court attendant, and the man disappeared to get it for him.

For a moment there was a long-drawn sigh from the listeners, and then Judge Sage leaned forward to the friend who tells the story and whispered: "Why don't you tell your friend, Alfred, that it is against the law to run a windmill with water?"

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### HIS EXCUSE.

"I shall fine you for assault and battery," said the police judge.

"But-but, judge," stammered 'Rastus, "I—I didn't go fer to run over de man—'deed I didn't."

"No, but you were riding your wheel on the left side of the street. Don't you know that the law requires you to keep to the right?"

"Yes, judge, but I—I's left-handed."

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The right of a bicycle rider to pass on the right-hand side in meeting a truck which is turning toward that side to the curb of the street is held, in Peltier v. Bradley, D. & C. Co., (Conn.) 32 L. R. A. 651, to be not absolute, and he is held not to have the right to assume that the driver must turn out for him, but is bound to exercise the same degree of care which is required of the driver in order to avoid a collision.

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A grant to husband and wife, the words of which show an intent to create a tenancy in common, will give them an estate as cotenants, and not as tenants by the entirety. Fulper v. Fulper (N. J.) 32 L. R. A. 701.

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A renewal after notice of the death of a guarantor, of paper discounted by a bank during his life, is held, in Gay v. Ward (Conn.) 32 L. R. A. 818, to constitute a payment so far as his estate is concerned, and to terminate his liability.

# THE MINNESOTA LAW JOURNAL.

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## DISTRICT COURT.

**John Irving vs. The Minneapolis & St. Louis Railway Company.**
**(District Court. Hennepin County.)**

### Service of Summons—Misnomer.

Frank D. Larrabee for plaintiff;
A. E. Clark & W. F. Booth for defendant.

Plaintiff brought an action against defendant and served the summons and complaint upon A. H. Mahler who was described in the affidavit of service as the general manager of defendant. Defendant appeared specially and moved to set aside the service of the summons and complaint upon the ground that the pretended service was not made in accordance with the statutes of Minnesota and upon the ground that the person upon whom the pretended service was made was neither an officer of defendant nor a director, nor agent, nor was he authorized to accept service of any papers for defendant. The motion was based upon affidavit of A. L. Mahler in which he swore that he was not an officer, etc., of defendant. Plaintiff's attorney filed a counter affidavit in which he swore that the service was made upon A. L. Mahler and that said Mahler was general manager of The Minneapolis & St. Louis Railroad Company and asked to change the word Railway to Railroad in the title of the action. It appears that the old company was named Minneapolis & St. Louis Railway Company but it was thrown into the hands of a receiver some years ago and a new organization known as Minneapolis & St. Louis Railroad Company bought the property and has since operated the same and the action was intended to be brought against this last named Company.

SMITH, J.: The above entitled action being regularly upon the special term calendar came on for hearing upon motion of defendant, Minneapolis & St. Louis Railway Company, to set aside the service of the summons and complaint in said action. The defendant appeared specially for the sole purpose of making said motion. After reading and filing the affidavits in support of said motion and in opposition thereto and after hearing counsel it is ordered that said motion be and it is hereby granted.

**John W. Lane and John C. Quinby vs. Jonathan Eaton, et al.**
**(District Court. Ramsey County.)**

### Wills — Construction — Beneficiary Without Legal Entity.

H. J. & E. A. Horn for plaintiffs.
F. G. B. Woodruff and Ambrose Tighe for certain heirs.
Geo. E. Budd for Methodist Church.
C. W. Farnham for Salvation Army.

George Eaton died at St. Paul, Minnesota, in 1895, leaving a will in which there was the following clause:

"Clause IV. I give, devise and bequeath one other legal share or third part to be first selected and set apart by my executors or the survivor of them to John W. Lane and John C. Quinby or the survivor of them, in trust, to keep the same carefully invested and to receive the rents, profits and income thereof, and to pay and apply the same, together with the principal sum or third part to and for the use of the branch of the Salvation Army, so-called, located in said City of St. Paul, said principal sum and interest accruing thereon to be permanently invested in the purchase of a lot, the erection thereon of a place of worship, where said Salvation Army may hold its meetings; said other share or third part, and the interest thereon, never to be used or invested outside of said city; but it is given solely for the purpose heretofore mentioned. If said branch of the Salvation Army in said city is, or should become legally organized, so it may take and hold the title to property, then I direct the said trustees, or survivor of them, to transfer said third part or share, and all the rents, income and profits of the same, together with any property which may come to them under the provisions of this will, to said organization as soon after the settlement of my estate as practicable."

The executors of the estate brought the will into court and asked that the court interpret and determine said will and advise and direct them in the execution of the trusts, etc.

The court made the following findings and decision:

George Eaton died at St. Paul, Minnesota, in 1895, leaving a will in which there was the following clause:

The executors of the estate brought the will into court and asked that the court interpret and determine said will

and advise and direct them in the execution of the trusts, etc.

The court made the following findings and decision:

The Salvation Army is an unincorporated religious sect or society, organized in England some years ago by one William Booth, a resident and citizen of said country, for the purpose of inculcating the doctrines of Christianity and carrying on religious and like charitable work among the poorer classes of society, and especially among those classes of people not reached or directly influenced by the ordinary instrumentalities of the Christian churches, having somewhat the semblance of an army, with officers having titles borrowed from the titles of officers of the English army, with subdivision posts or branches located in the larger cities of the principal countries of the world and especially of England and the United States, and, at the time of the making of the said will by said George Eaton and ever since, having one of said subordinate branches located in said city of St. Paul. Said William Booth is the highest officer or general in command of said so-called Salvation Army, and the work thereof is all carried on under his direction and the direction of subordinate officers appointed by him or by subordinates under him, in the selection of whom the members of said society have no voice. Said society is not so organized as to have any legal entity or be capable of taking or holding title to real or personal property or of directing through its membership the control or disposition of said property, all property for the carrying on of said work being received, held and expended by its officers appointed as aforesaid. Said Salvation Army so-called and the post or branch thereof located in St. Paul is not so constituted or organized that it is or ever was capable of being a beneficiary of the property attempted to be devised in trust for its benefit as provided in article 4 of said will, and the said devise and all the provisions of said article 4 are without force and are wholly null and void.

As conclusions of law the court finds, that subdivision 4 of said will is invalid and of no force or effect, and that the property thereby attempted to be devised and disposed of should be distributed the same as if no disposition thereof had been made.

OTIS, J.—The question that has given me most difficulty is the devise attempted to be made for the benefit of the Salvation Army. In my judgment the devise is of real property, for the ultimate purpose thereof is the purchase of a lot and the erection of a building thereon to be held by the trustees named as a meeting place for the army. If this view is correct, all parties concede that the provision cannot be sustained as a devise for charitable uses. But plaintiffs mainly rely upon section 3040 General Statutes 1894, as authorizing a devise of this character to trustees named by the devisor for the benefit of an unincorporated religious society. In my view, the section is without application to the facts of this case. It first appears on our statute books as Section 21 of chapter 36 of the Revised Statutes of 1851, entitled "Of Religious Societies." Read in its connection as here found, I am of the opinion that the trustees there intended were trustees of the religious society for whose benefit the conveyance was to be made, and not any persons whom the devisor might see fit to name, over whom the society should have no control whatever. The provision that such property should descend "in perpetual succession" to such trustees, contemplated that the title should vest in trustees of the society as they should from time to time be elected or appointed, and never for a moment contemplated that such property should be held by strangers over whom no control could be exercised. The whole chapter, taken together, forces the construction I have given, and such must have been the view of the Supreme Court in Little v. Wilford, 31 Minn. 173. If plaintiffs' contention is correct, I do not see how this decision can stand, and I shall not assume that this provision of statute was overlooked if it does not seem to have been directly referred to.

I am, furthermore, strongly inclined to the opinion that this section 21 of chapter 36, Revised Statutes (Sec. 3040 Gen. Stat. 1894) has reference to trustees of religious societies duly organ-

ized in accordance with the preceding provisions of that chapter; in short, duly incorporated societies, though it is not necessary to go so far for the purposes of this case. Either view defeats the attempted devise.

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**Frank Sanke vs. City of St. Paul.**
**(District Court. Ramsey County.)**

## Municipal Corporation—Ice on Sidewalks.

J. L. MacDonald, Esq., for Plaintiff.
E. J. Darragh and Herman Phillips for defendant.

Plaintiff slipped on an icy sidewalk and broke his wrist. He sued the city for $1,000 damages, claiming that injury was due to the city's allowing the gutters of the street to become filled up and obstructed and the water which should have flowed through the same—flowed over and upon the sidewalk, and by reason thereof the sidewalk became slippery and dangerous.

On motion of counsel for defendant the court instructed the jury to bring in a verdict for defendant. In ruling on the motion the court said—
Kelly, J.:

"In this case, upon these allegations and the proof that has been introduced on the part of the plaintiff, the defendant introducing no testimony, the defendant has moved the court to instruct the jury to find a verdict in its favor. It will be observed that the cause of action set up in this complaint is the fact that the sidewalk in question had been suffered to become covered or coated with ice and thereby rendered slippery and dangerous, and for that reason the plaintiff fell upon it and was injured. It has been held in this state uniformly, and, as far as I am advised, in all the Northwestern states of this country, that mere slipperiness of a sidewalk or way will not constitute such an obstruction as would render the municipality liable for negligence to one who was injured by reason of the slipperiness. There must be something else than mere slipperiness. The cases that have been cited by counsel from the state of Massachusetts point out what the view of the courts of that commonwealth was, that something else should be shown.

"Counsel claimed, however, that because he has introduced testimony tending to show that at that time and in that vicinity there was a gutter which had been placed there to carry off the water that flowed along Ames avenue, which had become obstructed with ice and snow, dirt and other debris, the accumulation, it is to be presumed, of the winter, and that being so obstructed the water which melted, according to the testimony before the court, during that day, had failed to find an outlet, and in consequence of obeying the laws of gravitation it had flowed over the lowest point, which must have been the sidewalk in question, and during that night a sheet of ice had formed, and upon this he claims that there is a question of negligence to be submitted to this jury.

"I have studied this case as carefully as I posibly could, and with the single purpose of arriving at a conclusion just both to the plaintiff and to the City of St. Paul, and I cannot see upon what hypothesis it would be possible to hold the City of St. Paul responsible for this sad accident. Of course, it is a sad thing that a citizen slips and falls and hurts himself, and under a proper state of facts, possibly, he should receive copensation from those that are responsible for it. But this court takes judicial notice of the season. We take judicial notice of the fact that for three or four and sometimes six months of the year in this climate the weather is such that everything is frozen solid, the earth and everything on the surface of the earth, and that under such circumstances to hold that it is the duty of the municipality, at its peril, to keep open all the waterways and gutters and the like, to meet every possible emergency of a sudden thaw, either in the winter or in the early spring, would be to entail a duty that would be absolutely impossible for the municipality to perform. The law does not require impossibilities, even from a municipal corporation. It requires reasonable things, and it is not reasonable to make a ruling that would result in such a requirement.

"Now, while this thing is perfectly plain to me, upon the reason of it, and while I do not see in the cases, either in Massachusetts that have been cited to me this morning, or in the case of Hall vs. the City of Fond du Lac, which was relied upon yesterday, anything to change my views upon it, and while I am not given very much to reciting authorities (rather basing my

conclusions upon the absolute reason and justice of the proposition), yet I have, in the short time that has been afforded me, been fortunate enough to find a case which is a good deal nearer home than the State of Massachusetts, which, it seems to me, fits precisely the circumstances of this case. It is the case of Chamberlain against the City of Oshkosh, reported in the 84th Wisconsin, page 289, also reported in the 36th American state reports, on page 928; and it is held there that where water accumulates in a hole in the sidewalk and forms a sheet of ice on which a traveler falls, the ice and not the hole is the proximate cause of the accident, and the city is not liable for injuries thereby sustained. To render a city liable for injuries resulting from a fall upon a sidewalk which had become dangerous to travelers through the formation of a smooth and slippery surface, and ice thereon, it is necessary that some other defect should have combined with the ice to cause the injury. They decide squarely in that case that where the other defect was alleged to have been a hole formed in the sidewalk itself, and in which water collected—water would not have collected in a hole unless it had been there, and the hole would not have been there unless from some negligence, as it was claimed, of the city—the water collected, the ice formed, it was slippery and the plaintiff fell and sustained an injury, and yet under those circumstances the supreme court of the State of Wisconsin holds that there could be no recovery, and they so hold upon the obvious proposition that the ice and not the hole in the sidewalk was the proximate cause of the injury.

sidewalk, and not the circumstances that produced the ice, was the proximate cause of the injury. And so in the case of Henke vs. the City of Minneapolis, in the 42d Minnesota, page 530, it has already been held by the supreme court of the State of Minnesota that it is immaterial in what way water comes upon the sidewalk; that where the smoothness of the formation caused by the water causes the injury there can be no recovery.

"Gentlemen of the jury, under the testimony in this case, the pleadings and the law, as I understand it, I instruct you to find a verdict in favor of the defendant."

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**Julia L. Dorothy vs. D. M. Clough as Governor of the state of Minnesota and G. H. Hazzard, Park Commissioner.**
**(District Court. Chisago County.)**

## Injunction—Due Process of Law—Eminent Domain—Mode of Exercise.

F. B. Dorothy, Esq., for plaintiff.
Geo. B. Edgerton, Esq., for defendants.

The action having come on for hearing upon the application of the plaintiff for a temporary writ of injunction herein enjoining the said defendants and each of them from entering upon the lands described in the complaint herein, and from in any manner interfering with said plaintiff in her enjoyment thereof, was heard upon the complaint, answer and reply herein, and the affidavits of F. B. Dorothy, of the date of June 25th and August 26th, 1896, of Frank Fredeen of date of August 24th, 1896, L. K. Shumard of date August 24, 1896, and of E. C. Gottry of the same date submitted on the part of said plaintiff, and the affidavits of said defendant George H. Hazard, of date of August 17th and August 25th, 1896; Benjamin Clayton, of August 17, 1896; of John Zelch, of August 18, 1896; of David M. Clough, Hans Thoen, Charles L. Bjoonmark, F. A. Lindquist, John A. Granstrand, R. E. Sevey, George W. Seymour, A. E. Fredeen, L. W. Marston, and William A. Hobbs, of date of July 25th, 1896; of W. H. C. Folsem and Henry Hildebrant, of date of August 7th, 1896; of Joseph Schottmuller of August 8, 1896; of August J. Anderson, of July 27, 1896, and of Peter Abear and Amelia Hamilton of August 26, 1896, submitted on the part of said defendants. Ordered, that said application be and the same hereby is denied.

WILLISTON, J.—By virtue of an act of the legislature approved April 25th, 1895, the same being chapter 196, Laws of 1895, the legislature of this state appropriated to the public use, as a public park, to be known as "The State Park of the Dalles of St. Croix," the lands described in section one of that act, the premises described in the complaint in this action and alleged to be the property of the plaintiff, being a part of the lands so appropriated.

Said section one authorizes and empowers the governor of the State to acquire for, and in the name of the State the title to the lands so appropriated.

Section two provides, that "To acquire the title to said lands the governor is hereby authorized and empowered to appoint a commission composed of three persons, one of whom shall be a resident of Taylors Falls, Chisago county, to examine and determine the value of the land to be appropriated to public use, and to the purposes above designated, said commissioners shall each qualify and organize as a commission in the manner now provided by law, for commissioners appointed to ascertain and determine the value of land taken and appropriated by corporations having the franchise of taking lands for right of way for public use, and shall proceed in all respects to determine the value of each tract of land and parcel appropriated, as required by the laws of this state, of commissioners appointed in proceedings for the condemnation and payment to the owners of lands appropriated to public use. Within three months after their appointment said commissioners shall make out and file with the governor and with the state auditor a report in duplicate, describing each tract and parcel of land tak-

en, with all streets, alleys and other public property appropriated, and the value thereof, as found or determined upon and reported by said commission, shall be conclusive both upon the owners of said land and upon the State of Minnesota, and the value of the same so reported shall be paid to the owners thereof respectively by warrants drawn on the State Treasurer in favor of such owner, or owners of said land, or lands, tract or parcel thereof out of the money in the treasury hereby appropriated for that purpose."

Section five provides that "the commissioners appointed under this act shall have power to administer oaths, and summon and examine witnesses."

Section seven, "that the sum of six thousand ($6,000) dollars be and the same is hereby appropriated out of the money in the state treasury not otherwise appropriated for the purpose of carrying out the provisions of this act."

From the pleadings in the action and the affidavits used on the hearing of the motion for an injunction it appears that the governor did appoint as the commissioners provided for in the act, Benjamin Clayton, John Zelch and the defendant George H. Hazzard, that May 20th, 1895, such commissioners met and severally qualified by taking an oath to "faithfuly and impartially discharge the duties of his appointment to the best of his judgment and ability.

May 21st. 1895, such commissioners met and organized as a commission by electing said Zelch as the chairman, and the said Hazzard as the secretary thereof.

That on the second day of July, 1895, said commissioners gave notice that they would on the 6th day of August, 1895, at 10 o'clock A. M., meet at the town hall in the town of Taylors Falls and proceed to view the lands described in section one of said act for the purpose of appraising and determining the value thereof. That on the 10th day of August, 1895, said plaintiff by her agent appeared before said commissioners. That the commission appraised the value of the plaintiffs land at $150.00 and have made and filed their report as required by said act.

The relief demanded by the plaintiff in this action is that the defendants be enjoined from entering upon, or in any manner interferring with her property claimed to have been so appropriated under said act, such relief being demanded upon the ground that the act under which the State claims to have appropriated such property is in violation of that clause of section 7, article 1 of the constitution of this State which provides that "no person shall be deprived of life, liberty, or property without due process of law" and also of section 13 of the same article which provides that "private property shall not be taken for public use without just compensation therefor first paid or secured."

For the plaintiff it is first contended that the act violates each of such constitutional provisions in that

1:—An impartial tribunal is not provided for the determination of the just compensation to be paid or secured to the land owner, in that:

A. There is no provision in the act for any notice as to the time or place where or when the commission shall be appointed and therefore the land owner has no opportunity to be heard no opportunity to object to or challenge any person appointed upon such commission.

B. That the legislature could not delegate to the governor the power to appoint such commissioners.

These several objections are so connected each with the other that they will be considered together.

In this state it appears to be the rule that the right of exercising the eminent domain is a political and not a judicial question. That the right has been delegated by the people to the legislative department of the government, which department may provide the manner in which the right shall be exercised, subject only to the constitutional limitations that no man shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation therefor first paid or secured, and subject further to the right of the property owner to have an impartial tribunal to determine the just compensation to which he may be entitled, a tribunal before which he has a right to be heard, as to such compensation, that within such legislation the power of the legislature is supreme, and it may determine what the tribunal shall be, whether a jury, a court without a jury or a commission.

Wilkin vs. First Division, &c., 16 Minn. 271.
Weir vs. St. Paul &c. R. R. Co., 18 Minn. 155.
Ames vs. Lake Superior R. R. Co., 21 Minn. 241 (93).
City of Minneapolis vs. Wilkin, 30 Minn. 140.
Comrs. vs. Henry, 38 Minn. 266.
State vs. Rapp, 39 Minn. 65.
St. Paul vs. Nickel, 42 Minn., 262.
Fairchild vs. City of St. Paul, 46 Minn. 540.
Burgerman vs. True, 25 Minn. 123.

In Weir vs. St. Paul &c. R. R. Co., the court on page 165 say:

"These propositions follow inevitably, from the propositions before established, to wit: that the State possesses the eminent domain, unrestrained." Again, from the foregoing consideration it follows, that the question as to the manner in which the eminent domain shall be exercised addresses itself to the legislature as

a question of propriety, expediency, rather than as a question of power. And in accordance with this view of the case, it is held to be competent for the government, in its discretion to exercise the eminent domain through its public officers, or agents, or through public or private corporations or private individuals."

In Ames vs. Lake Superioor &c. R. R. Co., on page 293:

"We conclude therefore that while the legislature must provide an impartial tribunal to ascertain the amount of compensation, and give the parties an opportunity to be heard before such tribunal, it may determine what the tribunal shall be, whether a jury, a court without a jury, or commissioners selected by a court."

And in State vs. Rapp on page 67:

"Condemnatory proceedings in the exercise of the right of eminent domain are not civil actions or causes within the meaning of the constitution, but special proceedings, only quasi judicial in their nature, whether conducted by judicial or non-judicial officers or tribunals. The propriety of the exercise of the right of eminent domain is a political or legislative and not a judicial question. The manner of the exercise of the right is, except as to compensation, unrestricted by the constitution and addresses itself to the legislature as a question of policy, propriety, or fitness, rather than of power. They are under no obligation to submit the question to a judicial tribunal, but may determine it themselves or delegate it to a municipal corporation, to a commission or to any body or tribunal they see fit.

Neither are they bound to submit the question of compensation incident to the exercise of the right of eminent domain to a judicial tribunal provided it be an impartial tribunal, and the property owner has an opportunity to be heard before it, the legislature may refer the matter for the determination of a jury, a court, a commission or any other body it may designate."

In Knoblauch vs. Minneapolis City, 56 Minn. 321 the question of the impartiality of the tribunal and of the appointment of the appraiser to determine the compensation was before the court. The law under which the proceedings were had provided, that the amount of damages or compensation to be paid would be determined by freeholders as commissioners to be appointed by the City Council Per Curia.

"Exception is taken to this, that it does not, in express terms, require that the persons appointed shall be fair and impartial. The legislature assumed that the council will honestly perform its duty and that the way prescribed will secure fair and impartial commissioners; and we must presume that it will, just as we would have to do if the same duty, to be performed in the same way, were imposed upon a court."

"Objection is also made that no sufficient notice of the proceeding was given plaintiff or her grantor. They were not entitled to notice of any proceedings prior to the meeting of the commissioners to ascertain the compensation."

See also City of St. Paul vs. Nickel, supra and cases cited, as to notice. In that case the court say, "the presumption is that the members of the board are competent and impartial and that they will faithfully perform their official duties."

The same presumption obtains in the case at bar and I cannot say from the matters contained in the affidavits submitted that it appears from a preponderance of the evidence that such presumption has been overthrown.

As to the question what tribunal is sufficient, see

Mills on Eminent Domain, sec. 313.

As to Notice, same author, sec. 366.

In Langford vs. Commrs. Ramsey County, 16 Minn. 373, on page 378, the Court say: "But the constitution contains no express provision as to the mode in which the compensation to be paid shall be determined. In the silence of the constitution upon this question, it is to be presumed that the framers of the constitution intended to leave that subject to the discretion of the legislature, to be regulated in such manner as might be prescribed by law" (citing authorities.) "But it is not to be understood that the discretion vested in the legislature on the exercise of its power is an unlimited one." And, "While, therefore, the constitution provides no particular mode in which compensation shall be ascertained it would seem to follow that as to the question of the amount of compensation, the owner of the land taken for public use has a right to require an impartial tribunal be provided for its determination."

The act under consideration in that case was c. 143 S L 1870 (p. 466.) Sec. 1 of which named these commissioners to locate, survey and establish a certain state road. Sec. 2. That they or a majority of them meet at such place as shall be most convenient to them on any day subsequent to the passage of the act, and prior to the first day of January then next.

Sec. 3. That they should file in each of the counties of Ramsey and Hennepin a certified plat of the survey of such road.

Sec. 4. That such commissioners or a majority of them should ascertain and determine all damages sustained by the laying out and opening of said road.

Sec. 5. That each county through which the road shall pass shall pay the reasonable expense of laying out

and surveying the road in such county.

Sec. 6. Authorized the county commissioners of Hennepin county to appropriate not exceeding $3,000 to aid in building and bridging that part of the road lying within that county.

That was an act framed upon the theory that the state was everything, the individual nothing, and that the land owner had no rights which the legislature was bound to respect.

In Beekman vs. Saratoga, etc., R. R. Co., 3 page, ch. 45.

The Commissioners to determine the compensation to be paid were appointed by the Governor.

On page 70 the chancellor says: "When, therefore, the constitution provided that private property should not be taken for public use without just compensation, and without prescribing any mode in which the amount of compensation should be ascertained, it is fairly to be presumed the framers of that instrument intended to leave that subject to be regulated by law, as it had been before that time, or in such other manner as the legislature in their discretion might deem best calculated to carry into effect the constitutional provisions, according to its spirit and intent."

See also Livingston vs. Mayor of New York, 8 Wend. 85.

On page 109, Sherman, Senator, says: "I am of opinion that if the mode of taking rests with the legislature, and they have prescribed one which operates alike on all whom it affects, and is not individual or partial that it is valid, embraced within the constitutional limits."

Bloodgood vs. Mohawk & C. R. R. Co., 18 Wend. 9.

Commissioners to determine the compensation to be paid the land owners were under the statute appointed by the governor. The act was held to be constitutional.

In each of those cases the determination of the compensation appears to have been final with no right of appeal or other method of reviewing their action provided.

See also Calkins vs. Baldwin, 4 Wend. 668.

Kramer vs. The Cleveland, etc., R. R. Co., 5 O. S. 140.

Under the statute when the parties could not agree upon the compensation to be paid the land owner, or if the owners were under certain legal disabilities, or out of the state the court of common pleas (in this state the district court) or any judge thereof in vacation, on the application of either party, appointed three disinterested freeholders to appraise the damages which the land owner would sustain by the appropriation.

The determination of such tribunal appears to have been a finality. The Court, Ramsey, J., says: "It requires no judicial condemnation to subject private property to public use. Like the power to tax it resides with the legislative department, to whom the delegation is made. It may be exercised directly or indirectly by that body; and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted * * * and in regard to determining the compensation. "An impartial tribunal is certainly provided for ascertaining it. It must consist of three disinterested freeholders of the county, selected by an impartial judicial tribunal; at the instance of either parties * * * It might have been more judicial to have provided for reviewing their determination, but this was a matter of legislative discretion not to be revised by the judiciary.

In Morris vs. Comptroller, 54 N. J. Law, 268.

The tribunal to ascertain and determine the value of the premises to be appropriated was a commission of two disinterested persons, appointed by virtue of statute, by the governor of the state.

The Court say: "The fact that the governor appoints the commissioners does not impugn their impartiality. In performing such a duty he represents the state in no other sense than would the chancellor or chief justice in exercising the same function. He represents the state, not as a litigant party, but as the sovereign intent on guarding private rights as well as public interests, and no suspicion of unfairness can attach to him. Nor is his selection for commissioners an act in which the parties concerned are entitled to be heard. It is not a judicial act, it is political, like his selection for judges, and all other officers on whose integrity and discretion private citizens must rely. While usually the statutes of this state authorizing private corporations to condemn lands confine the selection of appraisers to some member of the judiciary and provide for notice of the selection, yet it frequently occurs that an appraiser is chosen entirely outside of any suggestion made at the hearing, and whose fitness therefor has not been the subject of comment by the parties, so that in effect the appointment is made without a hearing as to its propriety."

In Davidson vs. Farwell, 8 Minn. 258, the court, in construing Art. 1, sec. 7, of the constitution of this state, providing that: "No person shall be deprived of life, liberty, or property, without due process of law," on page 262 say: "What constitutes due process of law in any particular case must depend upon the facts and circumstances of the case"; and on page 263: "The intent of the language quoted, we think is to protect the citizen in the enjoyment of life, liberty

and property, and to prohibit interference therewith, except in accordance with such provisions of law as the legislature may enact to protect society and secure the rights guaranteed by the constitution. That instrument has nowhere defined process of law."

Baker vs. Kelly, 11 Minn. 480, was an action of ejectment, the defendant being in possession under a tax deed issued upon a sale made under the provisions of chap. 4, G. L. 1862. The principal question in the case was, whether, notwithstanding the provisions of that act, the plaintiff had the right in that action to test the validity of the sale. The court on page 496 say: "Due process of law without which the constitution declares no person shall be deprived of life, liberty, or property, is not merely an act of the legislature. Chancellor Kent says, 2 Com. 13: "The better and larger definition of 'due process of law' is that it means law in its regular sense of administration through the court of justice," and this is now the well-settled meaning of this clause of our constitution." (Citing authorities.) The court, however, preface the words here quoted, with the following sentence: "That the premises in question were taken under the power of eminent domain is not pretended."

That definition was approved in Beaupre vs. Hover, 13 Minn. 366, the question in that case being whether a statute which divested one of vested rights was constitutional, also in State vs. Becht, 23 Minn. 411, a proceeding under the bastardy act.

In Bardwell vs. Collins, 44 Minn. 95. On page 101, the court say: "No court has ever attempted to give a complete or exhaustive definition of the term 'due process of law,' for it is incapable of any such definition. All that can be done is to lay down certain general principles and apply these to the facts of each case as they arise." That case on page 102: "There are other proceedings in the nature of proceedings in rem, many of them not strictly judicial, and none of them proceedings according to the course of common law, such as the exercise of the right of eminent domain." The case recognizes the proposition that what would be a proceeding in "due process of law" in the latter class of cases would not be a compliance with the law in the personal action.

In Smart vs. Palmer, 74 N. Y. 183, on page 191, the court say: "It may be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

This definition is cited with approval in State vs. Billings, 55 Minn. 467 (74.)

In State vs. State Board of Medical Examiners, 34 Minn. 387, on page 389, the court say: "Due process of law, or the law of the land (which means the same thing) is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislature or executive, as well as the judicial department of the government, when it is declared that a person shall not be deprived of his property without "due process of law," it means such an exercise of the powers of the government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs."

Cooley, in his work on constitutional limitations, page 363, commenting upon the definition of "due process of law" given by Mr. Webster in the Dartmouth College case, viz: "By the law of the land it most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial," says: "The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial."

"But there are many cases where the title of property may pass from one person to another, without the intervention of judicial proceedings, properly so-called. * * * The necessity for "general rules therefore, does not preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power nor does the requirement of judicial action demand, in any case a hearing in court."

See further same author, page 356.

As to the tribunal to assess the compensation and notice, page 503. For "due process of law," see Lewis on Eminent Domain, s. 365. Notice in condemnation proceeding, s. 366.

In re Village of Middletown, 82 N. Y., 196 (201.) "It was objected that the act is unconstitutional because it does not provide that notice upon application for the appointment of commissioners should be given to the land owners or parties interested. It is undoubtedly true that the latter are entiled to such notice of the proceedings as enables them to appear and be heard, but it is not essential to the validity of the act, however proper and appropriate it might be, that they shall have notice of the formation of the tribunal which is to determine the damages. * * * If opportunity to appear and be heard is secured, it is wholly within the power of the legislature to determine the form and time and manner of notice to be given."

The act under consideration provides that the commissioners designated, shall qualify and organize as a commission in the manner provided by law, for commissioners appointed to ascertain and determine the value of land taken and appropriated by corporations having the franchise of taking lands for right of way for public use. Under the statute regulating that class of condemnatory proceedings, the commissioners are required severally to take and subscribe an oath faithfully and impartially to discharge the duties of their appointment. In the case at bar that was done. S. 609, G. S. 1894. The act further provides that the commissioners shall proceed in all respect to determine the value of the lands appropriated as required by the laws of this state, of commissioners in proceedings for the condemnation and payment to the owners of lands appropriated to public use. The method of proceeding in that class of cases is prescribed in chapter 36, G. L. 1874 (S. 4085, et seq. G. S. 1895) entitled "An act to provide for obtaining title to lands by the state of Minnesota, for the use of the state." The act provides that the commission shall proceed to examine the premises having given such notice as they may deem reasonable to the owner and other persons interested, such notice to be in writing, personally served upon residents of the county, by publication on others. Notice was given, the plaintiff appeared.

We have then a statute which provides for the appoinment of three commissioners by the governor of the state.

That before entering upon the performance of their duties the persons appointed as such commissioners shall severally take and subscribe on oath to faithfully and impartially discharge the duties of their appointment.

That before proceeding to determine the amount of compensation to be paid to land owners they shall give notice of the time and place of meeting for such purpose.

For the plainiff it is contended that as the legislature can not determine the amount of compensation to be paid the land owner, therefore that body cannot delegate to the chief executive of the state the duty of selecting commissioners who shall determine such compensation, or as plaintiff's counsel in his brief states the proposition: "The public is now considered as an individual (represented in this case by the governor defendant) treating with an individual (plaintiff herein) for an exchange. The governor then is the state, and he wthout notice to the parties interested appointed the commission."

The right or power of the legislature to delegate the power of appointing such commissioners to the court or a judge thereof is not questioned. It is not apparent why the governor might not with equal propriety be the official to whom such power might be delegated. The governor equally with the judge, in the performance of his official duties, acts under the oath prescribed by statute, each solemnly swears to support the constitution of the United States, and that of the state of Minnesota, the governor further swears that he will faithfully discharge the duties of his office to the best of his judgment and ability, the judge, that he will discharge the duties of his office faithfully and impartially according to his best learning, judgment and discretion. Practically the two oaths are the same, the obligation faithfully to discharge the duties of an office to the best of ones judgment and ability, necessarily implies that the official taking such oath will perform such duties, faithfully and impartially, according to his best

learning, judgment and discretion, that he will bring his best learning, ability and discretion into action in determining all questions relating to his duties, the best judgment and ability of a man always determine him to act faithfully and impartially.

The governor represents the state in the same and no different sense than the judge does, each represents the entire state, including land owner, not as an adverse party, but as a sworn official guarding the interests of, and acting impartially between the state and the owner of the appropriated property.

In Curryer vs. Merrill, 25 Minn. 1, on page 4 the court say: "Plenary legislative power is therefore the rule, while want of it is the exception. As a sequence it logically follows that every statute duly passed by the state legislature is presumably valid, and this presumption is conclusive unless it appears to be in conflict with some provision of the federal or state constitution; and in order to justify a court in pronouncing it invalid, because of its violation of some clause of the state constitution, its repugnancy therewith must be so "clear, plain and palpable" as to have no reasonable doubt or hesitation upon the judicial mind."

In the light of the authorities of this state it must be held that the legislature had power to delegate the appointment of the commission to the governor, that the plaintiff was not entitled to notice of the time and place when and where such commission would be appointed, that the commission so appointed was a fair and impartial tribunal, and that the fact that the law makes the decision of such tribunal, violates no provision of the state constitution, that the law does require notice to the land owner of the time and place of the meeting of the commission for the purpose of determining the compensation to be paid and gives to him ample opportunity to be heard, and does provide a means of paying the sum determined to be just compensation, and is a valid act. While the manner of appointing commissioners, and the making of their determination as to the amount of compensation a finality is not in accordance with previous legislation in this state; it is within the power of the legislature to so provide, and purely a question of policy which the courts cannot revise.

In regard to the alleged misconduct of the commissioners, that is too grave a question to be determined upon affidavits. At this time all that is determined is that the plaintiff is not entitled to the writ of injunction.

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### A LEGAL MIND.

A well known artist of this city received not long ago a circular letter from a business house engaged in the sale of California dried fruit, inviting him to compete for a prize to be given for the best design to be used in advertising their wares. Only one prize was to be given, and all unsuccessful drawings were to become the property of the fruit men. After reading the circular the artist sat down and wrote the following letter:

"The —— —— Dried Fruit Company:

"Gentlemen—I am offering a prize of 50 cents for the best specimen of dried fruit, and should be glad to have you take part in the competition. Twelve dozen boxes of each kind of fruit should be sent for examination, and all fruit that is not adjudged worthy of the prize will remain the property of the undersigned. It is also requested that the express charges on the fruit so forwarded should be paid by the sender. Very truly yours, — —."

—The Bookman.

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### YET ANOTHER TYPE OF MIND.

We learn that the ostrich will never go straight to its nest, but always approaches it with many windings and detours, in order, if possible, to conceal the locality from observation. And such often is the attorney's method regarding the point at issue when he pleads a hopeless case.—Ex.

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A Christmas gift by check to an employee according to a habit of previous years, although made in forgetfulness of a recent increase in his salary is held binding in Pickslay v. Starr (N.Y.) 32 L. R. A. 703, although the donor charged it to the employe's account a few days later but did not give him notice of the fact for several months.

## PERSONALS.

**Mankato—**

H. L. Schmidt and S. B. Wilson have formed a law partnership at Mankato, Minn.

**Duluth—**

The firm of Davies & Bureau has been dissolved and Mr. Bureau has removed to Three Rivers, Canada.

H. H. Phelps has withdrawn from the firm of Phelps, Towne & Harris and will continue his practice with offices in the Palladio building.

F. E. Searle, until recently the president of the Marine National Bank, has decided to resume the practice of law, and has formed a partnership with Senator H. R. Spencer under the firm name of Spencer & Searle with offices in the Board of Trade building.

John A Keyes and Otway W. Baldwin have formed a partnership as Keyes & Baldwin with offices in the Chamber of Commerce.

Jas. T. Watson, who left Duluth last July for New York City, has returned and will resume his practice at 407 Palladio building.

J. C. Hollembeek has removed to New York City.

The firm of McGindley & Whitely has been dissolved by mutual consent. Both of the former members will remain in the old offices in the Providence building.

Eric L. Winje has removed to Montevideo, Minnesota,to open a law office.

William O. Pealer and Bert Fesler have associated themselves together under the name of Pealer & Fesler, in the Exchange building.

The old and well known firm of Cash, Williams & Chester was dissolved the first of the year. All the former members wil remain in the First National Bank building.

**St. Paul—**

A. E. Boyeson, formerly of the firm of Munn, Boyeson & Thygeson, has formed a co-partnership with P. J. McLaughlan, with offices in the Pioneer Press building. Messrs. M. D. Munn and N. M. Thygeson, under the firm name of Munn & Thygeson, will remain in the Newspaper Row.

**Marshall—**

Virgil B. Seward and John E. Burchard have formed a co-partnership for the practice of law, with offices at Marshall.

## RECENT DECISIONS.

A thin strip of ice 3 feet wide and 1½ to 2 inches thick across a sidewalk, where it was formed by the discharge of water from a pipe which had been put up to take water from a sag in an eaves trough, is held, in Gavett v. Jackson, (Mich.) 32 L. R. A. 861, insufficient to make the city liable.

Reasonable care to have the common halls and stairways of a building in which apartments are leased fit for use for the passage of tenants is held. in Gleason v. Boehm, (N. J.) 32 L. R. A. 645, not to include an obligation of the landlord to furnish lights at night, and he is therefore held not liable for injury to a visitor of a tenant who fell while trying to find the stairway in the dark.

The rule that one who collects on his own premises a substance liable to escape and cause mischief must use reasonable care to restrain it is applied in Defiance Water Co. v. Olinger (Ohio) 32 L. R. A. 736, to a large iron tank or standpipe containing water which stood within 50 yards of a dwelling house occupied by a servant of the owner of the tank; and the latter was held liable for injury to a guest of the tenant resulting from the bursting of the tank.

The recipes prepared by a color mixer for the use of his employers in the manufacture of their carpets are held, in Dempsey v. Dobson (Pa.) 32 L. R. A. 761, to belong to the employers, so far, at least, as to give them the right to the use of the various colors and shades produced by them; and where he entered them in a book of his own, instead of a book furnished him for that purpose, the employers have a right to some record or register of the recipes.

## LEGAL POINTS.

A bad record.—The opinion of the court in 34 Ind. 423, opens as follows: "This record is another blundering and worthless one from Wayne county, in comparison with which the darkness of Erebus and Egypt were brilliant lights, and the chaos that existed before the creation was perfect order."

HON. G. L. BUNN.

**Judge Second 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.**

We publish in this number of the Journal two different constructions of ch. 30, Gen. Laws 1895, which law reads as follows: "Sec. 1. That subdivision or Section 8 of title 2 of chapter 66 of the General Statutes of 1878 of the State of Minn. be amended by changing the first subdivision thereof so as to read as follows, to-wit:

First. An act for libel, slander, assault, battery, false imprisonment *or other tort resulting in personal injury.*" other tort resulting in personal injury."

The words in italics constitute the amendment. The section in question provides that such actions shall be brought within two years.

Section 6, ch. 66, Gen'l Statutes 1878, enumerates the actions which shall be brought within six years. Subdivision 5 thereof reads: "An action for criminal conversation, or any other injury to the person or rights of another not arising on obligation, and not hereinafter enumerated."

In Wescott vs. Bigelow et al., receivers of the N. P. R. R. Company, Judge Lochren, of the United States circuit court, held that the amendment of 1895 limited the time for bringing all personal injury actions to two years. A few days afterwards the supreme court of Minnesota, in Brown vs. Village of Heron Lake, held to the contrary, and said that the only effect of the amendment was to include in

the class of actions to be brought within two years actions belonging to the same class as libel, slander, assault, battery and false imprisonment—that it was not intended to repeal Sec. 6. This seems to us to be a very strained construction and practically renders the amendment nugatory; but the effect of the decision is not to be regretted, for there is certainly no reason why the time for bringing an action for personal injury should be limited to two years. The amendment was evidently tacked on as it was for the purpose of evading close scrutiny of the legislators, and it is well that such legislation should be frowned upon.

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In the suit of Harry P. McGown, son of former Justice Henry P. McGown, of the city court of New York, for an absolute divorce and the custody of their child, against his wife, Mary Emma, who, on the strength of a North Dakota decree married Harry W. Bell, Justice Russell, of the supreme court, has handed down a decision in favor of McGown. The defendant, a daughter of Dr. John H. Demarest, a friend for many years of Justice McGown, married young McGown in 1887. Bell, who is a tile manufacturer, had boarded with them in New York city. On April 24th last she left her husband and went to Fargo, N. D., where she got a decree against her husband, who did not appear, not being served with papers in that state. He contended the decree was not binding upon him. McGown is suing Bell to recover damages for the alienation of her affections. After speaking of the claims of the defendant, that the courts here are bound to recognize a divorce which is valid in another state, and to recognize her subsequent marriage to Bell in that state, Justice Russell says:

"These claims are manifestly unsound. The domicile of the wife is the residence of the husband. While there are exceptional circumstances which justify the living apart from the husband against his will, and while a residence away from him may be gained with his consent, still, for legal purposes, unless for sufficient causes, the wife's place of residence is at the home of her husband and child, and she cannot acquire a foreign residence for the express purpose of freeing herself from the charge of violation of duty, and exempting herself from its obligations. Nor, if she had gained a residence in the State of North Dakota, would her suit there have been affective. To sever the marriage tie by judicial force, the courts must gain jurisdiction by personal service of process upon the defendant, or by his voluntary appearance. When the defendant went through the form of a marriage on September 26, 1896, to Mr. Bell, she was still the lawful wife of the plaintiff in this action. Her own wrong-doing, therefore, cannot render valid the judgment of a North Dakota court, which, but for that act, would have been wholly invalid. Nor can I agree with the counsel for the defence, that she should have the custody of the child."

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### CONFLICT OF AUTHORITIES RESPECTING COMMERCIAL PAPER.

Now that the legislatures of the different states have convened, it is important that the American Bar association and the bar associations of the different states and credit associations should bend all of their energies in the direction of establishing a uniformity in the law of some one of the many subjects so seriously affecting commercial life. Among the many of such unsettled questions none is of more importance, none that has caused such hesitancy, doubt and uncertainty to exist among bankers, credit men and the commercial world generally, than the liability of banks taking deposits for collection. Nothing has tended so much to clog the wheels of the great banking system as the existence of one rule of law in one state fixing the liability of a bank forwarding collections, and another rule in another state holding the opposite, and the supreme court of the United States, holding with a few of the states a certain rule, which is declared by others of unsound and unsatisfactory reasoning. What wonder then that banks hesitate before accepting paper or incurring responsibility when the courts of our states differ so widely upon a question that ought long ago

in justice and equity to the commercial world to have been settled on a uniform rule. banker accepting deposits for collection is about as certain in the liability he is incurring as he would be of winning a bet on which side a rooster on a fence would jump, or what the verdict of a jury in a criminal case would be.

The following states hold that the collecting bank is liable to its principal for neglect or default of its correspondents: Supreme Court of the United States, Georgia, Indiana, Michigan, Minnesota, Montana, New Jersey, New York and Ohio. England also adopts the same rule.

Other states hold that the collecting bank transmitting paper for collection to a suitable agent in due season is not liable for the default of the correspondent.

One theory is upon the principle that the forwarder undertakes the collection of the debt and is therefore responsible, and the other that he merely accepts the claim to transmit it to another for collection, using proper care in the selection of a correspondent.

No better service could be done to the country on the part of the bar associations than a vigorous effort in the direction of changing the conflict of opinion of the courts on this question. With only an imaginary line separating the different states, it seems almost incredible that a question so vital in its nature and so general in its scope and usage should have so many different rules applied respecting liability. It may be argued by some states, as has been done by courts long ago, that the rule is so firmly settled in the state that to change it now would work a greater hardship than to permit it to remain. That theory has long since been exploded. This case affects the very life of commerce, and ought not to be permitted to go further without the attention that its importance demands.

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### ELEVATOR INJURIES TO TRESPASSERS AND LICENSEES.

(James A. Webb in The Albany Law Journal.)

It is a general rule that a trespasser or mere licensee who is injured by a machine or contrivance on the land of another can not recover damages. This is always true unless it was unlawful to erect the machine or contrivance, or the injury was willful and wanton; and willfulness will be presumed from gross negligence. Galveston Oil Co. v. Morton, 70 Tex. 400; 7 S. W. Rep. 756; 8 Am. St. Rep. 611; Cusick v. Adams, 23 N. Y. St. Rep. 548; 23 N. E. Rep. 673. For example, in a case where a fire insurance patrolman, in trying to protect the goods of another from fire and water used an elevator which was so constructed and loaded as to show that it was intended for the carriage of freight, when he might have gone up the stairs, it was held that he assumed the risks of injury on the elevator. The court said in part: "The fundamental inquiry in this case is whether or not appellee owed a duty to appellant to so construct, keep and maintain the elevator or hoisting apparatus as that it should be a safe means of his transportation from one story of the building to another.

The owner of land and buildings assumes no duty to one who is on his premises by permission only as a mere licensee, except that he will refrain from willful or affirmative acts which are injurious. As was said in Sweeney v. Railroad Co., 10 Allen, 368: 'A licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, can not recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils.'" Gibson v. Leonard, 143 Ill. 182; 32 N. E. Rep. 182.

Frequently elevators which are ordinarily in use are out of order, or for some other reason not open to the public, or any portion of it, and notice of such fact or facts is posted in a conspicuous place near by. Again, elevators may be intended for freight only, and not for passengers, and notice of this fact duly posted. In either case any person who has a reasonable opportunity of seeing and reading the posted notice or notices assumes all the risks of venturing on or near to

such elevators. Springer v. Byram, 137 Ind. 15; 23 L. R. A. 244; Hunsen v. Schneider, 58 Hun. 60; 11 N. Y. St. Rep. 347. Thus, in a recent treatise (Webb on Elevators, p. 93) it is said: "In the case of Patterson v. Hemenway, 148 Mass. 95, where an elevator bearing the inscription: 'This elevator is for freight only, not for passengers,' had been repeatedly used by a boy, without invitation, in doing errands to the top of the building, he having never found any one at the elevator to operate it, but having been twice told by persons employed at the top of the building not to use it, and he went to it on the day of the accident, entered alone and went up, closing the door at the top floor behind him, knowing that any one below wishing to use the elevator could do so by lowering it with the rope used to operate it. In about five minutes he returned in a great hurry, opened the door, and turning quickly toward some one, speaking to him, and without looking at the elevator well, he stepped out into it. The elevator having been in the meanwhile lowered, he fell, and was injured. It was held that he was guilty of such contributory negligence as to preclude him from maintaining the action." See Gibson v. Leonard, 143 Ill. 182; 37 Ill. App. 344; 17 L. R. A. 588; O'Brien v. Western Steel Co., 100 Mo. 182; 18 Am. St. Rep. 536; Snyder v. Natchez R. R. & T. R. Co., 42 La. Ann. 302. So, if these facts become known in any manner to a person who then goes upon or near to the elevator for the purpose of riding upon it, such person becomes, in effect, a trespasser and assumes the risks of injury. Thus, in the case of McCarthy v. Foster, 136 Mass. 511, the court, upon this point, said: "The elevator with which he (plaintiff) fell was for merchandise only. He had operated it for years and was perfectly familiar with its construction and its use. He knew that all persons were forbidden to pass up and down upon it, by notices plainly posted and with which he was familiar. That he and others habitually disregarded them, and rode up and down in violation of them, can not favorably affect his case against the defendant, as the latter was not in possession of the store, and had no notice that the elevator was used except for merchandise. . . . He used it at his own risk, and for an injury resulting in the act of using it the defendant was not responsible to him. See Wise v. Ackerman, 76 Md. 375; 25 Atl. Rep. 424; Knox v. Hall Steam Power Co., 69 Hun. 231. In the case of Amerine v. Porteous (Mich.), 63 N. W. Rep. 300, the facts showed that both freight and passenger elevators had been provided, but the plaintiff chose to ride upon the freight elevator and was injured. The court held that, "The invitation extending from the defendants to take the passenger elevator was in its nature express, and the situation negatived any possible inference of an invitation to take the freight elevator."

The owner, as operator, of an elevator, is not responsible for injury by it to a person who enters a factory without authority for the purpose of finding an employe with whom he has business. Flannigan v. American Glucose Co., 11 N. Y. St. Rep. 688; or to a plaintiff's intestate who, having a son in the employment of the defendant, went upon the defendant's premises to carry the son's dinner to him, and was injured, Gibson v. Szieplenski, 37 Ill. App. 601; or to a tenant who improperly procures a key to an elevator, unlocks it, and is subsequently thereby injured, Handyside v. Powers, 145 Mass. 123; or to a newsboy who had been forbidden to ride in a passenger elevator and who was injured while attempting to board the car, Springer v. Byrans, 137 Ind. 15, 23 L. R. A. 244. And statutes with reference to the construction and operation of elevators in certain establishments as manufactories, afford no protection to trespassers, who enter upon the premises and are injured, because of the proprietor's failure to observe such statutes, Flannigan v. American Glucose Co., 11 N. Y. St. Rep. 688.

A different rule prevails where the person injured enters upon the premises through either an express or an implied invitation. "Where a person invites another upon his premises he is bound to exercise more than ordinary care towards that other. If the person giving the invitation is alone benefited, he is responsible for even the

slightest negligence. The reason of the rule is that one inviting another to come upon his premises is not expected to be drawing that other into a place of danger, but offering at least ordinary safety, so that the person invited is put off his guard and relies upon the implied warranty of safety. Thus, a storekeeper who either expressedly or impliedly invites the public to enter his place of business for the purpose of trading must exercise a high degree of care to keep the premises in a safe condition; and where a customer, or any one having any duty there, is injured by accidently falling into a negligently exposed elevator shaft, the shopkeeper is liable in the absence of negligence on the part of the person injured, Treadwell v. Whittier, 80 Cal. 574; 22 Pac. Rep. 266; see Oberfelder v. Doran, 26 Neb. 118; 41 N. W. Rep. 1094; Engel v. Smith, 82 Mich. 1; and see Whitaker's Smith on Neg. (2d ed.) p. 280, n, citing Turner v. Kelekr, 27 Ill. App. 391; Snyder v. Witner, 82 Ia. 652; 48 N. W. Rep. 1046; O'Brien v. Tatum, 84 Ala. 186; 4 So. Rep. 158; Klopp v. Mear, 134 Pa. St. 203; 19 Atl. Rep. 504; 25 W. N. C. 571, and other authorities." Webb on Elevators, sec. 64; see Peake v. Buell, 90 Wis. 508; 63 N. W. Rep. 1053.

It is upon this theory that letter carriers have an implied invitation to enter certain buildings for the purpose of placing mail in boxes. Gordon v. Cummings. 152 Mass. 513; 9 L. R. A. 640; Morrison v. Metropolitan Tel. Co., 52 N. Y. St. Rep. 601, and that an employe of a contractor for the construction of a building is not a trespasser, so that he cannot maintain an action for injuries received by reason of the unsafe condition of an elevator in the building. Ferris v. Aldrich, 58 Hun. 610; 12 N. Y. St. Rep. 482.

### BIG FEES.

The extravagant fees obtained by lawyers, as appears from time to time in the press of the country, is about as much overestimated as the estimate placed upon a man's wealth. A writer in the Pittsburg Leader says:

"How much do Pittsburg lawyers charge for their services on the average?" is a question which I asked several well-informed attorneys the other day, and by means of which I acquired quite a fund of information without getting any very definite answer. "Average?" said one gentleman. "Why, you couldn't average the charges of one man, let alone the whole profession. Fees range from $5 to $100,000, according to the ability of the attorney and the disposition of the client, or, rather, according to what he can make the client think his ability is and how much he will stand being charged for it."

"The statement that a fee amounting to $100,000 was paid for legal advice in this city seems rather incredible, and I was not able to confirm it fully enough to justify giving the names of the parties said to be concerned, but a story to the effect that it was once done has been in circulation among lawyers for quite a considerable time, and is believed by some of them at least to be true. It is said that a gentleman who has acquired wealth enough in manufacturing enterprises to rank as a magnate became interested, along with capitalists of other cities, in a large railway property. After they had acquired the property a question as to the validity of the charter they held arose, and several of the most eminent lawyers in the country informed them that their case was worthless, and they would lose a suit which had been instituted against them. Then the Pittsburg magnate consulted with his Pittsburg lawyer, and the latter thought out a theory upon which it appeared to him that the charter could be made to hold."

"This theory was submitted to the eminent counsel who had previously pronounced the charter worthless, and by them was admitted to contain a decided element of plausibility. So much were they impressed, in fact, that they got ready to fight the case along the lines which the Pittsburger had indicated. As the time for the argument of the case before a court in a distant city approached, it came to the ears of the Pittsburg capitalist that his Pittsburg lawyer was getting ready to take a trip to Europe. He visited him and entered a decided objection. "You are my attorney," he said, "and it is your view of the law upon which this case is to be submitted. You must stay here and prepare the case and make the argument."

"It will cost you a good deal if I

forego my summer trip," said the lawyer, as the concluding argument of a dispute in which the magnate had the best of it."

"Stay here and win this case and I will pay you $100,000," said the magnate, and the lawyer stayed. It is related, too, that he not only won the case and got the $100,000, but that he still made his trip to Europe, though a little late in the season."

"After this the best story which is told of a big fee is that the Standard Oil company once received a bill for $25,000 from D. T. Watson, and responded with a check for $35,000. This case was one in which an attempt was made to tax them on their income in Pennsylvania, the ground of the attempt being that they were a foreign corporation, and Mr. Watson won the suit after a long and hard legal battle. There are thought to be half a dozen lawyers of legal firms in the city with whom it is a comparatively frequent occurrence to render a bill of from $5,000 to $10,000, and have it promptly paid, and Mr. Watson is generally admitted to head the list, and to be the leader of the Pittsburg bar. J. Scott Ferguson and the firm of Knox & Reed, Dalzell, Scott & Gordon, and a few others, are believed to be in possession of a legal practice worth from $40,000 to $50,000 per year, and from these figures the incomes of the local attorneys range down to sums too low to contemplate. There are in the neighborhood of 600 practicing attorneys, and it is thought by very well-informed lawyers that not to exceed 150 of them do nearly all the business, and that the incomes of the rest average considerably less than $1,000 a year. The guess was also made that not less than $1,500,000 a year is paid in this city as attorneys' fees, and when its vast interests and the frequency with which they are in the courts are concerned it would seem that this, if correct, is a very moderate sum."

"People who have suits involving big money," said one lawyer with whom I talked, "do not, as a rule, care what the cost of an attorney's services is going to be, and so it is not generally the case that any stipulation is made, unless the case of a plaintiff seeking a lawyer to take a case upon a contingent fee. It has thus happened sometimes that lawyers have acquired reputations very largely by the nerve displayed in making high charges. Let a man have a high opinion of his own abilities, and make his client aware of the fact by charging big fees, and the thing will result to his advantage, provided he is a good enough judge of human nature to know just when to exact all that his client will stand. A man who has a case of a peculiar character, and has inquired and learned what lawyer is likely to conduct it for him to the best advantage, and who has found his lawyer to meet his expectations, is not going to quit that lawyer for another because he is made to understand that the lawyer knows what the services he has rendered is worth."

"For this statement to hold good, of course, the business has to be of a character where big money is involved. There are many kinds of service where, no matter who performs them, the charge must be moderate. For instance, the least fee which it is considered professional to accept is $5, for such work, for instance, as drawing a deed. There are, of course, lawyers who do not want such work as this at all, yet if they consented to do it I do not think there is one in the city who would feel justified in charging more than $25 for it. To get a big fee almost always implies that the case shall be a big one; that is, involving big money. The exceptions are where some very wealthy man is charged with a criminal offense, and wants the very best lawyers, and several of them, to defend him. Criminal business, as a rule, is not very profitable, and there have been very few really great lawyers who cared to have much of it. The prosecution of accused persons in particular does not pay well. A client may come in while his blood is hot and declare that he will pay thousands of dollars to have an adversary convicted, but before the time comes to go on with the case his blood will cool, and he will think differently about the matter. Very few persons, as a rule, want to spend money to get revenge."

"It sometimes happens, though, that

a large corporation will be willing to hire first-class lawyers, at a good stiff price, to secure the conviction of some defaulting employe, and to give its men everywhere an object lesson on the results of dishonesty. Such a concern as the Adams Express company, for instance, if one of its men is caught robbing it, does not want to miss the opportunity of making an example of him, so that wherever there are Adams Express employes they shall hear of the matter, lay it to heart and be good."

"Contrary to the general notion about the matter, the fact that it is difficult to obtain admission to this bar is not a great protection to the business of those lawyers who already have an established practice, nor would the admission of everybody that applied greatly affect them. I think we might admit any lawyer who came here from a bar of this or any other state, and still we should not have competition, except among those who would get very little business, and the established large practices would not be injured. In particular it would not hurt the older lawyers for the attorneys with well-earned reputations to come from other places. There are, in fact, some of them here now, and they are not making any great headway toward getting a large share of the rewards of the business.

"It appears to be a rule, to which there have been very few exceptions, that, after a lawyer has passed middle life, it is not worth while for him to change his location, and expect to get a practice. He may be a better attorney than any at the bar to which he comes, but will not get the business away from those who have it, and may consider himself fortunate if he even makes a comfortable living. I have never seen the fact explained, but I presume it is largely because of the extent to which getting a law practice is a matter of making acquaintances. There must also be something in the very air of a locality, so to speak, that is, in the peculiarities of its people, and the little eccentricities which they have in doing business, which the established lawyer will have gradually absorbed, and which the stranger, coming as an attorney already a master of his profession and not disposed to learn it all over again, cannot appreciate. It is strange that such trifles should constitute the difference between a big income and a poor living, but it seems to be a fact."

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### HON. GEO. L. BUNN.

Judge Bunn was appointed by Gov. Clough January 2nd, 1897, to fill the vacancy in the district bench for Ramsey county, caused by the death of Hon. Chas. D. Kerr. The appointment met with great satisfaction, both in a personal and a political aspect. Judge Bunn is a non-partisan Democrat, and he has the respect and confidence of his profession. He is the youngest member of the Ramsey county bench, being only 32 years old. He was born at Sparta, Wisconsin, and graduated from the law department of the University of Wisconsin. Law seems to "run in the family;" his father is U. S. district judge for the western district of Wisconsin, and three of his brothers are lawyers.

Since his appointment Judge Bunn has heard and determined a number of matters of importance in connection with the recent bank failures, and his decisions have always been clear, concise and impartial.

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### LITERARY NOTES.

By far the most complete account of the many-sided career and public services of the late Gen. Francis A. Walker that has appeared anywhere since his sudden death early in January is published in the February Review of Reviews. A character sketch by Joseph J. Spencer reviews General Walker's life as a student, lawyer, soldier, adjutant-general on Hancock's staff, journalist, teacher, government statistician, census commissioner, writer on economics, historian, and educational administrator. Prof. Davis R. Dewey treats in more detail of General Walker's services in the army, as head of the census bureau, as a political economist, and as president of the Massachusetts Institute of Technology, and discusses particularly President Walker's relations to the monetary questions of the day. The articles are illustrated

with portraits of General Walker at different ages.

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The principal topics treated editorially in the February Review of Reviews are the Anglo-American arbitration treaty, the Cuban situation, the prospects of the Nicaragua canal, the recent elections of United States senators in the different states, and the relation of the great corporations to political campaign funds. There is also the customary resume of the significant foreign events of the past month. The editorial pages, like the other parts of the magazine, are fully and suitably illustrated.

The frontispiece of the February Review of Reviews is a magnificent portrait of King Oscar of Sweden and Norway, who has been selected as umpire under the general arbitration treaty between the United States and Great Britain.

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### BOOK REVIEW.

"Jones on Evidence." 3 vols.; 18mo., (4x6 inches); 2,227 pages. Bancroft-Whitney Co. San Francisco, 1896. Sheep, $7.50.

This work in three small volumes, pony series, is a very excellent production. Mr. Burr W. Jones, its author, is a member of the Wisconsin bar and lecturer on "Evidence" in the University of Wisconsin. This work is neither a digest nor a philosophical dissertation, but rather a treatise on the law of evidence. It is strictly up to date, and is written in a clear, concise and pleasing style, with an ample citation of authorities.

Through his experience at the bar and research in the preparation of his lectures, Mr. Jones became well qualified to do this work, which he has done eminently well.

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### AN "OFFICIAL" DIGEST

There has been an increasing demand for a digest of the official reports, as it has seemed desirable to cite the official reports when possible. Heretofore the digests have been made from unofficial reports, with supplemental table of the official reports when the cases digested are officially reported after the digest is printed.

The General Digest has entered upon a new series with the 1896 volume, by which its publisher has undertaken to meet the requirements of a perfect official digest. The General Digest, vol. 1, New Series, gives the official citations, except those which are not to be officially reported. Advance parts of the digest are published quarterly, including all the decisions, whether reported officially or unofficially. Those unofficially reported are continued in the supplement until officially reported, when they are transferred to the permanent edition.

The scope of the work has been enlarged so as to include English and Canadian decisions and the decisions of the intermediate state courts.

The official digest is now published semi-annually, in two permanent volumes, which make it of a reasonable and convenient size for use.

The classification of matter in the new series will be uniform from year to year. All matter of the same kind will be found in the same place, under the same divisions or subdivisions in each volume, a feature peculiar to this series, and one which the profession will appreciate.

While digest making has become a science, and a progressive one, yet we hardly see how the new series can be improved upon.

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### HOW GREAT LAW OFFICES WORK.

"If I were a young lawyer again, just striving for my first honors, and looking for a place to settle," said Benjamin F. Tracy to a young attorney the other day, "I am sure I could do no better than begin right here in New York city or Brooklyn. I have passed through the mill and my experience has convinced me that there are more openings here, and there is as much chance to get to the top, and when you do get there the rewards are far greater than anywhere else in the United States."

Whether the general is right or not, it is highly probable that he will be supported in this opinion by the greater part of the well-established lawyers in the two cities. Nevertheless, a great deal can be said on the other side of the question.

The remarkable changes that have taken place within the last ten years in all the great cities of the United States, but more particularly in this city, in the organization of great law firms and in the conduct of their business has compelled the law clerk or the young lawyer to become a part of a rigid system that without doubt repels the more ambitious.

The old practice of a young man just admitted of "hanging out his shingle," as the saying goes, has become nothing more than a tradition. In this city more than 99 per cent of the young lawyers do not even take desk room as independent practitioners, but become law clerks. That means working under orders, submitting to the drudgery that the older clerks will not endure, and sinking one's identity behind the

army of assistants that the members of the firm direct. This, moreover, is not solely the experience of the clerk and the young attorney. There are hundreds of lawyers in this city, men in the prime of life, and members of well established firms, who are never heard of for the simple reason that their names do not appear in the firm's style, and that business is transacted with the firm or corporation (as it might be called), the individual being of little moment.

The conduct of one of these large offices is similar in a great many respects to the management of a great newspaper office. The office staff is usually divided into two general classes. There is the corps of business clerks and there is the corps of law clerks. The business clerks have nothing to do whatever with law matters. They attend solely to the commercial requirements of the firm and perform their duties under regulations similar to those of any other business establishment. They are directed in their labors by a chief clerk, who is responsible to the member of the firm who takes supervision of the office assistants.

The corps of law clerks is the one of which the aspiring young attorney becomes a member. They have wholly to do with law matters. These clerks are young men and women who are studying for the bar or have been admitted. Of the latter class it is true the most are young men, but unfortunately it is a fact, and one that often demonstrates the fault of the new system, that a lawyer with fair capabilities never rises above the grade of the law clerk. Just how many of these law clerks there are in this city is not a matter of statistics, and it would be difficult to make anything like a correct estimate. Their number will reach into the thousands and the tens of thousands. Add to this number those in Brooklyn, and the total will be increased by some thousands more.

The law clerks are captained by a clerk who is dignified by the title of managing clerk. In almost all cases he is a lawyer, and the senior clerk in the office. In many instances he is in the prime of life. In large offices the manging clerk has usually worked himself up from office boy or student.

So extensive is the tendency toward the consolidation of all of the law business with very large firms, to the exclusion of the small practitioner, that some of these managing clerks have from twenty-five to thirty men working under them.

It used to be the general impression and the fact as well, that when a lawyer had made his reputation he didn't trifle with very small cases. Under the present system, however, this is all changed. One of these large law corporations never finds the case, within certain limitations, that is too small for its attention. This further complicates the duties of the managing clerk.

The under clerks find out what they have to do from the managing clerk, and this dignitary gives out his orders in much the same way that a city editor does to his staff of reporters. The managing clerk has both his case book and his calendar. In his case book are entered all of the cases as they come into the office, classified as to the course in which they arise and sometimes by the nature of the action. This classification having been made, the cases are apportioned by classes to the different clerks, who attend usually to those particular cases. After once having been appointed to look after a case each clerk is expected not only to keep exact minutes of its progress, but to report the same to the managing clerk, who enters the fact upon his records.

The assignments of clerks to the attendance of cases in court or to the other duties in the office are made from the day calendar, and usually on the afternoon preceding the day on which the duty is to be performed. If the task to be imposed be the drawing of pleadings, the assignment is usually made before this, but it is not so necessary that the managing clerk should look after this particular line of work on the day calendar, for it is very rarely that a clerk having charge of a particular case overlooks so formal a matter as that.

The particularity with which details have to be cared for makes the most rigid system necessary. All of the most interesting parts of the practice are looked after by the junior members of the firm, or by the senior clerks, who are lawyers. The pleasing experiences of fame and fortune that the young man dreams of as a student are not open to him in the stern practical life that he encounters in working for one of these firms. The pay of the clerk ranges all the way from $3 a week to $5,000 a year. The man who would command the larger sum must be a well equipped lawyer. If he had been tble to establish himself in business with his ability at the same period of life he ought to be able to net from his practice three times that sum.

Whatever may be said in favor of the present system, it is certain that it is following the consolidation movement in other lines of business. It is very difficult for a young lawyer, unless he is exceedingly bright, to rise from the rank of the clerk to that of a partner in the firm. Such progress is known and occasionally noted, but it is indeed rare. It is the height of the ambition of every aspiring young lawyer to become an advocate, or what is known in common parlance as a trial lawyer. By working up through a clerkship it

will take years of patient toil and the demonstration of ability in many lines before the clerk will have an opportunity to try a case, and thereby have the prospect of membership in the firm held open to him. Many young men who are called to the bar have far more fitness for the trial of cases than for following with scrupulous accuracy the details of a large office. It has been shown time and again that such men frequently develop fair ability on the trial of their first case, and in a short while become able to try a case with much more skill than many lawyers of established standing at the bar. It is usually the case, too, that not only are these born advocates more or less unqualified for the routine work of an office, but such duties are positively offensive to them.

Such are the facts that cause the best recruits to the bar to hesitate before they will accept a clerkship in a large office, however alluring the prospect may seem when the offer is made.

The same considerations are driving many young men into the small towns up the state and in the far West. The records of the alumni in the law schools will prove that they do have this tendency. The fact is also depriving New York city and Brooklyn of legal timber of which they are in great need.

Elihu Root is quoted as having said recently that never before in the history of this city has the bar been in such dire need of young lawyers of good promise. The judges who preside at the trials in our Supreme Court, or in our criminal courts say that in all the hosts of lawyers in this city there are not a score who can try a case well. They will say that not one lawyer in a hundred who endeavors to try a case understands the most necessary principles underlying the cross-examination of a witness or the summing up to a jury. One of the best known judges in this state stated not long ago that it was a rare thing in his experience to find one of these so-called trial lawyers who knew how to put in an objection in a strictly legal form or impeach a witness on his cross-examination.—Law Student's Helper.

### ALIMONY TO THE HUSBAND.

In several states there are statutes giving a husband on divorce the right to claim alimony from his wife's estate. The late Nebraska case of Green v. Green, 68 N. W. Rep. 947, decides that this right cannot exist in the absence of a statute granting it. Such was also the decision in a Kansas case, Somers v. Somers, 39 Kan. 132. But a contrary doctrine is vigorously asserted by Judge Gibbons, in the case of Groth v. Groth, decided in the circuit court of Cook county, Illinois, and reported in 7 Chicago Law Journal, page 359. He declares that "prior to the establishment of feudalism married women might hold and enjoy property; that this right was simply suspended under feudal rule, and when that rule was abolished it was unjust to enforce its consequences as against her." Now that the statutes have restored her to her ancient rights, he thinks there is no reason why the court should not now treat the subject exactly the same as if her rights had never been suspended. He says: "Every reason of right, justice, and morals is in favor of the proposition that the duties which the husband and wife owe to each other are reciprocal," and declares that the right of the wife to claim alimony pendente lite is not statute law, but simply court-made law. He quotes from Harding v. Harding, 144 Ill. 588, on this point: "To refuse to allow her reasonable support pendente lite would in many cases be to deny her the right to prosecute her suit altogether." Judge Gibbons says: "If it be good law in behalf of the wife, why not in behalf of the husband? To use a trite old phrase, 'What is sauce for the goose is sauce for the gander.'"

Case and Comment.

### IS THE LEGAL PROFESSION HONEST?

This question is very happily answered by Mr. Roger M. Lee, in an able address on "Law and Lawyers," delivered before the Law School of the Ohio State university. The speaker said as follows:

"I venture the assertion without fear of successful contradiction that as a class the lawyers are the most trusted and honest body of men to be found in the world. The confidence reposed in the family physician is no greater than that placed in the lawyer and the trust is seldom betrayed. Nobody does or can know the immense sums of money and the large interests entrusted to the lawyers of the world without bond or security, and necessarily so, and unfaithfulness to these trusts is almost unheard of. The real opinion of the people as to the lawyers is evidenced by these facts, and this confidence is not at all connected with any questions of financial standing. Indeed, if only lawyers were trusted who had a rating in Dun's or Bradstreet's, the law business of the country would be in the hands of a very few men. It is because the lawyers have always re-

quired and maintained in their profession a high standard of integrity that they are to-day the most honored and trusted of men. The lawyer we know, is always the soul of honor and honesty, and the laughter excited by the antiquated jokes of the stage on the dishonesty of lawyers is to us as unreal as the shifting scenes of the pantomime, and we laugh at them because of their very unreality. The lawyer's honesty and integrity are more to him than wealth and honors, and life itself is too small a boon to exchange for either.

"That we have some black sheep is, alas, too true; sometimes we rise against them and slay them, but often they live by mere sufferance or pity for their helpless families. These disgraces to the profession are not always in the employ of the criminal and ignorant classes. Too often they are used by those who know better for purposes for which they dare not approach a reputable lawyer. And if in the attempt to wrong and rob others they are themselves betrayed and robbed, and I fear this does not happen as often as in justice it ought to, another is added to the list of those who cry out about lawyers' dishonesty."

### A MUCH INJURED PLAINTIFF AND HOW IT HAPPENED.

A complaint for personal injuries to a brakeman is said by the Chicago Evening Post to describe them somewhat in detail as follows: "Paralyzed in the left leg and his left hip was thrown and forced out of joint and his spine injured and he was otherwise then and there greatly bruised, hurt, wounded and the bones of his body broken, to wit: The bones of his legs, to-wit, the bones of his right leg, the bones of his left leg and the bones of his ankles, to-wit, the bones of his right ankle, the bones of his right foot, the bones of his left foot, and the bones of his shoulder joint, to-wit, the bones of his right shoulder joint, the bones of his left shoulder joint, the bones of his neck and the bones of his wrists, to-wit, the bones of his right wrist, the bones of his left wrist, and the bones of his hands, to-wit, the bones of his right hand, the bones of his left hand, and the bones of his back and of his body; and he was permanently injured in the organs of his body, to-wit, in his right lung, in his left lung, in his spleen, in his stomach and in his bowels; and he was greatly and permanently injured in his senses, to-wit, in the sense of sight, the sense of hearing, the sense of smelling, the sense of feeling and the sense of taste; and he was greatly and permanently injured in his right eye, in his left eye, his right ear, his left ear, his nose, his mouth, his tongue and his fingers and in the power of sensation of his body, and he was greatly and permanently injured in his brain, to-wit, the matter of his brain, and in his mind, to-wit, his reasoning faculties, his judgment, his imagination and his mental processes; and he became sick, sore, lame, and disordered, and so remained for a long space of time."

The theft by a cashier of securities held by a bank as a special deposit was held, in Gray v. Merriam (Ill.) 32 L. R. A. 769, to make the bank liable if it had permitted him to have access to them after he was known to be speculating on the board of trade, and had accepted his statement that he was using his own money, without knowledge that he had anything except his salary.

The similar case of Merchants' Nat. Bank v. Carhart (Ga.) 32 L. R. A. 775, held the bank liable for such theft by a cashier where the bank did not show that it had exercised proper supervision of him without discovering any indications of dishonesty or any reasons for distrusting him. With these cases is a note reviewing the authorities on the care required of a bank in keeping a special deposit.

### LOAN ASOCIATION—FORFEITED PAYMENTS.

Forfeited payments made by a member of a loan association on shares which lapse in consequence of his default are held, in Pioneer Savings & L. Co. v. Cannon (Tenn.) 33 L. R. A. 112, to be inapplicable to the mortgage debt and cannot be credited thereon.

### CORPORATION.—DISSOLUTION—JUDGMENT.

A judgment against a corporation after its dissolution is held invalid in Marion Phosphate Co. v. Perry (C. C. App. 5th C.) 33 L. R. A. 252; and statutes continuing corporate existence after dissolution for the purpose of suits are held inapplicable to foreign corporations.

# THE MINNESOTA LAW JOURNAL.

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## DISTRICT COURT.

**National Bank of the Republic of New York, vs. William Banholzer.**

**(District Court, Ramsey County.)**

### Receiver—After Supplementary Proceedings—Homestead Exemption.

Morphy, Ewing, Gilbert & Ewing, for plaintiff.

W. P. Westfall, for defendant.

Plaintiff obtained judgment against defendant and had issued execution which was returned unsatisfied. An order was then made requiring defendant to appear, and make disclosure in supplementary proceedings. Defendant disclosed that he owned a five-acre tract of land in the city of St. Paul, situated about two miles from the city hall and within the platted or laid-out portion of the city, but the tract itself had never been platted. He had lived upon the land since 1872. Besides defendant's house there were located upon the premises, a residence occupied by his father, a large stone building used for a brewery and several outhouses connected therewith, a barn and some other buildings.

Plaintiff moved upon such disclosure and the other files in the case for the appointment of a receiver.

BUNN, J:

This cause came on to be heard at the special term of this court held January 9, 1897, on the motion of plaintiff for the appointment of a receiver for the property of defendant after disclosure in supplementary proceedings. Upon the files and records herein and said disclosure and the exhibits therein referred to, after hearing counsel, it is

Ordered, that said motion be and the same is hereby denied.

This case presents in a very forcible manner the injustice that may be worked by our homestead law. The defendant is allowed to hold as his homestead five acres of land in the city of St. Paul, of great value, occupied not only by his dwelling house, but by his father's, and by a brewery and buildings connected with it, a beer garden and a dancing pavilion, and used not only for residence purposes, but for the purposes of carrying on a brewing business. It certainly seems very inequitable that the defendant should be allowed to hold all of this property exempt from execution while his neighbor, who owns property across the street which is platted, can hold but forty feet. But I am unable to see any escape from this result. The statute and the decisions of our supreme court seem to me to absolutely protect the defendant in his enjoyment of the entire five acres, however he may elect to use his property.

1. That the value of the property is immaterial is settled in Jacoby v. Parkland Distilling Co., 41 Minn. 227.

2. If defendant is entitled to hold the entire five acres, the law imposes no restraint as to the use of any part of it, provided only it is the dwelling place of the debtor.

In Kelly vs. Baker, 10 Minn. 124 (Gil.) the debtor owned a lot in Rochester on which he had erected a two-story building, the rear part of which he used as his dwelling, the front part

being used for business purposes, part of it rented to a tenant. Judge Berry says: "Homestead includes not only the ground upon which the dwelling house rests, but more; and how much more it may include in this state for the purposes of exemption, the statute defines." "And finally it is to be observed that no limitations were imposed by the legislature upon the use which should be made of the homestead of 80 acres, or of one lot, provided only it was the dwelling place of the party claiming the exemption. As to the balance, beyond what was required for the site of his house, the claimant seems to have been left free to allow it to remain unenclosed, unimproved, vacant and idle, or to devote it to any use which he might choose."

In Umland v. Holcombe, 26 Minn. 286, the judgment debtor owned a three story brick block on a lot in Stillwater; the second story was occupied as his residence, the first story by a tenant, the third story by a lodge of Odd Fellows under a written lease for five years, at a rental of $200 per year. The Court, Gilfillan C. J., held the entire block exempt, following Kelly v. Baker. "The power of a court to so deprive him of its use is not affected by the fact that there is an outstanding lease; if it were, then it would not be true, as held in Kelly v. Baker, that the owner may devote the part of the property exempted, not actually used as a dwelling, to any use he chooses, without removing the exemption from that part."

In Jacoby v. Parkland Distilling Co., 41 Minn.227, the judgment debtor owned an undivided interest in Lot 7, Block 108, in Minneapolis. There was upon the lot a three-story brick building covering the whole front, and sixty feet deep, the top being 165 feet in depth. The first story consisted of three stores used for business purposes and the others were divided into rooms, one suite of which was occupied by the debtor as her dwelling, the others being occupied by other persons, tenants of the owner's. The Court. Mitchell J., held the entire lot and building exempt. "The fact that the building was on the lot in question was in part suited to and used for business purposes was wholly immaterial. The law exempts as a homestead a quantity of land not exceeding one lot, and no restriction is placed upon the uses of any part of it, provided it is the dwelling of the debtor. This has been the settled construction of the statute for many years:" Citing Kelly v. Baker and Umland v. Holcombe.

While in each of the above cases, the dwelling of the debtor was part of the building, the decisions do not rest on that point, but on the right of the debtor to use any part of the exempt land as he chooses, and there seems no distinction upon principle between a case where the dwelling and the portions of the property used for other purposes are parts of one building, and cases like the present, where the dwelling is detached and separate from the portions used for business purposes. The broad rule is that the use is immaterials, so long as the debtor has his residence on the property.

3. The amount of land exempt as a homestead is either a quantity of land not exceeding eighty acres; or, if within the laid-out or platted portion of an incorporated city of over 5,000 inhabitants, a quantity of land not exceeding one lot of the original plat or any rearrangement or subdivision thereof. To be "within the laid-out or platted portion," the land must itself be laid out or platted. As said by Justice Collins, in Mintzer v. St. Paul Trust Co., 45 Minn. 326, "It must be a part and parcel of that portion of the municipality which is either laid out or platted, and not merely a tract of ground, not subdivided in any manner, but which may be surrounded in whole or in part by tracts which have been laid out or platted by other parties." See also: Baldwin v. Robinson, 39 Minn. 244; in re Smith's Estate, 51 Minn. 316; Heidel v. Benedict, 61 Minn. 170; Kiewert v. Anderson, 67 N. W. Rep. 1031. The Mintzer case seems to settle the question unless the present case can be brought within the following language of the opinion in that case: "But from what has been said it must not be understood that a formal laying out of land, or its regular platting in lots, blocks, streets and alleys, according to the statute, is absolutely essential in order to reduce the area of the homestead from the larger to the smaller

tract, for there might be acts of the owner which would amount to the laying out of his property and equivalent to its platting. He might, by an actual subdivision of it in some other manner, divest it of its suburban or agricultural character, and transform it into a city lot, as thoroughly as if it was platted under the statute."

The chief argument of the plaintiff is based upon the above language, but the testimony fails to show that the defendant has "actually subdivided the property in some other manner." The supreme court has nowhere said that the mere divesting property of its suburban character in any manner would limit the exemption to one lot, but simply that there might be an "actual subdivision" in some other manner than by a statutory platting which would have that effect. This "subdivision" fails to appear in this case. The land is fenced as an entire tract, no roads run through it, and no part is cut off from the rest by a fence, road or in any other manner. It is true that the tract is used for different purposes, but we cannot construe this to be an actual subdivision. Further, it does not appear that the property has become wholly "urban" in character. It is still used for gardening and agricultural purposes, as well as for brewand and selling beer.

The point that the brewery is not an "appurtenance" of the dwelling house, within the meaning of the statute, I regard as immaterial. To hold otherwise would be to disregard the decisions holding that the debtor may use the exempted land as he chooses.

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**August Duffy v. Alfred Dufrene, et al.**
**(District Court, Ramsey County.)**

## Torts—Liability of Landlord for Injury Caused by Building Being Out of Repair.

J. L. McDonald for plaintiff: W. S. Moore for defendants.

Plaintiff brought an action against defendants for damages for injuries sustained by breaking through a defective board in the balcony of a house rented by him from defendants. Defendants moved for judgment on pleadings.

Willis, J. I feel constrained, following the authority (in particular) of the case of Cole v. McKey, reported in the 68th volume of the Wisconsin Reports, p. 500, to sustain the motion in this case for judgment on the pleadings. That seems to me the only logical and proper rule to follow.

It is conceded that a landlord is under no obligation to repair unless that obligation is specifically provided for in the letting That being so, the landlord is not responsible for any accident arising, or injury caused, by the want of proper repair of any portion of the demised premises.

A logical analysis of the situation leads us to this conclusion: Either the letting included the use of this balcony or it did not. It is idle to say that it did not, because, if the tenant in the cause at bar were penned up in this room and denied access to this balcony, he would not be in the full enjoyment of the rights usual to tenants, and must be defeated in such an action as this, because he would have no legal right to go upon the balcony, nor to permit any member of his family to go there, or to occupy or use it in any way. If the privilege of using the balcony was a right attendant upon or appertaining to the use and enjoyment of the demised premises, it was implied in the letting, and it governed and regulated the use of a certain portion of the premises which the landlord was under no obligation to repair, because it does not appear by the pleadings in this case that any covenant on the part of the landlord to repair existed. Therefore, as the authorities say, the tenant takes the premises, under such circumstances, cum onere. He has the opportunity of inspecting the premises; he takes them as they are—he takes the woodwork, for instance, in its partially decayed or completely decayed condition. He assumes the risk, and should others use the premises they are participants in its use at his invitation, and not at he invitation of the landlord." It is necessary, therefore, for tenants, in order to protect themselves in the use of premises where defects in passage-ways or approaches may exist, to insist upon a covenant in the lease by which the landlord is bound to make repair. If the tenants do not see fit to protect themselves in that

way, then they must accept the situation in which the law places them as taking the premises cum onere, and are not entitled to look to the landlord for compensation, either for financial loss, for injury to their goods or injury to their person, by reason of defects existing in any portion of the structure upon the demised premises.

I shold have been very glad indeed, to find some way of gratifying that desire which we always have to give a person who is injured some redress as a solatium (as it is termed in law), but it seems impossible in this case. The motion for judgment on the pleadings is granted.

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**Wm. H. Allen, by Anna L. Allen, his deserted wife, vs. The Minnesota Loan and Trust Company.**

**(District Court, Ramsey County.**

## Deserted Wife—Right of Action in Husband's Name.

Humphrey Borton, for plaintiff; W. J. Hahn and J. M. Martin, for defendant.

Motion by defendant for judgment on the pleadings in an action brought by a deserted wife in her husband's name upon a chose in action belonging to the husband.

At the call of the General Term calendar defendant moved to dismiss this action, on the ground that the complaint does not state facts sufficient to constitute a cause of action. Inasmuch as the defendant had already answered the complaint, the Court construed this motion to be in effect a motion for judgment in defendant's favor upon the pleadings, and it was afterwards argued orally and submitted on briefs as such motion.

KELLY, J:

This motion involves the construction of section 5165 Statutes of Minnesota 1894, which read as follows:

"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."

The summons and complaint are entitled "William H. Allen, by Anna L. Allen, his deserted wife," and based upon an alleged contract between the defendant and Willia mH. Allen under which the latter at the request of the defendant and William H. Allen under certain infant ward of the defendant company, and demands judgment for $3,000, the alleged reasonable value thereof. While the pleadings mention the wife of William H. Allen in connection with this alleged contract, it was conceded on the argument that the contract sued on was that of William H. Allen alone and that his wife has no rights therein, except such as this statute gives her, or which are hers by reason of her marital relation to William H. Allen.

The defendant's counsel contends that this statute was never intended to vest in the wife, when deserted by her husband the right to reduce to possession the choses in action which are the sole property of her husband. If such must be its construction, then it is claimed to be unconstitutional, because it deprives the husband of his property without due process of law. On the other hand, plaintiff's counsel argues that the language used is plain, and that the Court should give it the meaning which the words used import.

That the words of the statute are broad enough to support the plaintiff's contention seems true. But when we look into the history of the statute—as we may and should—and read it in the light of the law and the conditions existing at the time it was first enacted, it may well be doubted that the legislature ever intended to clothe a deserted wife with the rights and powers here claimed.

This statute is found for the first time in Chapter 70, Revised Statutes Territory of Minnesota, 1851, in the following words:

"Sec. 35. When a husband and father has deserted his family, the wife and mother 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."

The statute in the same words again appears as Section 35, Chapter 60, Statutes of Minnesota of 1858. Afterwards, as Sec. 34, Chap. 66, Revision of 1866, and as Sec. 35, Chap. 66, General Statutes of 1878, it is found in the same words as Sec. 5165, Stat. Minn.

of 1894; the revision of 1866 omitting from the original of 1851 the words "and father" after the word "husband," and the words "and mother" after the word "wife."

The defendant's counsel, calling attention to Sec. 30, Chap. 70, Revised Statutes of 1851, "when a married woman is a party her husband must be joined with her," and to the fact that not until long afterwards what is known as the Married Woman's Act was passed, argues that Sec. 35 supra was intended to give a married woman, when deserted by her husband, the right to use his name and appear in court to prosecute or defend her rights, either in her separate property or in her husband's and such as grew out of the marital relation. This argument is plausible, but it is not sound in this, that it does not explain why such right was given only married women who were mothers. Why should a childless but deserted wife be left without remedy?

Contemporaneous legislation in our adjoining sister states sheds some side light on the question. In 1860 in Iowa married women were in large measure capacitated to sue and be sued. See Secs. 2771, 2772, 2774 and 2775, Chap. 117, Revision 1860, Laws of Iowa. I also find that in Iowa at that time a married woman, abandoned by her husband, might apply to the Court for leave to transact business as feme sole. (Sec. 2508-9-10 Ia. Revision 1860). And in addition to this, Sec. 2511: "The Court may also under such circumstances authorize the wife to sue and defend in any and all cases in place of her husband, to sell or otherwise dispose of so much of the husband's property as is necessary for the maintenance of the family, and to collect debts due the husband." Yet I find identically the same statute as our section 35 supra 1851, in section 2776 of this Iowa Revision.

In Illinois the same condition existed in 1874; see Section 3, Chapter 68, p. 790, Revised Statutes of Illinois, 1881. Other states, perhaps Indiana, Michigan and Missouri, have laws for certain provision to a deserted wife out of her husband's estate. From all these and from the reason of the thing itself, I am satisfied this statute means more than to simply capacitate a wife, when deserted by her husband, to sue and be sued.

The law under discussion must be read in the connection where it is found. The Chapter 70, Laws 1851, is entitled "Civil Actions," and the subdivision where Section 35 is found, "Of the parties to civil actions." It is really an act regulating procedure in court. Reading Section 35 in connection with the sections associated therewith, particularly Sections 33 and 34, in my opinion the intention was to permit the wife and mother, when the husband and father deserted his family, to take the father's place in court in all respects as he could, where necessary to enforce or defend the rights of any remaining member of the family. It does not mean to turn the husband's estate, however despicable his conduct may have been, without opportunity for him to be heard, over to his wife.

It will be noticed that Sections 33 and 34 give to the father, and in case of his death or desertion of his family, the mother, the right to prosecute actions for injuries to the child. Section 35 is broader and permits the deserted wife to prosecute and defend all actions he might.

The construction I place on the statute is in harmony with Davis vs. Woodward, 19 Minn., 174 (Gil. 137), where the occupancy of the homestead was involved. The fact that the law has existed for 45 years and has never been invoked here or elsewhere as now, is strongly against the contention of the plaintiff.

The marriage relation under the common law invested the husband with great powers and corresponding obligation touching his wife and his family. He espoused his wife and took all her goods. But he became obligated to pay her debts contracted before marriage, though she brought him no estate. He also became liable for her torts. Even now, in Minnesota he is still liable if her tongue become a trifle unruly. Morgan vs. Kennedy, 62 Minn., 348. He was, until the statute changed it, always a necessary party where either his wife's honor or estate

were involved.

The construction claimed by plaintiff's counsel would lead often to wrongs and manifest absurdities. It is true that if he is right, no absurdity it leads to, or wrong it seems to legalize, will justify the Court in refusing to enforce. But we have the right when the meaning is not plain to consider what the possible results may be in order to more correctly reach the real intent of the law-giver.

Another view may be taken. The law, if plaintiff's contention is correct, binds the husband irrevocably by the judgment. He is not a party of his own volition or otherwise to the action. The judgment therefore takes his property without giving him his day in court, unless the court shall hold that a deserted wife occupies towards her husband substantially the same position in such action as the parent towards the child under Sections 33 and 34 supra.

See Gardner v. Kellogg, 23 Minn., 463; Lathrop v. Schutte, 61 Minn., 196; Banka v. Chi., St. P., M. & O. Rwy. Co., 61 Minn., 549.

In the cases above cited it is held that Secs. 33 and 34 are constitutional solely because the parent being the natural guardian holds the amount of recovery for injury to the child in trust for the child. The parent has personally no interest therein. There is no analogy whatever between the relation of parent and child and that of husband and wife. The wife is neither the natural nor legal guardian of the husband. In fact the old law tended to make the husband, if anything, the guardian of his wife. And it may be asked, Why should the statute be so considerate in protecting the rights of a runaway husband? The law under consideration is for the benefit of the deserted wife and family—not for the deserting husband.

It therefore follows that, if we give this Section 35 the meaning claimed for it by the plaintiff's counsel, it is clearly in violation of the constitution of this state and of the United States and void.

**State of Minnesota, Plaintiff, vs. James Rogan, Defendant.**

**(District Court, Washington County.)**

## State Prison Convict—Arraignment Without Writ of Habeas Corpus—Voluntary Plea.

George A. Sullivan, for the State.
J. C. Nethaway, for defendant.

The defendant, while a convict in the state prison, was indicted by the grand jury of Washington county for an assault in the second degree committed upon a guard at the prison. When arraigned he pleaded not guilty. Up to this time he had not procured counsel.

When the defendant came before the court for arraignment, and also for trial, he came in the custody of the warden of the prison. The bringing of defendant into court was, on each occasion, entirely voluntary on the part of the warden. No process had been issued by the court directing the warden to bring the defendant into court for any purpose.

After the arraignment defendant procured counsel.

When the case was called for trial, and before the jury had been impanneled, defendant's counsel moved,

1st. That the defendant be permitted to withdraw his plea of not guilty; and, 2nd, that he immediately be re-arraigned.

Counsel for defendant submitted an affidavit, sworn to by defendant, in which he stated that at the time of the arraignment he had not been by the court fully advised as to his rights before being required to plead to the indictment. That had he been fully informed as to his rights he would not have pleaded, but would have stood mute, and thereby obliged the court, as required by the statutes under such circumstances, to enter a plea of not guilty in the records. That he had been illegally brought into court, and thereby the court had not jurisdiction of the person of defendant, and the plea of not guilty, made by him at the time of the arraignment, might operate as a waiver of the jurisdiction.

After the jury had been impaneled the defendant objected to any testimony on the part of the state on the ground that the court did not have

jurisdiction of the person of the defendant.

It was contended by defendant that the warden had no power or authority to voluntarily take the defendant, who was convict, from the prison where he was confined upon judgment of a court, and bring him before this court; that the warden had no power or authority to take defendant from the prison except by a writ of habeas corpus issued by the court; that if he could do so in a case like this he could take him anywhere; to Europe, if he saw fit. That the bringing of defendant into court, in custody of the warden, against the protests of defendant (as stated in said affidavit), and without any process of the court compelling the warden to produce him, was illegal and did not give the court jurisdiction of the person of defendant.

Citing State vs. Wilson, 36 Conn. 126, he also called attention to the fact that in New York the statutes expressly provide that in order to bring one confined in prison before a court to answer to an indictment against him, a writ of habeas corpus must issue requiring the officer in charge of the prison to bring the convict into court; that the court can acquire jurisdiction of the person of the convict in no other way.

Williston, Judge: After hearing counsel it is ordered, That said motions and each of them be and the same hereby are in all things denied and the objections to the admission of testimony on the part of the state be overruled.

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**Frederick W. Romer vs. James W. Welrick.**

**(Municipal Court, City of St. Paul.)**

## Purchase Money Note---Endorsee---Exemption.

Thompkins & Burr, for Plaintiff; Morton Barrows, for Defendant.

In an action brought by the endorsee of a promissory note, given for the purchase price of a bicycle, wherein judgment was obtained against the maker of the note and a garnishment action brought against a person having possession of the bicycle. The defendant made a motion for an order discharging the garnishee upon the ground that the bicycle was exempt from execution and sale. Upon the hearing the motion was denied and the following memorandum filed:

ORR, J.: The defendant purchased a certain bicycle and executed two promissory notes therefor. The payee sold and transferred these notes to this plaintiff. The plaintiff brought suit upon the notes and obtained judgment against the defendant. The defendant claims the bicycle is exempt from execution and sale, and contends that whatever right or lien the vendor may have had in or upon the property sold by him was lost by the sale and transfer of the notes given by the vendee for the purchase price thereof.

These notes were given for and represent purchase money, and an action by the vendor upon such notes so given would be an action for the "purchase money."

Rogers vs. Brackett, 34 Minn., 279.

The property in question, though otherwise exempt, is within the statutory exception. The statute in such case does not create a lien in favor of the vendor, but makes an exception against the vendee. It is not so much an affirmative right to be claimed by the vendor as it is a denial of the right of exemption to the vendee. The fact that this action is for "purchase money" is sufficient to bring it within the statute. The transfer and endorsement of the sale notes would not change the character of the indebtedness, and an action upon them against the maker would be an action for "purchase money" within the meaning of the statute.

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**State of Minnesota ex rel. John R. Carey Administrator of the Estate of N. Hulett, Deceased, vs. Odin Halden, as Auditor of the County of St. Louis, Minnesota.**

## Delinquent Tax List.

H. S. Mahan, for Relator; W. B. Phelps, for Respondent.

The relator made application for an alternative writ of mandamus directed to the respondent as county auditor, and upon the hearing and return of the alternative writ a peremptory writ was granted.

The petition, which was found and admitted true, set forth that the relator is the administrator of the estate of N. Hulett, and as such administrator was the owner and in possession of certain real estate in said county. That the real estate had been sold at the tax sale of 1894 for the amount of the delinquent taxes of 1892, with costs, penalties and interest. That said lands were bid in by the state, and that the same still remain unredeemed, and that no person has taken an assignment of any of said pieces or parcels of land from the state.

That taxes have been levied and assessed theron for 1893, 1894 and 1895. and that no part of the taxes of any of said years has been paid. That the taxes for said three years are all de-

linquent, and that, notwithstanding such delinquency, none of the tracts of land were put on the delinquent list filed by the county auditor in the office of the clerk of court in 1895 or 1896, as is required by section 1,579, General Statutes '94.

Moer, J. Held, that it is the duty of the county auditor, under such circumstances, to include in such delinquent list all of such lands upon which the taxes are delinquent, although bid in by the state on a prior sale. That such list should contain the description of the piece or parcel, the name of the owner, if known, the total amount of taxes delinquent and the penalty for each year opposite each description, and to verify the same as required by section 1,579, General Statutes '94, thus enabling any person, company or corporation having any estate, right, title or interest in or lien upon said property to appear and answer, setting forth his defense or objection to the tax or penalty under section 1,584, General Statutes '94.

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**William H. Westcott vs. Edwin McHenry and Frank J. Bigelow, Receivers o the Northern Pacific Railroad Company (United States Circuit Court, Distric of Minnesota.)**

McDonald & Barnard for Plaintiffs; C. W. Bunn and L. T. Chamberlain for Plaintiffs.

Statute of Limitations in Tort Action.

Plaintiff alleged that he was injured by one of defendant's trains at Staples, Minnesota, on the 30th day of December, 1893. Defendant pleaded section 5,138, General Statutes Minnesota, 1894, as amended by chapter 30, Laws of 1895, as a bar to the action.

Lochren, J. The above entitled matter having been brought on for hearing before me as acting Judge of the Circuit Court, upon motion of defendants for judgment on the pleadings in their favor and against plaintiff, and it being admitted by both parties as a fact that said cause was commenced on or after June 11th, 1896, it is hereby ordered that said motion be and the same is hereby granted, and that judgment may be entered accordingly.

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**Brown v. Village of Heron Lake. (Supreme Court of Minnesota, Jan. 7, 1897.)**

## Statute of Limitations—Amendment—Action for Personal Injuries.

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.

(Syllabus by the Court.)

Appeal from district court, Jackson county; M. J. Severance, Judge.

Action by Leroy Brown against the village of Heron Lake to recover for personal injuries caused by a defective sidewalk. From an order overruling a demurrer to the answer, plaintiff appeals. Reversed.

Wilson Borst, for appellant; L. F. Lammers, for respondent.

Collins, J. If by the amendment (Laws 1895, c. 30) to Gen. St. 1878, c. 66, sec. 8 (Gen. St. 1894, sec. 5138), the right of action set out in the complaint herein is barred by limitation if not brought within two years, the demurrer was well taken, and the order appealed from will have to be affirmed. If, however, as urged by counsel for appellant, the amendment did not have that effect, the right to bring action remains for six years, being governed by Gen. St. 1894, sec. 5136, subd. 5, and the order will have to be reversed. We are of the opinion that the act of 1895 fails to amend the nancy between sections 5136 and 5138 as they now stand. This being so, and, even where the legislative intent is simply doubtful, it being our duty to use every effort to make all acts stand, and to construe statutes in pari materia when they can be reconciled, we conclude that the doctrine of ejusdem generis should be applied to section 5138, as amended, and that the amendment was designed to apply only to that class of wrongs of a like nature to those specifically mentioned in the original act or section. The general rule is that, where there are general words following particular and specific part of this subdivision was repealed unless by implication, and such repeal is not favored, nor was there any provision in the amendatory statute repealing inconsistent acts. It is not a case where the later act revises, amends, and sums up the whole law on the particular subject to which it relates, covering all of the ground treated of in the earlier statute, and thus plainly showing that it was intended to supersede any and all prior enactments on the subject-matter. Nor is it a case where the amendatory

statute is clearly intended to prescribe the only rule which should govern, and therefore must be construed as repealing the statute which had heretofore controlled. We think, if it had been the deliberate intention to amend or repeal subdivision 5, that the legislature would have done it directly, and would not have left it to be inferred, for there is no irreconcilable repugfifth subdivision of the section last referred to, and is not applicable to that class of wrongs covered by it, namely, injuries to the person or rights of another, not arising on obligation and not afterwards enumerated. The amendatory legislation was aimed directly at section 5138, subd. 1, which fixes the limitation at two years as to certain specified acts of commission, namely, libel, slander, assault, battery, or false imprisonment, and the amendment added the words, "or other torts resulting in personal injury." There was no pretense at interference with section 5136, in the fifth subdivision of which the right of action, when the wrong or injury resulted from acts of omission, was limited to six years. No words, the former must be confined to things of the same nature and kind, and there are no exceptions to the rule which will take the amendment in question out of this general rule. A large class of civil wrongs of the same nature as those particularly specified might easily be named, and it is to these that the amendment refers and has application, and not to all. Order reversed.

## PERSONALS.

**St. Paul—**

The firm of Butts & Jaques has dissolved. Mr. Jaques and Francis E. Clarke have formed a copartnership, with offices in the Globe building. Mr. Butts will continue in practice at the old firm offices in the Pioneer Press building.

Samuel A. Anderson has taken charge of the office of county attorney, to which he was recently elected. He has an able assistant in Mr. F. W. Zollman.

Mr. Albert R. Moore has entered the firm of J. E. & G. W. Markham, the firm name being Markham, Moore & Markham, with offices in Germania Life Insurance building.

W. G. Pierce has taken offices in the N. Y. Life Building, and will resum the practice of law.

Stan J. Donnelly formerly assistan county attorney, has formed a copart nership with Fred N. Dickson.

Among the visitors at the house ses sion recently were a number of th legal fraternity from Duluth. Amon them Judge Page Morris, the sixth dis trict congressman-elect. The member of the bar at the head of the lakes ar said to have decided that they nee certain changes in the rules for prac tice before the courts. The service o summons and the order of pleading i criminal cases are among the matter to be amended. Some of the attorney down here are Walter Ayers an Judge White.

**Minneapolis—**

Frank Healy has been elected cit attorney, to succeed Hon. David Simp son, who was elected district judge a the recent election.

J. H. Steele, ex-judge of probate, ha taken offices in the Phoenix building.

Judge Pond will resume the practic of law, with offices in the Guarant Loan building.

T. E. Kepner has removed his office from the Phoenix to the Guarant Loan.

T. R. Huddleston, for many year one of the most prominent lawyers o the state, has gone to Europe for hi health. His present address is 2 Beau fort Square, Chepstow, Monmouth shire, England.

Mr. Francis Bergstrom, a graduat of Yale college, has prepared a direc tory of the graduates of Yale in th practice of law. It contains 1,40 names, represent'ng 40 states. Minne sota has 32 of the graduates, amon whom are Hon. Isaac Atwater, clas of '44; Hon. Jno. B. Brisbin, Hon. R R. Nelson, both of '46, and Hon Charles E. Vanderburg, of the class o '52. The oldest of the graduates ar Hon. Cassius M. Clay, '32, of Ken tucky, and Hon. Henry W. Archer '32, Bel Air, Maryland. Among th graduates are three justices of th United States supreme court, man judges of the supreme courts of th different states and quite a numbe of senators and congressmen. The di rectory will be of great value an much interest to the lawyers whos names appear therein.

**Fairmont—**

Ben Vorhies and F. A. Martwi have formed a partnership for th practice of the profession at Fairmon Minn.

**Stewartville, Minn.—**

S. C. Pattridge, of Pleasant Grov and A. M. Brand, of Faribault, hav formed a partnership, and have estal lished an office here.

# INDEX TO VOL. IV.

## BAR ASSOCIATIONS.



## BIOGRAPHICAL SKETCHES.



## DECISIONS OF DISTRICT COURTS.

### ACTIONS.

Action to procure subrogation to rights of mortgagee, and an assignment of the mortgage may be joined with action to foreclose the mortgage. Leland v. Hall, 199.

Where several actions may be consolidated in the District Court an order consolidating them will be made, although such consolidation will enable defendant to remove them to the federal court. Jones & Whitlock v. Erie & Western Transportation Co., 179.

### ASSIGNMENTS.

A cause of action for a personal injury after verdict is asignable under Cooper vs. Railway Co., 55 Minn., 134, which in effect overrules Hunt vs. Conrad, 47 Minn. 557. Melrose v. St. Paul City Ry. Co., 18.

An assignment of a judgment not yet entered operates to pass the judgment when actually entered. Id.

### BASTARDY,

See Change of Venue.

The city justice of Rochester, Minn., has jurisdiction to conduct an examination in bastardy proceedings (1894 Gen. St., chap. 17) under 1891 Sp. L., ch. 48, sec. 16, providing that he "shall possess all the authority, power and rights of a justice of the peace, and sole conclusive jurisdiction to hear all complaints and conduct all examinations and trials in criminal cases within the city, cognizable before a justice of the peace. State v. Hill, 112.

### BUILDING AND LOAN ASSOCIATIONS.

Building and loan associations, notwithstanding their private character, are amenable to the remedial provisions of Sec. 12, Chap. 76, Gen. Laws of 1878. State v. American Savings & Loan Assoc., 75.

A building and loan association cannot become insolvent within the strict technical sense of the term. Id.

Where a corporation like defendant, violates its act of incorporation, such violation brings it within the expressed intent of the provisions of section 12. Id.

The remedy given the state through its attorney general and at the instance and upon report of the public examiner, as against such associations violating the law, given by chapter 131 of the laws of 1891, is not exclusive of, although subsequent to, the provisions of chapters 34 and 76 upon the same subject. Le Fleur v. Home Savings and Loan Assoc., 48.

Neither are the provisions of chapter 131 inconsistent with those of chapters 34 and 76, but are merely additional and connective. Id.

There is no distinction between such associations and other financial corporations as respects the question of what constitutes legal insolvency; the rule is the same, requiring that it be shown that they have failed to pay their just obligations when falling due, in the ordinary course of business. The fact that the capital becomes impaired, from any cause, does not show a state of insolvency, although thereby the stockholders withdrawing are forced to wait for the sums otherwise payable to them. Id.

Stockholders, borrowing or non-borrowing, are not creditors of the association in any sense of the word; they are members and joint investors in the concern. Id.

Liability of stockholders of Northwestern Guaranty Loan Company to the extent of the par value of stock owned by them at time of appointment of receiver decreed. Rogers v. Minneapolis Trust Co., Assignee, 51.

### CHANGE OF VENUE.

In a prosecution for bastardy defendant is not entitled to a change of venue. State v. Hill, 112.

Where an action is brought in one county against several defendants, all of whom reside in another, the filing of the affidavit and de-

## DECISIONS OF JUSTICES OF THE PEACE.



## DECISIONS OF MUNICIPAL COURTS.

## NOTE AND COMMENT.



## NOTES OF RECENT CASES.

## OBITUARY NOTICES.



## OPINIONS OF ATTORNEY GENERAL.

### FIRE INSURANCE.

An insurance clause in a policy of insurance which stipulates that in case of a fire occurring in one pile of lumber only, the insured can recover such amount as the value of such parcel or pile bears to the total value in yard or dock, is contrary to the laws of Minnesota. The insured is entitled to a contract insuring him against the whole of such a loss.

### SPECIAL LEGISLATION.



## RULES OF COURT.

### SUPREME COURT.



### DISTRICT COURT, FIRST DISTRICT.



## WIT AND HUMOR.